

THE TRANSFORMATION OF CONSUMER LAW ENFORCEMENT: AN ITALIAN PERSPECTIVE*

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The paper aims to provide, in a comparative perspective, an analysis of the transformation of enforcement mechanisms for consumer protection under Italian Law. The analysis confirms that consumer protection relies on a variety of public, quasi-public and private enforcement mechanisms being subject to processes of co-existence and integration. We also propose to consider alternative dispute resolution separately from enforcement mechanisms, as an additional tool and not an alternative to enforcement. The purpose of our analysis is to provide an overarching view of the enforcement structure in this field and to stress the need to design an integrated enforcement system for consumer protection.

SUMMARY: I. Introduction – II. Co-Existence of Public and Private Enforcement – 2.1. Public Enforcement – 2.2. Quasi-Public Enforcement – 2.3. Private Enforcement – 2.3.1. Consumer Individual Claims – 2.3.2. The failed promise of the *azione di classe* - III. Integration of Public and Private Enforcement – 3.1. Consumer claims in criminal proceedings – 3.2. Follow-on consumer actions – IV. Dispute Settlement: Non-judicial mechanisms – V. Conclusions.

I. INTRODUCTION

The International Association of Comparative Law organised a thematic congress in 2016 in Montevideo (Uruguay) devoted to the comparative study of the *Enforcement and Effectiveness of Consumer Law*. The draft General Report sought to offer a general overview of consumer law enforcement and the effectiveness of consumer protection regulatory regimes.³ The General Report is based on national reports from 34 jurisdictions

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³ Professor Hans-W. Micklitz and Professor Geneviève Saumier drafted the General Report. The Report has been accessed on 1 October 2017 at <http://tc.iuscomparatum.info/tc/wp-content/uploads/2016/09/Draft-General-Report->

representing most of the world's regions and one report from the European Union as the most advanced regional model of consumer law.

The reports provide answers to a series of 12 questions drafted by the general rapporteurs, who were not trying to fix the blurred boundaries of consumer law, but rather pragmatically refer to contract, tort, and product liability law; standard contract terms (boilerplates); commercial practices; and different enforcement mechanisms designed to secure consumer rights.

The questionnaire afforded national rapporteurs the opportunity to present their national consumer protection regimes, with particular emphasis on enforcement mechanisms, including, for example, administrative and judicial means, as well as alternative methods for resolving consumer disputes. In addition to the provision of verifiable objective information concerning existing legislative and regulatory sources and available data on consumer education, complaints and disputes, *rapporteurs* were invited to provide a subjective assessment of the overall effectiveness of consumer law enforcement in their respective jurisdictions and to identify areas where reforms might be needed.

This paper demonstrates the outcome of such research with respect to Italy.⁴

From the outset, Italian consumer law has been the product of the implementation of European Union law. A confused stratification of domestic legislative instruments, inside and outside the Italian civil code, was eventually rationalized in 2005 with the enactment of Legislative Decree 6 September 2005 no. 206 (the Italian Consumer Code, 'ICC').⁵ The systematization achieved in 2005 is undoubtedly remarkable. The restatement of consumer law, based on the French experience with the *code de la consommation*,⁶ made the rules more accessible to consumers and traders,⁷

[Enforcement-and-Effectiveness-of-Consumer-Law-MICKLITZ-SAUMIER-Montevideo-2016-.pdf](#) The general and national reports are due for publication in 2018.

⁴ The authors have prepared the Italian Report.

⁵ Practitioners and academics generally indicate the Legislative Decree 6 September 2005 no. 206 by the expression 'Italian Consumer Code'. We follow such practice, although this expression is inaccurate because the Legislative Decree does not have the structure and the content of a code, but it is a restatement of the laws in the field of consumer protection.

⁶ *Code de la consommation*, French Law no 92-60 18 January 1992, article 12 as amended.

⁷ Respectively defined as in Art. 2 of Directive 2011/83/EU stating: " 'consumer' means any natural person who [...] is acting for purposes which are outside his trade, business, craft or profession; 'trader' means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession".

favouring a homogeneous and methodical interpretation.⁸ The ICC, as amended, today represents the main legal framework for consumer protection in Italy, although there are still many other provisions outside the ICC with respect to sectorial consumer protection, e.g. in the fields of data protection,⁹ energy and gas,¹⁰ and telecommunications.¹¹ In 2011, the scope of the ICC was expanded to encompass the protection of micro-enterprises (defined as “entities, companies or associations, which exercise an economic activity employing less than 10 people with a turnover not exceeding two million euros”) against unfair trade practices implemented by traders.¹² Law Decree of 24 January 2012, no. 1, converted with modifications with Law Decree of 24 March 2012 no. 27, also vested the Italian Competition Authority (ICA) with new powers to protect consumer rights against unfair terms in contracts.¹³ In addition, Legislative Decree 21 February 2014 no. 21, implementing Directive 2011/83/UE of 25 October 2011, entered into force as of 13 June 2014, constitutes one of the last steps towards the strengthening of the applicable consumer protection framework. The law completely replaced Chapter I, Title III, Part III (Articles 45 – 67) of the ICC with a new Chapter, entitled “Consumer rights in contracts”.¹⁴ The new provisions address both distance contracts and traditional contracts, although the main changes concern distance and off-premises contracts. Other developments, such as the introduction of a collective redress mechanism or the creation of a comprehensive ADR scheme, are discussed *infra* in this paper.

In particular, this paper aims to present and discuss, by relying on a comparative perspective, the transformation of consumer rights *enforcement regimes* in Italy.¹⁵ We note

⁸ B. PASA and M. WEITENBERG, *Improved Consumer Protection through New Codification? – First Comments on the New Italian Consumer Code*, in G. HOWELLS ET AL. (eds.), *Yearbook of Consumer Law* (2007, Aldershot), p. 295-308.

⁹ Legislative Decree of 30 June 2003, no. 196.

¹⁰ Law of 14 November 1995, no. 481 creating an independent Authority for Electric Energy, Gas and Water.

¹¹ Law of 31 July 1997, no. 249 creating an independent Authority for Telecommunications; Legislative Decree of 31 July 2005, no. 177 (Unified Text on Television), and Law 30 April 1998, no. 122 on television activities.

¹² Art. 7 of the Law Decree of the Law Decree of 24 January 2012, no. 1, converted with modifications with Law of 24 March 2012 no. 27, inserted the definition as letter d) *bis* in art. 18 of the ICC.

¹³ Law Decree of 2 December 2011, no. 214 (so-called “Salva Italia”).

¹⁴ E. BATTELLI, *L’attuazione della direttiva sui consumatori tra rimodernizzazione di vecchie categorie e « nuovi » diritti*, in 3 *Europa e Diritto Privato*, 2014, p. 927.

¹⁵ H.-W. MICKLITZ, *The Transformation of Enforcement in European Private Law: Preliminary Considerations*, in 23 *ERPL*, 2015, p. 491. See also, C. HODGES, N. CREUTZFELDT, *The Transformations in Public and Private Enforcement*, in H.-W. MICKLITZ, A. WECHSLER, *The*

first that the system of consumer law enforcement is based both on public and private actors. Our analysis shows a certain degree of co-existence and integration between them.¹⁶ This co-existence is possible when the public and private enforcement of consumer rights run in parallel. Integration of the enforcement mechanisms occurs, for example, when a consumer or a consumer association brings a follow-on action for damages subsequent to an administrative procedure, or, traditionally, when a civil claim is brought in a criminal proceeding.

II. CO-EXISTENCE OF PUBLIC AND PRIVATE ENFORCEMENT

2.1. *Public Enforcement*

First, consumer protection in Italy rests principally upon a number of administrative authorisations, registrations, licenses, approvals and other sectorial requirements aimed at guaranteeing *ex ante* the safety and quality of products and services that traders make available to consumers on the market. In addition, a number of public bodies include consumer protection within their institutional responsibilities. For instance, the General Directorate for Market, Competition, Consumers, Supervision and Technical Standards at the Ministry of Economic Development promotes policies which aim to grant consumer protection in the domestic market. Furthermore, several Independent Authorities promote sectorial initiatives for consumer protection in specific markets (especially the ICA, but also the Bank of Italy; the Authority for Communication – AGCOM; the Authority for Energy and Gas – AEEG; the Authority for pricing surveillance; and the Authority for the Insurance Market etc.). Regional authorities are also involved in advancing consumer protection by promoting local initiatives, often in

Transformation of Enforcement European Economic Law in a Global Perspective (2016, Hart), p. 115-134.

¹⁶ H.-W. MICKLITZ, *Administrative Enforcement of European Private Law*, in R. BROWNSWORD ET AL. (eds), *The Foundations of European Private Law*, Oxford: Hart Publishing, 2011, p. 563; F. CAFAGGI (ed.), *Enforcement of Transnational Regulation: Ensuring Compliance in a Global World*, Cheltenham: Edward Elgar 2012; O. CHEREDNYCHENKO, *Public Supervision over Private Relationships: Towards European Supervision Private Law?*, in 22 ERPL 2017, p. 813-820. See also the Special Issue on *Public and Private Enforcement of European Private Law: Challenges and Perspectives*, in 23 ERPL, 2015, with an editorial by O.O. CHEREDNYCHENKO and contributions from H.-W. MICKLITZ, F. WEBER & M. FAURE, A.J. VERHEIJ, B. KRANS, R. STEENNOT, O.O. CHEREDNYCHENKO AND G. BELLANTUONO.

cooperation with consumer associations. Public prosecutors (*Pubblici Ministeri*) are in charge of prosecuting criminal violations of consumer rights.

To cite but one example, governmental oversight on consumer protection falls under the authority of the National Council of Consumers and Users (*Consiglio Nazionale dei Consumatori e degli Utenti*).¹⁷ The Council represents consumers and users' associations nationwide under the administrative authority of Article 136 of the Consumer Code. As part of the Ministry of Productive Activities, the Minister or one of his delegates holds its chair. At present, the Council is composed of 17 recognized associations along with a representative member of the Regions and Autonomous Provinces elected by the Regions-State Conference.¹⁸

With reference to public actors as a whole, our first observation is that the public enforcement regime appears to be fragmented due to the overlapping authority of many sectorial public authorities (e.g., energy, telecommunications, insurance, banking services, etc.).¹⁹ Secondly, there is no clear coordination between public players, nor between public and private components of consumer rights enforcement. In this respect, new EU-derived rules may encourage the private sector to complete the public activity by requesting damages in follow-on actions, at least with respect to damages caused by an infringement of competition law by an undertaking or an association of undertakings.²⁰

Of all the public players, the ICA stands out. Since 1992, the ICA has been entrusted with the duty of targeting misleading advertising on any medium (TV, newspapers, leaflets, posters, telemarketing) and, from 2000, with assessing comparative advertising. In 2007, following the implementation of Directive 29/2005/EC into Italian law (through Art. 21-26 of the Consumer Code), the ICA's authority in the consumer protection field has been broadened to include the protection of consumers against

¹⁷ The Council Website is available at www.tuttoconsumatori.it.

