

GIACINTO PARISI\*

NEW SCENARIOS FOR THE ITALIAN CLASS ACTION

ABSTRACT. *The present paper aims at reviewing the main innovations brought upon by the new regulation of the Italian class action, disciplined by Law no. 31 of 12 April 2019, also in relation to the problematic issues which had arisen in the precedent regulatory context.*

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\* Ph.D. in Procedural Civil Law, Roma Tre University.

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## 1. Foreword

Law no. 31 of 12 April 2019 introduced in the Italian system an organic regulation of the class action, which is now disciplined by Articles 840 *bis* - 840 *quinquiesdecies* of the Italian civil procedural code (c.p.c.).<sup>1</sup>

Since it is stated that the Law will enter into force nineteen months after its publication in the Italian Official Gazette,<sup>2</sup> the new provisions will become effective on 19 November 2020 and will be applied only to the unlawful conducts perpetrated after such date.

As it is commonly well-known, class action was already present in Italy: it was introduced in 2007 (but it then entered into force only in 2009) by Article 140 *bis* of Legislative Decree 206/2005 (so called Consumer Code) and was initially set to be applied only to specific torts committed within the business to consumer transaction and it presented some immediate issues, whose review seems relevant in order to analyse some choices which were made in the new regulation of 2019.<sup>3</sup>

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1 The literature regarding this particular matter, also in relation to the new regulation of 2019, is extremely broad. Among the first papers, please see: AA.VV., *Class action. Commento sistematico alla legge 12 aprile 2019, n. 31*, edited by B. Sassani, Pisa, 2019; AA.VV., *Le nuove forme di tutela collettiva (l. 12 aprile 2019 n. 31)*, *Foro it.*, V, 2019, p. 321 *et seq.*; AA.VV., *La Class action riformata*, edited by A. Carratta, *Giur. it.*, 2019, p. 2297 *et seq.*; D. AMADEI, *Nuova azione di classe e procedimenti collettivi nel codice di procedura civile (l. 12 aprile 2019, n. 31)*, *Nuove leggi civ. comm.*, 2019, p. 1049 *et seq.*; C. CONSOLO, *La terza edizione della azione di classe è legge ed entra nel c.p.c. Uno sguardo d'insieme ad una amplissima disciplina*, *Corr. giur.*, 2019, p. 737 *et seq.*; P. FARINA, *La riforma della disciplina dell'azione di classe e l'esecuzione forzata collettiva*, *Riv. esecuzione forzata*, 2019, p. 654 *et seq.*; M. FRANZONI, *Azione di classe, profili sostanziali, Danno e resp.*, 2019, p. 309 *et seq.*; A. GIUSSANI, *La riforma dell'azione di classe*, *Riv. dir. proc.*, 2019, p. 1572 *et seq.*; P.G. MONATERI, *La riforma italiana della class action tra norme speciali processuali e ricostruzione della tutela civilistica*, *Danno e resp.*, 2019, p. 312 *et seq.*; R. PARDOLESI, *La classe in azione. Finalmente*, *ibidem*, p. 301 *et seq.*; G. PONZANELLI, *La nuova class action*, *ibidem*, p. 306 *et seq.*; G. SCARSELLI, *La nuova azione di classe di cui alla legge 12 aprile 2019 n. 31*, *Judicium*, 7.6.2019.

2 The law was originally supposed to enter into force twelve months after the publication in the Italian Official Gazette (according to Article 7, § 1 of Law no. 31/2019) but such period of time was deferred for other seven months pursuing Article 8, § 5 of Decree no. 162 of 30 December 2019, which was later converted into law by Law no. 8 of 28 February 2020, in order to allow the Ministry to prepare the technical infrastructure necessary for the functioning of some of the mechanisms introduced by the new provisions.

