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# **European "Class" Action: British and Italian Points of View in Evolving Scenarios**

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1 March 2009

Online at <https://mpra.ub.uni-muenchen.de/15900/>  
MPRA Paper No. 15900, posted 01 Jul 2009 09:14 UTC

# European ‘Class’ Action: British and Italian points of view in evolving scenarios

In Europa e Diritto Privato, vol. 1/2009, Giuffrè, Milano, pp. 163-189

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## 1. Introduction

It is not easy to add something new to numerous articles that have appeared recently in most European countries in relation to the EC Green and White papers on private actions for damages as a consequence of anticompetitive conducts.

The aim of the present article is to outline from a European perspective the differences in implementation of collective private enforcement in two member States, namely in the United Kingdom and in Italy.<sup>3</sup>

As correctly argued, the legal ground for private enforcement for infringement of antitrust provisions of the EC Treaty (namely Articles 81 and 82 EC) is based on the general doctrine of the direct effect of some provisions of the Treaty, as well as of the principle of ‘full effectiveness’ of Community Law.

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<sup>3</sup> Collective action is the neutral wording to describe any form of collective legal action by (‘class action’) or on behalf of (‘representative action’) a group of claimants. As we will specify further, ‘class action’ is the term often improperly used in Europe to describe any form of legal action carried out by groups of claimants. In fact only the US-style collective actions can be called ‘class actions’ (in which a group of individuals and entities, lead by a lawyer, personally and jointly seek compensation or relief for the damages suffered. On the other hand, the representative action (the European ‘class action’) is the action where a representative body (i.e. a consumer association) brings an action on behalf of a group of claimants.

The position taken by the European Court of Justice in key judgments such as *Van Gend en Loos*<sup>4</sup> and *Defrenne v Sabena*<sup>5</sup> might be recalled as seminal points for the 'direct effect' doctrine, that twenty years later provided the legal basis for the *Crehan v Courage*<sup>6</sup> judgment, and subsequently the *Manfredi*<sup>7</sup> judgment, both cases dealing with the acknowledgment of the right to damages for individuals (and businesses) having sued the responsible party of infringement according to Art. 81 (and/or Art. 82) EC.

Leaving aside the general provisions of the EC Treaty on economic integration and growth of the European market, another legal basis for private enforcement, in general, and for individual or collective actions in particular, can be found in the Charter of the Fundamental Rights of the European Union, in Section 38 that expressly recognises that 'Union policies shall ensure a high level of consumer protection'.<sup>8</sup>

More specifically, the Modernisation Regulation 1/2003/EC, that entered into force in May 2004, clearly stressed the need for cooperation between the enforcers (the European Commission and the National Competition Authorities), on the one hand, and the national Courts, on the other, reaffirming the principle of 'dual forms' of enforcement: public and private<sup>9</sup>.

The collective action in the EU legal system represents a step forward. On the one hand, individual private enforcement, through the acknowledgement of the right to damages for individuals harmed by anticompetitive behaviours, is the adequate counter-part to public enforcement in order to enhance the

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<sup>4</sup> Case 26/62 NV Algemeine Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration [1963] ECR I.

<sup>5</sup> Case 43/75 Defrenne v Sabena [1976] ICR 547.

<sup>6</sup> Case C-453/99, *Courage and Crehan*, [2001] ECR I-6297

<sup>7</sup> Joined Cases C-295-298/04 *Manfredi*, [2006] ECR I-6619.

<sup>8</sup> Charter of the Fundamental Rights of the European Union, adopted in Nice on 7 December 2000 (2000/C 364/01). An adapted version of the Charter was proclaimed on 12 December 2007 in Strasbourg, ahead of the signing of the Treaty of Lisbon, which makes the Charter legally binding in all countries except Poland and the United Kingdom.

<sup>9</sup> The latter, in the two further forms of individual and collective actions.

deterrence effect of the prohibitions contained in Article 81 and 82 EC (i.e. the nullity of the anticompetitive agreement provided by Art. 81.2) and of the antitrust remedies contained in Regulation 1/2003 (i.e. fines, interim measures, structural and functional measures). On the other, collective action, with a theoretically very high number of potential claimants, further strengthens the deterrence effect of individual private action.<sup>10</sup>

From a legal point of view, the choice of individual action or collective action may be strategically decisive, for a variety of reasons.

In terms of legal strategy, the lawyer first of all will advise the client taking into consideration the applicable substantial or procedural laws. At the same time, he will take into account the efficiency of the local legal system(s) where the lawsuit might be filed (with the related risk of 'forum shopping': the defendant will aim at ensuring that the trial takes place in a country where the proceedings will last longer<sup>11</sup>, or where the rules on evidence are particularly burdensome; the plaintiff will seek to file the action in a country where it is more likely that the trial will be 'quickly' brought to an end). The plaintiff will also be informed that in some jurisdictions a quantity of appeals and reviews, sometimes for each phase of the legal proceedings, are likely to occur.

The present article tackles the collective action keeping in mind twin areas of analysis: class action as it originated and developed in the US legal system, and is currently proposed, with modifications, by the European Commission as a further tool of enforcement at national level, is one<sup>12</sup>; the other is an analysis of two national examples of collective action legislation, one

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<sup>10</sup> The article by Renato Nazzini, *Potency and Act of the Principle of Effectiveness: The Development of Competition Law Remedies and Procedures in Community Law*, in C. Barnard and O. Odudu, *The Outer Limits of EU Law*, Hart Publishing, 2008 (forthcoming), is very clear on this dichotomy, as well as on the reconstruction of the entire evolution of private enforcement, also with respect to opt out/opt in aspects. It provides very detailed and widely-ranging bibliography.

<sup>11</sup> A well-known procedural *escamotage* is called 'the Italian torpedo'.  
<sup>12</sup> Class action, as is called in the United States, represents a form of law-suit carried out by an individual which is, at the same time, 'representative' of an entire group (class), as defined by the judge, harmed by a specific conduct (which may also be, but not necessarily, related to anti-competitive conducts). In the US meaning, a large group of people collectively brings a claim to court. As mentioned above, in Europe it should instead be called 'representative action', since the law-suit is normally carried out by a 'representative body', such as a consumer association or organisation which triggers the action on behalf of a large group of consumers.

already into force (United Kingdom) and one recently adopted but currently suspended (Italy). In both cases probably criticism outweighs positive assessments. In the perspective of different forms of collective actions soon available in Europe, it must be taken into consideration the existence in UK of a recently reformed Civil Procedure Code that makes this system particularly appealing for those claimants (undertakings and consumers) seeking expedite legal proceedings.

Before examining in more detail the mechanisms of the European 'class action', a few words explain how this legal category entered into the European legal system.

It is worth recalling the 'state of play' of institutions in Europe *vis à vis* the introduction of a European 'class action' (Section 2). This was an American legal instrument introduced into a European system based more on the concept of loss-based compensation and gain-based restitution, therefore making it highly debatable. We will examine how the enterprises part of anticompetitive conducts and the consumers (and other businesses in relation with the mentioned enterprises) will be affected by the legislative changes that have been introduced (or will be introduced soon) for collective actions in some European member States.

Sections 3-4 will deal with the collective action (officially 'representative action') introduced in the United Kingdom by the Enterprise Act 2002; while the final sections (Sections 5-6-7) will deal with the Italian 'class action'.

Through this dual perspective, it should be possible to sketch what might be the legal strategies which will be undertaken by those European (and third country) enterprises or individuals that at some point are called to face (or decide to trigger) competition law private enforcement legal proceedings.

## **2. The European idea of a 'class action': a private enforcement remedy to re-address anticompetitive behaviours and protect consumers**

Is the collective action in Europe a new 'European madness', as some scholars have called it?<sup>13</sup>

Certainly one could agree with those who have described the US class action as one of the tools that antitrust lawyers use to protect individual rights. In the US, antitrust law is a tool as important to enforce individual rights, as the Magna Charta and the Bill of Rights actually are.<sup>14</sup>

Antitrust infringements impact not only the few targeted enterprises but on consumer welfare, and society as a whole.<sup>15</sup>

In the US, antitrust laws are seen as a tool to realise constitutional principles, such as the famous 'pursuit of happiness' encapsulated at the very heart of the entire US legal system.