¹⁸ The Council invites representatives from recognized Environmental Protection Associations and National Consumer Co-Operative Associations to its meetings. Representatives from bodies and organs with the functions of regulating or standardizing the market, of the economic and social sectors concerned, competent public authorities, and experts in the subjects under consideration may also be invited to attend.

¹⁹ Interestingly, a recent reform in Italian law conferred the antitrust authority an exclusive competence to combat unfair commercial practices also in regulated sectors, after having consulted the sector specific regulator, 'apart when the breach of sector specific regulation does not result in an unfair commercial practice' (Art. 23, paragraph 12, Legislative Decree 6 July 2012, No. 95). Unfortunately, the case law of the administrative tribunals still shows a significant degree of uncertainty about the overlapping competencies of the ICA and sectorial authorities.

²⁰ Article 9 of Directive 2014/104/EU, implemented as Article 7 of the Legislative Decree of 19 January 2017, no. 3.

unfair commercial practices by undertakings.²¹ As noted above, since 2012 the ICA also deals with unfair commercial practices targeting ‘micro-firms’.

We turn our focus now to private claims (i.e. cases in which public actors, such as the ICA, bring claims that seem to address the private rights of consumers). We note with interest that since Law no. 27/2012's enactment, the ICA also has the power to enforce rules on unfair contractual terms with reference to contractual forms or general contractual conditions drafted by sellers or suppliers and used with consumers.²² More specifically, according to article 37-bis ICC, the ICA “(...) *ex officio* or in response to complaints, and for the sole purpose of the subsequent paragraphs, declares the unfair nature of terms that are included in contracts between traders and consumers through the acceptance of general contract conditions or the signing of forms, models or templates”.²³ Thus, the procedure follows a working mode in which private entities do the ‘barking’, by lodging complaints in an administrative procedure before a public authority, while the ‘biting’ remains a public prerogative (fines, claims, injunctions).²⁴ The *ex officio* procedure aims to remedy the fact that consumers are in most cases unaware of the possibility of invoking rules on unfair contract terms, and that consumer protection associations still have limited financial means and sometimes interest with which to apply for an injunction against unfair terms (Art. 139 of the Consumer Code).

In particular, this paper notes the recent development in which the ICA gained exclusive authority over unfair commercial practices in other regulated sectors as well. Unfortunately, administrative tribunal case law still shows a significant degree of uncertainty about the overlapping authority of the ICA and sectorial authorities.²⁵

For the sake of completeness, in these cases, the ICA has similar powers to those enjoyed in the field of competition. For example, the ICA can issue interim measures

²¹ If an undertaking try to distort the economic choices of a consumer by, for instance, omitting relevant information, spreading out untruthful information or even using forms of undue influence, the ICA may act, also via interim measure, and impose fines which (since August 2012) could range up to 5 million euro (previously, the maximum was 500.000,00 euro).

²² R. STEENNOT, *Public and Private Enforcement in the Field of Unfair Contract Terms*, in 23:4 ERPL 2015, pp. 589-619. The author discusses the case of Belgium.

²³ L. ROSSI CARLEO, *Il "public enforcement" nell'atutela dei consumatori* (Commento a d.lg. 21 febbraio 2014, n. 21), in *Corrieregiuridico*, 2014, pp. 5-9, noting the increasing role of the ICA.

²⁴ C. HODGES, ‘Collectivism: Evaluating the effectiveness of public and private models for regulating consumer protection’, in: W.H. VAN BOOM, M.B.M. LOOS (eds.), *Collective enforcement of consumer law in Europe. Securing compliance in Europe through private group action and public authority intervention*, Groningen: Europa Law Publishing, 2007, pp. 207-228.

²⁵ Art. 23, paragraph 12, Legislative Decree 6 July 2012, No. 95.

against grave infringements or make use of its cease and desist powers, without the need to go to the Court and rely on long, complex decision-making.²⁶

In addition, the ICA may proceed to inspections (in cooperation with the Financial Police); may accept commitments by traders to end an infringement;²⁷ and adopt “moral suasion” procedures. The ICA may also issue fines of €5.000 up to €5 million for each unfair practice. For deceptive or comparative advertising the fine is between €5.000 and €500.000. The ICA's final decisions are published and can be appealed to the system of Italian Administrative Tribunals in two steps: first before the Regional Tribunal, then with a final appeal to the *Consiglio di Stato*).

At the end of the procedure, the ICA may declare contractual terms to be unfair and order publication of its decision on both the ICA's as well as the trader's websites, to ensure a broader dissemination of information to consumers and to help prevent traders from inserting such terms in their standard forms. Traders may also ask the ICA for an opinion in advance about the fairness of the terms they intend to use in their standard contracts with consumers.²⁸

Notwithstanding these increasing duties (such as the public enforcement of unfair terms in consumer contracts mentioned above), the ICA's experience in enforcing consumer rights confirms that the authority suffers many limitations. Much like Italian consumer associations, the ICA and other sectorial authorities have limited resources to ensure the effectiveness of consumer rights. In addition, they may have limited access to information about an infringement. Finally, quite frankly they may have a limited interest in pursuing an infringement. To provide a clear example, the ICA has made only a very limited use of its power (and duty) to verify unfair contract terms (e.g. 14 cases in 2013; 15 in 2014; and only three in 2016).²⁹

²⁶ Art. 27, paragraph 3, ICC and art. 8, paragraph 3, of Legislative Decree no. 145/2007.

²⁷ Art. 27, paragraph 7, ICC and art. 8, paragraph 7, of Legislative Decree no. 145/2007).

²⁸ E. BATTELLI, *L'intervento dell'autorità antitrust contro le clausole vessatorie e le prospettive di un sistema integrato di protezione dei consumatori*, in 1 *Europa e Diritto Privato*, 2014, p. 207.

²⁹ Some data are available in M. Angelone Marco, *La tutela amministrativa contro le clausole vessatorie alla luce dell'attività provvedimentale condotta dall'Agcm nel triennio 2013-2015*, in *Concorrenza e mercato*, 2016, p. 525-551.

2.2. *Quasi-Public Enforcement*

Articles 139 and ff. ICC assign to consumer associations a central role in judicial enforcement of consumer rights. While the ICC does not prevent injured consumers from acting individually (under ordinary rules) or collectively (through an *azione di classe* as described *infra* at paragraph 2.3.2.), only consumer associations may file an action for injunction pursuant to Article 140 ICC and, in practice, consumer associations have been lead plaintiffs in most *azioni di classe* brought so far. The *quasi-public* aspect is further stressed by the fact that not every consumer association has standing to sue (Article 139 ICC), but only those registered with the Ministry for Economic Development pursuant to Article 137 ICC. Such a broad standing of associations confirms the historical bias of the Italian legal system towards assigning a central role to *quasi-public* actors, as opposed to the US *private attorney general* model.³⁰

Despite the broad mandate contained in the ICC, Italian consumer associations cannot and do not have the same role and importance as the plaintiff bar in the US. There are many fundamental differences between consumer associations and law firms, as the former have fewer financial resources and different economic incentives. The Italian State and local authorities provide very limited public funding to consumer associations, which mostly rely on association quotas. This in turn means that these consumer associations often have the primary goal of increasing their influence and visibility, if perhaps only implicitly. This may be in order to increase their own visibility because part of their power and resources come from their reputation and the broadening of their base. Thus, the ability to draw publicity is likely to be a crucial factor in selecting a case.

In addition, Italian consumer associations are required by law to be not-for-profit and do not stand to gain directly from settlements or judicial awards. Thus, they may see consumer welfare as a broader concept than the simple compensation of damages, and therefore aim at sending a signal to the entire industry or pushing for changes in current business practices. As a result, associations are less likely to pursue settlements, at least on purely monetary terms. Moreover, associations' lack of economic resources, and

³⁰ See, S. BURBANK – S. FARHANG – H. KRITZER, *Private enforcement of statutory and administrative law in the United States*, *Int'l L.*, 2011, 3-4, p. 153 ss ; and H. BUXBAUM, *The Private Attorney General in a Global Age: Public Interest in Private International Antitrust Litigation*, in *Y. L. J.* XXVI, 2001, p. 219.

sometimes of adequate expertise, are obstacles to the effective pursuit of injunctive and collective litigation.

Faced with the obstacles of limited resources, limited incentive to pursue settlements, and limited expertise in this area, Italian associations have adopted different strategies with respect to enforcement. Some, like *Codacons*, have tried to exploit the new collective mechanism, filing a comparatively high number of actions and announcing potential claims for millions of Euros. Due in part to a few unsuccessful and costly attempts, though, they have decided to focus on political and social activities, as well as joining in as victims in criminal proceedings seeking civil compensation. Others, such as *Altroconsumo*, one of the most active associations in filing suits before Italian courts under the new procedure, have been able to gradually produce classes encompassing thousands of participants. Thus, there seems to be a trend towards specialization among associations with the result that only a few organisations are effectively representing consumers in judicial collective redress with the aim of recovering economic damages. Others appear more inclined towards bringing injunctive actions pursuant to Art. 139 ICC, or provoking the intervention of the ICA or public prosecutors, as well as being generally active at the policy-making level.

a) Injunctive relief

Consumer associations are granted standing by the ICC and special laws to bring *quasi-public* actions aimed not at compensating damages, but at obtaining injunctive relief from wrongdoers. In such cases, the goal is not an *ex post* compensation of damages for a particular group of consumers, but rather to solve an issue *pro futuro* for consumers considered as a whole (Art. 139-140 ICC). With respect to standing, Article 140 ICC provides that '[associations of consumers and users registered before the Ministry of Productive Activities, as well as independent Italian public organisms and organisations recognised in another Member State of the European Union] have standing to act to protect the collective interests of consumers and users'. In light of our practical experience with this type of action, we note that the system of government accreditation for consumer associations provided under Art. 140 ICC is unreliable. While 'court certification' concerns the conduct of the representative in a specific lawsuit, government

accreditation has resulted in generic application: the association is accredited as a ‘fit representative’, irrespective of the existence of an actual lawsuit.³¹

Some lawyers or law firms are now specialised in representing consumer associations before the Courts. The ordinary rules concerning lawyers' fees apply and associations usually bear the litigation costs, with some very limited support from legal aid schemes.

