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Hans-W. Micklitz · Geneviève Saumier
Editors

Enforcement and Effectiveness of Consumer Law

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Editors

Enforcement and Effectiveness of Consumer Law

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Editors
Hans-W. Micklitz
Department of Law, Badia Fiesolana
European University Institute
San Domenico di Fiesole, Italy

Geneviève Saumier
Faculty of Law
McGill University
Montreal, Québec, Canada

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In Search of an Effective Enforcement of Consumer Rights: The Italian Case

Giacomo Pailli and Cristina Poncibò

1 Introduction

From its origins, 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 the Legislative Decree 6 September 2005 no. 206 (the Italian Consumer Code, 'ICC').[1] The systematization that has been achieved in 2005 is undoubtedly remarkable: the restatement of consumer law, based on the French experience with the *code de la consommation*, made the rules more accessible to consumers and traders, favouring a homogeneous and systematic interpretation.[2] The ICC, as amended, represents today the main legal framework for consumer protection in Italy. It should be noted that there are still many other provisions

Cristina Poncibò is the author of Sects. 2 and 3, with the exclusion of Sects. 3.4 and 3.5. Giacomo Pailli is the author of Sects. 1, 3.4, 3.5 and 4. The co-authors jointly drafted the conclusion.

[1]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.

[2]Pasa and Weitenberg (2007), pp. 295–308.

G. Pailli (✉)
University of Florence, Florence, Italy
e-mail: giacomo.pailli@unifi.it

C. Poncibò
University of Turin, Turin, Italy
e-mail: cristina.poncibo@unito.it

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outside the ICC with respect to sectorial consumer protection, e.g. in the fields of data protection,[3] energy and gas,[4] telecommunications.[5]

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. The Law of 24 March 2012 no. 27, converting with modifications the Law Decree of 24 January 2012, no. 1, also vested the Italian Competition Authority (ICA) with new powers to protect consumer rights against unfair terms in contracts.[6]

2 Actors Involved in the Enforcement Regimes

Many actors take part to the enforcement of consumer's right in Italy. The following sub-paragraphs describe the main players, starting with public actors, and specifically the ICA, then considering consumer associations and the legal profession. The last sub-paragraph contains a few remarks on the role and coordination between these actors.

2.1 Public Actors

A number of public bodies include within their institutional responsibilities the protection of consumers. To begin, the General Directorate for Market, Competition, Consumers, Supervision and Technical Standards at the Ministry of Economic Development promotes policies with the aim of granting consumer protection in the domestic market. In addition, 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 prices surveillance, the Authority for the Insurance Market etc.). Regional authorities are also involved in advancing consumer protection by promoting, often in cooperation with consumer associations, local initiatives. Public prosecutors (*Pubblici Ministeri*) are in charge of the criminal aspects of violations of consumer rights.

[3]Legislative Decree of 30 June 2003, no. 196.

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

[5]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.

[6]Law Decree of 2 December 2011, no. 214 (so-called "Salva Italia").

Among all public players, the ICA stands out. Since 1992, the ICA was entrusted with the duty to target misleading advertising by any means (TV, newspapers, leaflets, posters, tele marketing) and, starting from 2000, also to assess comparative advertising. In 2007, following the implementation of Directive 29/2005/EC into Italian law (by the Art. 21–26 of the Consumer Code), ICA's competences in the consumer protection field have been broadened to include the protection of consumers against unfair commercial practices by undertakings.[7] As noted above, since 2012 ICA also deals with unfair commercial practices targeting 'micro-firms'. The ICA may also declare contractual terms to be unfair and order its decision to be published on the ICA's and trader's own websites, to ensure a broad information to consumers and to prevent traders from inserting such terms in their standard forms. 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 cases in 2014 and 3 in 2016). Traders may also ask in advance an opinion to the ICA about the fairness of the terms that they intend to use in their standard contracts with consumers.[8]

ICA is entitled to investigate unfair contract practices, unfair contract terms and CRD violations not only upon reception of consumers' complaints, but also ex officio. For example, ICA can issue interim measures against grave infringements, or make use of its cease and desist powers, without the need to go to the Court and relay on long, complex decision-making by the Courts.[9] In addition, ICA may proceed to inspections (in cooperation with Financial Police), may accept commitments by traders to end an infringement[10] and adopt "moral suasion" procedures. ICA may also issue fines (from € 5000 up to € 5 million for each unfair practice—for deceptive or comparative advertising the fine is between € 5000 and € 500,000). In the field of unfair contract terms, Italy represents an example of a "fully administrative competence". ICA final decisions are published and can be appealed to the system of Italian Administrative Tribunals (in two steps, at first instance before the Regional Tribunal, and final appeal to the *Consiglio di Stato*).

The Legislative Decree 21 February 2014 no. 21, implementing the Directive 2011/83/UE of 25 October 2011, that entered into force as of 13 June 2014, constitutes one of the last steps towards the strengthening of the consumers' protection applicable 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".[11] The new provisions deal with both distance contracts and traditional contracts, although the main changes concern distance and off-premises contracts.

[7] 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).

[8] See Battelli (2014a), p. 207.