In the US, public enforcement as a consequence of an antitrust infringement plays a key role. Antitrust infringements are acted upon with particular determination by the State and Federal Courts, the Department of Justice and the Federal Trade Commission.

However, antitrust lawyers, acting privately for clients (enterprises, consumers) damaged by anti-competitive behaviours, are considered 'private attorneys general', whose activities are complementary to public enforcement.

The risks of deviation from the 'private attorney general' model are seen in the US as particularly serious. The fact that antitrust cases are often combined with other, parallel, non-competition-law-related infringements, may create the impression that a large number of greedy lawyers are in search of the 'case of the year' to generate enormous profits. In fact, the highly

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<sup>13</sup> Gordon Schnell, *Class Action Madness in Europe - Call for a More Balanced Debate*, *European Competition Law Review*, Issue 11, Sweet & Maxwell, 2007, pp. 617 et seq.

<sup>14</sup> Gordon Schnell, *Class Action Madness in Europe*, p. 617. Concept stated in *US v Topco Assoc.*, 405 U.S. 596, 610 (1972).

<sup>15</sup> This is particularly evident when dealing with fundamental goods of daily life. Not everybody is called to deal with ethanbutol, but more likely with his moped insurance, or with the price of bread, milk and phone calls.

specialised sector in which antitrust lawyers operate makes it particularly risky, and often not economically interesting, given they have to demonstrate the (difficult to prove) combined presence of higher prices, reduced output, restriction of consumers' choice.<sup>16</sup> However, the occurrence in the US of a few distorted uses of the class-action mechanism has thrown a negative light on this otherwise successful remedy against the most serious anticompetitive behaviours.

From a strategic point of view (given the agreements signed between the legal counsel and their clients) lawyers do not always chose univocal conduct.

In some cases they might encourage 'offensive litigation' ('fishing expedition') trying to get the highest amount of liquidated damages, in particular when they are directly calculated as a fraction of the final monetary outcome, established by the Court ('contingency fees'). However it is evident that in such a case the longer the proceedings last, the lower the profit is for the lawyer. More often, lawyers prefer to separately negotiate their fees as part of the settlement agreement. To 'encourage' the settlement, they might also negotiate 'escalating fees' with their clients with respect to the time spent on the case.

An interesting example of settlement in recent times is the case *Carole Eustice v. Network Associates, Inc.*<sup>17</sup>, with respect to a class action against McAfee filed with the Supreme Court of California in 2004. The plaintiff alleged that Network Associates had violated California State Law and breached their licence agreements by failing to provide free lifetime updates to purchasers of versions 3 and/or 4 of McAfee Virus Scan software.

McAfee (Network Associates) denied any liability, but preferred to settle, and agreed to give each class action member a free download of the perpetual version of McAfee Virus Scan, Anti-spyware and Quick Clean software, to be

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<sup>16</sup> The US government was therefore called to adopt a 'Class Action Fairness Act' in 2005 (Pub. L. No. 109-2 (2005) to make further difficult the class action in State courts, where more often lawyers used to get huge profits from illegal attorney recoveries.

<sup>17</sup> The settlement proposal can be found at [http://software.mcafee.com/lcas/pdf/class\\_notice.pdf](http://software.mcafee.com/lcas/pdf/class_notice.pdf)

downloaded by the members of the class action within a certain time-limit. Interestingly, the 'class counsel' under the settlement agreement was to be paid \$ 227,000 in attorneys' fees. In this case the difference between the final 'compensation' received by the plaintiffs and the huge attorneys' fee may perhaps explain some of the doubts that emerged in Europe with respect to the effectiveness in terms of 'moral suasion' of a European 'class action'.

However there are examples of class actions in which the final outcome can be considered as fully satisfactory in terms of 'consumer interest' (as correctly recorded by Schnell in his recent article). In the *Visa-Master Card* class action, carried out on behalf of five million merchants against the exclusionary conducts in the debit card market, the costs carried by the plaintiffs (around \$18 million and 250,000 hours of attorney time), were mostly compensated by the resultant \$ 3.4 billion in monetary damages and tens of billions of dollars in reduced pricing (to restore effective competition).<sup>18</sup>

At EU level, the contours of a new, European, form of 'class action' have been recently outlined in the White Paper 'Damages actions for breach of the EC antitrust rules'<sup>19</sup>, published in April 2008. It was anticipated by the Green Paper, dating to December 2005<sup>20</sup>, and is published in conjunction with a Staff Working Paper and other documents, which should help the Commission staff create further European legislation on this topic.

Taking into consideration what has been produced in recent times, it is difficult to clearly define the boundaries of 'damages actions'. These are not limited to private single individual actions, but also encompass 'class actions'.

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<sup>18</sup> Re Visa Check/Mastermoney Antitrust Litig., 297 F. Supp.2d 503, 524 (E.D.N.Y. 2003). See the conclusions of Schnell's 'Class Action Madness in Europe', on the arguable importance of the first 'class action' case in the overpriced football shirts in UK (Case no. 1078/7/9/07, Consumers Association v JJB Sports Plc, registered 5 March 2007, CAT).

<sup>19</sup> Hereinafter, the 'White Paper', published in Brussels the 2 April 2008, COM (2008) 16 final. It can be downloaded [http://www.ec.europa.eu/competition/antitrust/actionsdamages/files\\_white\\_paper/whitepaper\\_en.pdf](http://www.ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf)

<sup>20</sup> Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final. The Green Paper must be read in conjunction with the Commission Staff Working Paper (Commission Staff Working Paper, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules, SEC(2005) 1732.

Under this model, damages might be awarded to any person injured by anticompetitive behaviours, i.e. not only direct competitors, but also direct (and indirect, under specific circumstances) purchasers and final consumers.

From a strategic point of view, the reaction of the plaintiffs and defendants will vary. The direct purchasers will try to carry on a form of 'offensive passing-on' attack. On the other hand, the defendants will try to defend themselves by demonstrating that the plaintiffs had actually passed-on their extra-costs ('passing on defence').

If individual, private, actions follow the normal rules of civil proceedings then two forms of collective action should be possible:

- (i) representative actions by consumers groups, public entities, trade associations, expressly 'certified' for this scope<sup>21</sup>
- (ii) opt-in collective claims for consumers and businesses (as distinguished from the opt-out collective claims).

The first mentioned (representative actions) is the form of collective private enforcement introduced in United Kingdom and, more recently, in Italy; the second is probably the closest to the 'class action' in the broader US sense.

On the evidence and burden of proof side, the White Paper stresses the necessity of reducing the obstacles to gathering proof for the plaintiff, in general the weakest part.

The follow-on civil claims (as distinguished from the 'stand-alone' claims) are based on the binding force of the decisions adopted by the Commission and by national competition authorities, as well as final judgement (or judicial review) made by EC or national courts.

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<sup>21</sup> These may be (i) officially designated in advance or (ii) certified on an *ad hoc* basis by a Member state for a particular antitrust infringement to bring an action on behalf of some or all of their members (White Paper, page 4).

Another target of the White Paper is to make the enterprise's liability objective to enhance the capacity of plaintiff to trigger civil proceedings ('fault must not be proved'). Similarly, the compensation shall be not limited to the actual losses, but also to the lost profits and interest (a combination of the compensation and restitution-based systems).