3 The main monographs on the issue are C. CONSOLO, B. ZUFFI, *L'azione di classe ex art. 140-bis cod. cons. Lineamenti processuali*, Padova, 2012; A.D. DE SANTIS, *La tutela giurisdizionale collettiva: contributo allo studio della legittimazione ad agire e delle tecniche inibitorie e risarcitorie*, Napoli, 2013; R. DONZELLI, *L'azione di classe a tutela dei consumatori*, Napoli, 2011; C. D'ORTA, *La class action tra proclami e deterrence. Uno studio di diritto interno e*

## 2. *The issues of the “old” class action*

The reform of class action is based on the idea that Article 140 *bis* of the Consumer Code has not reached the targets that were set out, and in particular has failed to provide a proper compensation in favour of the aggrieved subjects and to create a deterring effect on the businesses, given the short number of class action law suits which have been brought over the relevant years and the fact that such collective trials have proven to be extremely time-consuming.<sup>4</sup>

The main complaints that have been made in relation to the class action provided by Article 140 *bis* concerned the main features of said regulation, starting from its field of application, and in particular the fact that it was intended to be applied only to some specific torts.<sup>5</sup>

A further issue was that the legal standing was granted only upon the individual aggrieved subjects and that entities and associations could be involved in the proceedings only by means of a specific power of attorney released by the aggrieved consumer member of the class.<sup>6</sup>

Another downside has been identified in how the parties could subscribe to the class, as it was believed that the complex mechanism that was outlined represented a concrete obstacle to a widespread participation, in particular given its poor flexibility and the fact that, in any case, it was limited to the introductory phase of the suit.<sup>7</sup>

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*comparato*, Torino, 2014; T. FEBBRAJO, *L'azione di classe a tutela dei consumatori. Profili sostanziali*, Napoli, 2012; E. FERRANTE, *L'azione di classe nel diritto italiano: profili sostanziali*, Assago, 2012.

4 G. PAILLI, C. PONCIBÒ, *The Transformation of Consumer Law Enforcement: an Italian Perspective*, *Comparative Law review*, 8, 2018, p. 21 et seq.

5 C. CONSOLO, B. ZUFFI, *L'azione di classe ex art. 140-bis cod. cons. Lineamenti processuali*, 2012, p. 5.

6 E. FERRANTE, *L'azione di classe nel diritto italiano. Profili sostanziali*, 2012, p. 89 et seq.

7 It is of particular interest the case of the banks' commissions that was analysed by the Court of Turin (15 June 2012), which, after decreeing the non-admissibility of the suit (with a decision which was later reformed by the Court of Appeal), admitted the action as long as the signature of the subscriber was declared authentic by a third party. Such formality has definitely influenced the collection of subscriptions, which was limited to only 104 members although the class was potentially composed of hundreds of damaged clients. The first-instance decision, which was later confirmed by the Court of Appeal, has been recently annulled by the Court of Cassation (judgement no. 12997 of 15 May 2019), which underlined the absolute informality of the proceedings as a whole and the subsequent need for the reduction of the burdens on the subscriber: it is then evident that the Court of Turin, when asking for the signatures to be declared authentic pursuing D.P.R. n. 445 of 2000, has imposed a formality over such process which

Lastly, a further disincentive from joining the class action was identified in the high costs involved, starting from the ones requested for the publication of the decision over the admissibility of the action, which were to be paid by the plaintiff in order to avoid the declaration of the inadmissibility of the suit, also given the lack of financial incentives for the ones who filed the suit.<sup>8</sup>

Bearing all the above in mind, it is now possible to review the innovations which are present in the new 2019 regulation.

### **3. The “new” class action: a) the field of application**

The field of application of the “new” class action is regulated by Article 840 *bis*, § 3, c.p.c., which states that the action can be brought against businesses or entities providing publish services or services of public interest: on the other hand, any individual (thus not only consumers) can bring the action in relation to any unlawful conduct.

It has already been suggested by the first scholars who have reviewed the new regulation that it is appropriate to provide an interpretation of the term “businesses” in a wider sense, so that such is not limited by the definition set forth in Article 2082 of the Italian Civil Code (c.c.), but also entails the category of «professionals», which is also present in the Consumer Code.<sup>9</sup>

As already mentioned, according to the new regulation the class action is intended to protect homogeneous individual rights, without any limits or restrictions, as it is also confirmed by the fact that any member of the class can bring the action. The members of the class can then be individuals, institutions, subjects of any kind and

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is not dictated by law and which actually goes against the interest of highest informality which is a very relevant feature of the whole proceedings.

