



COMPARATIVE LAW REVIEW

VOLUME 17 · N. 3 · 2026

*Special Issue — Harmonizing and Enhancing the Enforcement of Consumer Law: A
Comparative Analysis of Germany and Italy*

COMPARATIVE LAW REVIEW

The Comparative Law Review is a biannual journal published by the
I. A. C. L. under the auspices and the hosting of the University of Perugia Department of Law.

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Comparative Law Review is registered at the Courthouse of Monza (Italy) - Nr. 1988 - May, 10th 2010.

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*HARMONIZING AND ENHANCING THE ENFORCEMENT OF CONSUMER LAW: A
COMPARATIVE ANALYSIS OF ITALY AND GERMANY*

Veronica Montani, Laura Bugatti & Peter Rott

The present *Special Issue* collects a selection of papers originally presented and discussed during the Italo-German colloquium held at Villa Vigoni from 5 to 9 May 2025, devoted to the theme *Harmonizing and Enhancing the Enforcement of Consumer Law: A Comparative Analysis*. The initiative was jointly coordinated by Veronica Montani, Laura Bugatti and Peter Rott and brought together a distinguished group of scholars with the aim of fostering a structured dialogue between the Italian and German legal systems on the evolving architecture of consumer law enforcement.

In this context, the introductory contribution by Cristina Amato—drawing on her dual experience as an academic and as a judge of the Corte di Cassazione—provides a critical framework for the volume, highlighting the persistent gap between the formal development of EU consumer enforcement mechanisms and their practical effectiveness, and thereby framing the broader reflection developed in the contributions that follow.

At the core of both the discussions and this volume lies a comparative inquiry into the dual-track system of consumer law enforcement, understood as the interaction between public and private mechanisms of protection, alongside an assessment of the impact of Directive (EU) 2020/1828 on representative actions and of the broader reconfiguration of access to justice in an increasingly digital and mass-harm-oriented society.

The structural divergences between the Italian and German systems constitute the principal analytical axis of this volume, which is grounded in a systematic and critical comparison aimed at identifying convergences, persistent asymmetries, and potential pathways for mutual learning. The implementation of Directive (EU) 2020/1828 on representative actions has provided a common normative reference point; however, its transposition in the two legal orders reveals how deeply embedded legal traditions continue to shape the architecture of enforcement. In Germany, the cautious evolution of pre-existing procedural instruments has resulted in a system marked by significant safeguards and access thresholds; in Italy, the introduction of new representative mechanisms has occurred alongside existing forms of collective redress, raising concerns about fragmentation and systemic coherence.

Against this backdrop, the volume captures a legal landscape in transformation. A recurring theme across the contributions is the tension between the European aspiration toward harmonisation and the persistence of national procedural autonomy. This tension manifests itself in multiple dimensions: in the design of collective redress mechanisms, in the role and legitimacy of qualified entities, in the financing of litigation, and in the integration of alternative dispute resolution systems within the broader enforcement landscape.

Particular attention is devoted to emerging forms of enforcement, which are reshaping the traditional boundaries between public and private action. The rise of legal tech-driven claims management, the growing relevance of third-party litigation funding, and the expansion of collective remedies into adjacent fields such as data protection and environmental law all point toward a more complex and hybrid enforcement ecosystem. These developments, while opening

new avenues for access to justice, also raise significant normative questions concerning transparency, accountability, and the preservation of procedural guarantees.

Taken together, the contributions articulate a common research agenda structured around three interrelated dimensions: the evolution of collective redress, the institutional interplay between different enforcement actors, and the emerging challenges posed by digitalisation and new market structures.

Within this analytical framework, the contribution by Laura Bugatti, Ann-Kristin Mayrhofer and Caroline Meller-Hannich provides a comprehensive comparison of the implementation of the Representative Actions Directive in Italy and Germany, illuminating both convergences and enduring divergences between the two systems and setting the stage for the more specific analyses that follow.

A second line of inquiry concerns the procedural architecture of representative actions, particularly with regard to evidentiary issues. In this respect, Malte Jochem examines the German framework for disclosure, highlighting its restrictive features and the potential gaps in the implementation of Article 18 of the Directive. From a comparative perspective, Andrea Piletta Massaro analyses the Italian model, emphasising both the innovations introduced by recent reforms and the persistent challenges linked to evidentiary asymmetries in mass litigation.

The internal functioning of representative actions is further explored by Veronica Montani, who focuses on the relationship between procedural design and the effective implementation of compensatory remedies, thereby linking normative architecture with practical enforceability.

Closely connected to these issues is the problem of financing collective redress. Astrid Stadler underscores the structural centrality of funding, and of third-party litigation funding in particular, as a precondition for the effective functioning of representative actions, pointing to the limitations of current institutional arrangements. Cristina Poncibò further develops this line of inquiry by examining the role of third-party litigation funding as a mechanism capable of mitigating financial barriers, while simultaneously raising complex regulatory concerns relating to transparency, independence, and conflicts of interest.

In this evolving landscape, Giorgio Afferni offers a broader reflection on the development of collective litigation in Italy, highlighting the emergence of a true “industry” of mass claims, driven in particular by litigation funders and claims aggregation mechanisms. His analysis emphasises both the limits of existing class action models and the growing relevance of alternative techniques—such as the assignment of claims—as more flexible and economically sustainable tools for managing mass harm and reducing inefficient forms of serial litigation.

Within the Italian context, Marina Federico examines the intersection between consumer law and data protection, arguing that collective mechanisms represent a privileged tool for addressing the “redress vulnerability” of digital consumers and for integrating fundamental rights protection with market regulation.

From a different perspective, Luigi Cristiano critically reassesses the European ODR system, demonstrating how its limited success exposes the structural constraints of a governance model grounded in voluntarism and technological intermediation in the absence of effective enforcement incentives.

The institutional interplay between different enforcement actors is further explored in a joint article by Maria Cecilia Paglietti and Peter Rott who analyse hybrid enforcement models in the financial sector in Italy and Germany, illustrating how regulatory authorities and ADR mechanisms interact within an evolving and multilayered framework.

Within the strand focusing on the articulation between public and private enforcement, Angelo Bonaiti reconstructs the Italian system of public consumer protection, highlighting the persistence of overlapping competences among independent authorities and the resulting need for a more coherent institutional design, particularly in the digital environment.

Finally, Axel Halfmeier situates European developments within the broader global trajectory of collective redress, highlighting its dual function as an instrument of access to justice and as a mechanism for the effective enforcement of substantive law, thus providing a conceptual framework that ties together the various contributions of the volume.

The overall picture that emerges is one of a legal system in transition. The Europeanisation of consumer law enforcement, most notably through the Representative Actions Directive, has expanded the available instruments and strengthened the role of collective mechanisms. Yet, as the contributions consistently demonstrate, the effectiveness of this evolving framework depends on a delicate balance between procedural design, institutional coordination, economic sustainability, and adaptability to technological change.

It is precisely this interaction that defines the intellectual horizon of the present Special Issue, which seeks to contribute to a broader rethinking of the “enforcement mix” in European consumer law by critically assessing existing models, exploring avenues for reform, and reflecting on how enforcement may evolve toward greater effectiveness, accessibility, and systemic coherence.