The White Paper also focuses on the necessity of preserving the main aim of the leniency application, i.e. encouraging members of the cartel to provide the Commission (or the National Competition Authorities, where applicable) with any relevant information that may be considered sufficient to trigger an investigation without being unnecessarily exposed to the private enforcement actions on the basis of the documents provided by leniency applicants. Therefore, materials provided to underpin the claims contained in the leniency application cannot be disclosed for private actions purposes.<sup>22</sup>

The White Paper<sup>23</sup> recalls two recent 'mile-stone' judgments: *Courage v. Crehan* and *Manfredi* to underline that the Court of Justice has clearly affirmed that:

*'any individual' who has suffered harm caused by an antitrust infringement must be allowed to claim damages before national courts'*.<sup>24</sup>

Since it does not make any distinction between individual and collective actions, the White Paper clearly aims to encourage forms of 'collective redress'. Collective, representative actions would represent a mechanism 'allowing aggregation of the individual claims of victims of antitrust infringements' since the individuals (consumer, but also small businesses) are often discouraged from embarking into burdensome civil proceedings, and even deterred by the high costs of justice.

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<sup>22</sup> For a detailed analysis of the recent White Paper, see an excellent article by Assimakis P. Komninos, 'The EU White Paper for damages actions: A first appraisal', in *Concurrences – Revue des droits de la concurrence*, n. 2 – 2008, pp. 84-92.

<sup>23</sup> White Paper, p. 4.

<sup>24</sup> Case C-453/99, *Courage and Crehan*, [2001] ECR I-6297, and joined Cases C-295-298/04, *Manfredi*, [2006] ECR I-6619.

The White Paper also acknowledges that, in the absence of clear legislation on the point, the present legal proceedings carried out to redress the harm suffered by group of individuals have serious procedural inefficiencies. The White Paper advocates further refinement of the legislation also at national level, to encourage and facilitate the introduction of collective civil proceedings, alongside the traditional individual actions.

### 3. The British Approach: Follow-on and stand-alone ‘representative’ actions

As a general rule, in the United Kingdom some bodies have the right to carry out ‘representative’ actions on behalf of consumers, when the Office of Fair Trading (‘OFT’) or the Commission already has made a decision regarding an anti-competitive behaviour. The principle, therefore, in the UK is to admit only ‘follow-on’ representative actions.<sup>25</sup>

This represents an enhanced form of private action, because it also allows groups of damaged consumers to get adequate protection in terms of the recovery of damages as a consequence of anti-competitive conducts, in line with the Modernisation Regulation principles. However, the idea is now to further enlarge the possibility of action, authorising ‘stand-alone’ actions, i.e. those actions which do not need to be preceded by a OFT / Commission decision.<sup>26</sup>

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<sup>25</sup> In 1999 under the UK Civil Procedural Rules (‘CPR’) Group Litigation Orders were introduced to extend the access to justice. A Group Litigation Order is issued for claims which ‘give rise to **common or related** issues of fact or law’. These claims are carried out by a group, usually of at least ten claimants normally lead by the same lawyer. Any claimant must expressly ‘opt in’ to participate to this form of collective action. This kind of actions has been issued in a panoply of areas, ranging from product liability to compatibility with UK tax provisions. If the parties have the ‘**same interest**’ (under Section 19 of the CPR) will rather file a representative action. As an example of representative action, see further in the same section the description of the representative action under Section 47A and 47B of the Competition Act 98, brought by a ‘specialised body’ on behalf of consumers in claims for damages for breach of UK or EC competition law.

<sup>26</sup> On this point see Stephen Kon and Amy Barcroft, Aspects of the Complementary Roles of Public and Private Enforcement of UK and EU Antitrust Law: An Enforcement Deficit?, E.C.L.R. [2008], Issue 1, page 11 et seq.

A further step will be the extension of follow-on and stand-alone actions to business, not just to consumers.<sup>27</sup>

England will probably become the 'forum' where many antitrust (individual and collective) actions will be triggered in the future for a number of reasons: the faster speed of a normal trial; the rules on disclosure; the enshrined capacity to assess complex business litigation. The question is whether collective actions (stand-alone or follow-on) from other parts of Europe will be filed alongside individual actions.

From a legislative point of view the basic principles on which private actions are based are the Competition ACT 1998 ('CA98') and the Enterprise Act 2002 ('EA02'). The CA98 introduced the main provisions (Chapter I and II Prohibitions) prohibiting the same anticompetitive conducts foreseen by Article 81 and 82 EC (anti-competitive agreements and abuses of dominant position). The EA02, on the other hand, modified the CA98 introducing substantial changes making possible the present private enforcement policy strongly encouraged by both the Commission and the UK Competition Authority (including the Competition Commission). In particular, the EA02 created the Competition Appeal Tribunal ('CAT') that, among other competences, is also empowered to award damages (and to deal with other monetary claims) for violation of CA98 provisions.<sup>28</sup>

It was the EA02 that established the right of third parties (private, and in principle, groups of consumers) to carry out private litigation for the recovery of

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<sup>27</sup> On the different impact of 'follow-on' actions and 'stand-alone' actions, see the OFT's Recommendations Paper ('Private Actions in Competition Law: effective redress for consumers and business', OFT 916Resp, available at [http://www.of.gov.uk/shared\\_of/reports/comp\\_policy/oft916resp.pdf](http://www.of.gov.uk/shared_of/reports/comp_policy/oft916resp.pdf)) where states '*[a]s competition authorities have finite resources, this limits the number of cases in which consumers can seek redress: it is not realistic to expect that a competition authority could investigate all cases where consumers have been harmed and then take on the role of securing redress for them. If competition authorities were to pursue every single alleged infringement, this would weaken rather than strengthen the competition regime*'.

<sup>28</sup> The CAT is formed by a three 'judge' panel: the president (or a member of the panel of chairmen, i.e. judges of the Chancery Division of the High Court and other senior lawyers) and two other members which are chosen from a panel made by economists, accountants and competition law experts. Of course, preceding the provisions introduced by the EA02, private individual actions could be in any case filed with the High Court.

damages and other monetary claims as a consequence of infringements of Article I and II Prohibitions and Articles 81 and 82 EC.

However, CAT actions are possible only as 'follow-on' claims, based on previous decisions made by the OFT or the Commission. When no previous decisions exist, private actions for damages are filed before the civil courts. Technically, follow-on law suits before the CAT can be filed within two years of the 'relevant' date. The 'relevant' date is the date in which the period of time after which it is permitted to carry out an appeal before the European Court against any decision has expired; or, if the appeal has been regularly filed, the date in which it has been decided. However the CAT may authorise an action filed before the relevant date, after a hearing with the defendant.

Actions may be brought either before the CAT or the High Court.

The EA02 also introduced the entity of a specialised body that is entitled to carry on 'representative actions' on behalf of group of consumers.

In fact the first entity which triggered an action against JJB Sports for price fixing of 'replica' England and Manchester United football kits is the Consumers' Association. The case was finally settled.<sup>29</sup>

On the model of the European Commission, last year the OFT also launched a consultation process<sup>30</sup>, suggesting that in due course the UK government adopt new pieces of legislation to enhance the present system, mainly 'public enforcement-centred'.

The UK legal system, among European legal systems, being the closest to the US legal system, will take on a pioneer role in the enlarged EU of the

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<sup>29</sup> Case no. 1078/7/9/07, Consumers Association v JJB Sports Plc, registered 5 March 2007, CAT. See above, n. 7.

<sup>30</sup> Office of Fair Trading, Private Actions in competition law: effective redress for consumers and business-Recommendations from the Office of Fair Trading. OFT 916 resp., November 2007. See also the Business Plan of the OFT for the coming years (2008-2010) available at [http://www.of.gov.uk/shared\\_of/about\\_of/ap09/ap09.pdf](http://www.of.gov.uk/shared_of/about_of/ap09/ap09.pdf). To develop the private enforcement policy is set as one of OFT's main targets.

future for launching a new private enforcement front, not only in terms of substantial antitrust law, but also in terms of procedural techniques.<sup>31</sup>

However, since the Modernisation Regulation 1/2003, which has clearly stated the need for decentralisation, and given the enhanced role of the national courts to enforce Art. 81 and 82 EC, in the United Kingdom there are still very few cases of private enforcement (though more cases have been settled before going to court).<sup>32</sup>

The leading case in the UK at present is *Healthcare at Home Ltd v. Genzyme Ltd* in which interim damages were awarded.

