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EUROPEAN VS. AMERICAN CLASS ACTION: DISCREPANCY IN LAW AND ECONOMICS PERSPECTIVE!

Anna Bitetto

SUMMARY:

This article moves on considering class action as a reasonable chance to obtain fair protection of a right or reparation of an injustice whenever the costs of an individual action are forbidding.
The essay, however, takes a different standpoint, underlining all main problems in introducing class action in Europe, the different experiences in Germany, Italy, Spain and France and the need of European Commission to pursue through class actions an end to illegal activities, a reinforcement of deterrence, a chance of obtaining a legal remedy, a compensation of victims for suffered damages.
Therefore, we look at the new Directive (EU) 2020/1828 of the European Parliament and of the Council of 25th November 2020 on representative actions as a remedy to ensure that at Union and national level at least one effective and efficient procedural mechanism for representative actions, for injunctive measures and for redress measures is available to consumers in all Member States.
In this scenario, a comparison with American legal experience shows how the absence of legal procedures: a) the pactum de quota litis, b) the self-bearing of dispute costs without moving them to the losing party; c) the punitive damages; d) the investigation before examining the evidence under discussion; e) the decision coming from a jury, deprives the willingness for class actions in UE.
Finally, the perspective of law and economics literature on class actions demonstrates the success of procedure in resolving the crucial issue of risk-bearing when litigation costs appear prohibitive for individuals who decide to act alone.

I. CLASS ACTIONS IN EUROPE AMONG PROBLEMS AND REQUIREMENTS

Considering the main problems of introducing class actions in Europe according to our recent past, the concept of representation without authorization stands out. There is a cultural problem that lurks in the old Continent and considers the enforcement of public interest[1] an unbreakable and exclusive privilege of each State.

Collective actions use the procedural tool of representation without a given authorization in order to overcome the critical issue of obtaining an open consent from subjects belonging to a class. However, the above-mentioned ploy is blamed as unconstitutional for its undue subtraction of private autonomy and because it is unfamiliar to continental legal traditions.

The danger of allowing representation with an implied authorization is associated with a difficult identification of class members and, on the other hand, with the proof of belonging

[1] See C. I. Nagy, *Comparative collective redress from a law and economics perspective: without risk there is no reward!*, 19 *Columbia J Eur Law* 469 (2013).

to the group. Last but not least, representation without authorization is being opposed because of the high probability of an exponential growth in quarrels for petty damages[2].

In the Spanish experience, it emerged the idea that group representative actions, after an initial reluctance to extend the effects of *res iudicata* to members of a non-party group and even without a formal authorization, respected the principle of a fair trial whenever class members were nevertheless guaranteed to exercise a right to renounce to *decisum*[3].

In the French tradition there is a principle under which no one can take a legal action without a power of attorney, an addition to claiming that the plaintiff should have a legitimate interest in the dispute, a very direct and personal interest, and the interested party has to be identified and represented by a lawyer appointed during the proceedings[4].

In the Italian legal system, the last one to have recognized the right of citizenship during a trial for a group reparation defense[5], the compliance to law 31/2019, like the consumer class action, revolves around *opt-in* mechanism and the assessment of class members' rights is divided into two steps[6]: 1) the first one after the acceptance declaration but prior to issuing a sentence; 2) the second one after the outcome of the sentence accepting the proposer's request[7].

In German history, class actions in an *opt-out system* collide with the right to take a legal action and dispose of one's rights, enforcing or not judicial dictates. It is precisely the silence, considered an implicit acceptance of class participation, which represents a serious violation of the right to dispose of one's own legal actions and to be a master-promoter of protecting one's interests[8].

However, European objections have been clouded over time by judicial evaluations that have shown how innumerable small claims without class actions remained with no legal protection and how group actions, on the contrary, were able to confer substantial benefits to participants, including the elimination of the risk of bearing the cost of a dispute every time the group loses a lawsuit. As a result of maintaining private autonomy, not even cracked by an opt-out system, since there is always a chance for a group member to sign a declaration of non-partecipation in the class, over time the right to dispose has thus partially emerged in the form of protecting the right of access to justice[9]. It was precisely to consider the access to justice equal for all people as a fundamental constitutional right that led the European

[2] For a detailed analysis, see C. I. Nagy, *Le débat sur l'action collective en Europe: ils n'ont rien appris, ni rien oublié?,*in *Revue internationale de droit comparé*, 2015, p. 941 ss.

[3] L.C. Piñeiro, *Las acciones colectivas y su eficacia extraterritorial,* in *Problemas de recepción y transplante de las class actions en Europa*, Santiago de Compostela, 2009, p. 661ss.

[4] V. E. Poisson, C.Fléchet, *Proposed reforms in France in Representative actions and proposed reforms in the European Union*, in *World class actions: a guide to group and representative actions around the globe*, Oxford, 2012, p. 166.

[5] See M. Pastore, Class action *e modelli di tutela collettiva*, in *Seminari di diritto privato comparato*, P. Pardolesi (a cura di), Cacucci, Bari, 2011, p. 114.

[6] On the argument, G. Ponzanelli, *La nuova class action*, in *Danno e resp.*, 2029, p. 306

[7] See: R. Pardolesi, *La classe in azione. Finalmente*, in *Danno e resp.*, 2019, p.305; P.G. Monateri, *La riforma italiana della class action tra norme speciali processuali e ricostruzione della tutela civilistica*, *ibid.*, p. 312,.

[8] A. Stadler, *Mass tort litigation*, in *R- Stürner, Comparative studies on business tort litigation*, Mohr Siebeck, Tübingen, 2011, p. 163 ss.