[9] Article 27(3) ICC and Article 8(3) of Legislative Decree no. 145/2007.

[10] Article 27(7) ICC and Article 8(7) of Legislative Decree no. 145/2007.

[11] See Battelli (2014b), p. 927.

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.

2.2 Consumer Associations

Article 139 ff. ICC assign to consumer associations a central role in judicial enforcement of consumer's rights. While ICC also does not prevent injured consumers to act individually (under ordinary rules) or collectively (through an *azione di classe* as described *infra* at Sect. 3.4), 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 *azione di classe* brought so far. 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.[12]

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 association that are registered in a list kept by the Ministry for Economic Development pursuant to Article 137 ICC. The criteria are explained below. 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 (perhaps only implicitly) as their primary goal that of increasing their influence and visibility. They may aim to increase their own visibility because part of their power and resources comes from their reputation and the widening of their association 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 the 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 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, the lack of economic resources, and sometimes of adequate expertise, of associations are an obstacle to an effective pursuit of injunctive and collective litigation. Italian associations are adopting 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. Then, also due to a few of unsuccessful and costly attempts, have decided to focus their activity on political and social activities, as well as joining affected victims in criminal proceedings seeking civil compensation. Others, such as *Altroconsumo*, one of the most active association in filing suits

[12]See, Burbank et al. (2011), pp. 153 ss; Buxbaum (2001), p. 219.

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: only few organisations are (effectively) representing consumers in judicial collective redress with the aim of recovering economic damages. Others appear more inclined towards bringing an injunctive action according to Article 139 ICC, or to provoke the intervention of the ICA or of public prosecutors, as well as being generally active at the policy-making level.

3 Enforcement Practices: An Overall Picture

The article aims to present an overall picture of the various enforcement practices of consumer rights in Italy. The picture include, for example, judicial mechanisms, the first device crafted was the quasi-public actions of consumer association for injunctive relief (Articles 139–140 ICC).[13] When over time it became clear that this approach was not sufficient to grant the effectiveness of consumer rights, new approaches were designed, including judicial collective redress (e.g. the *azione di classe* under Article 140-bis ICC—Sect. 3.4) and a collective injunctive action against the public administration (see at Sect. 3.2). Recent developments have encouraged non-judicial mechanisms (e.g. conciliation, arbitration and mediation—Sect. 4).

Accordingly, the mechanisms could be categorised by following the traditional distinctions, including, for example, ex ante and ex post mechanisms, public and private actions, more in details, administrative, judicial and non-judicial mechanisms, and compensatory and the injunctive actions.

In considering these mechanisms, we note, in particular, that, quite often, the enforcement mechanisms are based on a combined *approach* to include both private and public actors and mechanisms. For example, on one hand, some private organisations (i.e. consumer associations) are entrusted to act before the Courts for the protection of the collective interests of the consumers (and are the most common plaintiffs in the azione di classe). On the other hand, the ICA, a public actor, has now the competence to protect consumer rights against unfair terms in contracts.

Our point here is to stress the enforcement regimes in the Italian legal system are the result of a combination of public and private enforcement. Such integration process is becoming more evident—and discussed by legal scholars—in the last years, while before enforcement regimes were considered as separate and working in parallel without a connection. Nevertheless, the point is that our understanding of the integration processes, and its dimensions, remains limited in legal scholarship and further developments in this field deserve attention. In Italy, the said process is occurring without being part of an overall strategy for consumer protection, because it is the result of a piecemeal approach. In Sects. 3.2 and 3.3, and 4 dealing with civil

[13]Chiarloni and Fiorio (2005).

actions in criminal proceeding, quasi-public actions and alternative dispute resolution, we examine some cases of integrated approaches to consumer protection.

3.1 Administrative Consumer Protection

First of all, consumer protection in Italy mainly rests 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.

For example, the governmental oversight on consumer protection falls under the competence of the National Council of Consumers and Users (*Consiglio Nazionale dei Consumatori e degli Utenti*).[14] Article 136 of the Consumer Code gives administrative authority to the Council to represent the consumers' and users' associations nationwide. It is part of the Ministry of Productive Activities and its chair is held by the Minister or one of his delegates. At the moment the council is composed of 17 recognized associations and a representative member of the Regions and Autonomous Provinces elected by the Regions-State Conference.[15]

With reference to public actors considered as a whole, the first remark is that the public enforcement regime appears to be fragmented due to the concurring competence of many sectorial public authorities (e.g., energy, telecommunications, insurance, banking services, etc.).[16] Secondly, there is no clear coordination between public players, nor between the public and the private component of enforcement of consumer rights. 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 in the field of damages caused by an infringement of competition law by an undertaking or by an association of undertakings.[17]

Because of the limitations, shortcomings and obstacles mentioned above, as well as of other factors, the Italian regime is characterised by a significant under-enforcement both as to public authorities, as well as the private (or *quasi-public*)

[14]The Council Website is available at http://www.tuttoconsumatori.it.

[15]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.

[16]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' (Article 23(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.

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

sector, that has not been adequately empowered, as it will be explained in more details in the next paragraphs.