8 C. D’ORTA, *La class action tra proclami e deterrence. Uno studio di diritto interno e comparato*, 2014, p. 196 *et seq.*

9 R. DONZELLI, *L’ambito d’applicazione e la legittimazione ad agire*, in AA.VV., *Le nuove forme di tutela collettiva (l. 12 aprile 2019 n. 31)*, *Foro it.*, V, 2019, p. 339 *et seq.* Supporting the contrary theory, A. CARRATTA, *I nuovi procedimenti collettivi: considerazioni a prima lettura*, in AA.VV., *La Class action riformata*, edited by the same Author, *Giur. it.*, 2019, p. 2298. For an intermediate interpretation, please see A. GIUSSANI, *La riforma dell’azione di classe*, 2019, p. 1574.

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thus also shareholders' companies.<sup>10</sup>

The individual rights that can be actioned can have been breached by specific conducts, but also by behaviours perpetrated over time. The only condition is that such wrongdoings need to be committed within the professional activity of the individual or must be related to the public services provided by the entity: such requirement present in the Law is not particularly clear and, at a first glance, seems to be aimed at further clarifying that the unlawful conducts need to be ascribed to the sued legal.

The unlawful conduct can be related to a contract or can be qualified as a tort<sup>11</sup> and does not need any further requirements: this confirms that the privileged position that consumers had within class actions in the previous regulation has completely been erased.<sup>12</sup>

There is also no restriction imposed on the individual value of the single breached right: this means that there will be not only small claims, but also controversies having a medium or a high value.

In any case, and beside the specific nature of the individual right, it is necessary, as stated by Article 840 *bis*, § 1, c.p.c., that the claims have a homogenous nature.

The homogeneity is a requirement that the Tribunal needs to assess in order to declare the suit admissible, pursuing Article 840 *ter*, § 4, letter b) c.p.c. and needs to be detailed both in the decision over the admissibility and in the judgment which declares the liability of the defendant, pursuing Articles 840 *ter* and 840 *sexies*, letter c) c.p.c.

However, there is still no clear definition of the term «homogeneity», which was already present in Article 140 *bis* of the Consumer Code, and thus one of the main issues already present in the old regulation is still existent in the new one.<sup>13</sup>

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10 R. DONZELLI, *L'ambito d'applicazione e la legittimazione ad agire*, 2019, p. 339 *et seq.*

11 P. FARINA, *La riforma della disciplina dell'azione di classe e l'esecuzione forzata collettiva*, 2019, p. 656.

12 B. SASSANI, *Presentazione*, in AA.VV., *Class action. Commento sistematico alla legge 12 aprile 2019, n. 31*, edited by the same Author, Pisa, 2019, IX.

13 Lastly, see on this matter Court of Cassation, judgment no. 14886 of 31 May 2019, according to which the homogeneity requirement is present when the different claims have common features that justify a serial assessment and a joint trial: thus, it is to be excluded, from a logical standpoint rather than judicial, the compatibility of such instrument with all those situations that require a specific assessment based on personal situations or that entail evaluations over the specific reverberation of the unlawful conducts over the emotional or relational sphere of

A further interesting aspect is that it was previously not clear whether, pursuing Article 140 *bis* of the Consumer Code, the final settlement of damages was supposed to be the same (and thus, homogenous) for all the plaintiffs (case-law believed not<sup>14</sup>). The “new” class action sets forth two different phases: the second one is intended to assess the specific issues of each plaintiff, in order to accommodate classes which have different members and can also be divided into sub-classes.<sup>15</sup>

#### ***4. b) the legal standing***

The subjects who are granted with legal standing, pursuing Article 840 *bis*, § 1, c.p.c. are the members of the class and no-profit associations or organizations, whose aims, set in the internal bylaws, entail the protection of homogenous individual rights and which are listed in a specific document which is to be periodically reviewed by the Ministry of Justice.

Therefore there is a concurrent legal standing, which is granted, on the one hand, to entities, as it already happens in other European countries and, on the other hand, to the single individuals, as it happens in the American model: it is an innovative solution, which has the clear goal to outline more than one path so to further enhance the presentation of class action law suits, which are then not any more limited to the power of attorney bestowed by the single aggrieved subject, as it happened in the class action regulated by Article 140 *bis* of the Consumer Code.