A CRITICAL ASSESSMENT OF CONTEMPORARY EU COLLECTIVE REDRESS

Cristina Amato

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I. INTRODUCTION: EXPANDING STRUCTURES, LAGGING OUTCOMES - II. FRAGMENTATION AND DUAL-TRACK ARCHITECTURE AFTER THE RAD - III. STANDING, GOVERNANCE, AND THE REPRESENTATION DILEMMA - IV. EVIDENCE AND INFORMATION ASYMMETRY: DISCLOSURE AS A BOTTLENECK - V. FINANCING AND THIRD-PARTY FUNDING: ACCESS TO JUSTICE V. CAPTURE RISKS - VI. DIGITAL REDRESS AND THE LESSON OF ODR FAILURE - VII. FIVE STRUCTURAL FAULT LINES AND AN EFFECTIVENESS AGENDA - VIII. FINAL OVERVIEW EFFICIENT ENFORCEMENT DESIGN AS THE “MISSING LINK” IN CONSUMER PROTECTION: ECONOMIC AND SOCIAL INSIGHTS

I. INTRODUCTION: EXPANDING STRUCTURES, LAGGING OUTCOMES

The workshop that took place in Villa Vigoni over five days (5-9 May 2025), gathering expert scholars and researchers on the topic of “Harmonizing and strengthening the enforcement of consumers’ rights”, ended up in these collective papers, representing in my view a cornerstone that provides a complete and deep analysis of a fundamental theme in consumer’s law literature.

Across the precious contributions, a shared diagnosis emerges: European consumer enforcement is expanding procedurally, yet often struggles to convert availability into effective outcomes. The under-enforcement gap is attributed to: (i) the uneven design and uptake of collective mechanisms after transposition of the Representative Actions Directive (EU 2020/1828, ‘RAD’) ; (ii) persistent information and evidence asymmetries, particularly salient in platform and data-driven harms; (iii) financing constraints and exposure to adverse costs that deter qualified entities from pursuing complex cases; and (iv) institutional design problems in digital redress, where ‘gateway’ models fail without credible incentives or authority. Taken together, these contributions portray a ‘compliance and capability paradox’: EU law mandates structures, while national procedural cultures, institutional competences, and market incentives determine whether and when deliver those structures. This is particularly evident in Italy and Germany as concerns the high requirements imposed for the admissibility of the new redress actions, although they result into different procedural models; in the possibilities for commercial funders to support representative actions under the RAD that must face legitimate concerns expressed in different way and intensity in the different legal systems; in the different procedural law systems, affecting in particular access to information and the disclosure of evidence in the context of collective claims and related Third-Party Funding (“TPF”) agreements; in the redress vulnerability of digital consumers, as demonstrated by the substantive failure of ODR, notwithstanding the double shield provided by EU legislation for data protection.

II. FRAGMENTATION AND DUAL-TRACK ARCHITECTURE AFTER THE RAD

Multiple papers highlight fragmentation not only between Member States but within national systems. Comparative analysis of Germany and Italy underscores that minimum harmonisation leaves wide discretion on scope, beneficiaries, and procedural design. This discretion can improve

fit with domestic legal cultures, yet it also creates inconsistent access depending on legal basis and procedural route. In Italy, the coexistence of a general collective action under the Civil Procedure Code and a consumer representative action under the Consumer Code illustrates a ‘dual-track’ complexity, with cross-references and scope boundaries that may raise transaction costs and generate strategic uncertainty. In Germany, choices such as broader material scope (‘gold-plating’) may expand theoretical coverage, but do not automatically resolve the practical barriers that discourage filing and participation.

III. STANDING, GOVERNANCE, AND THE REPRESENTATION DILEMMA

The EU’s preference for Qualified Entities over individual ‘entrepreneurial’ representatives is defended as a safeguard against opportunism, but it generates a representation dilemma. Over-curation - through limited standing, strict designation criteria, and reliance on a small ecosystem of organizations - may reduce responsiveness to emerging mass harms. Conversely, expanding standing to public authorities can improve capacity and coordination with administrative enforcement, but raises equality-of-arms and role-confusion concerns (regulator versus litigant), particularly where competences overlap across consumer, competition, and data protection domains.

The digital environment intensifies this dilemma: overlapping mandates may be practically managed through cooperation, yet legal conflicts remain, producing residual uncertainty in both public and private enforcement pathways.

IV. EVIDENCE AND INFORMATION ASYMMETRY: DISCLOSURE AS A BOTTLENECK

Evidence access is treated as a decisive variable for collective enforcement because many mass harms are ‘data-rich’ for traders and ‘data-poor’ for consumers. The papers contrast procedural cultures. German analysis emphasises that reliance on pre-existing civil procedure tools (rather than a robust disclosure regime) tends to preserve high thresholds (conclusiveness, specificity, anti-‘fishing expedition’ doctrines) and judicial discretion that may narrow practical access to disclosure. Italian analysis, by contrast, describes a more court-driven, deformed approach that explicitly empowers judges to order exhibition of evidence and uses sanctions and evidentiary facilitation (including statistical evidence and presumptions) to address asymmetries - while still balancing confidentiality, privilege, and proportionality. A common concern remains: collective mechanisms risk being most usable for ‘simple arithmetic’ harms and least usable for complex digital harms, where evidence is structurally concentrated.

V. FINANCING AND THIRD-PARTY FUNDING: ACCESS TO JUSTICE V. CAPTURE RISKS

Financing is presented as both a practical bottleneck and a political lever. Collective redress is expensive, involves high preparation costs, and - under loser-pays rules preferred in European Procedural Civil Codes - creates significant risk exposure for qualified entities. The RAD’s promise that actions should not fail for lack of resources is widely seen as programmatic rather than self-executing. TPF is framed as a potential solution that reallocates risk and enables cases against well-resourced defendants, especially for diffuse and low-value harms in digital markets. At the same time, TPF raises governance concerns: conflicts of interest, funder influence on settlement strategy, and transparency deficits. The papers caution that rigid remuneration caps can be counterproductive if they make funding economically non-viable, whereas ‘light-touch’

frameworks combining disclosure, fairness controls, and judicial oversight may better preserve both legitimacy and market availability.

VI. DIGITAL REDRESS AND THE LESSON OF ODR FAILURE

The post-mortem of the EU ODR platform illustrates the limits of technology-first designs. High traffic did not convert into outcomes because the platform relied on voluntary trader consent, creating a structural bottleneck where complaints closed without progression to ADR. Comparative lessons emphasise that digital redress requires at least one anchor: authority (binding outcomes), incentives (reputational or market discipline), or mandatory engagement. This insight aligns with analyses of sectoral ombuds models (in particular, in Italy and Germany) where mandatory participation and reputational sanctions produce higher compliance and predictable pathways. The broader implication is that digital consumer justice cannot be achieved through interfaces alone; it must be designed as an enforcement ecosystem that makes engagement rational for traders and credible for consumers.

VII. FIVE STRUCTURAL FAULT LINES AND AN EFFECTIVENESS AGENDA

Across the papers, five recurring fault lines stand out: (1) fragmentation and dual-track complexity; (2) representation and competence dilemmas; (3) evidence bottlenecks and restrained disclosure cultures; (4) financing constraints and the contested governance of TPF; and (5) incentive misalignment in digital redress systems. The effectiveness agenda implied by the analysed contributions is pragmatic: reduce pathway complexity and forum uncertainty; strengthen proportionate access to evidence for high-asymmetry harms; ensure funding is economically viable while subject to transparent, case-specific safeguards; and redesign digital redress with credible participation incentives or authority. Without such capacity-building measures, collective redress risks becoming a procedural architecture of enforcement without enforcement capability.