3.2 Civil Claims in Criminal Proceedings

Over the last two decades or so, damaged consumers have advanced a significant number of cases of mass torts by joining criminal proceedings and seeking compensation of 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.[18]

Somehow surprisingly, notwithstanding the various enforcement mechanisms described in this paper, damage claims by consumer continue to be lodged in criminal proceedings. To be sure, criminal proceedings are 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 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 to criminal proceedings as (formally individual) *parti civili*. Such a confirmed role of the criminal component, on one side shows a strong cultural resistance of Italian lawyers and judges, who prefer to dwell with well-established mechanisms, on the other is further evidence of the procedural shortcomings of the *azione di classe* and of the other enforcement mechanism that seem to have failed to conquer the "market" for enforcement of consumer's rights. Needless to say, many cases that do not represent a criminal offence do not fall under the competence of the Pubblico Ministero. Here, the institute of *litisconsorzio* (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.[19] 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.

[18]Coggiola and Graziadei (2014), p. 29.

[19]Coggiola and Graziadei (2014), p. 29.

3.3 Quasi-Public Judicial Actions: Injunctive Relief and the Action for the Efficiency of the Public Administration

3.3.1 Injunctive Relief

Consumers association are granted standing by the ICC and special laws to bring *quasi-public* action aimed not at compensating damages, but at obtaining injunctive relief against wrongdoers. In this case, the goal is not an *ex post* compensation of damages for a group of consumers, but to solve an issue *pro futuro*, for consumers considered as a whole (Articles 139–140 of the ICC).

In the light of the practical experience with this action, we note that the system of government accreditation for consumer associations provided under the Article 140 ICC is not convincing. While 'court certification' concerns the conduct of the representative in a specific lawsuit, the government accreditation has resulted to be generic: the association is accredited as a 'fit representative', irrespective of the existence of an actual lawsuit.[20]

Before applying to the Court, consumer associations are required to pursue a conciliatory procedure before the Chamber of commerce (Article 140(2) ICC) or before an institution regulated by Article 141 ICC (see *infra* Sect. 4). The agreement is then filed with the court that renders it an enforceable title.

If the conciliatory procedure has a negative outcome (or if 60 days have expired), the association may apply to the Court to obtain a limited set of remedies. Precisely: (a) prohibition order against actions harming consumers' interests; (b) suitable measures to remedy or eliminate the harmful effects of any breaches; (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.[21]

The Court, when it grants the action, specifies a deadline for compliance with the order and, upon request by the plaintiff, sets a penalty between € 516 and € 1032 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 that such mechanism suffers from some shortcomings, including the limited standing, the limitations of consumer associations in funding

[20]Poncibò (2002), pp. 659–669. In particular, the Ministry of Economic Development keeps the list of the national consumers and users' associations.

Currently, 18 associations are registered in the said list.

[21]Article 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, 51–55.

the actions, and having the relevant legal expertise. About 25–30 cases have been reported since the adoption of this mechanisms in the ICC.[22]

3.3.2 The Action for the Efficiency of the Public Administration

The action for the efficiency of the public administration introduced with the Legislative Decree of 20 December 2009, no. 198, commonly referred to as "public class action", a somewhat misleading term, is another injunctive action. Under the extended name of 'collective action for the effectiveness of the action of government entities and the providers of public services', this action may be brought by holders of relevant identical interests, such as citizens, consumers, or users, or any association. The action aims at protecting consumers and users against violations of quality standards of public services, regardless of the public or private nature of the entities providing such services. This action is an implementation of the principles contained in Article 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'.

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 (Article 1(7) Leg. Decree 198/2009).

The actions for the efficiency of the public administration may be directed only to obtain the removal of the inefficiency in the public service caused by the relevant violation, and does not include compensation of damages (Article 1(6) Leg. Decree 198/2009). 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 (Articles 4(2), 1(2) Leg. Decree 198/2009).

Since the introduction of this action, a few cases have been decided by Italian administrative courts, which gave their interpretation of some of the rules governing such procedural tool.[23]

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

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

3.4 Individual Judicial Mechanisms

Especially when it comes to judicial mechanisms, a remark by a legal scholar in 1999 is still valid today: "In Italy there seems to be a sharp contrast between the law as it is written in the books and its operation in reality".[24] The Italian "machinery of justice" remains slow and inefficient[25] and the constant increase in the number of cases on each judge's docket list has, in time, created a large backlog.[26] This endless increase as well as the lack of resources (i.e. number of judges, court personnel, access to technology) seriously affects the average duration of civil proceedings, as well showed 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.[27]

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 litigating, notwithstanding the presence of the "loser pays all" rule in Article 91 of the Code of Civil Procedure. Accordingly, since any defendant is fully cognizant of this state of thing, the threat of litigation by an aggrieved consumer is often not credible. This, in turns, also means that since no or limited recoveries will be sought in the absence of some collective enforcement action, leading to a predictable and generalised under-deterrence of wrongdoings.

