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I. INTRODUCTION: THE MAIN FEATURES OF THE ITALIAN CLASS ACTION SYSTEM

A. Object

As from January 1, 2010, a new procedural tool for the protection of consumers, the class action, is now available in the Italian legal system. Class actions constitute a new instrument consumers can rely on for the safeguard of certain individual rights already enforceable with individual lawsuits before courts. Thus, class actions are an alternative, rather than a substitute, to the existing judicial remedies available to consumers, which are by no means affected by the entry into force of the class action.

The Italian legislation on class actions was initially sketched out in the 2006 *Codice del Consumo* (hereafter "Consumer Act") and then largely reshaped in July 2009 by Law n. 99/09 amending the Consumer Act. While the new rules apply from January 1, a partial retroactivity regime allows for class actions to be brought forward in respect to events occurred on or after August 16, 2009 (the actual date of entry into force of Law n. 99/09).

The matters which can trigger a class action are: i) contractual liability of an undertaking stemming from application of disproportionate obligations excessively bearing on the consumer party; ii) tort liability for damages caused to consumers by defaulting products; and iii) liability for damages suffered by consumers as a consequence of an undertaking's unfair commercial practices or anticompetitive conducts.

Pursuant to the new regime, a single complainant is now entitled to lodge, on behalf of a group of individuals sharing an identical position and the same interest vis-à-vis a given undertaking, a civil lawsuit against the same undertaking for compensation of damages caused as a consequence of unlawful conducts impacting on consumers.

It is important to note that, according to general rules, class actions can only aim to recover actual damages suffered by consumers, punitive damages being expressly non-pursuable in the Italian legal system.

B. Procedure

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Competence to hear the class action lies with the lower civil court (the "Tribunale") of the capital city of the region where the defendant has its registered office, regardless of the amount of the claim.

Class actions are subject to a preliminary admissibility assessment by the competent civil court, which can reject the claim when: i) the same is manifestly unfounded; ii) a conflict of interests exists between the class action members; iii) the rights and claims of the class members are not identical; and iv) the complainant does not seem able to adequately pursue the class interest throughout the whole proceeding (for instance, where it may lack the organizational and financial means necessary to adequately support the action).

Once admitted by the court, class actions shall be duly publicized so as to allow for interested consumers to "opt-in" within the set deadline by adhering to the collective claim, which entails the waiver of any statutory rights to lodge a stand-alone lawsuit on the same claims brought forward in the class action. After the "opt-in" phase, the proceeding follows the ordinary trial procedure before the competent court, which shall render—based on the evidence submitted by the parties—a judgment either rejecting the action, or condemning the defendant to pay damages to the class action members. Transaction agreements between class members and the defendant are possible throughout the proceeding; however, these agreements are exclusively binding on those class members expressly accepting them.

C. A Key Issue: The Admissibility of the Class Action and the "Class Interest"

The court assessment of the admissibility of the class action is a key procedural step on which plaintiffs and defendants are expected to vigorously debate, provided that a finding of inadmissibility by the court would preclude from the outset the class action proceeding.

The most complex admissibility test has to do with the existence of identical rights within the consumers' class as represented by the class action, as regards both the title of their claim and the type of damage suffered. Indeed, under the Consumer Act, class actions can take place only when they aim to safeguard positions which are identical for a whole class of consumers, so that a homogeneous "class interest" can be identified.

Accordingly, in order to rule class actions as admissible, courts are called to verify, on a case-by-case basis, that the class lawsuit actually endorses the identical, homogeneous interest of a whole consumer group. Should the court conclude that the class action is not underpinned by identical rights of all consumers within the class, the class action must be rejected by the court as inadmissible in its entirety. It is apparent, here, the difference between the Italian system and other legal systems (for instance the United States) which allow some degree of differentiation, within the same class action, among consumers' individual rights, which are then grouped in categories.

II. CLASS ACTIONS AIMED AT RECOVERING DAMAGES SUFFERED BY CONSUMERS AS A CONSEQUENCE OF AN UNDERTAKING'S ANTICOMPETITIVE CONDUCTS OR UNFAIR COMMERCIAL PRACTICES

A. The Scope for Class Actions in the Enforcement of Antitrust and Unfair Commercial Practices Provisions

The possibility for consumers to employ class actions to recover damages caused them by anticompetitive or unfair commercial practices opens new perspectives for antitrust and consumer law enforcement in Italy, an area traditionally subject to the initiative of the public administration,

namely the Italian Competition Authority ("ICA") which is competent to enforce EC and national antitrust rules as well as the provisions on unfair commercial practices provided for in the Consumer Act.

It is expected that class actions will focus on unlawful practices which have immediate repercussions on consumers' welfare and are, as such, more immediately perceived as damaging.