VIII. FINAL OVERVIEW EFFICIENT ENFORCEMENT DESIGN AS THE “MISSING LINK” IN CONSUMER PROTECTION: ECONOMIC AND SOCIAL INSIGHTS

The outcome of this five-days marathon provides inspiration for some further reflections. Why enforcement design matters (beyond “rights on the books”)?

Consumer protection rules only shape market outcomes if they are credible - that is, if traders expect that violations will be detected and sanctioned, and consumers can realistically obtain remedies. Modern policy frameworks explicitly connect effective enforcement to consumer confidence and the proper functioning of the internal market, especially in cross-border and digital settings where rogue traders can relocate or obscure their identity. In the EU context, this is the core premise of the “New Deal for Consumers” agenda, which was launched precisely because high formal protection can be undermined by weak public and private enforcement.

From a law-and-economics viewpoint, enforcement is an input into deterrence: compliance depends on the probability of detection and the expected sanction, relative to gains from non-compliance. A large body of enforcement theory emphasizes that policy-makers can trade off monitoring intensity and sanction severity to achieve efficient deterrence, while accounting for administrative costs, errors, and strategic behavior by regulated actors. In consumer markets, these deterrence mechanics are tightly linked to classic failures - information asymmetries, bounded rationality, and “low-value, high-volume” harms - where individual claims are often too small to pursue. When enforcement is predictable and timely, it reduces transaction costs (e.g., fewer

disputes, less need for costly self-protection), discourages “lemon” equilibria by making deception unprofitable, and supports fair competition by preventing non-compliant firms from undercutting compliant rivals.

EU measures illustrate how enforcement design is increasingly tuned to deterrence and cross-border scalability. The Consumer Protection Cooperation (CPC) framework strengthens coordinated investigative and corrective powers (e.g., information requests, mystery shopping, orders to remove scam content) to address fast-moving online infringements across jurisdictions; precisely where private enforcement alone tends to underperform. Likewise, the “Omnibus” reform explicitly highlights that consumer law effectiveness is compromised by weak enforcement and seeks stronger, more consistent penalties for widespread infringements, including turnover-based fines to make sanctions economically salient for large traders.

Enforcement also has a distributional and social function: it protects those who are least able to “self-insure” through expertise, time, or legal resources. Policy documents emphasize that large-scale unlawful practices can make consumers feel powerless and deter them from acting due to cost-benefit imbalances and psychological reluctance; dynamics that are especially acute for vulnerable groups.

An efficient enforcement architecture therefore supports substantive equality: it narrows the gap between formally equal rights and unequal real-world capacity to vindicate them. When consumers observe that unlawful conduct is promptly stopped and harm is repaired, trust in markets and institutions increases; when enforcement is slow or fragmented, cynicism rises and compliance becomes selectively rational. The EU’s strategic framing repeatedly links effective enforcement and redress to consumer confidence and to shielding compliant businesses from unfair competition, thereby reinforcing social cohesion alongside market integrity.

In short, efficient enforcement is not merely a technical add-on: it is the mechanism that converts consumer law into credible market governance. By aligning incentives (deterrence), lowering system-wide frictions (transaction costs), and improving fairness in access to justice (equity), enforcement design supports both economic performance and social legitimacy: two pillars that consumer protection ultimately depends on.

This volume underlines what the EU objectives are, how to achieve them, how to improve the adopted tools.

COMPARATIVE ANALYSIS OF COLLECTIVE REDRESS IN ITALY AND GERMANY. FRAMEWORK CONDITIONS AND LEGAL DECISIONS IN THE IMPLEMENTATION OF THE EUROPEAN REPRESENTATIVE ACTION DIRECTIVE

Laura Bugatti, Ann-Kristin Mayrhofer, Caroline Meller-Hannich¹

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I. SETTING THE SCENE: COLLECTIVE PROCEDURES IN ITALY AND GERMANY - II. PREREQUISITES AND ADMISSIBILITY
- III. COURSE OF PROCEEDINGS AND JUDGMENTS - IV. COSTS AND FUNDING - V. CONCLUSION

This paper examines the implementation of the European Representative Action Directive (RAD)² in Italy and Germany from a comparative perspective, with particular emphasis on representative actions for redress. Section I sets the scene by outlining the pre-existing national frameworks for collective procedures in the two jurisdictions. Section II analyses the prerequisites and admissibility conditions of representative actions, focusing on the scope of application, potential beneficiaries and defendants, the designation of qualified entities (QEs), and the collective dimension of redress. Section III addresses the course of proceedings and the types of judgments, including procedural design, opt-in mechanisms, evidentiary rules, settlements, and the implementation of redress measures. Section IV is devoted to costs, funding, and financial risks of representative actions, with particular attention to litigation costs and the potential role of third-party funding. The paper concludes with comparative reflections on the strengths and weaknesses of the Italian and German models and their implications for the effective enforcement of consumer law under the RAD (Section V).

Keywords: Representative Actions Directive – Redress Action – German-Italian legal comparison – Enforcement – Third-Party Litigation Funding

I. SETTING THE SCENE: COLLECTIVE PROCEDURES IN ITALY AND GERMANY

I.1 Focus on injunctions and consumer association lawsuits in Germany

Germany has long-standing experience with injunction actions brought before the courts by consumer associations. Traditionally, associations have been able to sue companies for injunctions on the grounds of unfair competition, unfair terms and conditions, and practices that violate consumer protection laws.³ Such lawsuits are filed regularly and en masse, with consumer associations supported in their activities by the Competition Centre, Chambers of industry and commerce, and other trade associations.⁴

In contrast, the ability of associations to assert consumer rights in a quasi-collective manner following assignment or authorisation for collection, which has long been regulated in a somewhat hidden provision of the German Code of Civil Procedure (Zivilprozessordnung, ZPO),⁵ has hardly

¹ Although this article is the result of joint work and shared reflection, Sections I, III and V were written by Caroline Meller-Hannich, Sections II was written by Ann-Kristin Mayrhofer, and Section IV was written by Laura Bugatti.

² Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

³ §§ 1, 2 of the German Injunctive Relief Act (Unterlassungsklagengesetz, UKlaG), § 8 of the German Act against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb, UWG).

⁴ For empirical data, see C. Meller-Hannich and A. Höland, Evaluierung der Effektivität kollektiver Rechtsschutzzinstrumente, p. 23, at p. 143 passim (2010), available at https://www.bmlh.de/SharedDocs/Downloads/DE/Service/AnWis/Heft523.pdf?__blob=publicationFile&v=2 (last visited Mar. 2, 2026).

⁵ § 79(2) sent. 2 no. 3 ZPO.

been utilised to date, as the effort involved in collecting and organising the lawsuits seems overly arduous and unreasonable for the associations.⁶

Under the impression of the diesel emissions scandal, another legal remedy was introduced relatively late into German law: the model declaratory action (*Musterfeststellungsklage*).⁷ Several model declaratory actions have produced important results and decisions⁸, but they are not brought frequently. The model declaratory action should not be confused with the capital investor model proceedings (*Kapitalanlegermusterverfahren*).⁹ The *Musterfeststellungsklage* focuses on consumer law and is purely an action by a consumer association, although individual consumers can benefit from the action by joining it: the results achieved by the association in the model declaratory action can subsequently serve as a basis for consumers to bring their own lawsuits. *Kapitalanlegermusterverfahren* are, on the other hand, only relevant in the narrow field of investment law and always require individual investor lawsuits, which can then be combined in a relatively complex process based on common legal and factual issues.