[9] S. Issacharoff , GP. Miller, *Will aggregate litigation come to Europe,* in *The law and economics of class action in Europe: lessons from America*, G. Backhaus, A. Cassone, GB. Ramello (a cura di), Cheltenham, 2012, p. 60.

Court of Human Rights to rule in favor of representation without authorization as early as 1986 in the well-known case *Lithgow v. United Kingdom*, regarding a British expropriation of a joint stock company, that allowed all shareholders to obtain compensation for damages that would have been precluded by the number of individual actions that could have been proposed[10]. At that time, it was stated that pursuing a legitimate aim (such as avoiding a proliferation of individual actions by shareholders, in cases of large-scale nationalization measures) seemed to be a more than reasonable measure, given the relation between the means employed and the objective pursued[11].

This jurisdicional line was confirmed by the European Court of Human Rights' decision as requested by the German Federal Constitutional Court in the *Wenderburg* case, where the previous *Lithgow* was explicitly referred to, in order to rule that it is appropriate to keep plaintiffs from individually appearing before courts in proceedings which involve decisions on group protection, when it is not possible or extremely expensive to listen to all individuals in the class: it is to say that, if justified, representation without authorization can guarantee the constitutional right to access to justice that would otherwise be denied[12].

After all, the tool of group actions in the nineties had widely spred in French trade union law in cases of appeal against collective dismissals which allowed each worker to give up the proceedings after being informed of a legal action taken by the trade union association. Recognizing the opportunity for workers to be defended against unjustified dismissals and obtain compensation for damages, as well as proving how the effects of a *res iudicata* could be extended only to members of groups that had obtained compensation for suffering injustices, have shown the constitutional aspect of group actions[13].

In our country, the law identifies legitimate active subjects in: *a*) each holder of «equal individual rights» among which workers may be included, as well as *b*) each «organization» or «non-profit association whose statutory objectives include defense of the aforementioned rights», among which trade unions can be abstractly counted, provided that they are «registered in a public list established by the Ministry of Justice». In particular, it seems that active legitimation of collective subjects has to be identified as an assumption of legal substitution, since in court they assert equal individual rights which class members clearly hold. The class action could be for trade unions an extremely useful legal tool to support their action if they want to protect workers from any illegal multiple serial offenses, committed by employers or customers using *algorithmic management* devices, and obtain as well, besides assessing responsibility, a sentence to pay compensation for damages or refunds[14]

The fact that only dispute benefits and lawsuit results are extended to group members who participate in the action has made it possible to reconcile the European constitutional tradition and the need to guarantee access to justice by widespread compensation petitions

[10] Case no. 9405/81, *Lithgow v. United Kingdom*, 8 July 1986, [1986] 8 *ECHR* 329.

[11] For a detailed presentation see S.I. Strong, *Cross-border collective redress in the European Union: constitutional rights in the face of the Brussels I regulation*, in *Arizona State Law Journal*, 2013, p. 233 ss.

[12]Case no. 7163/01, *Wenderburg v. Germany*, 6 febbraio 2003, [2003] *ECHR* 353.

[13] V. E. Poisson, C. Flechet, *Proposed reforms in France in Representative actions and proposed reforms in the European Union, World class actions*, p. 166

[14] See G. Gaudio, Algorithmic management, sindacato e tutela giurisdizionale, Diritto delle Relazioni Industriali, fasc.1, 2022, 30ss.

of little economic value[15]. Regarding criticisms to class actions due to the effort of identifying who is entitled to obtain compensation for damages, of verifying whether the opt-in system guarantees a reallocation of the compensation amount and even if the *opt-out* system allows a correct allocation when class members are recognizable, the Court itself dictates class membership requirements in many cases - for example, the customers of a distribution contract for television services offered by a company in a dominant position, or rather university students who have paid a discriminatory academic fee -, without neglecting that identifiability may be required as a prerequisite for group action.

However, the legal requirement of belonging to a recognizable group is difficult to demonstrate: one has to think of a surcharge paid for a taxi service and a good chance that customers have not kept the receipt of done payment[16]. Even in these cases with a poor chance that victims obtain a reward for suffered damages, a group action will achieve the double objective of not allowing the injurer to keep the profit of his/her deceptive conduct and act as a deterrent for further blameful behaviors.

Finally, as regards the chance of propitiating petty disputes of low value with class actions, this statement is not supported by the data collected in ten European countries that have introduced a system of group actions with an opt-out mechanism[17]. In this regard, it is necessary to remember how in Europe the choice to propose a group action will be rational only when there is a wide chance of success, since it is not in force neither the norm recognizing treble damages nor the entrepreneurial vision of a law-firm that invests in the case, not even a strict claim of the idea that losing party has to bear litigation costs[18].

On its part, the European Commission has never hidden the need for an adequate legal tool which makes collective actions equal to facilitate access to justice for violations of European legislation and reinforce its effectiveness[19]. According to a mindful European observer, many targets still appear to be pursued through class actions: 1) to put an end to illegal activities; 2) to strengthen deterrence; 3) to guarantee the chance of obtaining a legal remedy; 4) to compensate victims for suffered damages.

However, as remarked by the European Commission, "the rights that cannot be enforced are less valuable»[20]. And if the problem arises whenever instances of small value make it appear unprofitable to propose a legal action, especially because of the stranded costs that become a real obstacle to establishing a trial, the solution of collective actions ensures the

[15] Così, C. I. Nagy, *Major European objections and fears against opt-out system: superego, ego and id*, cit., p. 28 ss.

[16] Cf. K. Kinsella, S. Wheatman, *Class notice and claims administration,* in *The international handbook on private enforcement of competition law*, 2010, Cheltenham, p. 264 ss.