Here, we analyse small claims courts and legal aid as elements that may ease some of the obstacles for individual 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.[28] Within the Italian legal system, small claims (up to € 5000) are presently dealt with by the Justices of Peace (*Giudici di pace*) instead of ordinary courts (*Tribunali*), including consumer's claims.[29] Typically, small claims consumer cases involve issues of commercial law, private contracts, property rights and minor personal injuries.[30] Procedure before the Justice of Peace is designed to be simplified with little costs, no complex legal briefs

[24]Chiarloni (1999), p. 263. Resources on Italian civil procedure in English are Cappelletti and Perillo (1965); Varano (1997), pp. 657 ff.; Chiarloni (1999); Taruffo (2002); Colvin and Vigoriti (2008); Trocker and De Cristofaro (2010); Pailli and Trocker (2014), pp. 163–183.

[25]See Marchesi (2003).

[26]See Benvenuti (2014). See, also, Reynolds (2003), article 1. Accessed the 21st August 2007 at: http://www.bepress.com/gj/advances/vol3/iss2/art1.

[27]See Tarzia (2001), pp. 1 ss.; Didone (2002); Martino (2001), pp. 1068 ss.; Biavati (2012), p. 475.

[28]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.

[29]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).

[30]Lewis (2006), pp. 52–69.

and less strict rules on evidence. Assistance of a lawyer, otherwise compulsory in civil procedure, is not required if the value of the dispute is below € 1100. The *Giudice di pace* should simply hear the testimony of both the parties and third parties who have knowledge of the dispute, and either attempt to mediate a compromise or decide the case. Decision may be based on equitable principles, and not on a strict application of the law, if the value is below € 1100. Appeals against decision by small claim courts are heard by the *Tribunali* (the first-instance court under ordinary rules), which apply ordinary rules of civil procedures.[31] 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 consumer access to justice problem firstly because it reduces legal costs. Anyway, 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 in a more complex and structured procedure and rarely a consumer will be able to navigate through it without the assistance of a lawyer, thereby rising overall costs.

In consideration of 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 scheme consists in exemption by certain costs and taxes, with the State paying other costs and (diminished) lawyer's fees.[32] The State has the right of reimbursement and, where it does not recover the money from the loser party, it may claim repayment from the party eligible for legal aid, if the recipient wins the case or settlement of the dispute and receives at least six times the cost of the expenses incurred, or if cases are discontinued or barred. Applicants granted legal aid might 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 aid[33] is granted only to parties with a taxable income not exceeding Euro 9723.84, as shown on his or her latest tax return.[34] Such a scheme is so limited, and the criteria so stringent, that only a few and seriously indigent consumers may benefit from it.

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

[31] See Pailli and Trocker (2014).

[32] The State pays the following: (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.

[33] 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.

[34] The income threshold is adjusted every 2 years by order of the Ministry of Justice to take account of variations in ISTAT's consumer price index.

damage claimed is of substantial nature, thereby justifying the costs of defending an ordinary action.

3.5 *Collective Judicial Mechanisms: The Failed Promise of the* azione di classe

Before the enactment of the *azione di classe* in 2007–2009, the only option to litigate mass torts, beside participating as *parte civile* in criminal proceedings as discussed *supra* at Sect. 3.1, was through the institute of joinder of parties (*litisconsorzio*), which has been employed in a few cases, such as those concerning blood infection or asbestos. However, simple joinder—where each plaintiff becomes a formal part to the proceedings—is not either designed, nor effective to manage mass cases.

Discussions around the enactment of a proper collective judicial redress in Italy have been going on for years.[35] 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.[36] 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* starting from January 1, 2010.[37] In 2012 there was a further set of amendments,[38] lowering one of the admissibility thresholds. While in its original structure, the *azione di classe* was inadmissible if the group members' rights were not 'identical', these rights now need only to be 'homogeneous', a wider concept already developed by some courts under the previous law.

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: (1) contractual claims, including based on standard terms, against a company brought by consumers and users who are found in a similar situation; (2) homogeneous claims by end-consumers (*consumatori finali*) of a specific product or service against the relevant manufacturer/provider, even in the absence of a direct contractual relationship; (3) homogeneous claims for damages by consumers and users as a consequence of unfair business practices or violation of competition law.

[35]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. Poncibò (2015) and Caponi (2011), pp. 61–77.

[36]Legislative Decree no. 206 of 6 September 2005, OJ 8.10.20015 no. 235 ('Consumer Code'). Article 2(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.

[37]Article 49 of the Law 23 July 2009, no. 99, OJ 31.07.1999 no. 176.

[38]Article 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. The order denying admissibility may be challenged before the Court of Appeal. The *azione di classe* is admissible when: (1) it is not manifestly unfounded; (2) there is no conflict of interests; (3) the individual rights are homogeneous; (4) the plaintiff appears to be fit to represent the interests of the whole class. If the Court allows the action, it (a) defines the characteristics of the individual rights claimed within the proceedings; (b) sets terms and procedures for the most appropriate publicity; and (c) sets a mandatory term for expression of intention to participate by class members (the participation mechanism is strictly "opt-in"). Upon expiration of the deadline for participation, the Court hears the merits and, if granting the claim, specifies the amounts owed by the defendant to any individual consumer that joined the action. In 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 on punitive damages and/or other economic sanctions.