These procedures, which are mostly organised and carried out by state-financed associations, have been and continue to be supplemented by legal tech class actions (see II.1.d)aa)(4)). In these actions, private providers bundle individual claims and bring them before the courts.¹⁰ Consequently, matters that were previously not considered economically viable for litigation, such as smaller consumer disputes, air passenger rights and rental disputes, are increasingly being pursued.

1.2 Overview – German framework before the implementation of the RAD

Procedure	Objective	Who can bring an action?	Special feature
Model declaratory action	Model determination	Consumer associations	Only determination, no compensation
Injunction	Omission	Consumer associations, trade associations	Prevention only, no compensation
Model proceedings for capital investors	Exemplary response to capital market questions	Capital investors	Model response for a number of individual proceedings
Legal tech class action	Bundling of individual claims	Private service	No statutory collective redress

Prior to the implementation of the RAD, there was no legal framework in Germany through which consumers could collectively assert claims for performance in the form of compensation, repayment or damages.

⁶ C. Meller-Hannich and A. Höland, *Evaluierung der Effektivität kollektiver Rechtsschutzzinstrumente*, cit., p. 23, p. 31, p. 109, at p. 150 passim. .

⁷ *Musterfeststellungsklage*, previous version: §§ 606-614 ZPO; current version: §§ 1–13, 41–42 *Verbraucherrechtendurchsetzungsgesetz* (VDuG).

⁸ E.g., the lawsuits filed against Volkswagen AG, Mercedes-Benz Group AG, various savings banks and energy providers, for details see the *Musterfeststellungsklagenregister* at the German Bundesamt für Justiz, available at https://www.bundesjustizamt.de/DE/Themen/Verbraucherrechte/VerbandsklagenregisterMusterfeststellungsklagenregister/Verbandsklagenregister/Verbandsklagen/Verbandsklagen_node.html (last visited Mar. 2, 2026).

⁹ See the German Act on Model Case Proceedings in Disputes under Capital Markets Law (*Kapitalanleger-Musterverfahrensgesetz*, KapMuG).

¹⁰ Examples of such providers include flightright, CONNY and financialright claims.

As we will see, in implementing the Directive, the German legislature has remained faithful to the approach of allowing only a select few consumer associations to take legal action. Proposals for class actions discussed in academia¹¹ have yet to become a reality.

1.3 General collective action and representative consumer action in Italy

Even before the implementation of the RAD, Italy had already developed collective litigation mechanisms designed to protect consumers, encompassing both injunctive¹² and compensatory remedies. Following years of debate and in response to major financial scandals such as Parmalat and Cirio, the first legislative framework for consumer collective actions was introduced in 2007 through Art. 140-bis of the Consumer Code¹³. However, before entering into force, this model was replaced in 2009¹⁴ and the new model became effective in 2010. Under that regime, each member of the class (consumers and users, individually or through ad hoc associations or committees to which they granted authority) could initiate class actions against traders through a two-phase opt-in procedure aimed at safeguarding homogeneous consumer rights arising primarily from contractual relationships and, to a lesser extent, from tortious liability, particularly in cases of product or service provider liability, unfair commercial practices, and breaches of competition law¹⁵.

The system soon displayed notable weaknesses, including procedural complexity, difficulties in adapting to the national procedural framework, and uncertainties surrounding the interpretation of “homogeneous” individual rights, a core prerequisite for collective proceedings (see II.2). Additional factors such as high litigation costs, the instrumental use of class actions, and limited consumer participation further undermined its effectiveness. Despite addressing significant cases involving unfair practices, antitrust infringements, and product liability¹⁶, the mechanism remained

¹¹ C. Meller-Hannich, *Gutachten A zum 72. Deutschen Juristentag. Sammelklagen, Gruppenklagen, Verbandsklagen – Bedarf es neuer Instrumente des kollektiven Rechtsschutzes im Zivilprozess?* (Munich, 2018).

¹² The Consumer Code provided for collective injunctive relief under Art. 139 and 140. Registered consumer associations authorised under Art. 137 were empowered to act on behalf of consumers to halt unlawful practices by traders that harmed collective consumer interests. These consumer associations could request the court to impose orders stopping the harmful behaviour, mandate corrective measures to neutralise any damage, and publicise the rulings if this may help to correct or eliminate the effects of any established breaches. Additionally, upon request of the plaintiff, courts could impose monetary penalties payable to the state in cases of non-compliance or delayed compliance by the wrongdoing trader.

¹³ Art. 2, section 446, Legge Dec. 28, 2007 n. 224, Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2008), Gazzetta Ufficiale n. 300 of Dec. 28, 2007 - S.O. 285, as amended by Art. 6 of Decreto Legge Jan. 24, 2012 n. 1, Disposizioni urgenti per la concorrenza, lo sviluppo delle infrastrutture e la competitività, Gazzetta Ufficiale n. 19 of Jan. 24, 2012 – suppl. Ord. 18, ratified by Legge Mar. 24, 2012 n. 27, Conversione in legge, con modificazioni, del decreto-legge 24 gennaio 2012, n. 1, recante disposizioni urgenti per la concorrenza, lo sviluppo delle infrastrutture e la competitività, in Gazzetta Ufficiale n. 71 of Mar. 24, 2012, S.O. n. 53.

¹⁴ Legge Jul. 23, 2009, n. 99, recante disposizioni per lo sviluppo e l'internazionalizzazione delle imprese, nonché in materia di energia, in *Gazzetta Ufficiale*, Jul. 31, 2009, n. 176, S.O. n. 136. C. Consolo, *Come cambia, rivelando ormai a tutti e in pieno il suo volto, l'art. 140-bis e la Class Action consumeristica*, in *Corr. Giur.*, p. 1297 (10, 2009); F. Camilletti, *Il nuovo art. 140-bis del codice del consumo e l'azione di classe*, in *Contr.*, p. 1179 (12, 2009).

¹⁵ For more details on the former consumer class action based on ex Art. 140-bis of the Consumer Code see: R. Caponi, Italian ‘Class Action’ Suits in the Field of Consumer Protection: 2016 Update (June 16, 2016), available at <https://ssrn.com/abstract=2796611> or <http://dx.doi.org/10.2139/ssrn.2796611> (last visited Mar. 2, 2026); G. Pailli and C. Poncibò, In search of an effective enforcement of consumer rights: The Italian case, in H.W. Micklitz and G. Saumier (eds), *Enforcement and Effectiveness of Consumer Law*, p. 360, p. 172 (Cham, 2018); G. Pailli and C. Poncibò, The transformation of consumer law enforcement: An Italian perspective, in *Comparative Law Review*, 1, p. 19 (8, 2017); M.L. Chiarella, Overview of class actions: Italian consumer law and cross-border litigation, in *Athens Journal of Law*, p. 165, p. 172 (4–2, 2018).

¹⁶ For an overview see L. Bugatti, *The Directive (EU) 1828/2020 and the Consumer Representative Actions in Italy: A Step Back or Forward?*, in *Revue Européenne de Droit de la Consommation*, p. 289, p. 293 ff. (2024).

underutilised and largely ineffective, generating widespread dissatisfaction.¹⁷ Following partial amendments in 2012¹⁸, the consumer class action framework was repealed in 2019 as part of a comprehensive reform that replaced the previous consumer law provisions with a general regime for collective proceedings, now codified in Section IV, Title VIII-bis, Arts. 840-bis to 840-sexiesdecies of the Civil Procedure Code¹⁹.