The United Kingdom is now looking to enhance stand-alone actions. It is still concerned by the plethora of reasons that might discourage class actions, ranging from the difficulty of convincing groups of plaintiffs to undertake what may appear costly (or indeed very costly) proceedings for what is still a 'pioneer' approach in this field.<sup>33</sup>

One of the main concerns is represented by those collective actions that may have, either on the plaintiff's or defendant's side, elements of connection with other jurisdictions.

EC Regulation 44/2001 governs the choice of the jurisdiction in civil and commercial matters ('Brussels Regulation'), providing the defendants with a wide range of possibilities when facing the choice of the most suitable jurisdiction. However it must be noted that just recently the UK courts have shown their willingness to de-localise the trials towards those courts in other EU member states, where the case seems that can be best decided.<sup>34</sup>

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<sup>31</sup> It must be remembered that in April 1999 new civil procedure rules were introduced in England by Lord Wolfe. The aims of the reform set out by Lord Wolfe were to modernise court procedures to create a fairer, cheaper and more efficient dispute resolution process.

<sup>32</sup> See Barry J. Rodger, *Private Enforcement of Competition Law, the Hidden Story: Competition Litigation Settlements in the United Kingdom, 2000-2005*, [2008] E.C.L.R., p. 96-116.

<sup>33</sup> See Kon and Barcroft: *Enforcement deficit in antitrust law*, [2008] G.C.L.R., page 12. The UK Civil Justice Council report recently pointed out that '[a]ccess to justice is still disproportionately weighted against claimants whether they are groups of consumers, small businesses, employees, or victims of mass torts [...] 'This has resulted in few claims being brought and, significantly, demonstrates that a number of meritorious claims simply have not seen the light of day'.

<sup>34</sup> See *SamDisk Corp v Koninklijke Philips Electronics NV* [2007] EWHC 332 (Ch).

In the UK at the beginning of the current year (2008) only five damages actions had been lodged under s.47A of the CA98 (individual damages actions).<sup>35</sup> Of the representative actions filed under s.47B of CA98, we must recall an action launched in 2007, and then settled<sup>36</sup>. Another (stand-alone) 'class action' has been recently triggered, in relation to the 'sub-prime' crisis.<sup>37</sup>

The first UK follow-on action was filed by the British Consumers' Association '*Which*'? against JJB Sports, and reached a settlement (announced on 8 January 2008) in which the 130 purchasers of replica football shirts received £ 20,00 each. Interestingly, the agreement is valid also to all those individuals who, even though they did not participate in the collective action, provide (within a certain time) a proof of purchase of a football replica shirt of JJB, or the shirt itself, being compensated with just £ 10,00.

JJB, on the other hand, obtained in the settlement agreement a clause stating that individual who participated to the collective action 'had suffered loss giving rise to an action for damages as a result of its words, actions or behaviours'.<sup>38</sup>

Seeing the number of settlements already reached, it is possible to argue that in the next few years, before the rules for private individual or collective

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<sup>35</sup> JJ Burgess & Sons v. W Austin & Sons (Stevenage) Ltd v Harwood Park Crematorium Ltd (1044/2/1/04); Consumers' Association v JJB Sports (1078/7/9/07); Emerson Electric Co v Morgan Crucible Co Plc (1077/5/7/07); Genzyme Ltd [2006] CAT 29 (settled after interim damages were awarded); BCL Old Co Ltd v Aventis and Hoffman-La Roche (1028/5/5/7/04) [2005] CAT 2 (actions dismissed); Deans Foods Ltd v Aventis and Hoffman-La Roche (1029/5/7/04) (actions dismissed). See footnote 13, of Kon and Barcroft's article 'Enforcement deficit in Antitrust Law', above.

<sup>36</sup> Here the word 'settlement' must not be read in the 'administrative' meaning applicable to one of the ways of bringing to an early end the investigation (i.e. in cartel cases). It is rather an agreement between damaged parties and allegedly liable for the anticompetitive or anti-consumers behaviours, in order to bring a private litigation to an end before the natural end of the civil legal proceedings.

<sup>37</sup> On the 12 August 2008 it was announced that Lothian Pension Fund and the Northern Ireland Local Government Officer Superannuation Committee (NILGOSC) have been appointed as co-lead plaintiffs in a class action against Lehman Brothers for the subprime crises (source: <http://www.ipe.com>). Interestingly, one month later (September 2008) Lehman Brothers filed bankruptcy in the United States.

<sup>38</sup> See footnote 14, Kon and Barcroft: Enforcement Deficit in Antitrust Law, 2008 G.C.L.R.

enforcement can be further developed, settlements will be the main way to satisfy both public and private enforcement imperative.

Settlements procedures will reduce the 'secrecy' of normal antitrust proceedings. This is problematic, as a certain quantity of evidence useful for private enforcers will not be available anymore.<sup>39</sup> A recent example of this outcome is the settlement reached in 2006 by a group of independent schools that had been exchanging information regarding tuition fees.<sup>40</sup> The schools and admitted their liability and agreed to pay £ 3 million to a charitable trust in favour of affected students (and their parents); but only a symbolic fine of £ 10,000 for each school was imposed, as the plaintiffs had failed to demonstrate the effective economic loss for any student as a consequence of the anticompetitive conduct. In other words, this decision discouraged the possibility of multiple private enforcement actions against the schools.

In other settlement cases the OFT, even though it obtained admissions of liability, in its final decision did not provide any further element to allow private persons to (individually or collectively) act against those responsible for the infringements. In particular, it was difficult for the damaged parties to infer from the settlement decision the amount of damage individually suffered, either because this was too difficult, or because the generic reconstruction of the illegal behaviour (without disclosing relevant details) was part of the 'settlement package'.<sup>41</sup>

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<sup>39</sup> Kon and Barcroft, *Enforcement Deficit in Antitrust law*, 2008 G.C.L.R., page 14.

<sup>40</sup> OFT's decision in case CA98/05/2006 'Exchange of information on future fees by certain independent fee-paying schools', 26 November 2006.

<sup>41</sup> See on the point, the case *British Airways and Virgin Atlantic*. OFT press release ORR/113/07 issued on 1 August 2007 (<http://www.of.gov.uk/news/press/2007/113-07>). British Airways, prosecuted in a joint action carried out by the OFT and the US DoJ, was fined with £ 270 m (while Virgin Atlantic got immunity for having blown the whistle). The settlement signed in August 2008 to bring to an end the US class-action established that the companies will refund £ 10 for each passenger who travelled between 2004 and 2005 on long haul flights. The total amount to be paid has been set to \$ 200 m as a compensation for 8m damaged customers. On 7 August 2008 the OFT also charged four former employees of British Airways with criminal offences for price-fixing, applying the recently introduced (2003) criminal provision aimed at eradicating cartels in United Kingdom. See also, in the supermarkets sector, the OFT press release 170/07 of 7 December 2007 and 22/08 of 15 February 2008. Asda, Safeway and Sainsbury's signed a settlement agreement with OFT (Morrison and Tesco did not settle).

From a 'strategic' point of view, a firm may therefore consider that settlement proceedings satisfy the urgency for the Competition Authority to bring to an end an alleged infringement; on the other hand, it might provide at least a certain number of victims with a certain amount of compensation, knowing that long and burdensome (both for the taxpayer and for the investigated enterprises) proceedings at the end would not reach the same level of overall 'satisfaction' that should be the target of any public body.

Another interesting strategic perspective is that emerging from the leniency regime.

Under UK law, the judges (the CAT, for instance) may take into consideration a 'legitimate public interest objective' in not disclosing information gathered by leniency applicants.