Article 196 *ter* of the implementing provisions of the Italian Civil Procedural Code authorises the Ministry of Justice, jointly with the Ministry of Economics, to indicate with a decree the requirements necessary to be inserted in the list indicated by Article 840 *bis*: in particular, it is stated that said requirements will have to be drafted in order to ensure that the entities have features that make them suitable to protect the

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the single aggrieved party.

14 Among all, see Court of Cassation, judgment no. 14886 of 31 May 2019. In the jurisprudence, see R. DONZELLI, *L'azione di classe a tutela dei consumatori*, 2011, p. 257, who, after underlining that all homogenous individual rights have a common part and a different one, states that the common part needs to cover the factual and juridical issues which are necessary for establishing the liability of the defendant, whereas the different part can regard the extension of the liability and the quantification of the compensation amount.

15 P. FARINA, *La riforma della disciplina dell'azione di classe e l'esecuzione forzata collettiva*, 2019, p. 664.

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individual rights, have adequate means and are meant to operate continuously over time; it is also requested to verify the origins of the funds which are used.<sup>16</sup>

It is worth underlining that Article 196 *ter* generically mentions organizations, whereas Article 140 *bis* specifically addressed associations and committees: such change seems to be due to the recent introduction of Legislative Decree no. 117/2017, which reformed the no profit sector and disciplined several types of no-profit entities. However, on the basis of the principles listed in Article 196 *ter* c.p.c. it is questionable whether committees, which are entities that are created with a specific protection aim, can be considered as having the legal standing to bring class action suits, as they seem to lack in the continuity criterion which is listed in the provision.

Such new regulation presents two critical issues. Firstly, it is to be considered that it would have been better not to forego the previous lists and registers of entities representing collective interests and to integrate them with the new list which will be presented by the Ministry of Justice: once assessed whether the present associations met the needed requirements, they could have been authorised to bring class action suits.

Secondly, it is not clear whether the legal standing of the associations present in the list set forth in Article 840 *bis* will be assessed by an administrative authority or if it is up to the Tribunal, which, when pronouncing on the admissibility of the action, pursuing Article 840 *ter*, § 4, letter c), is also called to assess whether the entity is capable to represent the homogenous individual rights protected by Article 840 *bis*. However, it seems preferable to think that such evaluation by the Tribunal is referred to collective

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16 Such provision raises, however, serious doubts over its compatibility with the Italian Constitution, given that: a) the conditions to access trial, in this case in its collective dimension, protected by Article 2 of the Constitution, are not dictated by law, thus violating Articles 24, § 1 and 111, § 1 of the Italian Constitution; b) the introduction of a preliminary administrative selection over the collective subjects who are entitled to act seems problematic, considering that, on the one hand, within the same trial it is in any case possible for the single individuals to present their suit and, on the other hand, the judge is any case required to evaluate the capability of the plaintiff to properly take care of the homogenous individual rights. This potentially creates an issue in terms of an unreasonable different treatment between similar situations, given that it cannot be excluded that the entities which do not belong to the specific lists may bring their action as voluntary processual representatives of the member of the class pursuing Article 77 of the Italian procedural code (R. DONZELLI, *L'ambito d'applicazione e la legittimazione ad agire*, 2019, p. 339 *et seq.*; for other issues on this subject, please see C. CONSOLO, *La terza edizione della azione di classe è legge ed entra nel c.p.c. Uno sguardo d'insieme ad una amplissima disciplina*, 2019, p. 738.

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class actions and not to the suit brought by an association, which will be evaluated on its inner coherence with the allegedly breached homogenous right rather than on its capacity to bring class action suits, which will be considered to have already been evaluated on an administrative basis.

### **5. c) subscriptions**

The subjective efficacy of the judgment which grants the request present in the collective suit is one of the most relevant aspects of any regulation on class actions. The new class action, following the path set forth in Article 140 *bis*, adopts an opt-in mechanism, which is focused on the subscription by the aggrieved subjects.<sup>17</sup>

Article 840 *bis*, § 4, specifies that the class action suit does not prevent individuals from bringing individual suits, although the final judgment issued in relation to the collective proceedings can be employed in the liquidation procedure only by the individuals who were members of the suit and did not withdraw their subscription before the liquidation decree became final in their regards (Art. 840 *undecies*, last paragraph).