Before applying to the Court, consumer associations are required to pursue a conciliatory procedure before the Chamber of Commerce (art. 140, paragraph 2, ICC) or before an institution regulated by art. 141 ICC. The agreement is then filed with the court, which renders it an enforceable title. If the conciliatory procedure has a negative outcome (or if 60 days have passed), the association may apply to the Court to obtain a limited set of remedies. These include: a) a prohibition order against actions harming consumers' interests; b) suitable measures to remedy or eliminate the harmful effects of any breaches; and c) orders to publish measures in one or more national or local daily newspapers where publicising measures may help to correct or eliminate the effects of any breaches.³² When it grants the action, the Court specifies a deadline for compliance with the order and, upon plaintiff's request, sets a penalty between €516 and €1,032 for each instance of non-compliance or each day of delay, in proportion to the seriousness of the breach. These sums are paid to the State to finance initiatives for the benefit of consumers. There is no need to stress again that such mechanism suffers from some shortcomings, including consumer associations' limited standing, limited funding with which to pursue actions, and limited relevant legal expertise. About 25-30 cases have been reported since the adoption of these mechanisms in the ICC.³³

³¹ C. PONCIBÒ, *Le azioni di interesse collettivo per la tutela dei consumatori*, in 4 *Riv. Crit. Dir. Priv.*, 2012, p. 659-669. In particular, the Ministry of Economic Development keeps the list of the national consumers and users' associations. The inclusion in the list is subject to the certain requirements, which are confirmed by presenting documentation conforming to the directions and procedures established by an order from the Ministry of Economic Development. Requirements include for example the number of members, the years of activity, and the presence in the country. Currently, eighteen associations are registered in the said list, and the Ministry for Production Activities updates the list annually, adding new associations.

³² Art. 139 and followings of Consumer Code implementing Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ, L 166, 11 June 1998, p. 51-55.

³³ 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 and the updates are available at www.collectiveredress.org/collective-redress/member-states.

b) The action against the public administration

Another injunctive action, commonly referred to by the misleading term of "public class action", was introduced by the Legislative Decree of 20 December 2009, no. 198. This action goes under the unwieldy name 'collective action for the effectiveness of the action of government entities and the providers of public services'. The holders of relevant identical interests, such as citizens, consumers, or users, or any association, may bring such action. The action aims at protecting consumers and users against violations of quality standards related to public services, regardless of the public or private nature of the entities providing such services. This action implements the principles contained in Art. 97 of the Italian Constitution, according to which the Public Administration, and, by extension, private providers of public services, should ensure 'quality performance' and 'impartiality'.

This type of action is directed at 'restor[ing] the correct course of the administration's duty or the correct provision of a public service' in instances of a direct, tangible, and current violation of identical material interests of a plurality of users/consumers (Art. 1, par. 1, Leg. Decree No. 198/2009) caused by violation of:

- a) Terms and deadlines or lack of issuance of general administrative acts (but not of normative acts) which must be issued within a mandatory term fixed by law or regulations;
- b) Obligations contained in charters of services (*carte di servizi*), that is, the means through which any entity providing public services specifies the standards of its performance, declaring its goals and recognizing specific rights to citizens, users, or consumers. Through these charters, entities providing public services undertake to respect given quality and quantity standards, with the purpose of monitoring and improving the provision of such services);
- c) Quality and economic standards set, as to providers of public services, by the authorities in charge of the regulation of the sector and, as to other government entities, by the latter entities according to the applicable provisions (Art. 1, paragraph 1).

In practice, defendants may be government entities, other public bodies, and providers of public services, excluding independent administrative authorities, jurisdictional bodies, legislative assemblies, constitutional bodies, and the Presidency of the Council of Ministers (Art. 1, paragraph 1-ter, Legislative Decree No. 198/2009).

Unlike the *azione di classe*, which is brought before civil courts, exclusive jurisdiction for actions for the efficiency of the public administration lies with Italian administrative courts (Art. 1, paragraph 7). Indeed, in this context the Public Administration is not deemed to carry out civil or commercial activities (*iure privatorum*), but rather administrative activities connected to the exercise of public powers.

Procedurally, these actions may be brought only after a warning letter is served on the defendant entity, requesting compliance with its obligations and cure of its violations within a 90-day term (Art. 3, paragraph 1). Only upon expiration of such term, and within one year, is the right holder entitled to bring an action. The statement of claim is then duly published on the official site of the defendant entity, and notice thereof is given to the Italian Public Administration Minister (Art. 1, paragraph 2).

These types of actions may only be brought to remove the inefficiency of the public service caused by the violation, and do not include compensation for damages (Art. 1, paragraph 6). Hence, a decision upholding plaintiffs' request will merely order the defendant to remedy its proven wrongdoing. Notice of the decision is then duly given in the same fashion as the statement of claim at the outset of the action (Art. 4, paragraph 2, Art. 1, paragraph 2).

Since the introduction of this type of action, only a few cases have been decided by Italian administrative courts, which have interpreted some of the rules governing such procedural tool.³⁴ One of the first cases involved plaintiffs who filed against the Region of Basilicata, complaining they had to physically go to the Region's offices in order to use any of the regional services. This was because the Region had not published its certified email address on its official website, as provided by law. They argued that they were unable to benefit from the advantages of digital communications, in an action brought, *inter alia*, by a number of single users/consumers as well as an association, *Agorà Digitale*, which represented the collective interest of 'defending digital freedom and developing internet communications to the public'.³⁵ The Basilicata Administrative Regional Tribunal ('T.A.R.') ultimately held that the Region's conduct amounted to a relevant violation³⁶ and ordered it to publish its certified email address on its website. However, the Tribunal issued its decision in favour of the above-mentioned association only. In fact, the T.A.R. preliminarily rejected the claims brought by the individual citizens because they failed to

³⁴ C. PONCIBÒ and E. RAJNERI, note 32 before.

³⁵ T.A.R. Basilicata, 23 September 2011, no. 478.

³⁶ T.A.R. Basilicata, 23 September 2011, no. 478.

prove a direct, tangible, and current violation of their rights, a requirement specifically prescribed by Art. 1, par. 1, Legislative Decree n. 198/2009, which aims to prevent this type of action from being used as an alternative tool to the administrative–political control of Public Administration actions. Nevertheless, the T.A.R. granted the association's claim, acknowledging its standing to sue.

In a later decision issued by the Lazio T.A.R., the Court specified that this type of action may in principle be brought by ‘associations or committees’ pursuant to Art. 1, par. 4, Legislative Decree No. 198/2009.³⁷ However, under the same provision, these entities must do so with the aim of ‘protect[ing] the interests of [their] members,’ i.e., the holders of legally relevant interests who may be subject to a direct, tangible, and current offense caused by Public Administration misconduct. In this case, the Administrative Court held, *inter alia*, that the plaintiff consumer association would in principle have been entitled to bring the action, but it should have done so in representation of its members' interests, specifying the title and subject matter of each claim. The Tribunal dismissed the claim because the plaintiffs had not specified these elements. The Court gave another reason for dismissal: the plaintiffs based their claims on the fact that the sued Public Administrations did not adopt adequate measures to prevent hydrogeological risks in several different geographical areas. However, as each area was different from the others, plaintiffs failed to allege which public act was lacking in each situation. In addition, the plaintiffs described such situations only in general terms. Therefore, the Court dismissed the claim, stating that it lacked the necessary specificity of the object of judicial claims (*petitum*).

Two additional cases brought in the Lazio region, this time concerning migration issues, shed further light on this type of action. The first involved the repeated breach by the administration of the 90-day deadline³⁸ for issuing residence permits to people held in migrant detention centres. The Court deemed the application made by the migrants' representatives admissible and with merit. In the T.A.R.'s decision, 6 September 2013, no. 8154,³⁹ the Court^{40,41} ordered the administration to ‘remedy this situation by adopting appropriate measures within one year of the notification of this judgment’. At the same

³⁷ T.A.R. Lazio, 3 September 2012, no. 7483, in *Guida al diritto*, 2012, 40, 63.

³⁸ Article 9 of Legislative Decree of 6 March 1998, no. 267.

³⁹ M. GNES, *L'applicazione della 'class action' pubblica in materia di immigrazione* (Comment to TAR Lazio, sez. II quater, 6 September 2013, no. 8154; TAR Lazio, sez. II quater, 26 February 2014, n. 2257, in *Giornale di diritto amministrativo*, 2014, 7, pp.734-740.

⁴⁰ Article 9 of Legislative Decree of 6 March 1998, no. 267.

⁴¹ Article 9 of Legislative Decree of 6 March 1998, no. 267.

time, though, the judgment stated that the administration could act in this respect using the instrumental, financial and human resources already allocated. No allocation of new or greater resources was required.

The second case concerned the failure of the Ministry of Interiors to conclude administrative proceedings granting citizenship to long-term foreign residents within the already generous statutory deadline of 730 days, as provided by law.⁴² The Court, having recognized the applicability of this procedural device to the breach of procedural deadlines, as well as the standing of both individual applicants and associations, partially granted the application in February 2014. The T.A.R. ordered the Ministry of Interior to remedy the situation by adopting appropriate organizational and procedural actions, again within the instrumental, financial and human resources already allocated for providing, with the goal of respecting the 730-day deadline.

Public administrations are clearly given a privilege when compared to commercial traders, as the former is not required to compensate damages in this kind of action, while the latter may be subject to a compensatory *azione di classe*. To be sure, ultimately it could be possible to obtain compensation of damages from public entities through ordinary means (Art. 30 of the Code of Administrative Proceedings), although such avenue is undoubtedly more burdensome and not expressly designed for collective actions.⁴³

2.3. *Private Enforcement*

Quite often administrative procedures for consumer protection coexist with consumer individual and collective claims before civil courts. In general, this co-existence may be explained by relying on the concept of *redundancy*. That is duplication of enforcement mechanisms may increase the effectiveness of the system overall. The point of the ‘redundancy theory in litigation’⁴⁴ is that, despite obvious costs, redundant enforcement may serve to further valuable legislative objectives, particularly when multiple actors can be harnessed toward the same ends. In our case, redundancy aims to

⁴² Article 9 of Legislative Decree of 5 February 1992, no. 91. See M. Gnes, before at 734.