Such 'protective' behaviours with respect to applicants is aimed at encouraging potential participants in an anti-competitive conduct to co-operate with the public enforcer. Therefore, an enterprise which decides to file a leniency application in UK, relying on the 'legitimate public interest' imperative, might find convenient to denounce its own behaviours (alongside those of the other parties of the illicit conduct) in order to prevent the disclosure of confidential information that otherwise, following to the disclosure in the Statement of Objections or in the final decision, might be used in a collective (or individual) private action for damages.

On a similar note, the OFT Recommendations Paper actually suggest an express mitigation for the damages to be reimbursed by the leniency applicant, as well as the possibility of contribution to the payment of damages by the other participants to the anticompetitive conduct. Despite what the Discussion Paper suggested, the Recommendations Paper proposes a legislation which should encourage the leniency application excluding 'joint and several' liability. Therefore, the leniency applicants would be exclusively called to reimburse the exact damages they had caused with their behaviour.<sup>42</sup>

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Here a further difference with the US legal system can be found, since in the US each party of the

Finally a few notes on adding ‘stand-alone’ representative actions to existing ‘follow-on’ representative actions.

The UK consultation process preceding the Recommendations Paper obtained a significant consensus about the possibility of introducing a ‘stand alone’ collective action for consumers, alongside a follow-on class action for businesses.<sup>43</sup> They also emphasised that the ‘opt-in’ model was preferable to any form of generalised participation in representative actions.

The OFT recommendation tries to mitigate and balance the diverging interests of consumers and enterprises, also keeping in mind the highly sophisticated civil proceedings in the United Kingdom. Therefore, the OFT is certainly prone to admit ‘stand-alone’ proceedings for the consumers, and is planning to introduce representative actions on behalf of businesses for both ‘follow-on’ and ‘stand alone’ actions. It also aims at promoting actions with respect to minor amounts of damages and is therefore planning to allow the judges to apply an ‘opt-out’ model of representative action for those cases that otherwise would see only a few, well informed, consumers recover damages suffered.

Another key point of OFT action will be allowing the distribution of damages on a ‘compensatory’ basis, but leaving open the possibility of awarding damages on a ‘restitutionary’ basis in specific cases (in particular, in presence of ‘opt-out’ representative actions with many participants).

#### **4. Defensive and offensive strategies at the European and UK level: the ‘passing-on defence’ and the ‘indirect purchasers’ standing’**

The ‘passing-on defence’, in its cartel, price-fixing-related meaning, means that members of cartels will refuse to pay damages to those claimants

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anticompetitive conduct can be individually called to respond also for the damages inflicted by the other parties.

<sup>43</sup> However, many participants to the consultation were against the option of stand alone actions.

who had 'passed-on' the overpricing to their customers, thereby completely or partially compensating their losses.

Points 20 and 19 of the 2007 Parliament's Resolution makes clear that:

*'Member states that make provision for actions for indirect losses should grant the defendant the possibility of asserting a passing-on defence in order to avoid the possibility of unjust enrichment.'*<sup>44</sup>

However, it also underlines

*'that [...] the possibility of defendants arguing that all or part of the gains they made as a result of the infringement have been transferred to third parties (the passing-on defence) would be detrimental to establishing the extent of the damage and the causal link'.*

In the United States the passing-on defence is not admitted. In Europe this is a much debated issue. Not admitting the passing-on defence may have a negative effect, since it would encourage and strengthen the relationship between members of the cartel and direct purchasers. The threat of being punished, even having passed on the over-charging, may strengthen the collusive relationship.

This is a possible drawback, but ultimately it is not granted that the direct purchasers effectively will be able to pass on overcharged prices to their clients. In a perfectly competitive market, the final prices are generally established at the price of equilibrium. If someone purchases a good at a artificially higher price the further offer of a particular good will shrink, but the final purchasers will look elsewhere for the same good. The damage, in terms of reduction of the supply of a specific good, and in terms of quantity of money spent, is evident.

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<sup>44</sup> European Parliament Resolution of 25 April 2007 on the Green Paper on Damages Actions for breach of the EC Antitrust Rules (2006/2207[INI]).

The damage caused to the direct purchaser is self-explanatory. The overcharged price will diminish the direct purchaser's possibility to buy a certain product; and this will reduce the quantity of product sold, and, in the medium term, the market share.

Point 2.6 of the White Paper makes some distinctions that may help the firm to consider its position vis-à-vis the passing on defence:

*(i) The Commission reiterates that the Courts follow the 'compensatory principle', and that damages shall be acknowledged to any injured party, even if that party may have passed-on the overcharge. What really matters is to show the 'causal link'.*

*(ii) However, the Commission also acknowledges the risk of 'unjust enrichment' for those purchasers that effectively have passed on the overcharge to their customers; therefore the Commission suggests that 'defendants should be entitled to invoke the passing-on defence against a claim for compensation of the overcharge. [However] the standard of proof for this defence should be not lower than the standard imposed on the claimant to prove the damage'.<sup>45</sup>*

In other words, the members of the cartel and the direct purchasers cannot automatically rely on the fact that the over-charge was passed on the final consumers.

Another hypothesis is that the indirect purchaser may also claim to have been the ultimate victim of the anti-competitive behaviour, in order to claim for compensation (the so-called 'indirect purchaser's standing'). Unfortunately these individuals, often at the end of the distribution chain, may find it particularly difficult to demonstrate that they ultimately paid a price that was higher as an effect of an anticompetitive behaviour. If they are unable to show the causal link, those who have infringed competition law provisions would 'retain an unjust enrichment'.

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<sup>45</sup> White Paper, point 2.6, page 8.

Therefore the Commission, to facilitate the compensation of damages suffered by indirect purchasers, suggests that:

*indirect purchasers should be able to rely on the rebuttable presumption that the illegal overcharge was passed on to them in its entirety.*<sup>46</sup>

This scenario shows how in Europe the Courts will be called to take a case-by-case approach, not excluding *a priori* the passing-on defence nor the indirect purchaser claims, but rather focusing the attention on the exercise of the burden of proof.

At British level some differences might be underlined. If at a European level a general principle of 'unjustified enrichment' is admitted, as a basis for passing-on defence, this form of defence in the United Kingdom is admitted only on a case-by-case basis.

In the *Kleinwort Benson* case, for instance, the Court of Appeal rejected the applicability of the passing-on defence.<sup>47</sup> Here the issue at stake was the right to restitution of interest paid under a void interest-rate swap agreement. However the Court acknowledged the possibility, in principle, of apply the passing-on defence in case of the restitution of undue taxes where a public element is present.<sup>48</sup>

With respect to indirect purchasers' standing, in the UK legal system the principle of unjustified enrichment would not be applicable to justify *per se* the recovery of compensatory damages.

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<sup>46</sup> On this point, see another difference with the US system, which does not acknowledge indirect purchasers damages.

<sup>47</sup> *Kleinwort Benson Ltd v Birmingham City Council* [1996] 3 W.L.R. 1139. See on the point C. Petrucci, *The Issues of the Passing-on Defence and Indirect Purchasers' standing in European Competition Law*, E.C.L.R., issue 1, 2008.

<sup>48</sup> Petrucci, quoted, p. 40.

However, in the *Courage* case<sup>49</sup> one of the key statements of the Court was that:

*The full effectiveness of Article 85 [now Article 81] of the Treaty ... would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition,*

making clear that not only the direct victim of the illegal price-fixing but also any other individual could claim damages.<sup>50</sup>

On this specific point Petrucci argues that the acknowledgment, in *Courage*, of the possibility that the overcharge was passed on to the indirect purchaser (in order to award the indirect purchaser the damages suffered), actually opens the door to the admissibility of the passing-on defence also for the members of a cartel. The same position that was finally accepted also by the White Paper, within the boundaries of the burden of proof we mentioned above.