[17] B.J. Rodger, *Editorial—private enforcement and collective redress: the benefits of empirical research and comparative approaches*, 8 *Comp. L. Rev.* 1 (2011).

[18] Cf. M. Gryphon, *Assessing the effects of a "loser pays" rule on the American legal system: an economic analysis and proposal for reform,* 8 *Rutgers J.L. & Pub. Pol'y* 567 (2011).

[19] *Recommendation on common principles for injunctive and compensatory redress mechanism in the Members States concerning violation of rights granted under Union Law*, Raccomandazione 2013/396/Ue dell'11 giugno 2013, in G.U.U.E. del 26 luglio 2013.

[20] Sse European Parliament resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress' (2011/2089(INI)).

advantage of making small reimbursement claims available when many people are harmed by the same illegal act[21].

Different studies of Law and Economics regarding collective actions start from considering that to promote rationally a judgment will be conditioned by the expected value of a dispute and the chance of winning the case against litigation costs: that is, it will be rational to promote the trial costs only if the expected value exceeds the debate[22].

In European experiences there are at least three relevant factors that concur to discourage the proposal of actions aimed at obtaining compensation for an undergoing prejudice: *a*) the principle according to which the person who loses the case pays legal costs is not fully respected; *b*) the cost of discerning whether a dispute is appropriate or not is high; *c*) the risk of losing the dispute lies with the damaged party[23].

Regarding the first of the highlighted problems, it is necessary to consider the costs related to the burden of proof that falls on the plaintiff: it is very difficult to demonstrate that he has borne those expenses, as well as the chance that a judge, even in case the injured party wins, decreases his lawyer's fee and takes over just a part of it to the losing party. In the past, the tendency to compensate the costs - almost a sop for the losing party - was widespread to the point of being a real scourge, which in recent times has been taken to stem by asking judges for a specific motivation in this regard. However, pitfall is still there and threatens to have serious consequences by way of (unspoken) *ex ante* intimidation.

As for the cost of a preliminary assessment for the dispute to be suitable, it depends on the value of information on the chance of winning the case and must be depreciated even in case there is no good reason to proceed with a legal action. That's the reason why in low-value disputes it triggers a discouraging effect for those who have to incur in this expense without knowing whether the amount will be recovered. The current fluidity of jurisdicial law - some has talked about liquid law, others about uncountable legal rules – worsens+ the uncertainty.

Finally and with regard to the risks of a dispute, we cannot ignore the possibility that a successful outcome is neutralized by a debtor's incompetence which nullifies any possibility of obtaining the execution of a judicial rule. In any case, the remarkable outcome variation weighs even more on a person who is fairly not inclined to risks.

To give an example, let's suppose that: *a*) a consumer bears a loss on his current account equal to € 100.00 due to unjustified bank charges; *b*) the cost to sue the credit institution is € 10.00; c) the probability of losing the dispute is very low and equal to 1%; d) all costs related to the dispute will be charged to the losing party. According to this assumption, it is easy to verify how the expected dispute value for the plaintiff is € 100 x 0.99 = 99.00, whereas the expected costs, though on a very low percentage, is equal to € 100 x 0, 01 = 100.00, so the comparison between opportunity and cost will discourage the plaintiff party from engaging in the dispute.

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[21] Cf. T. Ulen, *An introduction to the law and economics of class action litigation*, 32 *Eur. J. Law Econ.* 2011, p. 185 ss.

[22] See R. Bone, *Civil procedure: the economics of civile procedure*, Minnesota, West Academic, 2003, p. 261 ss.

[23] C. I. Nagy, *Why collective actions needed in Europe: Small claims are not reasonably enforced in practice and collective actions ensure effective access to justice,* 2019, p. 9 ss., available in https://doi.org/10.1007/978-3-030-24222-0_3.

If we consider that the litigation costs are not directly proportional to the number of parties involved, canvassing the above assessments, there will be at least two cases in which class actions will benefit from scale economies: in case of high or linear fixed costs.
If the damage of several subjects depends on the same trial, they will be able to take advantage of sharing legal expenses connected to the witness evidence, the case solution and their lawyers' fees, expenses that can be divided among the plaintiffs. In fact, we assume there are ten victims and each of them has suffered damage equal to € 1000.00, while the litigation cost amounts to € 750.00 for both the damaging and the damaged party. In the event of an individual dispute with the rule that a loser party bears all legal costs and a win percentage equal to 50% is for the plaintiff and the counterparty, we will have an expected value of compensation for damages equal to € 1000 x 0.5 = 500, 00 for expected costs equal to € [(750 x2) x 0.50 (the probability of bearing them)] = 750.00 so that the comparison between expected benefit and costs will be negative (€ 500-750) = -250 and , therefore, suitable to discourage any plaintiff.
Nonetheless, the comparison between expected benefits and costs will change greatly in favor of the victims if they can take advantage of a class action and divide the expected costs. If the ten victims collectively enforce their right, the litigation costs will not rise significantly. On the plaintiff's side, there are € 500.00 of fixed costs (for example, unified contribution and roll registration) and € 250.00 of variable costs per individual to be multiplied by the number of participants in the action, equal to € 250 x10 = 2500.00: the sum of expected costs to promote the action will be € 3000.00. Simply assuming that costs for the respondent's defense do not change and are equal to € 750.00, as a result we know that the total dispute expected costs are equal to € 3,750.00x0.5 (probability of losing) = 1,875.00; however, the expected dispute value is equal to € 1,000.00 x 0.5 x 100.00 = 5,000.00. If we consider that participants' variable costs in the action could decrease because of a joint decision, it becomes increasingly rational to take legal action given the extremely advantageous comparison between expected costs and benefits.
Moreover, it is known in this field how it is difficult to organize a group which represents class members' rights, in order to obtain through the 'loser pays' mechanism cost reimbursement for organizing the group[24], to cover the settlement cost of organizing a class both in cases where it is decided not to initiate an action and in those where the judgment is lost[25]. A solution to these problems is offered by the opt-out system, suitable to decrease organizational costs by allowing someone to participate in the judgment without the need to explicitly be part of the group (but simply avoiding detaching oneself from it). In these cases, the representative group by law gives the lawyer a warrant.
On the other hand, this tool is also suitable to mitigate the transaction costs associated with organizing a group, even if participants percentage in class actions with the opt-out method is far higher than the one with members of the so-called opt-in class actions. In fact, the group using this technique brings the case before a court, prospecting a reduction of some