The main difference between the new and the old class action concerns the deadline for the subscriptions, which can be filed not only after the issuing of the judgment over the admissibility of the suit (Art. 840, § 1), but also after the release of the judgment which grants the formulated request (Art. 840 *sexies*, §1, letter e).<sup>18</sup> The intent is clearly to further sponsor the subscription to class actions and to make it possible also when the outcome has been (almost) achieved, or even after the request has been granted, in order to overcome one of the main issues of the old regulation.

On the other hand, there might be some perplexities on the reason why the law provides for a system of early subscription and sets forth two defined time-slots to file

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17 R. DONZELLI, *L'ambito d'applicazione e la legittimazione ad agire*, p. 339 et seq.; A.D. DE SANTIS, *L'azione di classe a dieci anni dalla sua entrata in vigore*, *Foro it.*, 2019, p. 2180. Furthermore, it is to be considered that the Court of Milan, with judgment no. 10773 of 25 October 2018, *Corr. giur.*, 2019, p. 1107, has acknowledged the compatibility with the Italian law system of the mechanism of the *opt-out*, which is present in the United States' regulation.

18 A.D. DE SANTIS, *L'adesione*, in AA.VV., *Le nuove forme di tutela collettiva (l. 12 aprile 2019 n. 31)*, *Foro it.*, V, 2019, p. 356 et seq.



one's application.

In fact, pursuing Article 840 *sexies*, § 1, letter a), the judgement only concerns the suits presented by the plaintiff and not also by the subscribers, whereas Article 840 *sexies*, § 1, letter e) specifies that with such judgment the tribunal can order the integration of documents that are deemed necessary for the initial members. Such analysis of the new regulation allows to observe that the opening of the first time-slot for the filing of subscriptions does not meet the interests of the potential members of the class actions, who might find more convenient to wait for the judgment, and thus cause a delay of the class action suit between sixty and one hundred and fifty days.<sup>19</sup>

In reality, early subscriptions serve a specific purpose. First off, they allow one to be introduced into the class in a moment of time that is closer to the unlawful act; the time necessary for the conclusion of the suit could in fact be considered a disincentive from joining the action.<sup>20</sup>

This is particularly poignant, for example, in relation to minor damages, which require the preservation of documents related to balance sheets or to contracts in order to provide evidence in relation to the homogenous right which has allegedly been breached: the passing of too much time from the perpetration of the unlawful act, besides potentially leading the plaintiff to forget the damage he/she suffered, can make the retrieval of said documents particularly difficult or can cause issues in the reconstruction of the events, leading the aggrieved party to be tempted to decide not to bring the action.

Furthermore, it is to be considered that the collective action has no interruptive effect on the statute of limitation referred to the individual rights of the members of the class: thus, the judgment which with the collective request is granted might also be published after the statute of limitation period has elapsed, with the risk that the individual rights of the potential members might not be enforceable by then.<sup>21</sup>

On the other hand, given that subscribing to the suit has the same effect as

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19 A. CARRATTA, *I nuovi procedimenti collettivi: considerazioni a prima lettura*, 2019, p. 2299.

20 DE SANTIS, *L'adesione*, 2019, p. 356 *et seq.*

21 M. BOVE, *L'aderente*, in AA.VV., *La Class action riformata*, edited by A. Carratta, *Giur. it.*, 2019, p. 2307 *et seq.*

bringing a suit in first person (as per Art. 840 *septies*, § 6), the collective plaintiff will then be interested in gathering the subscriptions also before the judgment, in order to avoid the risk to lose potential members or to be gathering subscriptions for rights whose statutes of limitation has already elapsed.

The new regulation also presents some new features in relation to the liquidation phase of the damage suffered by the individual subscribers.<sup>22</sup>

In fact, pursuing the regulation of the Consumer Code, it was up to the tribunal, when issuing the conviction judgment, also to settle damages – on an equitable basis – suffered by the members or to adopt an homogenous criterion in order to proceed with the settlement: in the latter case, the very same tribunal settles damages, upon request of the party and in case there is no agreement on the amount.