## **5. The Italian path to class action through the EU experience.**

The European Court of Justice (ECJ) has consistently held that, in the absence of relevant Community rules, it is for each Member State's legal system to designate the appropriate courts having jurisdiction, and to adopt the necessary procedural rules on the actions aimed at safeguarding those rights which individuals derive directly from Community law, while pointing out that national rules are in any case subject to the principle of effectiveness and equivalence of Community law.<sup>51</sup>

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<sup>49</sup> *Courage v. Crehan* [2001] E.C.R. I-6297 at [30].

<sup>50</sup> J. Edelman and O. Odudu, 'Compensatory Damages for Breach of Article 81', 2002, 27 E.L.Rev. 327.

<sup>51</sup> See Case C-295/04, *Vincenzo Manfredi v. Lloyd Adriatico SpA*, [2006] ECR I-6619, para 62, where the ECJ provides that such national rules "are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle

The harm deriving from a breach of Competition law may affect a significant number of individuals. Although an individual loss may be relatively small the aggregate loss to all potential claimants may be large. As pointed out by the European Commission, individual claimants may be effectively deterred from bringing proceedings even if they have a well-founded case, considering the difficulties of proving their claims, the uncertainty in outcome and the risks associated with the rejection of the case<sup>52</sup> As Nazzini stresses, the result may be that when the infringer harms a great number of individuals in circumstances where the individual loss is not sufficiently large to justify the costs and risks of bringing an individual claim, in the absence of an effective collective redress mechanism the perpetrator will not be held liable for the loss caused, and those who have been harmed will not be compensated.<sup>53</sup> As a consequence, the effective enforcement of EC competition law, would be impaired.

The Community Law obligation to respect the principle of effectiveness, applied to the subject at issue, 'requires that Member States must provide an effective redress mechanism which ensures that the right to damages of those who have been harmed by competition law infringements is effective in circumstances in which a sufficiently large number of individual claims would in practice be unlikely to be brought'.<sup>54</sup>

## **6. Collective actions in the Italian legal system.**

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*of effectiveness*)". See also Case C-261/95, *Palmisani*, [1997] ECR I-4025, para 27; and Case C-453/99, *Courage and Crehan* [2001] ECR I-6297, para 29.

<sup>52</sup> See the Commission Staff Working Paper accompanying the White Paper on damages, at para. 6.

<sup>53</sup> See, R. Nazzini, 'Potency and Act of the Principle of Effectiveness: The Development of Competition Law Remedies and Procedures in Community Law', in C. Barnard and O. Odudu, 'The Outer Limits of EU Law' (Hart Publishing, 2008, forthcoming). On that particular issue, the Impact Assessment annexed to the White Paper on damages has shown that in the absence of any measures to facilitate actions for damages, most of the harm caused by competition law infringements will continue to be left uncompensated, and victims and businesses that comply with the law will continue to have to absorb that loss. See, Impact Assessment Report annexed to the White Paper, section 2 and section 5.2.5.

<sup>54</sup> Nazzini, footnote 46 above. More generally, see the Commission Staff Working Paper accompanying the White Paper on damages, para. 78, where the Commission pointed out that: "*According to the principle of effectiveness, the domestic rules governing the enforcement of Community rights may not render the exercise of those rights practically impossible or excessively difficult.*"

In the absence, at least for the moment, of Community legislation, the design of the appropriate collective redress mechanism is left to the Member States.

Collective actions, although a typical legal instrument of Common law countries, have been increasingly introduced also in Civil law countries. Up until the adoption of the *Legge finanziaria 2008* ('Budget law' 2008) in December 2007, collective actions were still not part of the Italian legal system.<sup>55</sup> This instrument has been introduced by Article 2, paragraphs 445 to 449, of the Law 244/2007 (the above mentioned "*Legge finanziaria 2008*").<sup>56</sup>

In particular, Article 2, para 446, reformed the *Codice del Consumo* (the Italian Consumer Code),<sup>57</sup> introducing Article 140 bis, titled '*Azione collettiva risarcitoria*' (Collective compensatory action).<sup>58</sup> The first two paragraphs of the new provision deal with the associations who have a *locus standi* for the protection of consumers' collective interests. Standing is granted, for this purpose, to consumers associations, professional associations and chamber of commerce, craftsman and industries;<sup>59</sup> the relevant claim has to be brought in the *Tribunale* where the defendant has its residence or business.<sup>60</sup>

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<sup>55</sup> It is worthwhile mentioning that the mechanism adopted by the Italian legislator is not a sectoral measure, concerning infringements of competition law, but a horizontal measure, covering the whole spectrum of sectors where consumers operate.

<sup>56</sup> *Legge n. 244 of 24 December 2007 (Legge finanziaria 2008)*. Paragraph 445, in particular, constitutes a sort of preamble of the subsequent provisions, by defining the collective compensatory actions for the protection of consumers as the new general instrument of protection in the framework of national measures aimed at ruling the rights of consumers and users, in accordance with the principles established at Community level in order to increase the standard of protection.

<sup>57</sup> The Consumer Code has been adopted by the *Decreto Legislativo* (Legislative Decree) n. 206, of 6 September 2005.

<sup>58</sup> Article 140 of the same Consumer Code, in fact, just limited and limits itself to authorise consumers and users associations to act to obtain: an injunction from a Court; the adoption of the appropriate measures to remove the effects; and the publication of the provision itself in newspapers distributed nationwide. For an analysis of the new Article 140 bis of the Consumer Code, see, G. Costantino, *La tutela collettiva risarcitoria: note a prima lettura dell'articolo 140 bis cod. consumo*, in *Foro italiano*, n. 1, 2008, p. 18-24; P. MAZZINA, *Prime considerazioni sugli aspetti costituzionali dell'azione collettiva*, in *Forum di Quaderni Costituzionali*, published on 6 June 2008.

<sup>59</sup> In the light of this provision, the Italian legislator introduces a form of representative action rather

Most importantly, as per Article 140 bis, para 2, of the Consumer Code, the legislator has privileged an opt-in mechanism for Italian collective actions. Such a choice has been considered as inevitable as the specific features of an opt-out action would have allegedly raised problems at a constitutional level, in particular as far as Article 24 of the Italian Constitution is concerned, which affirms the individual right of persons to bring an action for the protection of their rights and legitimate interests.<sup>61</sup> However, such a concern on opt-out representative actions, also supported by an alleged Article 6 ECHR argument, may be easily overcome by a necessary and appropriate publicity of the action thereof and the fact that the representative entity will not act in its own interest.<sup>62</sup>

The consequence of the Italian legislator's choice is that consumers who intend to take part to a collective compensatory action, according to Article 140 bis, par. 2, of the Consumer Code, have to give an express written communication of their intention to join a particular collective action. The adhesion may also be communicated at the appeal stage, but not after the final conclusive hearing.

Unlike the US system, but in line with the trend in the other European jurisdictions, it is important to underline the absence of so-called 'punitive damages', which usually, but not exclusively, contribute to pursue public

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than a collective one. The differences between these two collective redress mechanisms are described by the Commission in its Staff Working Paper accompanying the White Paper on damages, in particular, at para. 57.

<sup>60</sup> Thus waiving the general principle according to which, in cases concerning consumer protection, the competent court is the one exercising its territorial jurisdiction in the place of domicile of the consumer. See, Cases C-240/98 *et al.*, *Océano Grupo Editorial*, [2000] ECR I-4941.

<sup>61</sup> To this end, it is important to point out that the original formulation of the provision at issue, the one presented to the Senate, was based on an opt-out mechanism. The choice to turn to an opt-in one has been considered necessary to reconcile the introduction of collective actions in the Italian legal system with the provision of Article 24 of the Constitution. According to this provision, it would have been difficult to introduce in the Italian legal system a US-style *ultra partes* effects class action mechanism, whereby individuals are bound to the result of a collective action, thus precluding them the possibility of an individual action, except when they individually express their opting-out from the relevant collective action. See, P. Mazzina, *Prime considerazioni sugli aspetti costituzionali dell'azione collettiva*, *ibid*, p. 12-13.