⁴³ M. GNES before note 38 at 734. See also F. PORCARI, ‘*Primi fragili spiragli per l'azione di classe contro gli enti pubblici territoriali*’ [First fragile openings for class action against local governments] (Comment to order by the Tribunal of Rome, sez. II civ. 2 May 2013, in *Responsabilità civile e previdenza*, n. 3/2014, p. 969-977.

⁴⁴ Z. D. CLOPTON, *Redundant Public-Private Enforcement*, in 69 *Vanderbilt Law Review*, 2016, p. 286-332.

reduce under-enforcement of consumer rights by multiplying the actors; avoiding the respective biases of public and private actors, problems of information and *expertise*; and overcoming the lack of resources of one or more actors (assuming they possess different resource pools).

While this approach is reasonable, the proliferation of actors in enforcement regimes may in the end escalate the level of confusion and litigation costs. Of course, the benefits of redundant enforcement will not emerge without careful institutional design, which seems to be lacking in our case. In order to explore such cases of co-existence of enforcement regimes for consumer protection in Italy, the next paragraphs introduce the two other forms of consumer law enforcement: litigation and alternative dispute resolution.

2.3.1. Consumer individual claims

“In Italy there seems to be a sharp contrast between the law as it is written in the books and its operation in reality”.⁴⁵ This remark by a legal scholar in 1999 is still valid today, especially as it applies to judicial mechanisms. The Italian “machinery of justice” remains slow and inefficient⁴⁶ and the constant increase in the number of cases on each judge’s docket list has, in time, created a large backlog.⁴⁷ This endless increase, combined with a lack of resources (i.e. number of judges, court personnel, access to technology), seriously affects the average duration of civil proceedings, as clearly demonstrated by the many decisions of the European Court of Human Rights finding Italy in breach of the right to a reasonable duration of judicial proceedings.⁴⁸

⁴⁵ S. CHIARLONI, *Civil Justice and its Paradoxes: An Italian Perspective*, in A. ZUCKERMAN (ed.), *Civil Justice in Crisis, Comparative Perspectives of Civil Procedure*, (Oxford, 1999), p. 263. Resources on Italian civil procedure in English are M. CAPPELLETTI – J. PERILLO, *Civil Procedure in Italy*, 1965; V. VARANO, *Civil Procedure Reform in Italy*, 45 *Am. J. Comp. L.*, 1997, 657 ff.; S. CHIARLONI, *Civil Justice and its Paradoxes: An Italian Perspective*, in A. ZUCKERMAN (ed.), *Civil Justice in Crisis*, OUP 1999. See also, M. TARUFFO, *Civil Procedure and the Path of a Civil Case*, in J. LENA – U. MATTEI (eds.), *Introduction to Italian Law*, 2002 Kluwer Law International; A. COLVIN – V. VIGORITI, *Italy*, in A. LAYTON – H. MERCER (eds.), *European Civil Practice*, 2nd Thompson 2008; N. TROCKER – M. DE CRISTOFARO(eds.), *Civil Justice in Italy* (eds.), Jigakusha 2010; G. PAILLI and N. TROCKER, “Italian Civil Procedure”, in A. DE LUCA–A. SIMONI (eds.), *Fundamentals of Italian Law*, eds.), Giuffrè, 2014, p. 163–183.

⁴⁶ See D. MARCHESI, *Litiganti, avvocati e magistrati. Diritto ed economia del processo civile*, Bologna, 2003.

⁴⁷ See S. BENVENUTI, *The Machinery of Italian Civil Justice*, in A. DE LUCA AND A. SIMONI (eds.), *Fundamentals of Italian Law*, Milan, Giuffrè, 2014. See, also, A. C. REYNOLDS, ‘Dimensions of Justice in Italy: a Practical Review’, *Global Jurist Advances*, 3/2 (2003), article 1.

⁴⁸ See G. TARZIA, *L'art. 111 Cost. e le garanzie europee del processo civile*, in *Riv. dir. proc.*, 2001, p. 1 ss.; A. DIDONE, *Equa riparazione e ragionevole durata del giusto processo*, Milano, 2002,

In a situation characterized by the abnormal duration of civil proceedings and their uncertain outcome, consumers can quite rationally decide that the cost of attempting to secure redress is not justified if the amount involved is not substantially higher than the cost of litigation. This is notwithstanding the presence of the “loser pays all” rule in Article 91 of the Code of Civil Procedure, which necessarily has its own chilling effect on potential plaintiffs. Accordingly, since any defendant is fully cognizant of this fact, the threat of litigation by an aggrieved consumer is often not credible. In addition, since no or limited recoveries will be sought absent a collective enforcement action, there is a predictable and generalised under-deterrence of wrongdoings. Here, we analyse small claims courts and legal aid as elements which may remove some of the obstacles to filing judicial actions by aggrieved consumers.

According to the EC Regulation on European Small Claims Procedure, the establishment of an efficient and effective “small claims” court mechanism might contribute greatly in furthering the goal of consumer protection.⁴⁹

Within the Italian legal system, small claims (up to €5.000) are presently dealt with by the Justices of Peace (*Giudici di pace*) instead of ordinary courts (*Tribunali*). This includes consumers' claims.⁵⁰ Typically, small claims consumer cases involve issues of commercial law, private contracts, property rights and minor personal injuries.⁵¹ Procedure before the Justice of Peace has been designed to be simplified, with lower costs, no complex legal briefs and more lenient rules on evidence. Assistance of a lawyer, otherwise compulsory in civil procedure, is not required if the value of the dispute is below €1.100. The *Giudice di pace* should simply hear the testimony of both parties and third parties who have knowledge of the dispute, and either attempt to mediate a compromise or decide the case. The decision may be based on equitable principles, and

passim; R. MARTINO, *Sul diritto all'equa riparazione in caso di violazione del termine ragionevole del processo* (legge 24 marzo 2001, n. 89), in *Riv. dir. proc.*, 2001, p. 1068 ss.; P. BIAVATI, *Osservazioni sulla ragionevole durata del processo di cognizione*, in 2 *Riv. trim. dir. proc. civ.*, 2012, p. 475.

⁴⁹ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ n. L 199, 2007, pp. 1-22, as amended by Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015. However, even the EU Small Claims procedure *per se* has showed many limits and it is not as used as it could be, see EU Commission's report of 19 November 2013 on the application of Regulation (EC) No 861/2007, available at ec.europa.eu/justice/civil/files/com_2013_795_en.pdf.

⁵⁰ The Legislative Decree 5 has reformed the access to the role of *Giudice di Pace* in May 2017. The reform is aimed to a global revision of the status of non-professional judges and prosecutors (recruitment, functions, competence, and allowances).

⁵¹ P. LEWIS, *The Consumer's Court? Revisiting the Theory of the Small Claim Procedure*, in 25 *CJQ*, 2006, pp. 52-69.

not on a strict application of the law, if the value is below €1.100. The *Tribunali* (the first-instance court under ordinary rules) hear the appeals decisions by small claims courts, by applying the ordinary rules of civil procedure.⁵² As a practical matter, not many small claim cases are appealed, as the appeal will often cost more than the amount in dispute.

The system of *Giudici di pace* addresses the problem of consumer access to justice firstly because it reduces legal costs. In any case, the system has come under strong criticism for the low level of training of *Giudici di pace* and the very limited accuracy of their decisions. Furthermore, in practice, this simplified procedure often develops into a more complex and structured procedure and rarely will a consumer be able to navigate through it without the assistance of a lawyer, thereby raising overall costs.

Given this situation, one may expect that consumers are at least granted access to justice by way of some form of legal aid from the State. Italian legal aid consists of an exemption from certain costs and taxes, with the State paying other costs and diminished lawyer's fees.⁵³ The State has the right to reimbursement and, where it does not recover the money from the losing party, it may claim repayment from the party eligible for legal aid, if the recipient wins and receives at least six times the cost of the expenses incurred, or if cases are discontinued or barred. Applicants granted legal aid may choose a lawyer from a list of authorised lawyers kept by the local Bar associations. They may also appoint expert witnesses where allowed by law. The crucial point is that legal aid⁵⁴ is granted only to parties with a taxable income not exceeding €9.723,84, as shown on his or her latest tax return.⁵⁵ Such a scheme is so limited, and the criteria so stringent, that only a few seriously indigent consumers may benefit.

In conclusion, enforcement of consumer's rights through individual judicial action, although an option on the books, is in practice not a viable route unless the damage claimed is substantial, thereby justifying the costs of defending an ordinary action.

⁵² G. PAILLI and N. TROCKER, "*Italian Civil Procedure*", cited *supra*.

⁵³ The State pays the following costs: (a) counsel's fees and expenses; (b) travel costs and expenses incurred by judges, officials and judicial officers for performing their duties outside the court; (c) travel costs and expenses incurred by witnesses, court officials and expert witnesses who incurred expenses when performing their duties are also reimbursed; (d) the cost of publishing any notice regarding the judge's ruling; (e) the cost of official notification.

⁵⁴ President of the Republic's Decree of 30 May 2002 no. 115, Unified text of laws and regulations on judicial costs (*Testo unico delle disposizioni legislative e regolamentari in materia di spese di giustizia*), in OJ n. 139, 15 June 2002 - Suppl. ordinario n. 126 as amended.

⁵⁵ The income threshold is adjusted every two years by order of the Ministry of Justice to take account of variations in ISTAT's consumer price index.

In this regard, it is also worth noting that Italian lawyers do not traditionally think of themselves as ‘entrepreneurs’, but rather as institutional players whose task it is to render effective the individual constitutional right of action enshrined in article 24 of the Italian Constitution.⁵⁶ This provision entails a constitutional protection of the legal profession, thus differentiating it from other intellectual professions and granting it a specificity and a role having institutional implications. The new law regulating the legal profession, no. 247 of 21 December 2012, which has brought a few significant innovations to the organization and regulation of the legal profession, has not promoted any significant change in this mentality. Accordingly, the legal profession is to be practised “with independence, loyalty, integrity, dignity, propriety, competence and care, taking into account the social importance of defence and respecting the principles of fair and loyal competition” (Article 3(2), Law no. 247/2012).