Article 840 *octies* c.p.c. now sets forth an innovative proceeding, according to which, after the judgment which assesses the unlawfulness of the conduct of the defendant, the tribunal can issue a decree containing the settlement of claims for each subscriber, following a mechanism that reminds the one set forth in the Italian bankruptcy law (recently repealed).<sup>23</sup>

After the issuing of the liquidation decree, there can be two different scenarios.<sup>24</sup> If the defendant intends to pay spontaneously, he is due to deposit the money on a bank account in the proceedings' name, and he is then precluded from giving the money directly to the single creditors: only after the general representative prepares a distribution plan, the sums are awarded to the single subscribers (Article 840 *duodecies*).

On the contrary, if the defendant does not comply, also the enforcement procedure is regulated in the collective terms set forth in Article 840 *terdecies*, which innovates in such regard the regulation present in the Consumer Code, according to which the enforcement was regulated by the ordinary rules on the foreclosure requested

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22 Among which, please, A. GIUSSANI, *La fase di determinazione del quantum nella nuova azione di classe*, in AA.VV., *La Class action riformata*, edited by A. Carratta, *Giur. it.*, 2019, p. 2316 et seq.

23 P. FARINA, *La riforma della disciplina dell'azione di classe e l'esecuzione forzata collettiva*, p. 665; D. AMADEI, *L'esecuzione spontanea e coattiva degli obblighi del decreto di liquidazione di somme agli aderenti*, in AA.VV., *Le nuove forme di tutela collettiva (l. 12 aprile 2019 n. 31)*, *Foro it.*, V, 2019, p. 375 et seq.

24 Among which, please see F. COSSIGNANI, *Adempimento spontaneo ed esecuzione collettiva*, in AA.VV., *Class action. Commento sistematico alla legge 12 aprile 2019, n. 31*, edited by B. Sassani, Pisa, 2019, p. 179 et seq.

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by more than one creditor (Art. 493, § 1, c.p.c.).

According to the new Article 840 *terdecies* c.p.c., the collective enforcement of the decree of the tribunal is enhanced by the common representative of the subscribers, who takes all the necessary measures in the interest of the members of the class, including also the ones related to the potential opposition proceedings. The legal standing in such proceedings is then to be attributed to the common representative:<sup>25</sup> the intent is to avoid that the individual claims of the participants (often small sums) would start enforcement proceedings concerning different goods and that could be difficult to coordinate, with a consequent damage for the debtor.

#### **6. d) costs and financial incentives**

One of the main criticisms brought against the class action regulated by Article 140 *bis* of the Consumer Code concerned the high costs requested to file the suit and the lack of appropriate incentives in relation to said costs and the related risks. In particular, Article 140 *bis*, § 9, of the Consumer Code states that with the judgment that declares the admissibility of the suit, the tribunal sets the deadlines and the manners in which the action is made public, in order to facilitate the prompt subscription by the individuals belonging to the class, specifying that said publicity is a condition without which the action cannot be taken forward.

When applying such provision, courts usually request that the publication of the decision is printed on newspapers, imposing on the plaintiff a significant cost.<sup>26</sup> On the other hand, Article 140 *bis* did not have any provision regulating the costs of the proceedings and in particular the ones related to the appointment of technical consultants and to the collection of evidence undertaken by the collective plaintiff: the only provision on this regard concerned the clearance of the expenditure attributed to the subject who lost the suit, as in such case it is provided that the legal fees can be increased up to three times the original amount (Art. 4, § 10, Ministerial Decree 10

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25 D. AMADEI, *L'esecuzione spontanea e coattiva degli obblighi del decreto di liquidazione di somme agli aderenti*, 2019, p. 375 *et seq.*

26 On this please see the judgments published on the website of the Ministry of Economic Development at the following link: <<https://urly.it/33gk1>>.

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March 2014, no. 55).

The new class action takes into account such criticism and dictates new provisions aiming at reducing the costs of the plaintiff and inserting incentives for the payment of the legal fees of the counsels assisting the class.

In relation to the costs of the legal action it is immediately specified that the ones related to the publicity of the suit are to be individuated exclusively in the publication of the suit (840 *ter*, § 2), of the judgment over the admissibility of the suit (840 *ter*, § 4) and of the final judgment (Art. 840 *quinquies*, last paragraph) on a specific webpage provided by Article 840 *ter*, § 2.