This is the case, for example, of price-fixing cartels at the retail level, or abuses of dominance consisting in exploitative conducts (for instance, excessive pricing, unlawful tie-ins, etc.) directly affecting consumers in their everyday life, as is the case with utilities and telecommunications, or retail banking and insurance services. As regards unfair commercial practices, the provision in the Consumer Act of a "black list" of prohibited conducts (among which, for example, are bundling and tie-in of unrelated products, unsolicited activation of pay services, and unilateral worsening of contractual conditions applied to consumers) as well as the more immediate link between the conduct and the damage caused to customers (as opposed to antitrust infringements, where the damage suffered by customers is sometimes hard to identify) should facilitate the diffusion of class actions.

That said, it is to be seen whether the prospect of success of class actions in antitrust damage claims might be undermined by certain procedural gaps which have, so far, limited the development of antitrust private enforcement before Italian civil courts; namely, burden of proof, access to evidence, and quantification of damages.

B. The Burden of Proof in Class Actions Related to Antitrust Private Enforcement

A procedural issue which has been arising throughout Europe in the context of actions for the recovery of damages caused by anticompetitive practices (cartels and abuses of dominance), concerns the burden for plaintiffs to prove the existence of a causation link between the unlawful conduct of the undertaking and the damage suffered by the plaintiffs, absent the availability of discovery orders in Italian court proceedings.

As with individual damage actions, the burden of proof in class actions is regulated by the general rules of the Italian Civil Code (art. 2697) according to which "it is up to the plaintiff to prove the foundation of its claims."

Yet, the burden of proving a causation link between conduct and damage weighs differently with respect to collective antitrust damage claims, as opposed to the other domains in which the class actions may be employed, i.e. a manufacturer's liability for faulty products, an undertaking's liability for disproportionate contractual obligations, or unfair commercial practices imposed on consumers.

In the latter areas, it is the substantive law (tort, contractual, and consumer protection law respectively) which qualifies a conduct as unlawful and liable to directly affect consumers. Thus, the proof of the causation link between the undertaking's conduct and the damage caused to the consumers is an immediate consequence of the finding of a breach of law, given that the law aims to protect consumers' rights in the first place.

Conversely, because antitrust rules aim primarily to safeguard markets and to protect consumers by ensuring that market competition is sound, in antitrust damage claims a specific and separate legal burden of proof bears on the plaintiff to demonstrate that an undertaking's conduct

is not only in breach of art. 101 or 102 of the EC Treaty (or corresponding national rules), but has also caused an actual damage to the consumers who have purchased the goods or services concerned by the antitrust violation. Often, the judicial proof of the actual damage suffered by consumers bears on complex economic analysis arguments, which courts are generally unfamiliar with. Additionally, being unable to plead the court for the issuing of discovery orders, consumers are left with little, if any, chance to access documental evidence to substantiate their claims.

The class action reform does not add any elements to resolve this issue of the burden of proof in private antitrust damage actions. An important attempt to bypass the described procedural shortcomings has been made by the Italian Supreme Court, which in a number of judgments (no. 2305/2007, and more recently no. 3638/2009) has stated that the decisions adopted by the ICA ascertaining the liability of an undertaking for antitrust infringements could be regarded as "privileged evidence" of the liability of the same undertaking for damages caused to consumers, sufficient as such for an inversion of the burden of proof between the parties in civil court trials, save in any case the successful rebuttal of proof by the defendant. Based on this case law, consumers should now be able to rely more heavily on the ICA's findings of an infringement in order to prove a causation link between the unlawful conduct acknowledged by the ICA and the damage suffered by them, which in any case still has to be fully proved in its exact amount in the context of the civil trial.

In a different vein, probably acknowledging the difficulties consumers may face in starting damage actions against undertakings, the new provisions of the Consumer Act (art. 140 *bis* para. 3) expressly provide the possibility for the court to stay the class action proceedings and not to decide on the admissibility of the class action, until the conclusion of either a pending investigation by an independent authority (the ICA or the European Commission) or an appeal against an independent authority's decision before the competent courts (the Italian administrative courts or the European courts), when such investigation concerns the same findings challenged by the class action.

It seems that such provision, aside being compliant with art. 16 of EC Regulation 1/2003 (which prevents national courts from adopting judgments that might clash with a Commission's decision ascertaining a violation of art. 101/102 of the EC Treaty), tends to favor "follow-on" class actions bearing as much as possible—to the benefit of consumers—on the findings of the administrative investigation, both with respect to the admissibility of the claim and the evidence of the causation link between anticompetitive conduct and damage.

C. The Interplay Between Public and Private Enforcement of Antitrust and Unfair Commercial Practices Provisions

Because of the above mentioned procedural shortcomings impacting on the private enforcement system, the activity of the ICA as public enforcer—albeit independent from the activity of courts—will be in all likelihood the basis for most class actions for recovery of damages stemming from antitrust infringements or unfair commercial practices. Indeed, because of the weight of the ICA's precedent decisions as evidence in court trials, the successful launch of class actions will be facilitated whenever a previous decision of the public agency has already ascertained a violation of the law by the defendant in the court proceeding.