[24] C. Silver, *Class action – representative proceedings,* in *Encyclopedia of Law and Economics*, 2000, p. 206 s.
[25] On the argument see J.G. Delatre, *Beyond the white paper: rethinking the Commision's proposal on private antitrust litigation*, 8 *Comp. L. Rev.* 38 (2011).

organizational costs by simplifying the requirement evidence of belonging to the class and the requirements to declare one's participation; and, on the other hand, it is possible to imagine that a defendant, if sentenced to pay legal costs, will contribute to reimburse a portion of organizational costs.

By reducing settlement costs dictated by organizing a class, collective actions represent a reasonable chance to obtain fair protection of a right or reparation of an injustice whenever the costs of an individual action are forbidding[26].

II. THE RESPONSE: DIRECTIVE 2020/1828

The response by the European Union to the need for consumer protection has seen its regulatory process be supported after several institutional interventions, including the proposed directive which dictated the guidelines of the following approved text.

First of all, attention was focused on two priority needs:

a) to level the quality of consumers' protection that in some Member States would have been lower if EU had not introduced the obligation to protect consumers' collective interests through a collective enforcement mechanism in the form of injunctions.

b) to facilitate the consumers' use of their right to obtain an effective remedy as ratified in Article 47 of the European Fundamental Charter of Rights, since the representative action model should address those situations in which individual consumers could be discouraged from obtaining justice in court due to high litigation costs, especially for low-value claims.

Secondly, European Parliament has defined:

- the application scope of this directive in the consumers' interest extended to different economic areas, such as financial services, energy, telecommunications, health and environment;
- the requirements to legitimate the "qualified entities" chosen by Member States to bring representative actions, that is, the so-called minimum reputational criteria – to be properly constituted and non-profit as well as to ensure compliance with a relevant EU legislation according to law - and as for collective redress actions, to check the financial capacity and origin of their supporting funds;
- the "due diligence" of proceedings in order to avoid that court costs become a financial obstacle to representative actions; consumers's correct information on the outcome of representative actions and on the benefit that will derive from them.

The proposal also promotes collective out-of-court settlements, subject to the control of judicial or administrative entity.

[26] Cf. C. I. Nagy, *Major European objections and fears against opt-out system: superego, ego and id*, in *Collective Actions in Europe*, 2019, available in https://doi.org/10.1007/978-3-030-24222-0_3.

Believing that the most effective and efficient representative actions available within the Union should enhance consumer confidence in the internal market and allow consumers to exercise their rights, we want to protect consumers' interests, regardless of the *nomen iuris* given to them such as consumers or travelers, users, customers, final investors, retail customers or others according to the law of each Member States.
As far as remedies are concerned, it is clear that qualified entities should ask to stop or forbid an infringement, to confirm the violation occurred and obtain a redress, for example a refund, a reparation or a price reduction, depending on national legal provisions.
Thus, the directive has made clear the intention to ensure there is:
- a representative action procedure to protect consumers' collective interests to be used in all Member States, providing adequate guarantees to avoid litigation abuse;
- a high level of consumer protection so that internal market can properly function by harmonizing some features of laws, regulations and administrative provisions of Member States on representative actions;
- the removal of all obstacles to consumers' access to justice.
Among the declared goals, one is to improve deterring actions against illicit practices and reduce damages to consumers in an increasingly globalized and digitalized market, by strengthening procedural mechanisms to protect consumers' collective interests that confer injunctions as well as redress measures.
The directive provides for rules that partially overlap with national rules on class actions: in fact, it concerns actions proposed by consumer associations to protect category interests which may also concern redress and compensation measures in favor of the same consumers if individually taken, an effect both of their participation and of their failure to withdraw from the action.
In order to exert the action, this directive requires, among other things, that the entity entrusted with representing the class: *a*) does not pursue a profit-making purpose; *b*) is not influenced by people other than consumers; *c*) is not unduly influenced by third-party financiers in its decisions; *d*) is not financed by either an employee or a defendant's competitor; *e*) takes on the cost risk of losing, but cannot benefit from a reward in case of victory.
Furthermore, the directive allows Member States to choose to authorize public entities to carry out the action, but always on the premise that public funding may not jeopardize their independence and lack of interest for any purpose other than protecting consumers' collective interests.

III. A COMPARISON WITH THE NORTH AMERICAN MODEL

Considering the legislative dictate just briefly described, it is possible to conclude that the American experience of class actions differs greatly from European experiences, due to the absence, on this side of the Atlantic, of some legal instruments such as: *pactum de quota litis*, self-bearing of dispute costs without moving them to the losing party, punitive damages, the investigation before examining the evidence under discussion, the decision coming from a jury.