The new system, applicable to conduct occurring after 19 May 2021, substantially broadened both the scope and the accessibility of collective actions. Extending beyond consumer law, it grants standing to any individual or non-profit organisation pursuing statutory objectives relevant to the claim, allowing them to seek compensatory and/or injunctive relief against businesses, public service providers, and utilities. The reform also introduces innovative procedural elements, such as digital tools for opt-in and publicity, a more flexible opt-in structure with both early and late adhesion, expanded judicial powers regarding evidence, mechanisms encouraging settlements, and financial incentives for lawyers. Collectively, these measures aim to overcome the structural limitations of the earlier model and to establish a more efficient, accessible, and claimant-friendly collective redress system within the Italian legal order²⁰.

Building upon this foundation, Law No. 28/2023 implementing the RAD introduced a new and autonomous representative procedure within the Italian Consumer Code, functioning alongside the general collective actions and injunctive measures of the Civil Procedure Code²¹. This legislative development further enriches Italy's framework for collective enforcement, ensuring alignment with the RAD's requirements while maintaining consistency with the principles of the 2019 reform. Under the new procedure - and in line with the RAD - qualified (*Abstände*) entities (QEs) are authorised to bring representative actions to protect the collective interests of consumers whose rights have been or may be affected by traders' infringements of one or more legislative acts listed in Annex II-septies (corresponding to those in Annex I of the Directive). Although grounded in a distinct legal basis, the representative actions introduced under the Consumer Code preserve key procedural and structural features of the collective mechanisms contained in the Civil Procedure

¹⁷ Available at <https://www.mimit.gov.it/index.php/it/mercato-e-consumatori/tutela-del-consumatore/class-action/ordinanze-class-action> (last visited Mar. 2, 2026). F. De Dominicis, I numeri e lo stato dell'arte dei primi dieci anni di vita dell'istituto, in V. Barsotti, F. De Dominicis, G. Pailli and V. Varano (eds), *Azione di classe: la riforma italiana e le prospettive europee*, p. 261 (Torino, 2020); A. Bonafede, Il "mosaico" della class action italiana: la Legge n. 31/2019, 2022, available at <https://www.studiolegalebonafede.it/2022/07/05/mosaico-class-action-italiana-legge-31-2019/> (last visited Mar. 2, 2026); E. Silvestri, Rebooting Italian Class Action, in A. Uzelac and S. Voet, *Class Actions in Europe: Holy Grail or a Wrong Trail?*, p. 201, p. 202 (Cham, 2021); R. Pardolesi, La classe in azione. Finalmente, in *Danno e resp.*, 301 (3, 2019), who has underlined in 2019 that "I risultati positivi latitano. Li si conta sulle punte delle dita di una mano (monca...)", recalling: Corte di Appello di Milano Aug. 25, 2017, in *Rep. Foro it.*, (2018), voce *Consumatori e utenti*, n. 3, and *Giur. it.*, p. 105 (2018), commented by A. Dondi and A. Giussani, *Commonality all'italiana e avvio (timido) della nostra azione di classe*; Tribunale di Napoli Feb. 18, 2013, in *Foro it.*, p. 1719 (I, 2013), commented by A. Palmieri; Cass. Jan. 31, 2018, n. 2320, in *Danno e resp.*, p. 113 (2019), commented by M. Natale; Tribunale di Venezia Jan. 12, 2016, in *Foro it.*, p. 1017 (I, 2016).

¹⁸ Decreto Legge Jan. 24, 2012 n. 1 – Legge Mar. 24, 2012 n. 27.

¹⁹ Legge Apr. 12, 2019, n. 31 Disposizioni in materia di azione di classe, *Gazzetta Ufficiale* n. 92, Apr. 18, 2019.

²⁰ D. De Santis, The new Italian class action: Hope springs eternal, in *The Italian Law Journal*, p. 757 (2019); E. Silvestri, Rebooting Italian Class Action, in A. Uzelac and S. Voet, *Class Actions in Europe: Holy Grail or a Wrong Trail?*, cit., p. 203; C. Consolo, La terza edizione dell'azione di classe è legge ed entra nel c.p.c. Uno sguardo d'insieme ad un'amplessissima disciplina, in *Corr. Giur.*, p. 737 (2019); P.F. Giuggioli, *L'azione di classe. Un nuovo procedimento collettivo* (Milano, 2019).

²¹ Decreto Legislativo Mar. 10, 2023, n. 28, Attuazione della direttiva (UE) 2020/1828 del Parlamento europeo e del Consiglio, del Nov. 25, 2020, relativa alle azioni rappresentative a tutela degli interessi collettivi dei consumatori e che abroga la direttiva 2009/22/CE, in *Gazzetta Ufficiale* n. 70, Mar. 23, 2023. Arts. 140-ter – 140-quaterdecies Consumer Code.

Code. Within the leeway afforded to Member States, Italy's implementation of the RAD thus reflects a deliberate continuity with the 2019 framework, incorporating and adapting its core procedural innovations into a renewed consumer protection regime.

1.4 Comparative insights on the initial sets of conditions

The implementation of the RAD presented a challenge to the established system of collective legal protection in both countries, leading in some cases to the creation of parallel instruments alongside those already in place. Prior to the RAD, only Italy had regulated legal protection instruments in place that aimed to compensate consumers, rather than simply establish facts or issue injunctions. In Germany, by contrast, private legal tech class actions, which are largely unregulated, operated alongside collective actions that were limited to declaratory judgments and injunctive relief and were primarily brought by consumer associations.

II. PREREQUISITES AND ADMISSIBILITY

II.1 Scope of Application

II.1.a) Infringements covered by the redress action

The RAD only requires Member States to provide for representative actions against infringements by traders of the provisions of EU law referred to in its Annex I, including such provisions as transposed into national law (Art. 2(1) RAD). Annex I refers, *inter alia*, to instruments governing liability for defective products, unfair terms in consumer contracts, air carrier liability, the sale of consumer goods, data protection, product safety, unfair commercial practices, food, insurance, roaming, and the supply of digital content and digital services. However, Recital 18 clarifies that Member States may apply the provisions of the RAD to other areas. While the German legislator has indeed made use of this option, the Italian redress action is confined to the Directive's list, which has been subject to justified criticism.

Under the German Consumer Rights Enforcement Act (*Verbraucherrecht durchsetzungsgesetz*, VDuG), redress actions may also be brought for violations of national rules that do not transpose any EU requirements (§ 1(1) VDuG). When enacting the new law, the German legislator sought to ensure that the level of consumer protection would not fall below that afforded by the model declaratory action (see I.1), which was not confined to violations of EU law.²² This “gold-plating” of the Directive is commendable.²³ It not only enhances consumer protection but also avoids demarcation difficulties. Whether national law transposes EU law is not always evident. For example, § 823(2) of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB), which provides for damages in the event of a breach of a statute intended to protect another person, does not stem from EU legislation. However, the general EU principle of effectiveness may require national law to provide for damages in the case of a breach of a specific EU law, so that the provision may occasionally operate as a transposing measure.²⁴ The extension also avoids inefficiencies in cases

²² See the explanations accompanying the draft VDuG, BT-Drs. 20/6520, p. 69.

²³ See already B. Gsell and C. Meller-Hannich, *Die Umsetzung der neuen EU-Verbandsklagenrichtlinie*, Gutachten über die Umsetzung der europäischen Richtlinie über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher (RL (EU) 2020/1828) ins deutsche Recht, pp. 22–23 (2021), available at https://www.vzbv.de/sites/default/files/downloads/2021/02/03/21-02-04_vzbv_verbandsklagen-rl_gutachten_gsell_meller-hannich.pdf (last visited Mar. 2, 2026).