Thus, at least at nominally, the legal professional assists clients in the shadow of the public interest. This is clearly an anachronistic idea of legal practice but, with some exceptions, it still exercises a strong influence on the Bar. While in recent years a few large, entrepreneurial and corporation-oriented Italian firms have emerged, especially in Rome and Milan, the average Italian firm is a solo practice or a partnership with a few lawyers, which does not have adequate skills or the entrepreneurial mind-set to develop an effective plaintiff Bar. This state of affairs is not only the product of an entrenched culture, but also the result of a lack of adequate incentives to encourage specialisation in mass litigation, such as the unavailability of non-economic damages in product liability cases.⁵⁷ Also relevant in this respect is the longstanding incompatibility of punitive damages with the general principles of Italian private law, entrusting to private litigation only a compensatory function. The Italian Supreme Court, as Joint Chambers (Sezioni Unite), only recently decided that a foreign judgment providing for punitive damages may

⁵⁶ Article 24 of the Italian Constitution: ‘Everybody can initiate legal action to protect their legitimate rights and interests. Defence is an inviolable right at every stage and level of the proceedings’.

⁵⁷ Cass., 27 October 2004, No. 20814/2004, *P. c. U. s.p.a.*, in *Resp. civ.*, 2005, p. 172. Initially, Italian Courts were refusing to grant non-economic damages in strict liability cases. This because, in these cases, no show of fault or negligence was required. Such position changed when in 2004 the Italian Supreme Court recognized for the first time the possibility to awarding non-economic damages also in strict liability cases, including for product liability, but only upon a showing of negligence on the part of the wrongdoer.

be recognised under the Italian legal system, thus implicitly admitting for the very first time the punitive nature of civil damages.⁵⁸

Lawyer's fees, in principle open to negotiation by the lawyer and his client, are regulated by the Ministerial Decree of 10 March 2014, no. 55, which provides a minimum and maximum fee depending on the type of proceedings and the value at stake. Courts refer to Decree no. 55/2014 when awarding fees and costs to the winning party under the "loser pays all" rules (the so-called "English rule"). Nevertheless, courts quite often steer 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.⁵⁹ Contingency fee agreements have been illegal in Italy for long time, marked as an element capable of dramatically altering the interests and incentives of the lawyer, shifting his motivation from a *quasi-public* protection of justice to a corrupt selfishness. Article 13 of Law no. 247/2012 has partially lifted this prohibition, but the new provision's ambiguity still makes it unclear the extent to which lawyers are at liberty to agree to contingency fees.

2.3.2. *The failed promise of the azione di classe*

One of the fundamental transformations of Italian consumer law enforcement (and more generally of EU Consumer Law) results from the collectivization of enforcement, as an attempt to counter its fragmentation.

With respect to the Italian experience, before the enactment of the *azione di classe* in 2007-2009, the only option for litigating mass torts, besides participating as *parte civile* in criminal proceedings as discussed *supra* at paragraph 3.1, was through the joinder of parties (*litisconsorzio*). This joinder has been employed in a few cases, such as those

⁵⁸ Cass. Civ., Sez. Un., 5 July 2017 No. 16601, in *Ced Cass.*, *rv.644914 (m)*. On the topic of denial of recognition of foreign award of punitive damages, see, e.g., Corte di cassazione, 19 January 2007, No. 1183/2007, *Parrott v. Società Fimez*, in 4 *Resp. civ.*, 2007, p. 373. Corte di cassazione, 8 February 2012, No. 1781/2012, *Società Ruffinatti v. Oyola-Rosado*, *Giur. It.*, 2013, p. 126.

The Italian Supreme Court will soon decide 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 (*ordre public*) or, at least when recognition of a foreign decision is sought, damages could also play a punitive/deterrent function (Cassazione Civile, sez. I, ordinance of 16 May 2016, no. 9978 referring this matter from the First Chamber to the Joint Chambers). Such decision will also have to take 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.

⁵⁹ Third party funding is possible, since legal rules do not openly forbid 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.

concerning blood infection or asbestos. However, simple joinder, where each plaintiff becomes a formal party to the proceedings, is not designed, nor is it effective, to manage mass litigation.

Discussions about the enactment of a proper collective judicial redress in Italy have been ongoing for years.⁶⁰ At the end of 2007, on the wave of the Parmalat scandal, the Parliament introduced a collective mechanism as Article 140-bis of the ICC.⁶¹ In July 2009, before it even entered into force, the original text of Article 140-bis was replaced in its entirety with the current one, introducing a brand new *azione di classe* as of January 1, 2010.⁶² In 2012 a further set of amendments,⁶³ lowered one of the admissibility thresholds. 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.

Azioni di classe can be brought by any consumer or user, or by an association or committee empowered by them. The action can 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*) related to a specific product or service against the relevant manufacturer or provider, even in the absence of a direct contractual relationship; or (iii) homogeneous claims for damages by consumers and users as a consequence of unfair business practices or violation of competition law.

⁶⁰ 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.

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*, in 16 *ZZPInt* 2011, p. 61-77.

⁶¹ Legislative Decree no. 206 of 6 September 2005, OJ 8.10.20015 no. 235 ('Consumer Code').

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.

⁶² Art. 49 of the Law 23 July 2009, no. 99, OJ 31.07.1999 no. 176.

⁶³ 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.

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. An 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 interest; (iii) the individual rights are homogeneous; and (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 it grants the claim, specifies the amounts owed by the defendant to any individual consumer who joined the action. In the alternative, the judge may set the homogeneous criteria for the computation of such amounts, encouraging parties to agree on liquidation of damages. 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. There is no provision for punitive damages or other economic sanctions.

In practice the *azione* has not been a game changer. According to data of the *Osservatorio Antitrust* of the University of Trento,⁶⁴ as of January 2016 58 actions were filed in the courts of first instance, out of which 10 were declared admissible and 18 inadmissible.⁶⁵ Obstacles are not only intrinsic to the procedural devices, but also relate to the cultural mind-set of Italian lawyers, judges and consumers.⁶⁶ The only incentive to bringing an *azione di classe*, and this is perhaps insufficient, is that the standard fees provided for by Decree no. 55/2014 for an ordinary action are tripled, ensuring at least a partial coverage of the additional costs and stakes involved in a collective litigation.

In the vast majority of the proceedings scrutinized,⁶⁷ the promoter of the *azione di classe* was a consumers’ association. Individual or closed groups of consumers

⁶⁴ The Competition Law Observatory is available at the following address: www.osservatorioantitrust.eu/it/azioni-di-classe-incardinate-nei-tribunali-italiani/ (last visited, 13 Jan 2017).

⁶⁵ C. PONCIBÒ and E. RAJNERI note before.

⁶⁶ These aspects are examined in more detail in our *Legal Culture and Collective Redress: the Italian Experience*, ZZPInt, 2017, under publication.

⁶⁷ Despite the number of 58 actions filed according to the *Osservatorio Antitrust*, we located actual judicial orders and decisions only for 20 cases (for a total of 38 between orders and

promoted only a few actions, including the first *azione di classe* to be successful on the merits (regarding a travel package) and others related to water supply or failure to remove snow from the street.

Interestingly, in most cases the court of first instance initially ruled for the inadmissibility of the action, a decision then overturned by the court of appeal. This shows that the latter may be more open to understanding and applying the *ratio* of the new law than first-instance judges.

A handful of decisions by the Italian Supreme Court (*Corte di cassazione*) exists, but 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.⁶⁸ However, a statement made by a Simple Chamber of the Court stands out:⁶⁹ ‘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 admissible the former, the possibility to bring the latter would prevent consideration of a declaration of inadmissibility to have the content of a decision and to be final’. In brief, the Court deems it reductive to read art. 140 bis as just an alternative procedural ‘form’.

A collective action, indeed, due to the increased economic and psychological pressure that may be exerted on [traders], offers plaintiffs an ‘added value’ as compared to an ordinary action. It is more persuasive, may more effectively bring compliance, and is cheaper for those who participate in it. The court also notes that the individual action has content, goals and effects that are very different from the collective action: it has a different content, because it cannot promote the protection of “collective interests”, it

decisions, including by courts of appeal and the Supreme Court). The following analysis is based on these documents only.

⁶⁸Cass. Civ. sez. I, 21.11.2016, n. 23631, *Intesa San Paolo S.p.A. C. G.F. e altri*, in *Diritto&Giustizia* 2016 (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); Cass. Civ. sez. I, 14.06.2012, n. 9772, *Codacons C. Soc. Intesa San Paolo*, in *Foro it.*, I, 2012, p. 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 Cass. Civ. sez. III, 24.04.2015, n. 8433, *Codacons C. Soc. Bat Italia*, in 2 *Resp. Civ. Prev.*, 2016, p. 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*.

⁶⁹Cass. n. 8433/2015, *supra*.

has different goals, because an individual action on consumer's rights leaves the plaintiff in a 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 coming from Italy's highest court, while "business as usual" in an American court, is a promising sign that something may be changing in the judges' mind-set. So far, at least four actions have reached a decision on the merits, out of which two were successful and two were dismissed. In the two successful cases, an action decided in Napoli saw around 12 of 40 participants compensated, while in an action decided in Torino the court eventually admitted only three out of 110 participants, for purely bureaucratic reasons (see *infra* in this paragraph).

As to the subject matter of these *azioni di classe*, the areas with more than one action (which means two or three, not ten or twenty) have been banking practices, transportation, failure to provide public services (snow, water supply, school lunches) and diesel emissions (unfair practices). Two actions unsuccessfully tried to stretch the boundaries of this judicial collective redress mechanism to reach securities claims.⁷⁰ Single actions focused on health 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.

Below we will examine a few of the more interesting cases.⁷¹ In the first class action decided on the merits, the plaintiffs and the participants in 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 each bought a package specifying certain facilities and services in Zanzibar, but on arrival, they were hosted for three days in a different, lesser-quality facility. They spent the rest of their holiday in the advertised resort, but it was still under construction. The Napoli Tribunal, after admitting the action, ordered the

⁷⁰One is 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. The other is Tribunale di Genova, 13.06.2014, *Comitato Tutela del Risparmio v. Banca Carige Spa*, available at www.osservatorioantitrust.eu/it/wp-content/uploads/2014/06/Ord-Trib-GE_Comitato-c-Carige-2014.pdf (last visited 13 Jan 2017).