The comparative literature knows that transposition of legal institutions from one continent to another does not concern the transfer of legal systems and institutions responsible for their implementation. As a matter of fact, social as well as cultural and legal environment features influence the transfer of legal instruments to the point of changing their effectiveness and role in the context in which they are implemented[27]. An ontological difference between the United States and the European Union refers precisely to the scope pursued in class actions.

In America, the *private enforcement* entrusted to collective actions pursues the double function of compensating victims for the damage they have suffered as well as preserving state resources. Sponsoring class actions is, in the antitrust realm, a government strategy to guarantee the chance of obtaining three times the damages suffered, so that class members are encouraged to act as general representatives of the Government.

On the contrary, European class actions are aimed exclusively at obtaining a private remedy, since the possibility of pursuing a public interest is unfamiliar to legal experiences in the Union.

However, the biggest difference is represented by the role of lawyers. In Europe, the model of an intellectual professional stands out, whose prestige does not hypocritically tolerate whatsoever commercial hint: therefore, the absence of the so-called '*entrapreneurial lawyering*' emerges, while the amount of fees depends exclusively on factors such as the time taken for a dispute and a case difficulty. European lawyers do not take on any risk in relation to the case outcome and law firms do not finance the actions, whereas in the United States class initiatives are sponsored by specialized law firms (which manage portfolios of collective actions, practicing a prudent risk diversification) in exchange for a substantial payment related to the successful outcome of the dispute[28].

In Europe, the mere so-called *pactum de quota litis* is generally forbidden, that is, the agreement by which a service cost is linked to the judgment outcome, excluding the lawyer's reward in case of losing a dispute. For example, in France and Italy the chance of making a sponsor's reward depend on the result of the case is denied *a priori*, but the predetermination of a success fee is admitted as additional reward in case the happy outcome of a dispute[29].

In Germany, *pacta de quota litis* have been traditionally forbidden, even if the Federal Constitutional Court, called upon to rule on the matter, claimed that banning an agreement linked to the proceedings outcome would be unconstitutional and the system could remedy this law deficiency by defining a solicitor's reward, whenever a predetermined amount of service costs in relation to the time or case value would have discouraged a client from pursuing his/her right.

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[27] On the argument see P. Fava, *L'importabilità delle class actions* in Italia, in *Contratto e imp.*, 2004, p. 166 ss.

[28] American experience has shown how the *deep pocket syndrome* can be strengthened by *class actions*, due in particular to the role played by lawyers specializing in this type of dispute. In fact, the expectation of *pactum de quota litis* agreements makes those lawyers particularly interested in proposing large mass actions and defining their settlement: there is now open talk in the United States of a real category of lawyers as 'entrepreneurs', devoted to searching 'mass offenses' and specialized in 'promoting' such legal actions.

[29] V. Vigoriti, *Impossibile la class action in Italia? Attualità del pensiero di Mauro Cappelletti*, in *Rass. Forense*, 2006, p. 95 ss.;

Regarding this subject, it is interesting to observe how European lawyers' ethics code forbids a *pactum de quota litis*, unless it corresponds to an official rate or it is permitted by a supervisor authority[30]. If this were not enough, the rules of engagement for lawyers not only are different between the United States and European Union, but statistics have shown that people in America are much more quarrelsome.[31]

It is clear that in North America the chance of determining the remuneration for a technical defense in percentage, considering the sum paid as a redress, allows the lawyer to take on an entrepreneurial risk on his own and for whose evaluation he possesses specific competence: this mechanism alone removes census barriers to justice, it promotes initiatives that present a greater validity and thus encourages the efficiency in allocating legal resources. Furthermore, the discretion of juries in quantifying a compensable damage, in which often redistributive instances can be overtly found, makes actually this mechanism very attractive when determining a payment.

It should also be added that US law provides for the parties to overtly cooperate in examining triggerable facts by formulating legal requests, which are largely devoid of specificity in identifying a substantial event generating the situation of a protecting advantage: this element contributes to widen access and promote the amicable settlement of a dispute (reducing the differences in the parties' expectations regarding a trial outcome).

Moreover, the 'stars and stripes' system contemplates to extend the liability from loss to defense fees, but only if the application is accepted: the so-called *one-way fee-shifting* leads to an asymmetry in the loss liability system, because not the plaintiff but only the defendant risks to be liable for the opponent's defense fees.

This incentive to take action, instead of taking defense, has allowed law firms to take on an additional role compared to those traditionally performed: the role of those who could be seriously defined as the hunters of white collars. Even in cases where claims for compensation are not taken into account and for which determining a reward as a percentage of the compensation awarded is not feasible, the defender can possibly anticipates dispute costs on his/her own, in order to obtain a reward from the unsuccessful defendant, without either he/she or his/her client running the risk of paying the opposing defense party in case of an unfavorable outcome

To sum up, law firms in the United States take on the risk of litigation when they consider it advantageous and the plaintiff does not basically run the risk of bearing the cost of defendant's legal fees even in case he loses, unlike the European system where the loser pays

[30] Charter of Core Principles of the European Legal Profession and Code of conduct for European Lawyers Art.3 "Pactum de quota litis"3.3.1. A lawyer shall not be entitled to make a pactum de quota litis. 3.3.2. By "pactum de quota litis" is meant an agreement between a lawyer and the client entered into prior to final conclusion of a matter to which the client is a party, by virtue of which the client undertakes to pay the lawyer a share of the result regardless of whether this is represented by a sum of money or by any other benefit achieved by the client upon the conclusion of the matter. 3.3.3. "Pactum de quota litis" does not include an agreement that fees be charged in proportion to the value of a matter handled by the lawyer if this is in accordance with an officially approved fee scale or under the control of the Competent Authority having jurisdiction over the lawyer.