²⁴ See, for example, CJEU Mar. 21, 2023 – C-100/21, *Mercedes-Benz Group*, para. 93 with regard to Art. 5(2) of the EU Regulation No. 715/2007 which, however, is not part of Annex I of the RAD; cf. also the national decision following the preliminary ruling, BGH Jun. 26, 2023 – VIa ZR 335/21, *Entscheidungen des Bundesgerichtshofs in Zivilsachen* 237, 245, paras. 43–44.

where national law and EU-based law apply side by side: without such an extension, a QE could, for example, lose a redress action against a manufacturer grounded in EU-based product liability law, whereas registered consumers could still subsequently sue the manufacturer in individual proceedings under general national fault-based liability. Additionally, from a national perspective, there appears to be no reason to afford consumers better protection against violations of EU law than against violations of national law.

Nevertheless, the Italian consumer representative action introduced by Law No. 28/2023, by contrast, is confined to a narrowly defined material scope, covering only infringements listed in Annex II-septies of the Consumer Code, which mirrors Annex I of the RAD. By choosing not to expand the material subject matter beyond the Directive's list, the Italian legislator has adopted a restrictive strategy for transposition. This decision may be difficult to reconcile with the dynamic nature of markets and the increasing demands for enhanced consumer protection. Critics argue that a broader and more flexible approach, allowing representative actions for any infringement of collective consumer interests, would have enhanced the effectiveness of collective redress. Moreover, this restrictive scope creates systemic inconsistencies within Italy's collective redress architecture. Whereas the general collective action under the Civil Procedure Code applies irrespective of the subject matter and is open to all holders of "individual homogeneous rights", the representative action under the Consumer Code is limited to the enumerated EU law fields. The fragmentation of enforcement regimes produces a disjointed system in which similar infringements may be litigated under different procedural tracks, depending on the legal basis invoked. This dualism risks compromising the effectiveness of collective enforcement by generating jurisdictional uncertainty and procedural asymmetry between claims.²⁵

II.1.b) Potential beneficiaries of the redress action

Redress actions within the meaning of the RAD are aimed at providing remedies to "consumers"²⁶ (Art. 3(1) RAD). However, Member States retain the discretion to extend the scope to other categories of persons (Recital 18 RAD). Once again, the German legislator has made use of this option, while the Italian law is confined to transposing the RAD's requirements.

The German legislator extended protection to "small enterprises", defined as entities employing fewer than ten persons and having an annual turnover or balance sheet total not exceeding €2 million (§ 1(2) VDUG). This extension is equally commendable.²⁷ Considering that redress actions can not only enhance consumer protection but also relieve courts from the burden of dealing with mass individual claims,²⁸ the legislator could even have extended the scope to encompass further B2B disputes.²⁹ At the very least, also for the sake of clarity, the legislator should have aligned the definition of "small enterprises" with the EU definition, which covers enterprises employing fewer

²⁵ L. Bugatti, *Collective Redress 3.0 in Italy: from Consumer Class Action to Consumer Representative Action*, in *The Italian Law Journal*, p. 483, at p. 495 (2024).

²⁶ On the definition of "consumer", see Art. 3(1) RAD.

²⁷ C. Meller-Hannich, *Stellungnahme zum Entwurf eines Gesetzes zur Umsetzung der Richtlinie (EU) 2020/1828 über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher und zur Aufhebung der Richtlinie 2009/22/EG (Verbandsklagenrichtlinienumsetzungsgesetz – VRUG)*, p. 2 (2023), available at <https://www.bundestag.de/resource/blob/947438/Stellungnahme-Meller-Hannich.pdf> (last visited Mar. 2, 2026); P. Röthemeyer, *Das Verbraucherrechtsetzungsgesetz (VDUG) zur Umsetzung der Verbandsklagen-Richtlinie – Die neue Abhilfeklage*, in *Verbraucher und Recht*, p. 332, at p. 333 (2023).

²⁸ Cf. the calculation accompanying the draft VDUG, BT-Drs. 20/6520, p. 135.

²⁹ B. Gsell, *Die Umsetzung der Verbandsklagenrichtlinie – Effektiver Rechtsschutz für Verbraucher und Entlastung der Justiz durch die neue Verbands-Abhilfeklage?*, in *Gewerblicher Rechtsschutz und Urheberrecht*, p. 979, at p. 981 (2024).

than fifty persons and having an annual turnover or annual balance sheet total not exceeding €10 million.³⁰ This was initially envisaged by the German government³¹ but did not prevail.

The Italian legislator did not make use of the option to extend the scope of potential beneficiaries to SMEs. Nevertheless, SMEs are not left without collective protection: they can rely on the general collective action under the Civil Procedure Code, which is not limited to consumers but may benefit all holders of individual homogeneous rights, including businesses, regardless of their size or turnover.

II.1.c) Potential obligors and defendants of the redress action

Redress measures within the meaning of the RAD require a “trader”³² to provide consumers with remedies (Art. 3(10) RAD); traders are the defendants in redress actions. Consistent with this approach, the German and Italian transposition provisions only apply to actions against traders (§ 1(1) VDuG, Art. 140-ter Italian Consumer Code).³³ In both jurisdictions, this approach marks a (slight) departure from the previous regime. In Germany, the rules on the former model declaratory action required a B2C relationship but not a specific defendant, which led to discussions as to whether such an action could also be directed against, for example, a person who assumed the claims but was not a trader.³⁴ In Italy, the inclusion of actions against any trader within the meaning of the RAD departs from the Civil Procedure Code-based collective action, which targets only businesses and providers of public services or utilities. The latter exhibits a narrower focus.³⁵

II.1.d) Potential claimants of the redress action: qualified entities

Redress actions within the meaning of the RAD are initiated by “qualified entities” (QEs). The RAD distinguishes between two types of QEs: QEs designated for the purpose of bringing domestic representative actions and QEs designated for the purpose of bringing cross-border representative actions. The Directive lays down different requirements for the two types (Art. 4(3) and (4) RAD). QEs for cross-border actions are subject to detailed regulation, whereas the specific requirements for QEs for domestic actions are largely left to the Member States. However, the RAD explicitly allows Member States to apply the criteria governing QEs for cross-border actions also to those designated for domestic actions (Art. 4(5) RAD). Neither Germany nor Italy has made use of this option. Therefore, as will be shown in the following, in both jurisdictions, QEs for domestic actions are subject to different, and in part stricter, requirements than QEs for cross-border actions.

³⁰ Art. 2(2) of the Commission Recommendation of 6 May, 2003 concerning the definition of micro, small and medium-sized enterprises, OJ 2003 L 124/36. The definition in § 2(2) VDuG corresponds to the definition of “microenterprises” in Art. 2(3).

³¹ See the draft legislation, BT-Drs. 20/6520, p. 69.

³² On the definition of “trader”, see Art. 3(2) RAD.

³³ On the definition of “trader” in Germany, see § 14 BGB, which, however, is primarily designed for contract law and must therefore be slightly modified in the context of civil procedure, see J. Wolber, § 1 VDuG, in T. Rauscher and W. Krüger, *Münchener Kommentar zur Zivilprozessordnung*, vol. 2, mn. 22 (7th ed., Munich, 2025); furthermore, the term must be interpreted in light of the RAD’s definition in Art. 3(2) RAD, see I. Scherer, § 1 VDuG, in H. Köhler and J. Feddersen, *Gesetz gegen den unlauteren Wettbewerb*, mn. 19 (43rd ed. 2025) on the definition of “trader” in Italy, see 140-ter, par. 1, lit. b) Consumer Code: The term broadly includes any individual or entity, whether public or private, engaged in activities related to their trade, business, craft, or profession (including through another entity).