Beside a description of its normative structure, we briefly examine here how the *azione* fared in practice. First, numbers. Short of any official statistics, already a shortcoming, the *Osservatorio Antitrust* of the University of Trento maintains the more reliable source on the action brought according to Article 140-bis.[39] According to their data, as of January 2016, 58 actions were filed in the courts of first instance, out of which 10 were declared admissible and 18 inadmissible.[40]

In the vast majority of the proceedings scrutinized,[41] the promoter of the *azione di classe* were consumers' associations, with two standing out: Codacons (with four actions) and Altroconsumo (with eight actions). Individual or closed groups of consumers promoted only a few actions, as the first *azione di classe* to be successful on the merits, which involved a group of consumers who sought compensation against a travel agency for the damages suffered. Three other cases brought without consumer's association related to problems with water supply to certain well-defined areas, while one last action targeted a service company that failed to properly remove

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

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

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

the snow in the city of Florence, having among the plaintiff a member of the city council.

In most cases the court of first instance initially ruled for the inadmissibility of the action, while in a few of them, the court of appeal overturned the decision and declared the action admissible (sending it back to the first judge for the proceedings on the merits). Focusing on the reasoning given by these courts, appellate judges appear to be much more ready to understand and apply the *ratio* of the new law than first-instance judges.

There is also a handful of decisions by the Italian Supreme Court (*Corte di cassazione*), 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.[42] Among these, in 2015, submitting a matter to the attention of the First President of the Court for a possible decision of the issue by the Joint Chambers, not yet made, a simple chamber of the Supreme Court interestingly noted[43]:

> . . . 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 to consider a declaration of inadmissibility to have the effect of a decision and to be final. If, in fact *scire leges non est verba earum tenere, sed vim ac potestatem*, the Court deems it reductive to read in [. . .] art. 140 bis just an alternative procedural 'form' [. . .] A collective action, indeed, due to the increased economic and psychological pressure that may be exerted on the [traders], offers to the plaintiff an 'added value' with reference to an ordinary action: it is more persuasive, may more effectively bring compliance, and it is cheaper for those who participate to it. The court also notes that [. . .] The individual action, on the other hand] as noted has content, goals and effects that are very different from the collective action: has a different content, because it cannot promote the protection of "collective interests" [. . .]. It has different goals, because an individual action on consumer's rights leave 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.

[42]Cassazione civile sez. I, 21.11.2016, n. 23631*, Intesa San Paolo S.p.A. C. G.F. e altri*, (2016) Diritto & Giustizia (the order of the Court of Appeal declaring an *azione di classe* admissible cannot be appealed, because it does not end the proceedings, but on the contrary it gives instructions on its continuation); Cassazione civile sez. I, 14.06.2012, n. 9772, *Codacons C. Soc. Intesa Sanpaolo*, (2012) 9, I, Foro it. 2304 (the order of the Court of Appeal declaring an *azione di classe* inadmissible is merely procedural and cannot be appealed to the *Corte di cassazione*, because it does not prevent to file individual actions) *contrast* with Cassazione civile sez. III, 24.04.2015, n. 8433, *Codacons C. Soc. Bat Italia*, (2016) 2 Responsabilità Civile e Previdenza, 550 (the Third Chamber of the *Corte*, disagreeing with the First chamber, submits to the Joint Chambers the question of whether an order of the Court of Appeal declaring an *azione di classe* inadmissible can or cannot be appealed to the *Corte di cassazione*).

See also the *obiter* in Cass. n. 23631/2016 *supra*, disagreeing with the earlier decision of the First chamber (but different judges) n. 9772/2012. Along these lines, the chambers of the *Corte* disagree on whether a declaration of inadmissibility prevents to file again the same *azione di classe*.

[43]Cass. n. 8433/2015, *supra*.

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

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

As to the subject matter of the action, the areas with more than one actions (which means 2 or 3, not 10 or 20) have been banking practices, transportation, failure to provide public services (snow, water supply, schools' canteen) and diesel emissions (unfair practices). Two actions tried to stretch the boundaries of this judicial collective redress mechanism to reach securities claims, but unsuccessfully.[44] Single actions focused on damages from smoking, false advertising of medical vaccines, package travel, a telecommunication blackout and false advertisement of the storage space available on Samsung mobile devices.

Below we will examine a few of the more interesting cases so far.[45] In the first class action decided on the merits, the plaintiffs and the participants to the class (it is not clear how many) claimed that a travel agency breached their rights in relation to an "all-inclusive" travel package. In short, the consumers bought a package specifying certain facilities and services in Zanzibar, but once arrived, they have been hosted for 3 days in a different facility, of lesser quality. They have also spent the rest in the resort, which—however—was still under construction. The Tribunale di Napoli, after admitting the action, ordered the defendant to compensate each of the twelve members of the class admitted to the action a sum of € 1300.00 (in relation to a package whose cost was € 1950.00), and a cost order of total € 8850.00 (for all participants).[46] Soon thereafter, the travel agency filed for bankruptcy. The court adopted a quite restrictive notion of homogeneity, requiring that both the *an* and *quantum* of damages being identical/homogeneous. It, therefore, excluded from the class around thirty consumers who were hosted in a different structure because their damages were found not to be identical as to the *quantum* (and due to lack of evidence, that such facility was not adequate).