For companies involved in antitrust investigations before the ICA or the Commission that are particularly exposed to the risk of follow-on class actions, it can be crucial to assess whether

cooperation with the antitrust agencies during the administrative proceeding may affect their exposure to follow-on consumers class actions.

A tool which might limit the risk for companies of being exposed to follow-on class actions relies on the possibility, provided for by EC Regulation 1/2003 and by the Italian antitrust law (art. 14 *ter* of Law n. 287/90), to offer—prior to the conclusion of the antitrust investigation—commitments able to remedy the unlawful conduct identified by the investigating antitrust authority.[2] Apart from avoiding fines by the ICA at the end of the administrative proceeding, a commitment decision would benefit the concerned undertakings as it would deprive potential class action plaintiffs of a formally binding infringement decision they could rely on as privileged evidence in court to substantiate their damage claims.

Conversely, an undertaking's choice to cooperate with the Commission or the ICA for the purpose of benefiting from immunity or fine reductions pursuant to the EC or the Italian leniency programs, while fully binding in the administrative sphere, does not extend to the private enforcement sphere. Here, the risk remains that class action members can rely on an infringement decision, which is addressed to all undertakings involved in the investigation, to pursue damages, *inter alia*, against those companies that benefited from immunity or fine reduction pursuant to the leniency program. Accordingly, these undertakings would still be exposed to damage actions in which their civil liability could be proved on the basis of the evidence of the wrongdoing offered by them in the context of the antitrust proceeding.

On this regard, a debate is currently ongoing at EC level in order to strike a balance between the public interest to unveil cartels through the incentive of leniency treatments for companies, and the interest to boost antitrust private enforcement. For this purpose, in the past the European Commission has put forward various regulatory proposals, such as excluding the joint liability of the "whistleblower" as regards the damages caused by the other undertakings sanctioned for taking part in the cartel, or limiting the amount of its civil liability proportionally to the relevant product market share it retains. Another proposal concerns the possibility of limiting the disclosure of leniency-related documents to private third parties to prevent their employment in follow-on damage actions.[3]

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[2] Art. 5 and 9 of EC Regulation n. 1/2003 and corresponding national legislation entitle the ICA to close an investigation concerning a violation of, respectively, art. 81or 82 of the EC Treaty and art. 3 or 4 of Law n. 287/90 without formally acknowledging the existence of a violation, by adopting a decision which both upholds and makes binding suitable behavioral and/or structural commitments offered by the concerned undertaking. A similar form of commitment decision is also applicable to investigations by the ICA relating to unfair commercial practices under the Consumer Act. However, it should be borne in mind that this avenue is accessible only in the event of antitrust infringements which do not constitute hard-core violations (such as cartels).

[3] Currently, the Commission is working on a draft directive aiming to harmonize national civil procedures and facilitate consumer actions against undertakings liable of violations to art. 81 and 82 EC Treaty. Although the legislative proposal was almost finalized in December 2009, newly appointed Competition Commissioner Almunia has recently stated that the adoption of any harmonization measure will require careful thinking and the full involvement of the European Parliament to ensure a balance between the diverging interests at stake as well as to avoid a spurring of litigation which might end up not serving consumers' interests. The Commission's slowdown on the adoption of harmonizing rules in the domain of antitrust private enforcement comes at a time when the EC Member States are taking different stances on dealing with antitrust damage actions, with certain countries, like Italy, pushing ahead with new rules on class actions, and others either discussing reforms in the same direction (France), or maintaining a cold attitude towards regulation (Germany).

III. CONCLUSIONS

The introduction of the class action in the Italian legal system appears to be a positive step forward in the protection of consumer rights in Italy.

The possibility for large numbers of consumers to team together in suing companies for recovery of damages originated by unlawful practices is expected to work as a catalyst for "imploded" litigation to emerge, as both the scope of the interests at stake, and the financial economies of scale achievable through class lawsuits would make it easier, and at the same time more profitable, for consumers to pursue this kind of collective claims before courts. The constituency of consumers' associations would play, at least in the initial phase, a key role in bringing forward the class actions, and this would likely be reflected in an ever-growing importance of consumers' associations as policy stakeholders.

For companies, the costs of being involved in class litigation might go beyond the financial costs they would have to bear as a result of an adverse class judgment, as they would be facing high reputation damages considering the high level of publicity required by the Consumer Act to ensure that affected consumers are fully aware of their right to join the class action.

Concerning the scope of application in the antitrust sector, the Italian class action appears to bring little to by-pass a number of procedural issues that have, so far, limited the development of private antitrust enforcement in several continental legal systems, including Italy. Yet, in the broader picture, the enhanced interplay between private and public enforcement should contribute to establishing a more integrated and virtuous policy system, to the ultimate benefit of both Italian markets and consumers.