⁷¹ 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., 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).

defendant to compensate each of the 12 members of the class admitted to the action a sum of €1.300,00 (in relation to a package whose cost was €1.950,00), and legal costs of €8.850,00 (total for all participants).⁷² Soon thereafter, the travel agency filed for bankruptcy. The court adopted a quite restrictive notion of homogeneity, requiring that both the *anand quantum* of damages be identical. It therefore excluded from the class around 30 consumers who were hosted in a different structure because their damages were found not to be identical as to the *quantum* (and additionally due to lack of evidence that such facility was inadequate).

In the second class action to reach a decision on the merits, promoted by the reputable consumer association Altroconsumo, the Torino Tribunal found that a bank had in fact inserted unfair terms in its contracts, but rejected most of the 104 class participants due to a defect in their participation documents.⁷³ The Tribunal required each participant's signature to be authenticated by a public officer, but many participants failed to do so.⁷⁴ As a result, the Tribunal granted the claim of the three "named" plaintiffs and of only three out of 104 class 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.⁷⁵

Following the renowned Dieselgate scandal, the consumer association, Altroconsumo launched two actions (Art. 140-bis) against car manufacturers in Italy. The first is against Fiat Chrysler Automobiles in Torino, where the Court of Appeal, with a very well-reasoned decision, overturned the Tribunal's order of inadmissibility and directly admitted the action, mandating the Tribunal to carry out the merits phase.⁷⁶ Altroconsumo claims that it filed 21.031 declarations of participation with the Tribunal.

⁷² Tribunale Napoli sez. XII 18.02.2013 n. 2195, *M. v. W.*, in 12 *Guida al diritto*, 2013, p. 16.

⁷³ Tribunale Torino 10.04.2014, *Gasca et al. v. Intesa Sanpaolo* in *Foro it.*, I, 2014, p. 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».

⁷⁴ 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.

⁷⁵ Corte di 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).

⁷⁶ Corte d'appello di Torino, 17.11.2015, *Altroconsumo v. FCA* (2016) I *Foro it.*, 1017.

The second action, against Volkswagen, was filed before the Venice Tribunal. As in the Torino case, at first the Tribunal declared the action inadmissible.⁷⁷ The judge rejected, in a well-written opinion, all defences raised by Volkswagen, but then mistakenly concluded that the evidence submitted by plaintiff was not enough to support the claim, and thus declared the action inadmissible as manifestly ungrounded. The Court of Appeal, following the Torino Court of Appeal's decision in *Altroconsumo v FCA*, criticized the Tribunal for confusing the admissibility and the merits phase, admitted the group, and referred the parties back to the Tribunal for a continuation of the proceedings on the merits.⁷⁸

While we are far, far away, from the speedy and billion-dollar settlements that Volkswagen reached in the US for the same fraud, both actions are a sign that something is slowly starting to change on the playing field. With respect to Dieselpgate, there is also an ongoing criminal investigation by the Verona public prosecutor's office, and other consumer associations (e.g., Codacons, Adiconsum and Federconsumatori), are gathering potential victims for participation in the criminal proceedings.

III. INTEGRATION OF PUBLIC AND PRIVATE ENFORCEMENT

3.1. Consumer claims in criminal proceedings

Enforcement of consumer rights may also be the result of an integration between enforcement mechanisms. We provide two examples of integration: the traditional case of a consumer claim brought before a criminal court and the more recent consumer follow-on action, i.e. an action following an administrative decision of the ICA.

Over the last two decades or so, wronged consumers have advanced a significant number of cases of mass torts by joining criminal proceedings and seeking compensation

⁷⁷ 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).

⁷⁸The Press Release is available at https://www.altroconsumo.it/organizzazione/-/media/lobbyandpressaltroconsumo/images/in-azione/classaction/fuel%20consumption%20volkswagen/ordinanza/ordinanza%20corte%20appello%20venezia%20class%20action%20vw%20ammessa%2017_06_2016.pdf (last visited 13 Jan 2017).

for individual damages for victims of a crime as *parte civile* (i.e., a civil claim brought by a harmed individual inside the criminal trial), an institution influenced by the French Code of Criminal Procedure.⁷⁹

By way of a brief introduction, in Italy enforcement of criminal laws falls entirely under the monopoly of public prosecutors (*Pubblico Ministero*), who have not only the power, but also the duty, to bring criminal charges. For more serious criminal offences, the public prosecutor must investigate *ex officio* under Article 112 of the Italian Constitution and Article 50 of the Italian Code of Criminal Procedure (CPP). Minor crimes require a complaint filed by the injured party, but then are subject to mandatory investigation and prosecution.

Victims of a crime may choose to pursue their claims for compensation in a civil action, or as part of the criminal proceedings. The choice depends upon a plurality of factors. For example, a private party may benefit from the pervasive investigative powers and technical expertise enjoyed by public prosecutors, but on the other hand, the standard of proof is higher (“beyond any reasonable doubt” *in lieu* of “more probable than not”) and the management of a criminal case lies largely in the hands of the public prosecutor.

If the civil action is brought within criminal proceedings, the *parte civile* has autonomous powers to bring evidence and to assist the prosecutor in proving the defendant guilty. The *parte civile* can, for instance, inspect and produce documents, call and cross-examine witnesses at trial, and present its own conclusions to the court. When the civil action is brought within criminal proceedings the court is empowered to award compensation under Article 185 of the Criminal Code, stating that ‘Every crime requires restoration according to civil law. Every crime which has caused patrimonial or non-patrimonial damage obliges the perpetrators and the persons who, according to the civil law, are responsible for his or her actions to pay compensation’.

Somewhat surprisingly, notwithstanding the various enforcement mechanisms described in this paper, including the *azione di classe*, damage claims by consumers continue to be lodged in criminal proceedings. Criminal proceedings are certainly not designed for mass torts, and there are many wrongs that do not meet the threshold of a criminal offence. Regardless, in a way, criminal proceedings still play an important role in

⁷⁹ 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*, De Gruyter 2014, vol. 34, p. 29 fs.

the enforcement of consumer rights, acting as a substitute for collective redress. To name but one, a widely known mass tort case pursued through criminal proceedings is the 2007 crack of Parmalat (the infamous financial scandal that also gave momentum to the introduction of the *azione di classe* in Italy), in which thousands of investors took part in criminal proceedings as formally individual *participili*.

Such a confirmed role of the criminal component shows a strong cultural resistance on the part of Italian lawyers and judges, who prefer to utilize well-established, traditional mechanisms. In addition, the *azione di classe* has failed to conquer the “market” for enforcement of consumers’ rights. Many cases that do not represent a criminal offence do not fall under the competence of the *Pubblico Ministero*. Here, the *litisconsorzio* procedure (i.e. joinder of parties) has been adapted as a device for mass litigation in cases concerning blood infection and asbestos where a settlement has followed the courts’ decisions in favour of consumer claims.⁸⁰ In such context, individual actions still play a major role in protecting consumer rights, but certain characteristics of the Italian judicial system reduce the effectiveness of private actions.

3.2. Follow-on consumer actions

Administrative actions and civil claims may also show a certain degree of interdependence in cases involving follow-on consumer actions. These actions are still uncommon in Italy. At present the ICA mainly issues administrative pecuniary sanctions (fines) against the wrongdoers to enforce some of the rights granted by the Consumer Code,⁸¹ but then follow-on individual or collective actions by consumers claiming

⁸⁰ Note 78 at 29 fs.

⁸¹ Similarly, the Office of Fair Trading can file for injunctive relief with regard to unfair terms in consumer contracts. See: Regulation 8 Unfair Terms in Consumer Contracts Regulations 1994; Regulation 12 of the Unfair Terms in Consumer Contracts Regulations 1999; Part 8 of the Enterprise Act 2002. OFT, Enforcement of consumer protection legislation, Guidance on Part 8 of the Enterprise Act, Office of Fair Trading (2003) 18 ff., p. 76 f. Usually, the threat of OFT seeking an order is sufficient to prompt businesses to change their general clauses.

damages have rarely followed the ICA's decisions.⁸² The same applies when consumers have suffered a damage for a breach of Competition Law sanctioned by the ICA.⁸³

The Supreme Court stated in several decisions that fact findings contained in the final decisions of the ICA must be considered privileged evidence (*prova privilegiata*). In one of these precedents, the Supreme Court added that a final decision of the ICA should have the effect of switching the burden of proof against the defendant. Because of the high evidentiary value attached to the administrative decision by the courts, the claimants usually wait to file a damages action until the decision becomes final.⁸⁴ If an ongoing investigation of the ICA or an appeal before the Administrative Court is pending, it is likely that the court will suspend the follow-on proceedings to avoid inconsistent outcomes between the two proceedings. The rules governing the *azione di classe* expressly provide power to the court to suspend the civil proceedings in case when an investigation is pending before the antitrust authority (see before).

Turning now to a specific example of consumer follow-on actions, in 2013 a group of tribunals and courts of appeal rendered judgments on cases arising from a price-fixing conspiracy among insurers in the third-party auto liability market.⁸⁵ Consumers made claims by following on a decision of the ICA. In these cases, the courts awarded damages based on a fair estimate of the overcharge paid by plaintiffs, amounting to 20 per cent of the total premiums (such percentage was held to correspond to the premiums' average annual price increase during the existence of the cartel, according to the Authority).

Although the Court of Cassation for a long time supported the opposite solution, since 2005 it has been an uncontroversial practice for consumers to bring actions for damages based on Italian and EU Competition Law. In particular, the Court of Cassation (judgments No. 2207/2005 and No. 2305/2007⁸⁶) stated that by its very nature Italian

⁸² See *supra* para. 3.1.

⁸³ See Legislative Decree of 19 January 2017, no. 3 implementing the Directive 2014/104/EU on antitrust damages actions and especially art. 7 of follow-on actions (see also *supra* para. 3.1.).

⁸⁴ A. DAVOLA, *Oltre il "private enforcement": l'ipotesi di un mercato delle azioni di risarcimento del danno antitrust*, in *Danno e responsabilità*, 2015, pp. 677-684. A. FRIGNANI, *La cassazione prosegue l'erosione del diritto di difesa nelle cause risarcitorie antitrust follow on*, in *Dir. e fiscalità assicuraz.*, n. 1/2013, p. 291.

⁸⁵ Precisely: Salerno Court of Appeals, 20 December 2008, upheld by Court of Cassation No. 8091/2013; Naples Court of Appeals, 30 March 2007, upheld by Court of Cassation No. 8110/2013.