In the second class action to reach a decision on the merits, promoted by the reputed consumer association Altroconsumo, the Tribunale di Torino found that a

[44]One is Corte appello Firenze 15.07.2014, *Masciullo e altro C. Monte dei Paschi Siena* (2015) 9, I Foro it. 2778; see Iacomin (2015), pp. 89–95. The other is Tribunale di Genova, 13.06.2014, *Comitato Tutela del Risparmio v. Banca Carige Spa*, available at http://www.osservatorioantitrust.eu/it/wp-content/uploads/2014/06/Ord-Trib-GE_Comitato-c-Carige-2014.pdf (last visited 13 Jan 2017).

[45]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., Taruffo and La Torre (1997).

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

bank had in fact inserted unfair terms in its contracts, but rejected most of the 104 participants to the class due to a defect in their participation documents.[47] In fact, the Tribunale required each participant's signature to be authenticated by a public officer, but many did not do it.[48] In the end, thus, the Tribunale granted the claim of the three "named" plaintiffs and of only three out of 104 participants, ordering the bank to pay sums between € 50.00 and € 430.00 and legal costs of € 36,000.00. The Court of Appeal recently confirmed the decision of the Tribunale.[49]

Following the renowned diesel-gate scandal, Altroconsumo has launched two actions (Article 140-bis) against car manufacturers in Italy. The first is against FCA in Torino, where the Court of Appeal, with a very well-reasoned decision, overturned the Tribunale order of inadmissibility and directly admitted the action, mandating for the first-instance to carry out the merits phase.[50] Altroconsumo claims that it filed with the Tribunale di Torino 21,031 declarations of participation.

The second action, against Volkswagen, has been filed before the court of Venezia. Once again, at first the Tribunale declared the action inadmissible.[51] The judge rejected, in a well-written opinion, all defences raised by Volkswagen, but then (mistakenly) concluded that the evidence submitted by the plaintiff were not enough to support the claim, and thus declared the action inadmissible as manifestly ungrounded. The Court of Appeal, in an equally good decision, following the Corte d'appello di Torino's decision in Altroconsumo/FCA, criticized the Tribunale for confusing the admissibility and the merits phase, admitted the group, and referred the parties back to the Tribunale for the continuation of the proceedings on the merits.[52]

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

[48]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.

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

[50]Corte d'appello di Torino, 17.11.2015, Altroconsumo v. FCA (2016) I Foro it., 1017.

[51]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).

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

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

4 Non-judicial Mechanisms

In recent 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 as mandatory conciliation for disputes between users and telecommunication providers (*Corecom*), the voluntary scheme of the Financial and Bank Arbiter (*ABF*),[53] a Bank Ombudsman (*Giurì Bancario*) and the conciliation attempt provided by Article 140 ICC (see *supra* Sect. 3.3). Arbitration of consumer's matters is not encouraged and is generally not legally admissible.[54]

The law 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 (Article 1(1) (a) and (b)).

Following the guidelines and the language of the EU Directive (52/2008/EU), the same Article 1, in its para. 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 of Italian mediation law is EU-derived, the country went further by implementing a mechanism of mandatory pre-trial mediation scheme designed to operate in an extensive area of civil and commercial matters (insurance, finance and banking contracts, property law, medical malpractice,[55] tenancy, wills and

[53]Finocchiario (2012); see, also, Giovannucci Orlandi (2009), pp. 1229 ff.; Marinaro (2013), p. 105.

[54]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 Micklitz and Cafaggi (2008), pp. 391, 400–401 for the treatment of arbitration clauses in consumer contracts in some Member States.

[55]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).

successions, and others).[56] As to numbers[57] (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%): 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 bank matters, of whose 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, success rate is higher (over 30%) when the matter at stake is valued between € 1000 and € 10,000, and gradually decreasing after that to 7–9% when the matter is valued € 500,000 or more.

Some have criticised the legislator's approach to consider mediation mainly as a tool to reduce courts' caseload and thereby cut the duration of typical court proceedings.[58] At the same time, in a system that is plagued with heavy delay and backlogs in court, mandatory schemes have the potential of facilitating a cultural shift and, in the end, improving access to justice and ensuring that disputants are able to resolve their matters within a reasonable time. Still, the road is a long one, particularly in countries, such as Italy, where the right to sue is seen as the right to a judge and a decision of the judge and where the emphasis traditionally placed on judicial adjudication as the "normal" way of disposing of civil controversies is strengthened by Article 24 of the Constitution, which guarantees that individuals have a right of action and defence in court for the protection of their rights and legitimate interests.[59] As seen *supra* in relation to the *azione di classe*, to be successful, the mediation scheme requires the support of the legal profession and the judiciary, and above all it needs to be accompanied by a shift in the prevailing dispute resolution culture.