³⁴ See P. Röthemeyer, *Zweieinhalb Jahre Musterfeststellungsklage – eine Zwischenbilanz im Spiegel der Rechtsprechung*, in *Zeitschrift für Bank- und Kapitalmarktrecht*, p. 191, at p. 194 (2021); the BGH left this question open, see BGH Jul. 27, 2023 – IX ZR 267/20, *Entscheidungen des Bundesgerichtshofs in Zivilsachen* 238, 61, para. 9 with further references on the debate.

³⁵ Art 840-bis, par. 3, Civil Procedure Code.

II.1.d)aa) Qualified entities designated to bring domestic redress actions

With regard to QEs designated for the purpose of bringing domestic representative actions, Art. 4(4) RAD only requires that the criteria applied by Member States are consistent with the objectives of the Directive in order to make the functioning of such representative actions effective and efficient. Both the German and the Italian rules focus on consumer organisations designated in advance (see (II.1.d)aa)(1)) and exclude ad hoc organisations (see (II.1.d)aa)(2)). Moreover, in Italy national independent public authorities may also act as claimants in redress actions (see (II.1.d)aa)(3)). Neither jurisdiction extends redress actions to individual consumers or commercial actors; however, in Italy individual consumers may resort to the general collective action under the Civil Procedure Code (see (II.1.d)aa)(4)).

II.1.d)aa)(1) Comparable focus on consumer organisations designated in advance

Both the German and the Italian rules primarily confer standing on consumer organisations that have been designated in advance, rather than for a specific redress action. This focus is consistent with the RAD.³⁶ Indeed, while such consumer organisations are not the only well-suited claimants (see (II.1.d)aa)(2)–(4)), they seem particularly effective in safeguarding consumers' interests through redress actions: their statutes commit them to consumer protection, while they are also subject to a certain degree of governmental supervision.³⁷

In Germany, QEs for domestic redress actions are referred to as “qualified consumer organisations” (qualifizierte Verbraucherverbände, § 2(1) no. 1 VDuG). Such organisations must, first, be registered in a list maintained by the Federal Office of Justice (§ 4 of the German Injunctive Relief Act, Unterlassungsklagengesetz, UKlaG), and, second, obtain no more than 5% of their financial resources from contributions by businesses. Regarding the first condition, § 4(2) UKlaG stipulates that, in order to be eligible for registration on the list, the organisation must be a registered association whose statutory tasks include the non-commercial protection of consumer interests through the provision of information and advice. Furthermore, the organisation must demonstrate that it has a significant number of members (at least three organisations or 75 natural persons), has been registered and active for at least one year, possesses sufficient human, material, and financial resources, and does not grant its members or employees any undue benefits. Consumer associations that are predominantly publicly funded are irrefutably presumed to meet these requirements. As of today, the list comprises 50 associations.³⁸ The second condition, the 5%-limit, concerns financing and will therefore be analysed in more detail later in this contribution (see IV.4). The 5%-limit neither applies to actions seeking injunctive measures (§ 3 UKlaG) nor is it among the requirements that organisations must meet in order to be designated to bring cross-border actions (Art. 4(3) RAD).

In Germany, another difference between actions for redress and actions for injunctions is that the latter may also be brought by qualified trade associations and chambers of industry and commerce (§ 3 UKlaG). Denying these organisations the ability to also bring redress actions is unconvincing, especially considering that redress actions may also be brought on behalf of “small enterprises”

³⁶ See Recitals 24 and 28.

³⁷ Cf. B. Gsell and C. Meller-Hannich, Die Umsetzung der neuen EU-Verbandsklagenrichtlinie, Folgegutachten über die Umsetzung der europäischen Richtlinie über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher – (RL (EU) 2020/1828) – ins deutsche Recht, p. 9 (2022), available at https://www.vzbv.de/sites/default/files/2022-02/22-02-23_vzbv_EU-Verbandsklage_Folgegutachten_final.pdf (last visited Mar. 2, 2026).

³⁸ See the list of the German Federal Office of Justice, available at https://www.bundesjustizamt.de/SharedDocs/Downloads/DE/Verbraucherschutz/Liste_qualifizierter_Einrichtungen.html (last visited Mar. 2, 2026).

(see II.1.b)).³⁹ The VDuG excludes, for instance, the Competition Centre (Wettbewerbszentrale), which plays an important role in bringing actions for injunctions.⁴⁰ A positive aspect of the new rule in § 2(1) no. 1 VDuG is that the requirements are less strict than those applicable to the former model declaratory action, which required a higher minimum number of association members and a longer period of activity.⁴¹

In Italy, QEs likewise primarily include nationally representative consumer associations enrolled in a special list maintained by the Ministry of Enterprises and Made in Italy.⁴² As of March 2026, nine consumer associations were registered in this list.⁴³ To be included in the list, organisations must fulfil a set of mandatory requirements, established under Art. 137 of the Consumer Code. The conditions for registration are stringent: entities must have been established for at least three years, have a statute that provides for the exclusive objective of consumer protection and possess a democratic internal structure, operate on a non-profit basis, demonstrate at least three years of activity in the protection of consumer interests, maintain a minimum membership threshold and national relevance⁴⁴, keep a register of members, updated annually, indicating the membership fees paid directly to the association for statutory purposes, and provide transparent financial reporting. Additional criteria related to integrity and independence exclude entities whose legal representatives have been convicted of offences connected with their activities or have economic interests in the same field as the association.

II.1.d)aa)(2) Similar exclusion of ad hoc consumer organisations

The RAD also allows for the designation of QEs for domestic actions on an ad hoc basis (Art. 4(6) RAD). However, Recital 28 sent. 2 RAD clarifies that the Directive should not encourage Member States to introduce this possibility. Neither the German nor the Italian rules on redress actions provide for ad hoc QEs. However, in Germany, the relatively short minimum period of activity—

³⁹ See already B. Gsell and C. Meller-Hannich, Die Umsetzung der neuen EU-Verbandsklagenrichtlinie, Gutachten über die Umsetzung der europäischen Richtlinie über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher (RL (EU) 2020/1828) ins deutsche Recht, cit., p. 24.

⁴⁰ See C. Meller-Hannich and A. Höland, Gutachten Evaluierung der Effektivität kollektiver Rechtsschutzinstrumente, pp. 62–64, passim (2010), available at https://www.bmlh.de/SharedDocs/Downloads/DE/Service/AnWis/Heft523.pdf?__blob=publicationFile&v=2 (last visited Mar. 2, 2026).

⁴¹ See § 606(1) ZPO (former version); P. Röthemeyer, Das Verbraucherrecht durchsetzungsgesetz (VDuG) zur Umsetzung der Verbandsklagen-Richtlinie – Die neue Abhilfeklage, cit., at p. 333; on the evolution of the registration criteria with regard to the action for injunctive relief and the former model declaratory action, as well as on the (restrictive) jurisprudence in this context, see A. Halfmeier, P. Rott, in P. Rott, A. Halfmeier, W. Vandenbussche, L. Bugatti and J. Mucha, Comparative Legal Study on Procedural Rules and their Impact on Collective Redress Actions in Europe, pp. 47–48 (BEUC, 2025), available at <https://www.beuc.eu/reports/comparative-legal-study-procedural-rules-and-their-impact-collective-redress-actions-europe> (last visited Mar. 2, 2026).