<sup>62</sup> That is why for purely collective actions an opt-in mechanism remains the most appropriate.

enforcement policies such as deterrence and punishment.<sup>63</sup> The Italian legislator, instead, in accordance with Civil law principles, considers responsibility as implying the restoration of the patrimonial condition of the victim of the violation, by attributing also an amount of money which tends to eliminate the consequences of the damage (compensatory function).<sup>64</sup>

## **7. Procedural peculiarities and confusion between conflicting competent jurisdictions in the Italian legal system.**

It is important to point out some procedural features concerning the interaction between the new rules on collective actions and the existing ones, in particular on civil procedure.

What seems to be peculiar is that the settlement procedure, usually serving as a preventive pre-judicial tool, according to Article 140 bis, para 6, follows the recourse to litigation; in fact, while the *an debeat* is subject to the *plena cognitio* of the ordinary judicial proceedings, the *quantum debeat* is subject to a settlement procedure (*camera di conciliazione*) posterior to the contentious part of the proceedings.

According to the provisions of Article 187, para 2, of the Italian Code of Civil Procedure, and Article 140 bis, para 3, of the Consumer Code, the Judge Rapporteur, at the first hearing, invites the parties to file their instances and to remit the case to the collegial decision of the *Tribunale* for admissibility purposes.

The Tribunal, at collegial level, adopts an order appealable to the *Corte d'Appello* (Court of Appeal), deliberating in *Camera di Consiglio* (Council

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<sup>63</sup> On the superiority of public antitrust enforcement to private actions for damages, for the achievement of the objectives of deterrence and punishment, see, W.P.J. Wils, *The Relationship between Public Antitrust Enforcement and Private Actions for Damages*, in *World Competition*, Vol. 32, No. 1, March 2009

<sup>64</sup> As a consequence, a US Court Judgment imposing the payment of punitive damages to an Italian undertaking, without any reference to the actual damage suffered by the victim, would breach the general principle of the public order and, therefore, it could not be applied in the Italian territory, according to Article 64, para 1(g), of the Law n. 218 of 31 May 1995, which reformed the rules of Italian Private International Law.

Chamber). The form of the order, however, does not prevent it from being considered, according to Article 111, para 7, of the Italian Constitution, as a final and definitive act; as a consequence, after the appeal to the *Corte d'Appello*, it can be further appealed to the *Corte di Cassazione* (the Italian Court of Last Instance).

Applying by analogy the provision of Article 279, para 3, second part, of the Italian Code of Civil Procedure, the appeal against the order affirming the admissibility of the action should not suspend the main proceedings, which, however, might be suspended pending the appeal to the *Cassazione* against the decision of the *Corte d'Appello* repealing the order of the *Tribunale*. What seems to be uncontroversial, instead, is the suspension of the main proceedings, pending the decision of either the *Corte d'Appello* or the *Cassazione*, when the *Tribunale* has declared the inadmissibility of the case.

As mentioned above, according to Article 140 bis, para 4, of the Consumer Code, the judgment in the main proceedings, when upholding the application, limits itself to set the criteria for compensation, determining only the minimum amount of the *quantum*.

It must be stressed that such a decision cannot be considered an enforceable judgment. It does not produce executive effects, ex Article 474, para 2, n. 1, of the Italian Code of Civil Procedure. In other words, the plaintiff is not entitled to register any legal mortgage as per Article 2818 of the Italian Civil Code. An enforceable decision can be adopted only in favour of those consumers who have made an express request in that sense; it is not, therefore, an effect of the collective action, but the result of an individual action proposed in the course of the same proceedings.<sup>65</sup>

Alternatively to the individual action for the actual compensation, Article 140 bis, para 6, of the Consumer Code, sets out the rules on the possible settlement procedures available, that is, either the establishment of an *ad hoc Camera di conciliazione* (Settlement Chamber), or the application to one of the

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<sup>65</sup> G. Costantino, *supra*, p. 23-24.

settlement bodies provided in Article 38 of the Legislative Decree n. 5 of 17 January 2003.

Another problem concerns the confusion between the different competent jurisdictions. In fact, the already confused framework will become even more puzzling with the introduction of the rules on collective redress. As Nebbia pointed out: “*it appears that the peculiarities of the Italian antitrust system have the potential to turn any matter concerning jurisdiction into a ‘mare’s nest’.*”<sup>66</sup>

Article 1 of Law n. 287 of 10 October 1990 (the Italian Competition Act),<sup>67</sup> introduced a form of residual application of national competition law, whereby this applies only to the extent that Community law does not apply; in addition, Article 33, para 2 of the same Law establishes that the *Corte d’Appello* has sole jurisdiction to hear all actions concerning nullity, damages and interim measures concerning a breach of national competition law; on the other hand, when these concern Community law, the ordinary rules of jurisdiction apply. The resulting scenario, therefore, is as follows: if the plaintiff pleads a breach of national law, the competent court is the *Corte d’Appello*; when he pleads a breach of EC law, the competent court is the *Tribunale*, or the *Giudice di Pace*, depending on the value of the claim.<sup>68</sup>

In practice, this means that if a *Corte d’Appello*, in the course of proceedings concerning a breach of national law, finds that an allegedly anti-competitive conduct affects interstate trade, it is under a duty to apply EC law; this automatically entails that they lose jurisdiction to hear the case, as under Italian law the body entitled to apply EC law is the *Tribunale*. The result is that hardly any case will end up in *Corte d’Appello*, as it is now rare to find an infringement that would have exclusively national dimension and the Italian

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<sup>66</sup> See, P. Nebbia, ‘...so what happened to Mr Manfredi? The Italian decision following the ruling of the European Court of Justice’, in *European Competition Law Review*, vol. 28, 2007, p. 591-596, 592.

<sup>67</sup> Law 10 October 1990 n. 287, *Norme per la tutela della concorrenza e del mercato*.

<sup>68</sup> *Giudici di Pace* are small claims judges who are simply required to have a law degree, but not necessarily further training.

Competition Authority has, since the entry into force of Regulation 1/2003, normally proceeded on the basis of EC law.<sup>69</sup>

This situation may give plaintiffs the choice to bring proceedings either in the *Corte d'Appello*, for an infringement of national law, or in the *Tribunale*, for the infringement of Community law. As pointed out by Nebbia,<sup>70</sup> from the point of view of Italian law the possibility of suing in either court (involving differing degrees of appeal) would undermine the principle of “*giudice naturale precostituito per legge*”. Common to several Western legal systems, this principle institutes the obligation for the state to establish by law the criteria to define as precisely as possible the competent judge for every dispute, so as to avoid the possibility of multiple jurisdictions for one case.

As mentioned above, the new rules on collective actions will not make things much easier, but even more puzzling. In fact, according to Article 140 bis, of the Consumer Code, standing for collective redress is granted to consumer associations, professional associations and chambers of commerce, craftsman and industry; the relevant claim, however, has to be brought in the *Tribunale*. This would mean that, while the *Corte d'Appello* has special jurisdiction on individual damages claims based on a breach of national law, the *Tribunale* would have jurisdiction should the same claim be brought as a collective action. This seems to be an inadequate solution in terms of legal certainty.

On the point, it must be remembered that in Italy the competence of the Court of Appeal (also) for individual damages claims filed by consumers was only recently acknowledged by the *Corte di Cassazione*, at the end of long-lasting civil proceedings triggered on the basis of an Italian Competition Authority decision that established that the exchange of information carried out by some major insurance companies to raise the policies prices in the year

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<sup>69</sup> After the entry into force of Regulation 1/2003 it could not be otherwise, as Article 3, para 1, of the same Regulation provides that: “*Where the competition authorities of the Member States or national courts apply national competition law to agreements, [...], within the meaning of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 of the Treaty to such agreements, [...].*”

<sup>70</sup> P. Nebbia, *supra*, p. 593.

1999-2000 had infringed Section 2 of the Italian Competition Act on anticompetitive agreements.