Several statutes, concerned with the protection of consumers, are supporting experiments with various other forms of ADR services through resort to institutions like the Banking Ombudsman set up by private institutions or to conciliation/arbitration

[56]The scheme is currently regulated by the law of August 9, 2013, no. 98. See Pailli and Trocker (2013), pp. 75–102. 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.

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

[58]Lupoi (2012), p. 41.

[59]Notably, the Court of Justice of the EU in Joined cases C-317/08, C-318/08, C-319/08 and C-320/08, *Alassini and others*, [2010] ECR I-2213, noted that mandatory pre-trial mediation does not necessarily contrast with the principle of access to courts, recognizing that : "no less restrictive alternative to the implementation *of a mandatory procedure exists*, since the introduction of an out-of-court settlement procedure *which is merely optional is not as efficient* a means of achieving those objective" (par. 65).

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 and Internet services provider, consumers (and traders) must file a complaint with the regional Corecom, where an attempt to 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 (usually small) sum of money 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.[60] Some Corecoms are switching their platforms online. 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 settling some 3174 disputes in the years 2013–2016.[61]

Notwithstanding the numerous legislative initiatives, the development of a true ADR culture still faces in Italy, as it does in much of Continental Europe, significant restraining factors; above all, the widespread perception of the intervention by the judge as the normal way of disposing of civil controversies.

The last in time legislative addition is the Legislative Decree of 6 August 2015, no. 130, implemented Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes.[62] The Decree included new provisions (Article 141 ff.) in the ICC establishing a homogeneous legal framework for consumer ADR with a view of 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 and not mandatory (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 limitation is interrupted avoiding the risk that participating to the ADR procedure may result in a forfeiture of consumer's rights. It is expressly stated in the Decree that certain earlier provisions, such as the mandatory mediation requirement of the Legislative Decree 28/2010 discussed above, prevail on the new voluntary scheme. Although it is yet too early to assess the impact of the new mechanism, it is noteworthy that the Decree provides for an extensive collection of statistic data by the Government, allowing close monitoring of the development of the new scheme.

[60]See, e.g., the Annual Report prepared by the ICA for 2016, available at https://www.agcom.it/relazioni-annuali.

[61]See the details at the official website at http://www.autorita.energia.it/it/consumatori/conciliazione.htm.

[62]See Desiato (2016), p. 1793B.

5 Conclusions

This paper notes the central role of the ICA, but also the fragmentation that characterises the public enforcement of consumer rights in Italy. The Italian regulatory system relies on a diffuse set of regulators, rather than on a centralized bureaucracy for the effectuation of its substantive aims. Nevertheless, the picture is so fragmented that this may undermine the effectiveness of the various tools. Some sort of rationalisation is, thus, necessary. In this respect, a positive development recently occurred when the ICA gained 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'. 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.[63]

On the other side, the level of the private enforcement is not satisfactory. The new action for the judicial collective redress of consumers (i.e., *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). The analysis confirms the shortcomings of a system where the main actors are, in practice, consumer associations., Italian lawyers do not consider themselves as entrepreneurs and, thus, the Italian legal profession, one of the largest in the EU, is not effectively promoting actions for damages in consumer and competition law. No other private actor has emerged. As a result, private enforcement remains underdeveloped, confirming the traditional preference of the Italian legal system for public enforcement of consumer protection.

Equally importantly, we underlined the overlap between the public and the private actors and tools in enforcing consumer rights and collective interests (e.g., *quasi-public* actions). Consequently, the article stresses the need of further understanding and developing such emerging integration of the enforcement regimes. For example, the ICA's new competence on unfair terms in consumer contract grounds on the idea of empowering public agencies to enforce private law rights for the benefit of the consumers.[64] Another example of the relationship between the enforcement regimes consists in follow-on actions, that are still rare in Italy: the ICA is mainly issuing administrative pecuniary sanctions (fines) against the wrongdoers to enforce some of the rights granted by the Consumer Code. Follow-on

[63] Article 23(12) Legislative Decree 6 July 2012, No. 95.

[64] 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.

individual or collective actions by consumers claiming for damages are rarely following ICA's decisions.[65] The same applies when consumers have suffered a damage for a breach of Competition Law sanctioned by the ICA.[66]

Amidst a not very encouraging picture, the recent two class actions filed in the diesel gate scandal, both drawing a larger participation by (allegedly) injured consumers, seem to cautiously open the way for further promising developments.

Finally, the article examines the increasing interest for alternative resolution mechanisms in consumer disputes, noting certain successful experiments in the field of telecommunications, but an overall lack of cultural confidence and of judicial alternatives to strengthen the consensual role of ADR.

To conclude, the mix of enforcement instruments is here to stay, challenging Italian policymakers and legal scholars to find the right balance between the different instruments, and, also important, to integrate them by designing a coherent strategy, with the aim of ensuring an effective enforcement of consumer rights.