[31] See P. Fava, *Class actions tra efficientismo processuale, aumento di competitività e risparmio di spesa: l'esame di un contenzioso seriale concreto*, in *Corr. Giur.*, 2006, p. 535.

all costs randomly ascribable to the procedure, subject to the judge's decision to reduce the amount of lawyers'fees[32]. In other words, in Europe the plaintiff party cannot pass on the cost of the dispute, based on the dispute value, to the lawyer who works at an hourly rate and has to reimburse the defendant for the legal costs suffered in case of losing the dispute. Finally, a compensation for damages in the United States is much more generous, thanks to the *'punitive damages'* which make attractive a series of disputes that would be structurally undesirable without such a multiplying factor, due to their modest value as resulting from a judicial success[33].

In short, the US rules make it possible to promote class actions[34]. A simple practical example will help us understand how American institutions encourage their feasibility, supporting a plaintiff's assessments on choosing between proposing or not the defendant's judgment on the opportunity of settling a dispute.

For example, imagine there is an antitrust violation and the plaintiff seeks a redress for damages equal to $ 1000.00, since he has to bear a cost in legal fees of $ 200.00. Moreover, we assume the defendant's legal fees are equal to $ 200.00 as well and the plaintiff's chance of winning is 10%. Being faced with an antitrust redress case, *treble damages* are available and the plaintiff will be able to benefit from having his legal costs reimbursed. On these premises, the decision on whether or not to propose legal action depends on the following calculations: damages $ 1000.00, treble recognizable damages $ 3000.00, plaintiff's reimbursement of legal costs $ 200.00, therefore the total sum expected by the plaintiff is $ 3200.00 with a 10% probability. The plaintiff's expected value will be $ 3200.00 = (1000.00 x 3 + 200.00) x 10% and the balance between the expected value and the cost will be extremely positive: $ 120 = $ 320- $ 200, that's why it is reasonable for the plaintiff to propose judgment and accept a settlement agreement for a sum greater than $ 120.00.

As a result, the respondent expects a sum equal to $ 200.00 for personal legal expenses; secondly, there is a 10% chance of paying the plaintiff $ 3000 in damages and reimbursement of legal fees also equal to $ 200. The respondent's balance is negative: - $ 520 = - $ 200.00 + (- $ 1000.00 x3 + $ - 200.00) x10% and it is reasonable to accept a transaction of less than $ 520.00, although the plaintiff's chance of winning is only 10%. If the parties act rationally they will come to an agreement for a damage value between $ 120.00 and $ 520.00.

We now analyze the same dispute within a European legal setting. The plaintiff's expected value is $ 1000.00 with a success probability of 10%, that is, $ 1000.00 x10% = 100.00 with a legal fee of $ 200.00 which, if lost, is added to the defendant's legal fees of $ 200.00 as total expenses of $ 400.0 which could not be paid in case of successful outcome. Considering the plaintiff has a 90% chance of losing the dispute, the expected costs are $ 360 = $ 400.00 x90% and the balance will be negative: - $ 260.00 = $ 100.00 - $ 360.00: it won't be reasonable to promote a trial.

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[32] See G. Calabresi, K.S. Schwartz, *The costs of class actions: allocations and collective redress in the US experience*, 32 *Eur J Law Econ* 169 (2011).

[33] Cf. A. Janssen, *The recognition and enforceability of US-american punitive damages awards in Germany and Italy: forever divided?*, in *Contratto e impr. - Europa*, 2017, p. 1.

[34] Cf. E. Carbonara - F. Parisi, *Rent-seeking and litigation: the hidden virtues of the loser-pays rule*, in *Minnesota Legal Studies Research*, (2012), p.12 ss., available http://ssrn.com/abstract=2144800.

The above mentioned figures describe how much the different legal setting between the United States and the European Union influences rational choices of plantiffs and impede class actions to develop in Europe, since they are prevented from obtaining a redress of damages higher than the costs to bear when starting a lawsuit.
Up to now, European class actions do not have a role in promoting social well-being, but they are limited to ensuring a compensation for limited groups of people. A first ploy that can be used in order to ensure plantiff groups not to run the risk of bearing legal costs higher than the expected benefits is represented by making opt-out systems prevail where the only benefit principle applies, that is, the chance that a judgment is extended to group participants only when it is clearly accepted or if it corresponds to their positive interest[35].

IV. Different pespectives according to Law & Economics.

The main European legal systems that have acquired collective legal instruments have limited their scope (to pro-consumer law, for instance) reflecting the idea of a limited use to what is strictly necessary[36].
As a result of this consideration, the assumptions required to establish collective actions in Europe exceed those normally necessary in the U.S., since recurring large-number requirements not only are expected, as well as common interests in acting, specific actions and an adequate representation, but also the circumstance that a group is definable and its members are recognizable every time the system presents the opt-out mechanism[37].
The role of law-firms across the Atlantic is delegated to non-profit organizations, that are entrusted with the task of guarding public interest as well as the rights of each represented individual. The representative group will bear the burden of a plaintiff's legal costs and, in case of losing a trial, a defendant's legal costs.
The all-European principle for the group to possibly obtain only benefits from the verdict should mitigate these burdens. The application of this principle contemplates different rules depending on national legal systems: in some of them the group members are bound by the judgement only if they accept a compensation the judge settles; in others, the exemption from executing the sentence is dictated by the subject matter jurisdiction (usually provided for consumers' rights and violations of competition rules); and in general, the judge is granted the power to exempt the group from the effects of *res iudicata* when the latter appears contrary to public interest[38].