⁸⁶ Cass. civ. Sez. III, 2 February 2007 No. 2007, in *Foro it.*, 2007, I, 1097, comment by A. PALMIERI, R. PARDOLESI.

Competition Law is intended to *protect anyone*, including consumers, whose interests may be affected by antitrust infringements. Individual consumer actions must be brought before the competent judicial section specialised in company law, whereas, pursuant to article 140-bis of the Consumer Code, the *azione di classe* brought by consumers and, more often, their associations, falls within the jurisdiction of the courts of the main Italian judicial districts, based on the location of the defendant company's registered office.⁸⁷ While follow-on actions remain rare, two recent proceedings filed in the Dieselgate scandal, both drawing a larger participation by allegedly injured consumers, seem to cautiously open the way for further promising developments.⁸⁸

IV. DISPUTE SETTLEMENT: NON-JUDICIAL MECHANISMS

In this paragraph we underline the rise of ADR for consumers and support the idea that ADR is not an alternative to consumer enforcement or to litigation, but an additional tool to be used in conjunction with public and private enforcement mechanisms (in this regard, see our conclusions).

In the last several years, Italy has developed a comprehensive scheme of ADR that revolves around a mediation law (encompassing voluntary and mandatory mediation) and certain consumer-specific schemes. Such schemes include mandatory conciliation for dispute between users and telecommunication providers (*Corecom*); the voluntary scheme of the Financial and Bank Arbiter (*ABF*);⁸⁹ a Bank Ombudsman

⁸⁷ Legislative Decree No. 3 of 2017 has recently implemented directive 2014/104/EU on actions for damages under national and EU competition law (the Damages Directive). According to article 10 of the 2017 Legislative Decree, whoever suffers damages from an antitrust infringement, irrespective of whether they are direct or indirect purchasers from an infringer, may bring a private antitrust action. G. BRUZZONE, A. SAIJA, *Private e public enforcement dopo il recepimento della direttiva. Più di un aggiustamento al margine?*, in *Mercato concorrenza regole*, 2017, pp. 9-36. Domestic civil courts' ruling already refer in their rulings to the principles established by the Damages Directive (e.g. Corte di cassazione No. 11564/2015). See, M. CASORIA – R. PARDOLESI, *Disciplina della concorrenza, private enforcement e attivismo giudiziale: dopo la dottrina, il diritto delle corti?*, in *Foro it.*, 2015, I, 2752.

⁸⁸ The relevant case-law is discussed in paragraph on the *azione di classe*.

⁸⁹ G. FINOCCHIARIO, *L'arbitro bancario finanziario tra funzioni di tutela e di vigilanza*, Milano, 2012; see, also, C. GIOVANNUCCI ORLANDI, *La normativa italiana in materia di conciliazione convenzionale*, in M. RUBINO SAMMARTANO (ed.), *Arbitrato, ADR, Conciliazione*, Bologna, 2009,

(*GiuriBancario*); and the conciliation attempt provided by art. 140 ICC, Arbitration of consumer matters is not encouraged and in general is not legally admissible.⁹⁰ Public or quasi-public institutions (e.g. providers related to local public entities, chambers of commerce, bar associations) administer most ADR. ADR by private providers is relatively less developed.

Some have rightly criticised the Italian approach of considering ADR mainly as a tool to reduce the courts' caseload and thereby cut the duration of typical court proceedings.⁹¹ Wagner especially criticizes the European move toward ADR as a method of law enforcement (as opposed to voluntary conciliation).⁹² At the same time, in a court system that is plagued with long delays and enormous backlogs, mandatory ADR schemes have the potential to facilitate a cultural shift and, in the end, improve access to justice while at the same time ensuring that disputants are able to timely resolve their disputes.

However, and despite certain notable results in specific areas (such as telecommunications, see *infra* in this paragraph), there appears to be a misunderstanding on the part of the Italian legislator as to the basis of the growing trend toward ADR. As noted, ADR schemes are not designed to promote the enforcement of rights, but are instead aimed at the composition of disputes. Hence, they should be viewed and offered to the public not as a substitute for public or private enforcement, but rather as an alternative to be pursued, with sometimes more convenient or effective results, other times less so. The existence in the background of an effective and comprehensive public and private enforcement system does not detract from or displace ADR, but instead makes it more effective because both parties, and especially defendants, would be well aware that if ADR fails, there is an effective enforcement mechanism that will step in.

Although in our view alternative dispute resolution does not strictly speaking participate in the *enforcement* of consumer law, it is nonetheless a valuable tool for

pp. 1229 fs.; M. MARINARO, *Arbitrato bancario e Consob senza avvocato*, in *Guida al diritto*, 2013, p. 105.

⁹⁰ See, e.g., the decisions of the CJEU in cases C-240/98, *Océano Grupo Editorial SA v. Roció Murciano Quintero*, 2000 E.C.R. I-4941; C-168/05, *Elisa María Mostaza Claro v. Centro Móvil Milenium SL*, 2006 E.C.R. I-10421 and C-243/08, *Pannon GSM Zrt. v. Erzsébet Sustikné Győrfi*, 2009 E.C.R. I-4713. See H. MICKLITZ-F. CAFAGGI, *Collective enforcement of consumer law: a framework for comparative assessment*, in 16 *ERPL*, 2008, 391, 400–01 for the treatment of arbitration clauses in consumer contracts in some Member States.

⁹¹ See, e.g., M.A. LUPOI, *Recent developments in Italian Civil Procedure Law*, in *Civil Procedure Review*, 2012, p. 41.

⁹² G. WAGNER, 'Private law enforcement through ADR: Wonder drug or snake oil?', in 51 *Common Market Law Review*, 2014, pp. 165–194.

resolving disputes, including serial disputes, as some examples discussed below clearly show.

The Legislative Decree of 4 March 2010, no. 28, defines mediation as an activity carried out by a neutral and impartial third-party, the professional mediator, with the aim of assisting two or more parties in reaching an amicable agreement for the resolution of a dispute, including by making use of forms. As for the mediator, the law specifies that he has no power to adjudicate the dispute or render binding decision for the parties (art. 1, paragraph. 1, letts. a and b).

Following the guidelines and the language of EU Directive 52/2008, the same Art. 1, in its paragraph. 1, lett. c, clarifies that mediation and conciliation are considered not as two different types of ADR, but rather as, respectively, the proceedings which parties go through to solve their dispute and the result of such proceedings. Conciliation is defined as the positive result of mediation, the agreement which eventually settles the dispute between the parties.

While most Italian mediation law is EU-derived, the country went further by implementing a mechanism of mandatory pre-trial mediation designed to operate in an extensive area of civil and commercial matters (insurance,⁹³ finance and banking contracts, property law, medical malpractice,⁹⁴ tenancy, wills and successions, and others).⁹⁵ The scheme is currently regulated by the law of August 9, 2013, no. 98, which converted with modifications and amendments Law Decree no. 69 of June 21, 2013, and introduced a new set of rules regulating and promoting the use of mediation in civil and commercial matters, with a particular focus on mandatory pre-trial mediation. The new legislative framework directly amended essential aspects of the provisions of Legislative

⁹³ Actions for compensation for damages caused by motor vehicle accidents are now exempted by the mandatory pre-trial scheme. In these cases, before going to court, victims are required to file a request for compensation with the insurance company. The insurance company has a duty to examine the request and formulate a proposal for compensation or explain why it cannot make such offer (for instance, because the damaging party is not insured with that company). Before being able to commence an action, a party has to wait sixty days (ninety in case of damages to persons) since receipt by the insurance company of such request (Arts. 145 ff. of Legislative Decree no. 209/2005). G. Gallone, *La mediazione in materia di R.C.A.*, in *Arch. giur. civ. e sin.*, 2011, pp. 374 ff.

⁹⁴ Under the new law of 8 March 2017, n. 17, medical malpractice is now subject to a mandatory pre-trial medical expertise and conciliation attempt (art. 696-bis of the Italian code of civil procedure).

⁹⁵ See G. PAILLI - N. TROCKER, *'Italy's new law on mediation in civil and commercial matters'*, in 18 ZZPInt, 2013, pp. 75-102. The mandatory scheme does not apply to certain proceedings, such as petitions for provisional measures, orders of payment or the first phase of eviction procedure.

Decree no. 28 of March 4, 2010, in force from March 2011 to December 2012.⁹⁶ As to numbers⁹⁷ (including both mandatory and voluntary mediation), in 2016 some 183.000 mediation proceedings were filed, and 173.000 concluded, with an overall success rate of around 26%. Across the years, mediation mandated by a judge during judicial proceedings (where mediation was not a mandatory pre-trial attempt) has risen sharply from 700 cases in 2011 to 19.128 cases in 2016, but with a low success rate (only 15%). This is a sign that judges are paying greater attention to mediation, but perhaps mainly as a way of easing their overcrowded dockets. Around 20% of all mediation proceedings started are in banking matters, of which only 7% reached an agreement, signalling that mediation in this area is largely ineffective. This contrasts with other areas such as property law, tenancy and wills and succession, where the success rate is around 30%. As to the value of the dispute, the success rate is higher, more than 30%, when the matter at stake is valued between €1.000 and €10.000, and gradually decreases after that to 7-9% when the matter is valued at €500.000 or more.

Several statutes concerned with the protection of consumers support experiments with various other forms of ADR services through resorting to institutions like the Banking Ombudsman set up by private institutions, or to conciliation/arbitration procedures set up by the Chambers of Commerce, managed by professionals formed within the Chambers, not necessarily among lawyers. One of the most successful examples is represented by the mandatory pre-trial conciliation procedure in telecommunications, delegated by the ICA to the “Corecom” (one for each Region). Before bringing an action against a telephone or Internet services provider, consumers (and traders) must file a complaint with the regional Corecom, where an attempt to

⁹⁶ The Italian Constitutional Court, finding that the Government had exceeded the legislative powers delegated by the Parliament, partially quashed the previous law, and specifically the rules providing for mandatory pre-trial mediation for certain categories of claims. For comments and analysis of the previous regime, M. MARINARI, *Italy*, in G. DE PALO – M.B. TREVOR (eds.), *EU Mediation Law and Practice*, OUP, 2012; I. QUEIROLO – L. CARPANETO – S. DOMINELLI, *Italy*, in *Civil and Commercial Mediation in Europe. National Mediation Rules and Procedures*, Intersentia, 2013, pp. 252-279. In comparative perspective, A. DE LUCA, *La mediazione in Europa. Una questione di cultura e non di regole*, in *Riv. Dir. civ.*, 2013, pp. 1451-1481, and the contributions in N. TROCKER – A. DE LUCA, *La mediazione civile alla luce della direttiva 2008/52/CE*, Firenze Univ. Press, 2011. A case is currently pending before the CJEU on whether the Italian regime is compatible with the Directive 2013/11/EU on consumer ADR, especially where the Italian law provides for compulsory representation by a lawyer when the pre-trial attempt is mandatory.