References

Battelli E (2014a) L'intervento dell'autorità antitrust contro le clausole vessatorie e le prospettive di un sistema integrato di protezione dei consumatori. In: Europa e Diritto Privato, fasc. 1, p 207

Battelli E (2014b) L'attuazione della direttiva sui consumatori tra rimodernizzazione di vecchie categorie e "nuovi" diritti. In: Europa e Diritto Privato, fasc. 3, p 927

Benvenuti S (2014) The machinery of Italian civil justice. In: De Luca A, Simoni A (eds) Fundamentals of Italian law. Giuffrè, Milan

Biavati P (2012) Osservazioni sulla ragionevole durata del processo di cognizione. In: Rivista trimestrale di diritto e procedura civile, fasc. 2, p 475

Burbank S, Farhang S, Kritzer H (2011) Private enforcement of statutory and administrative law in the United States. Int'l Lis 3–4:153 ss

Buxbaum H (2001) The private attorney general in a global age: public interest in private international antitrust litigation. Yale Law J XXVI:219

Caponi R (2011) Collective redress in Europe: current developments of "class action" suits in Italy. ZZPInt 16:61–77

Cappelletti M, Perillo J (1965) Civil procedure in Italy. Martinus Nijhoff, The Hague

Chiarloni S (1999) Civil justice and its paradoxes: an Italian perspective. In: Zuckerman A (ed) Civil justice in crisis, comparative perspectives of civil procedure. OUP, Oxford, p 263

Chiarloni S, Fiorio P (eds) (2005) Consumatori e Processo. La tutela degli interessi collettivi dei consumatori, Atti del convegno tenutosi a Torino il 28–29 Maggio 2004, Torino

Coggiola N, Graziadei M (2014) The Italian 'Eternit Trial': litigating massive asbestos damage in a criminal court. In: Van Boom WH, Wagner G (eds) Mass torts in Europe. Cases and reflections, tort and insurance law, vol 34. De Gruyter, Berlin, p 29

Colvin A, Vigoriti V (2008) Italy. In: Layton A, Mercer H (eds) European civil practice, 2nd edn. Thompson, Toronto

[65] See *supra* Sect. 3.1.

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

Desiato O (2016) 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: Responsabilita' Civile e Previdenza, fasc. 5, p 1793B
Didone A (2002) Equa riparazione e ragionevole durata del giusto processo. Giuffrè, Milano
Finocchiario G (2012) L'arbitro bancario finanziario tra funzioni di tutela e di vigilanza. Giuffrè, Milano
Giovannucci Orlandi C (2009) La normativa italiana in materia di conciliazione convenzionale. In: Rubino Sammartano M (ed) Arbitrato, ADR, Conciliazione, Zanichelli, Bologna, pp 1229 ff
Iacomin L (2015) Azione di classe e tutela degli azionisti. Giur Ital 1:89–95
Lewis P (2006) The consumer's court? Revisiting the theory of the small claim procedure. Civ Justice Q 25:52–69
Lupoi MA (2012) Recent developments in Italian civil procedure law. Civil Proced Rev 3:41
Marchesi D (2003) Litiganti, avvocati e magistrati. Diritto ed economia del processo civile. Il Mulino, Bologna
Marinaro M (2013) Arbitrato bancario e Consob senza avvocato. In: Guida al diritto, p 105
Martino R (2001) Sul diritto all'equa riparazione in caso di violazione del termine ragionevole del processo (legge 24 marzo 2001, n. 89). In: Rivista di diritto processuale, pp 1068 ss
Micklitz H, Cafaggi F (2008) Collective enforcement of consumer law: a framework for comparative assessment. Eur Rev Priv Law 16:391, 400–401
Pailli G, Trocker N (2013) Italy's new law on mediation in civil and commercial matters. ZZPInt 18:75–102
Pailli G, Trocker N (2014) Italian civil procedure. In: De Luca A, Simoni A (eds) Fundamentals of Italian law. Giuffrè, Milan, pp 163–183
Pasa B, Weitenberg M (2007) Improved consumer protection through new codification? – First comments on the new Italian consumer code. In: Howells G et al (eds) Yearbook of consumer law. Ashgate, Aldershot, pp 295–308
Poncibò C (2002) Le azioni di interesse collettivo per la tutela dei consumatori. Riv Crit Dir Priv 4:659–669
Poncibò C (2015) Forum shopping and consumer collective redress in action: the Costa Concordia Case. In: Lein E, Fairgrieve D, Otero Crespo M, Smith V (eds) Collective redress in Europe – why and how? BIICL, London
Reynolds AC (2003) Dimensions of justice in Italy: a practical review. Global Jurist Adv 3(2)
Taruffo M (2002) Civil procedure and the path of a civil case. In: Lena J, Mattei U (eds) Introduction to Italian law. Kluwer Law International, Alphen aan den Rijn
Taruffo M, La Torre M (1997) Precedent in Italy. In: MacCormick DN, Summers RS (eds) Interpreting precedents: a comparative study. Dartmouth Publishing, Aldershot
Tarzia G (2001) L'art. 111 Cost. e le garanzie europee del processo civile. In: Rivista di diritto processuale, pp 1 ss
Trocker N, De Cristofaro M (eds) (2010) Civil justice in Italy. Jigakusha, Tokyo
Varano V (1997) Civil procedure reform in Italy. Am J Comp Law 45:657 ff