This new provision has been positively evaluated, given the doubtful communicative functionality of the publication of judgments in newspapers: thus, its elimination can allow the collective plaintiff to use the relevant financial resources for other more effective communication means.<sup>27</sup>

The presence of a specific webpage which can be accessed by any potential collective plaintiff and where the main deeds related to each class action (suit, admissibility decision and final judgment) can be retrieved, jointly with the proposed transactions (Art. 840 *quaterdecies*), seems relevant also to meet the transparency requirements and to allow potential subscribers and actual members to control the management of the class action.

Furthermore, the new regulation also provides that it is up to the defendant to pay the fees and the expenses of the technical consultants appointed by the judge.<sup>28</sup>

The incentives for proposing a class action suit are set forth in Article 840 *novies*, which specifically regulates the expenses of the proceedings. Such provision states that with the final judgment the tribunal orders the defendant to pay a fee to the common representative, calculated on the basis of the number of subscribers, with the application of a decreasing percentage (from 9% until 0,5%), calculated on the basis of the total amount.

Article 840 *novies*, § 6, also states that the tribunal, with the decree that grants

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27 A.D. DE SANTIS, *Le spese e le sanzioni*, in AA.VV., *Le nuove forme di tutela collettiva (l. 12 aprile 2019 n. 31)*, *Foro it.*, V, 2019, p. 364 *et seq.*

28 DE SANTIS, *Le spese e le sanzioni*, 2019, p. 364 *et seq.*

the subscription requests, orders the defendant to pay the legal counsel of the original plaintiff, and also of the plaintiffs that later started joint actions, a rewarding fee which follow the same rules dictated for the remuneration of the common representative.

As it is a rewarding fee, it seems correct to think that the counsels are also to be reimbursed of the ordinary expenses they suffered, which are generally established in favour of the part succeeding in the case, pursuing Article 91 c.p.c., which provides for the increase of the amount up to three times, as set forth in Article 4, Ministerial Decree no. 55/2014.<sup>29</sup>

The concrete quantification of the fees to be awarded to the counsels and to the common representative depends on two parameters: the number of subscribers and the total amount due to all the members in order to calculate the percentage. The second element varies on the basis of the nature and the type of unlawful act, and thus on the choice operated at the beginning by the plaintiff, whereas the number of subscribers depends on the success of the suit and the consequent communication initiatives in order to increase said number. Such settlement of expenses then implies the activism of at least one of the potential interested parties, who usually can be identified in the common representative of the class or in the legal counsel, although there are some issues in relation to the compatibility of such proactivity with the relevant deontological rules.<sup>30</sup>

In particular, one issue might be whether the counsel can legitimately pursue actions, *e.g.*, looking for the aggrieved party who would be willing to act as the common representative of the class, committing himself to pay for the expenses and the costs of the common representative (also the one related to the technical reports or to the unsuccessful outcome of the suit), bringing and managing the suit, urging subscription and thus publicizing the suit.<sup>31</sup>

From a different angle, it can be then observed that the granting of incentives only to the counsels and not also to the collective plaintiff does not seem well

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29 For an analysis of the incentives in favour of the common representative, please see D. AMADEI, *L'esecuzione spontanea e coattiva degli obblighi del decreto di liquidazione di somme agli aderenti*, 2019, p. 375 et seq.

30 For a critical opinion, please see DE SANTIS, *Le spese e le sanzioni*, 2019, p. 364 et seq.

31 In fact, such activities could in principle violate Article 37 of the Lawyers' Deontological Code, which prohibits the acquisition of clients.

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coordinated with the decision to grant legal standing also to representative associations. If in presence of an individual plaintiff, the counsel of the class is destined to act as the main actor of the suit, the situation is obviously different when the plaintiff is an organization, which does not receive any benefits although it faces costs and risks related to the suit. For example, the appointment of the common representative of the subscribers is left to the discretion of the tribunal, and there is no provision that allows the representative organization which acts as a plaintiff to provide a contribution, as it might have been appropriate, in order to give an incentive to the party starting the suit and not to a third individual.