[35]See C. I. Nagy, *Transatlantic perspective: comparative Law Framing*, in *Collective Actions in Europe*, 2019, p. 59 ss.
[36] V. C. I. Nagy, *The Reception of Collective Actions in Europe: Reconstructing the Mental Process of a Legal Transplantation* (July 25, 2020), in *Journal of Dispute Resolution*, Vol. 2020, No. 2, p. 413 ss (2020), available on https://ssrn.com/abstract=3617920 or http://dx.doi.org/10.2139/ssrn.3617920.
[37] Cf. E. Ferrante, *La via italiana alla* "class action" *fra interesse di classe e regole ostruzionistiche per le adesioni*, in *Giur. it.*, 2017, p. 66 ss.
[38] E. Lein, D. Fairgrieve, R. Salim, A. James, C. Bonze, M. Zaveta, (2017), *State of Collective Redress in the EU in the context of the implementation of the Commission Recommendation JUST/2016/JCOO/FW/CIVI/0099,* available: http://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=50236.

Indeed, the success of class actions remains anchored in resolving the crucial issue of risk-bearing when litigation costs appear prohibitive for individuals who decide to act alone[39]. There is not simply a mere correlation between factors such as punitive damages, one way cost shifting and the success of collective actions, but a direct causal relationship: that is to say, legal systems with highly successful collective proceedings are those where it is possible to finance representative groups through government institutions[40].

Representative groups cannot invest in lawsuits without having an evident chance of being rewarded for the costs incurred in their members' interest. In this regard, there are two possible ways: to ensure a greater *risk premium* through instruments such as punitive damages (which trigger the multiplication of compensation amount), no payment of the defendant's legal costs and convergency fees; or, on the other hand, to finance the actions with public money[41].

Overseas, a diametrically opposite perspective opens up and many companies are asking consumers, employees and distributors to sign agreements to renounce class actions as a condition to terminate contractual relationships with them. In this regard, it is worth recalling three recent rulings by the American Federal Supreme Court -- *Concepcion*[42], *Italian Colors*[43] and *Epic Systems* --[44] which approved the possibility for companies to block collective actions through arbitration clauses to resolve a dispute.

In the first of the cases mentioned, *AT & T Mobility vs. Concepcion,* consumers complained about the advertising of telephone services as free of charge, against charges from the telephone company. They promoted a class action against the telephone provider who invoked a contractual arbitration clause according to which customers had given up on collective actions. In the first and second instance, Californian Courts rejected the company's jurisdictional objection by applying the 'discover bank rule' according to which a class action waiver clause cannot be enforced if signed in the context of membership agreements, when it predictably involves limited amounts of damages and the contractor with the strongest negotiating power has intentionally deceived to avoid paying small amounts of money. However, the Federal Supreme Court overturns *local decisions* based on the fact that consumers didn't know the negotiation forecast signed in this specific case would clash with the 'saving clause' of the Federal Arbitration Act, according to which an arbitration clause can always be enforced, unless serious reasons provided for by law or according to *equity*, in order to resolve a contract. Moreover, renouncing to a class action is allowed when it corresponds to a consumer's interest, besides a need for flexibility and informality of *consumer-friendly* procedure especially in terms of cost.

In the second case mentioned, *American Express v. Italian Colors Restaurant*, the plaintiff complained that American Express used its almost-monopolistic power to force retailers to

[39] For the american perspective see A. Palmieri, *Arbitrati individuali coatti e ghettizzazione della "class action": la controrivoluzione (a spese del contraente debole) nel sistema di "enforcement" statunitense*, in *Foro it.*, 2016, V, 81-89.

[40] Cf, T. Ulen, *An introduction to the law and economics of class action litigation*, cit. p. 185 ss.

[41] See C.I. Nagy, *Comparative collective redress from a law and economics perspective: without risk there is no reward!*, 19 *Columbia J Eur Law* 469 (2013).

[42] Case *AT&T Mobilyty LLC v. Concepcion*, 563 *U.S.* 333 (2011).

[43] Case *American Express Co. v. Italian Colors Restaurant*, 570 *U.S.* 2228 (2013).

[44] Case *Epic Systems Corporation v. Lewis*, 138 *S. Ct.*1612 (2018).

always use the company credit card in violation of antitrust law. The case peculiarity is represented by the fact that the use of the arbitration clause to waive the retailers' collective action raised the costs of individual litigations to a prohibitive level. Because of this fact, first instance courts had decided to invalidate the waivers of class actions signed by the retailers who had purchased credit cards. The Supreme Court, however, overturns these verdicts by ruling that the remedy cost cannot be the reason for cutting out the right to invoke the remedy itself.

Finally, the recent case *Epic System Corp v. Lewis* has faced the waiver of collective actions signed by workers as well as employment relationships in contrast with the provisions of the *National Labor Relations Board*. Also in this case, the U.S. Supreme Court has ruled that, regardless of what is established by public or trade union entities on employment relationships (that is, the possibility of being collectively defended by trade unions regarding those relationships), whenever a worker has signed a class action waiver agreement without suffering fraud, violence or other contract infringements, the arbitration clause does not lose its effectiveness.

In summary, the three mentioned judgments establish the principle of preserving waiver clauses of collective actions according to how many times a consumer, a customer, a retailer or a worker have signed an arbitration clause and there is no reason for deleting or nullifying the contract; nor there is a federal law that prevents the action waiver, especially if the arbitration reserve does not provide the possibility of avoiding liability.