In fact, until judgment n. 2207/2005<sup>71</sup> the position of the Italian Supreme Court had been fixed in another controversial judgement (n. 17475/2002),<sup>72</sup> that acknowledged the exclusive competence, at jurisdictional level, to the Court of Appeal in applying the national antitrust law, for damages claims filed by undertakings (hence foreclosing final consumers damages claims). Probably the influence of Regulation 1/2003 (and in particular the clear position expressed by the Commission in the preamble to the Regulation but also in a number of academic and professional discussion fora in the same period of time around Europe), the weight of the *Courage* saga (triggered in 1993!) at national and European level (followed by *Manfredi*), as well as the progressive acceptance of the utility and function of public and private dual enforcement to eradicate anticompetitive conducts in Europe, convinced the Supreme Court to extend the 'coverage' of Section 33 of the Italian Competition Act also to final consumers.<sup>73</sup>

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<sup>71</sup> Judgment of the *Corte di Cassazione* of 4 February 2005. For a first commentary see A. Nicolussi, 'Consumatori, percorso ad ostacoli', *Il Sole 24 Ore*, 11 February 2005. For a puzzling reconstruction of a civil law system approach to the dichotomy 'nullity of contract' (and restitution damages) v. 'illegal conduct' (and compensatory damages as per Section 2043 of the Italian civil code) see C. Castronovo, '*Sezioni più unite che antitrust*', note to the judgment of 4 February 2005, in *Europa e Diritto Privato*, 2005, 444 et ss. See, of the same Author, Private Law Remedies for Antitrust Violations-A Point of View from Italy, in *Private Enforcement of EC Competition Law*, J. Basedow ed., Alphen aan den Rijn, 2007, p. 107 et s. Castronovo, in an original, but coherent with the Italian legal system, reasoning, reaches the conclusion that the illegal conduct carried out by the cartel members (the exchange of information aimed at raising or lowering the prices) would be a valid reason to consider null and void also the follow-on contract between a cartel member and a consumer or another business and a sufficient reason for restitution at least of that part of the price (if not all) that the consumer would have paid had the forces of the market been free to reach the equilibrium price. Under the circumstances, for the author the conclusions reached by the Supreme Court, that damages should be awarded to consumers 'simply' as a consequence of the illegal conduct, would stretch the provisions of the code beyond their boundaries, particularly because there is a damages award with relation to pure economic loss. Favorable to the innovative approach adopted by the Supreme Court, see G. Tesaurò, *Concorrenza e assicurazioni*, in *Sole 24 Ore*, 16 February 2005. On the point of extending the same protection to final consumers, see also M. Libertini, *Ancora sui rimedi civili conseguenti a violazioni di norme antitrust, Danno e Responsabilità*, 2004, p. 936 et ss.

<sup>72</sup> The precedent position of the Supreme Court of 9 December 2002 is available in *Foro Italiano*, 2003, 1134. In fact the Supreme Court had acknowledged the competence of the Court of Appeal, on the basis of Section 33 of the Italian Competition Act, for damages claims filed by undertakings against undertakings, for conducts contrary to Articles 2 and 3 of the Italian Competition Act, but not for consumers harmed by anti-competitive behaviours. A commentary to this fundamental judgment is in G. Afferni and F.W. Bulst, *Kartellrechtliche Schadensersatz-ansprüche von Verbrauchern*, *Zeitschr. f. Eur. Privatrecht*, 2005, 143 ss., underlying the extra-contractual liability of the cartel members. Bulst, in particular, deems unacceptable the limitation of competence to the Court of Appeal.

<sup>73</sup> But the doors should be open for more detailed legislation, aimed at extending and regulating individual

From the undertakings' viewpoint, individual damages actions based on the present national law are far more preferable, as the procedure in the *Corte d'Appello* is usually less consumer-friendly and notably more formal than with the *Giudice di Pace*. Furthermore, it seems to be clear that undertakings should not worry too much as regards collective damages claims in Italy, as the *quantum* to be paid to consumers is left to a settlement chamber, whose three members are a lawyer chosen by the President of the Tribunale and a lawyer chosen by each of the two parties involved; not differently therefore, from a transaction chamber.

From a plaintiff/consumer's perspective, it is clear that a collective action, before either the *Giudice di Pace* or the *Tribunale*, would be far more preferable for the same reasons. Therefore, once the rules on collective actions enter into force in Italy, consumers will be more inclined to this type of action as compared to the individual one, not just from a practical viewpoint but also from a jurisdictional one, thus giving birth to a sort of "forum shopping" *sui generis* for consumers/plaintiffs.

The entry into force of the collective action mechanism provided in Article 140 bis, of the Consumer Code, was set after 180 days from its adoption. Unfortunately the 1<sup>st</sup> July 2008 has gone by without the entry into force of the provisions in question, as the new Italian Government decided to put them (twice) on hold. Far from agreeing with this choice, the hope for the future is that this delay may trigger further debate to make it possible that also the Italian legal system has an effective mechanism of collective actions. To this end, the adoption of binding legislation at EU level, hopefully in the near future, will have a very welcomed positive effect towards the achievement of a more effective system of collective redress, more in line with the initiative of the White Paper on damages actions, although limited to the peculiarities of the claims concerning competition law infringements.

## **8. Conclusion.**

This paper is aimed at providing a first insight into the legal strategies that both plaintiff and defendant might be interested in adopting in the presence of anti-competitive or anti-consumer behaviours for which collective action has been filed.

The US experience shows how deeply class action is enrooted in the constitutional principles of that country. It tackles the distortions that the class action system may face, in particular with respect to the concept of 'contingency fees', or the advantages that legal counsel can take from a early settlement, in particular if compared with the exiguity of individual satisfaction.

The paper then shows how the European Commission intends to leverage the deterrence force of US-style class action to prevent anti-competitive behaviours (in particular the most serious frauds), even though it is aware that consumers and purchasers will not trigger collective actions when the individual claim is of a limited nature.

As in the US legal system, it is possible that only those actions that are based on the interests of millions of people will be undertaken.

The collective action is particularly burdensome, for a plethora of reasons, both for the plaintiff and for the defendant. 'Social costs' also must be taken into consideration, since access to justice for thousand of people represents an enormous burden for already fragile administrative infrastructures (in Italy this is of particular relevance).

It seems therefore that the system of 'filters' encapsulated in both UK and Italian legislation (i.e. limiting the possibility of triggering class action to consumers associations) may reduce the risk of incautious access to justice mechanisms.

For the same reasons, the follow-on actions also represent a guarantee of 'reasoned' access to justice. It is self-explanatory how the presence of a

well-reasoned decision, often issued after many months (or years) of investigation, clarifies to the victims how their actual damage resulted from collusive (i.e. in a cartel case) or abusive conducts that sometimes may be difficult to detect or understand. The presence of an antitrust case as grounds for a collective action sometimes also means the presence of related evidence.

Stand-alone actions also may have an autonomous reason to exist. If the antitrust authority, i.e. for administrative priorities, did not trigger proceedings in the presence of anti-competitive conduct, a group of damaged people may nevertheless wish to trigger civil proceedings. This is particularly evident in the Italian system, where the collective action is not only based on the violation of competition law rules (Art. 81 and 82 EC and national equivalent) but also on the 'consumer code' provisions.

This reasoning can be extended to answer a further legitimate question: when a competition law case arise, which forum (the competition authority or the court) grants the best outcome for each of the parties?

In fact, as correctly underlined by several judgments of the European Court of Justice, the 'administrative' system of public enforcement, represented by the Commission and the National Competition Authorities, is a parallel way of ensuring the respect of rule of law within the European Union, in which the judicial system, both through individual and collective actions, represents perhaps the most important alternative. The main difference (as per John Locke's initial quote) being that public enforcement may be discretionary (and the possibility of not carrying out some legal proceedings does not weaken the enforcement of competition law principles), while private action belongs to the same essence of the constitutional right of the citizen (therefore the fact of reducing the possibility of private, individual or collective, enforcement may represent a serious compression of citizen's 'liberty from offence').

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