⁹⁷ All numbers are taken from the 2016 Annual report on mediation in civil matters prepared by the Ministry of Justice and available at webstat.giustizia.it/Analisi%20e%20ricerche/forms/mediazione.aspx (also in English language).

conciliate the dispute will be made. The scheme does not provide for compensation of damages suffered by the user, but the provider may write off debt and offer a sum of money (usually small) as partial indemnification. If the attempt fails, the parties are free to go before a judge or request the Corecom to issue a decision on the matter. The success rate of this procedure is reported at 78-79% over around 90.000 complaints, with an overall €32 million of indemnification to users.⁹⁸ Some Corecoms are switching to online platforms. With less impressive numbers, but still a very high success rate of 81%, the Italian Authority for Energy provides for an online conciliation procedure that helped settle some 3.174 disputes from 2013-2016.⁹⁹

Notwithstanding the numerous legislative initiatives, the development of a true ADR culture still faces significant restraining factors in Italy, as it does in much of Continental Europe. Namely, the widespread perception that judicial intervention remains the normal way to dispose of civil controversies.

The most recent legislative addition is the Legislative Decree of 6 August 2015, no. 130, which implemented Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes.¹⁰⁰ The Decree included new provisions (Arts. 141ff.) in the ICC establishing a homogeneous legal framework for consumer ADR with a view towards encouraging domestic and cross-border amicable settlement of consumer disputes, both online and in traditional settings. The law also describes the requirements for institutions to be registered as authorised ADR providers and specifies that in such procedures consumers do not need the assistance of a lawyer. The procedures envisaged by the new Decree are voluntary (i.e. a legal action may be commenced even if the procedure has not been previously attempted), but when a request for ADR is filed, the statute of limitations is interrupted, avoiding the risk that participating in the ADR procedure may result in a forfeiture of a consumer's rights. It is expressly stated in the Decree that certain earlier provisions, such as the mandatory mediation requirement of Legislative Decree 28/2010 discussed above, prevail over the new voluntary scheme. Although it is too early yet to assess the impact of the new mechanism, it is noteworthy that the Decree provides for an

⁹⁸ See, e.g., the Annual Report prepared by the ICA for 2016, available at www.agcom.it/relazioni-annuali

⁹⁹ See the details at the official website at www.autorita.energia.it/it/consumatori/conciliazione.htm.

¹⁰⁰ See O. DESIATO, *Le politiche dell'unione europea in favore della «degiurisdizionalizzazione» e i più recenti interventi del legislatore italiano in tema di adr per i consumatori*, in 5 *Resp. civ. prev.* 2016, p. 1793.

extensive collection of statistical data by the Government, allowing close monitoring of the new scheme's development.

Despite the general remark that institutional ADR is not being commonly offered by private providers, we should also underline here the growing importance of ODR contract-based schemes offered by large Internet platforms such as eBay, Amazon and others.¹⁰¹ To be sure, this is hardly a country-specific phenomenon. For the sake of saving space, we focus on only one example. As it is well known, eBay puts potential sellers in contact with prospective buyers or bidders. Each player has a rating of good (green) or bad (red) opinions from previous transactions. Publicity and reputation are a very important currency in order to keep making deals on eBay. Naturally, certain deals may go wrong, but to increase customer satisfaction, eBay long ago introduced a system of dispute resolution as part of its service. The way this system works is fascinating. Quoting from eBay material: *“Many problems are misunderstandings that can be worked out when members talk to one another. The first thing we recommend is for the buyer and seller to communicate.... If you aren't able to work things out after communicating with your buyer or seller, you can contact us. You'll be able to open a case, and track the steps that are being taken to resolve a problem. If the buyer and seller can't come to an agreement, eBay may decide the case. eBay may issue a refund, reverse a sale, or require the buyer to pay for an item.”*¹⁰²

A few interesting observations may be drawn here. Firstly, the mechanism does not necessarily entail the participation of a third party. The parties are encouraged to talk with each through the Resolution Centre and their written conversation is recorded. This may resemble a 21st century version of tribal dispute resolution mechanisms where disputants are confined to a hut just outside the village and requested to stay there until they work out their dispute, without the intervention of a third party, but under the watchful eyes of the entire village. Only if such attempt fails does eBay (the third party) get involved in additional attempts to mediate, eventually making an adjudication (or better, giving a remedy). Importantly, this remedy does not appear to be necessarily based on the law.

Two elements should not be overlooked. First, generally these are disputes of a certain and serial kind. It is always a sale and either the object is lost or defective or there

¹⁰¹ See, E. KATSH ET AL., *E-Commerce, E-Dispute, and E-Dispute Resolution: In the Shadow of “eBay Law”*, in 15 Ohio St. J. on Disp. Resol., 1999-2000, p. 795 fs. O. EINY-E. KATSH, *Technology and The Future of Dispute System Design*, 17 Harv. Negot. L. Rev., 2012, p. 151.

¹⁰² See the quotation at pages.ebay.com/help/buy/role-of-eBay.html (last accessed October 4th, 2017).

are payment issues. Second, parties are recurring players and part of a continuing relationship, not necessarily with each other but with eBay and its community of buyers and sellers. Every player has a strong interest in abiding by eBay's decision, maintaining her reputation, and thus being allowed to stay on the market.

As specific as such system may be, there are many other areas in which a similar system could and does work, every time you have a large website with many players interested in staying on the platform and maintaining their reputation. It is also a sign that technology is emerging as a powerful force in the context of dispute settlement, both in providing a promising tool as well as eroding traditional schemes.

V. CONCLUSIONS

From a comparative perspective, «*there seems to be a growing trend towards enforcement through consumer agencies (...)*», in the jurisdictions concerned by the *Questionnaires*. «*The mushrooming of regulatory agencies in sectoral fields has Member States to merge regulatory agencies across sectors (telecom, energy) or across fields of law (competition, consumer law) or even sectors and fields*»¹⁰³.

The Italian experience seems to confirm such trend. On the one hand, the ICA addresses different issues across various fields, although *ex ante* and *ex post* consumer protection still lies in the hands of a number of regulatory agencies. We noted that this is particularly the case with consumer associations and injunctive relief. On the other hand, the *azione di classe* remains a failed promise not only due to certain procedural shortcomings (i.e., limited standing, certification issues), but also because of the cultural resistance of the main actors in the field (i.e., associations, lawyers, judges).

Italy shares the trend of the 34 jurisdictions considered in the Draft General Report in failing to paint a clear picture of the various avenues of enforcement, whether individual and collective, administrative, judicial or through consumer ADR.¹⁰⁴ The new enforcement landscape of consumer law include novel enforcement mechanisms and remedies: an increased involvement of private actors in the enforcement system though, *inter alia*, collective redress mechanisms (e.g., the *azione di classe*); the rise of

¹⁰³ See Note 2 *supra* and, in particular, the conclusions of the Draft General Report at tc.iuscomparatum.info/tc/wp-content/uploads/2016/09/Draft-General-Report-Enforcement-and-Effectiveness-of-Consumer-Law-MICKLITZ-SAUMIER-Montevideo-2016.pdf

¹⁰⁴ Note 2 before.

administrative enforcement (e.g., the new role of the ICA in the field of unfair terms in consumer contracts); and the push towards ADR for consumers.

These changes transcend the public-private divide, and are driven *by pragmatic considerations* of finding effective enforcement techniques. Two authors wrote in this respect that ‘*we will lose some cherished features but gain some advantages. Some new options might be faster and cheaper but threaten some pre-existing values. Nothing is ever perfect. Innovation is disruptive*’.¹⁰⁵

With respect to the Italian situation, we note, specifically, that the traditional view *of exclusivity and complementarity* between the public enforcement and private enforcement mechanisms is too simplistic as a conceptual tool in describing such processes. The ongoing processes of *co-existence and integration* are transforming the enforcement of consumer rights. While the first brings us towards *redundant* consumer law enforcement, characterized by the duplication of actors and mechanisms, the second remains *underdeveloped* in the Italian legal system. In our view, the process of integrating public and private mechanisms seems to be preferable because it avoids the risk of designing a costly and confused enforcement landscape for consumer rights.

The above-mentioned changes in the methods and players have in turn produced a fragmentation of enforcement. In other words, the overlapping enforcement regimes and their blurred boundaries create a risk of a more confounding and costly enforcement landscape. Fragmentation results, for example, from various public and private enforcement mechanisms being applied simultaneously in the same area (as in the case of co-existence), or being an integrated public-private regime. It is questionable to what extent the new enforcement scenario, characterized by the complex interplay between multiple actors and enforcement techniques, can offer adequate protection to individual rights. More specifically, there are grounds to be sceptical about the potential of ADR and ODR mechanisms to ensure substantive consumer protection under the rights granted by EU legislation.¹⁰⁶

The emergence of a variety of enforcement mechanisms gives rise to the question of how they all relate and should relate to one other. An example is the follow-on

¹⁰⁵ C. HODGES and N. CREUTZFELDT, *before* at 133.

¹⁰⁶ H. EIDENMÜLLER and M. FRIES are highly sceptical about the potential of ADR and ODR mechanisms to ensure such protection to substantive consumer rights granted by EU legislation. See their *Chapter Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems in Europe*, in HANS-W. MICKLITZ, A. WECHSLER, *The Transformation of Enforcement European Economic Law in a Global Perspective*, 2016, Hart, p. 113.

consumer action: private enforcement of consumer rights was initially seen as *an alternative to* public enforcement. In practice, however, ‘follow-on actions’ rely on the previous decisions of the ICA: their success depends to a significant degree on the effectiveness of the public enforcement.

At present, a coherent consumer protection enforcement structure is still missing. The varied mix of enforcement instruments is here to stay, challenging scholars to chart a new course, conceptualizing and critically assessing the transformed system beyond the confines of specific sectors, jurisdictions or disciplines, all with the aim of *integrating public and private enforcement mechanisms* so as to address current shortcomings for the realization of consumer justice.