Therefore, considering exactly the perspective of allocating civil liability, while the North American L&E: *a*) focuses the analysis of class actions in cases where allowing companies to enter into agreements with consumers, so that they give up promoting a collective action, maximizes social well-being; *b*) analyzes with several numerical examples when giving up collective actions involves the achievement of greater social well-being and when, on the contrary, it is in fact a way of escaping civil liability[45]; in Europe there is still discussion on the mere possibility of accepting opt-out systems for collective membership.

It has recently caused sensation a case decided by the British Court of Appeal about the competition law which accepted compensation for damages requested by a class action of landline network telephone users participating in a class action by using an opt-out certification. The two defendants (collectively BT) appeal paragraphs of the order dated 19 October 2021 of the Tribunal, following the judgment dated 27 September 2021 approving the class representative's application for a collective proceedings order (CPO) under s. 47B of the Competition Act 1998 and authorispng the continuation of collective proceedings against BT on an opt-out basis, as well as refusing BT's cross application for strike out or summary judgment.

The case concerns a claim that BT has abused its dominant position in two telecommunications (telecoms) markets by imposing unfair prices, contrary to s18 of the Competition Act 1998. Mr Le Patourel brings the claim as class representative in respect of approximately 2.4 million affected BT customers for aggregate damages estimated at 589

[45] A. H. Choi, K. E. Spier, *The economics of class action waivers, Michigan Law & Econ Research* Paper No. 20-020, available: *https://ssrn.com/abstract=3665283 or http://dx.doi.org/10.2139/ssrn.3665283*

million pounds. Both markets concern the provision of residential landline telephone services known as Standalone Fixed Voice services.

As anticipated, BT challenge the judgment dated 27 September 2021 and order of 19 October 2021 insofar as they authorised the continuation of the collective proceedings on an opt-out rather than opt-in basis. Thus, the proposed appeal raised questions of principle concerning the approach in law to the certification of collective proceedings as opt-in or opt-out under the regime introduced by the Consumer Act 2015, not yet considered at the appellate level.

The recent Court of Appeal case of *BT v Le Patourel* has clarified the law, decisively confirming the CAT's full reasonable discretion to choose between opt-in v. opt-out regimes, and specifically to be able to choose opt-out whenever it wants to, for UK Competition Class Actions, on a case-by-case basis, and applying a "healthy dollop of judicial common sense."[46]

In particular, if we see Competition Appeal Tribunal Rules 2005, we have to notice that:

"In determining whether the claims are suitable to be brought in collective proceedings for the purposes of paragraph (1)(c), the Tribunal shall take into account all matters it thinks fit, including - (a) whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues; (b) the costs and the benefits of continuing the collective proceedings; (c) whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class; (d) the size and the nature of the class; (e) whether it is possible to determine in respect of any person whether that person is or is not a member of the class; (f) whether the claims are suitable for an aggregate award of damages; and (g) the availability of alternative dispute resolution and any other means of resolving the dispute, including the availability of redress through voluntary schemes whether approved by the CMA [Competition and Markets Authority] under section 49C of the 1998 Act(a) or otherwise" and also in determining whether collective proceedings should be opt-in or opt-out proceedings, the Tribunal may take into account all matters it thinks fit, including the following matters - (a) the strength of the claims; and (b) whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover. [47];

Indeed, the Tribunal has to consider two specific factors to choose between opt-in or opt-out:

a) given the greater complexity, cost and risks of opt-out proceedings, the Tribunal will usually expect the strength of the claims to be more immediately perceptible in an opt-out than an opt-in case, since in the latter case, the class members have chosen to be part of the proceedings and may be presumed to have conducted their own assessment of the strength of their claim;

b) the estimated amount of damages that individual class members may recover, there is a general preference for proceedings to be opt-in where practicable. Indicators that an opt-in approach could be both workable and in the interests of justice might include the fact that

[46] BT Group Plc v Patourel [2022] EWCA Civ 593 (06 May 2022).

[47] Rule 79 (1) and (2), certification and addresses the certification as eligible for collective proceedings.

the class is small, but the loss suffered by each class member is high, or the fact that it is straightforward to identify and contact the class members.

In addition, the recent decision of Court of appeal had been, in a sense, prepared by a forceful dissenting opinion in another case that stated: "Access to justice (although not a specific criterion under the Tribunal Rules) is clearly a critical policy behind the introduction of the collective proceedings regime in the CRA 2015… I do not see how the broader objectives of access to justice are met by choosing a method (opt-in) which will either (i) not occur at all or which (ii) if it did occur, would mean that the overwhelming number of what is likely to be in excess of 40,000 proposed class members (PCMs) did not opt in. This could be because they had no knowledge of the proceedings and hence no opportunity. Or it could be because the costs of understanding the (new) process, and advantages and disadvantages, coupled with risks and administrative costs associated with opting in, outweighed their relatively small loss (even if, in fact, the process was very favourable to them). Finally, if a sizeable number of that (conservative) 40,000 PCMs did opt in, the opt-in process would become unmanageable. Access to justice has to be more than notional".[48]

Indeed, the key guiding consideration for the Court of Appeal was that legislation must be construed purposively and the evident purpose of the statutory certification scheme was to facilitate rather than impede the vindication of those rights by class action claimants[49].

In conclusion, not only the success of class actions remains anchored in resolving the crucial issue of risk-bearing when litigation costs appear prohibitive for individuals who decide to act alone, but the opt-out approach is essential for the efficiency of the procedure.

[48] O'Higgins v Barclays et al, [2022] CAT 16, 31 March 2022, dissenting opinion Paul Lomas.

[49] Macey-Dare Rupert, *Opt-In, Opt-Out, Shake it All About… (Resolving the Legal Hokey-Cokey in UK Competition Class Action Certification), May 27, 2022*, SSRN: https://ssrn.com/abstract=4121538.