⁴² Associazione Assoutenti APS; Associazione Confconsumatori; Associazione Adiconsum - Associazione Difesa Consumatori APS; Associazione Codici - Centro per i Diritti del Cittadino; Associazione Difesa; Utenti Servizi Bancari, Finanziari, Postali, Assicurativi – Adusbef; Associazione Altroconsumo; Associazione Centro Tutela Consumatori Utenti – CTCU; Associazione Movimento Consumatori; Associazione UDICON – Unione per la Difesa dei Consumatori, available at <https://www.mimit.gov.it/it/mercato-e-consumatori/tutela-del-consumatore/class-action/azioni-rappresentative-nazionali> (last visited Mar. 2, 2026).

⁴³ See the list of the Ministry of Enterprises and Made in Italy, available at <https://www.mimit.gov.it/it/mercato-e-consumatori/tutela-del-consumatore/class-action/azioni-rappresentative-nazionali> (last visited Mar. 2, 2026).

⁴⁴ There must be at least 0.5 per thousand of the national population as members, and representation in at least five regions or autonomous provinces, with no fewer than 0.2 per thousand of the population of each territory (Art. 137(2), c) Consumer Code).

one year, compared to three years in Italy—may allow for the establishment of a QE for a specific domestic redress action.⁴⁵

On this point, greater boldness on the part of the legislators would have been desirable.⁴⁶ Ad hoc QEs established in response to a specific event—such as a major data breach—may offer greater specialisation and relieve existing QEs of the burden of addressing such exceptional matters in addition to their “daily business”. With regard to Italy, this choice appears to overlook valuable lessons drawn from the country’s earlier experience with consumer class actions, which can also be initiated by ad hoc entities and were, in fact, at times brought directly by ad hoc entities (*comitati*)⁴⁷ rather than by the most nationally representative consumer associations, especially in cases of local matters. This Italian experience suggests that the rigidity of the new system may reduce responsiveness to emerging forms of collective harm. However, it is important to note that Art. 4(6) RAD appears to impose strict conditions on ad hoc entities, insofar as it appears to require them to meet the same criteria as other national QEs. As a result, the stringent requirements for national QEs, such as the minimum period of activity, may have significantly limited the number of eligible ad hoc entities, thereby reducing the practical effects of including them. Consequently, without modifying the requirements for other national QEs, the potential benefits of broadening the scope to incorporate ad hoc entities may have been more theoretical than actionable.⁴⁸

II.1.d)aa)(3) Divergent role of public authorities

Art. 4(7) RAD also allows Member States to designate public bodies as QEs. While the German legislator has refrained from doing so, the Italian rules indeed confer standing on some authorities. In Germany, the participation of public bodies in civil proceedings is generally limited and has tended to be reduced over the past century.⁴⁹ Yet it appears that designating specific public bodies as QEs could enable the redress action to better realise its potential. Including public bodies could allow for better coordination between administrative and private consumer protection, thereby enhancing its effectiveness and efficiency.⁵⁰ One could imagine, for instance, a redress action brought by the Federal Financial Supervisory Authority on behalf of policyholders affected by unlawful premium adjustments.⁵¹

In Italy, independent public authorities entrusted with enforcing consumer law at the national, regional, or local levels (e.g., the Competition and Market Authority, AGCM) are empowered to bring domestic and cross-border representative actions (Art. 140-quater of the Consumer Code).

⁴⁵ See A. Stadler, *Die neue Verbands(abbilf)klage – Umsetzung der Richtlinie 2020/1828*, in *Zeitschrift für Zivilprozessrecht*, p. 129, at p. 135 (2023), who considers that this relatively short period allows for the creation of ad hoc QEs.

⁴⁶ With regard to Germany, see already B. Gsell and C. Meller-Hannich, *Die Umsetzung der neuen EU-Verbandsklagenrichtlinie, Gutachten über die Umsetzung der europäischen Richtlinie über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher (RL (EU) 2020/1828) ins deutsche Recht*, cit., p. 24.

⁴⁷ E.g., *Tribunale di Roma, sez. X, ord. June 20, 2018, Comitato composto 166 consumatori nei confronti di ACQUALATINA S.p.A.*, available at <https://www.mimit.gov.it/images/stories/documenti/azione-di-classe-ACQUA-LATINA.pdf> (last visited Mar. 2, 2026). According to F. De Dominicis, roughly one fifth of consumer class actions filed between 2010 and 2023 were initiated by individual consumers or ad hoc entities: F. De Dominicis, *La nuova “class action europea”: tratti fondamentali e criticità del d.lgs. 10 marzo 2023, n. 28 che recepisce la Direttiva 2020/1828 (UE) (2023)*.

⁴⁸ L. Bugatti, Italy, in P. Rott, A. Halfmeier, W. Vandenbussche, L. Bugatti and J. Mucha, *Comparative Legal Study on Procedural Rules and their Impact on Collective Redress Actions in Europe*, cit.

⁴⁹ Cf. A.-K. Mayrhofer, *Die Versicherungsaufsicht als Klägerin im Verbandsklageverfahren? Am Beispiel der Prämienanpassung privater Krankenversicherungen*, in *Zeitschrift für die gesamte Versicherungswissenschaft*, 114, p. 57, at p. 87 (2025).

⁵⁰ For more details, see A.-K. Mayrhofer, *Die Versicherungsaufsicht als Klägerin im Verbandsklageverfahren? Am Beispiel der Prämienanpassung privater Krankenversicherungen*, cit., at pp. 85–104.

⁵¹ On this case, see A.-K. Mayrhofer, *Die Versicherungsaufsicht als Klägerin im Verbandsklageverfahren? Am Beispiel der Prämienanpassung privater Krankenversicherungen*, cit., p. 57.

The legislator clarified that the inclusion of independent public authorities is justified by the aim of reinforcing their institutional functions, given that these bodies are already charged with safeguarding consumer interests within their respective fields of competence.⁵² The significant complexity inherent in representative actions—particularly when they involve cross-border elements (see also Art. 140-quincoques)—further supports this choice. Owing to their organisational and financial stability, as well as their expertise and established experience in consumer protection, these authorities are deemed capable of effectively advancing consumer interests in judicial proceedings. Indeed, integrating authorities into redress actions may enhance the institutional capacity of this mechanism to protect consumers. Admittedly, it may also raise concerns⁵³ about its full alignment with the procedural principle of equality of arms (cf. Recital 68 RAD), since such authorities possess investigatory powers and access to evidence not available to private defendants. In fact, these public entities, under their enforcement mandates, play a critical role in supervising markets and ensuring compliance with legal rules by businesses and professionals. They have the authority to impose sanctions, such as fines, and issue orders to cease unlawful practices. The overlapping roles of public enforcement and private representative actions thus risk blurring the distinction between public and private enforcement. For instance, the Italian Antitrust Authority, after penalising a trader for unlawful conduct, has the power to directly jump into the private realm through a follow-on action, claiming damages on behalf of consumers, leveraging its privileged access to information gathered during the public enforcement proceeding. Nevertheless, it should not be overlooked that procedural equality may likewise be impaired when a consumer organisation with limited financial resources (see IV) and limited access to evidence brings a redress action against a well-equipped trader. Furthermore, traders whose infringements have already been established do not appear particularly worthy of protection against follow-on actions. While the involvement of public authorities may blur the traditional distinction between public and private enforcement, it could also contribute to a closer alignment of these mechanisms, thereby strengthening consumer protection and reducing the number of actors and proceedings with which traders must engage.⁵⁴

Ultimately, it seems that the extent to which the potential benefits and risks of administrative participation in representative actions will materialise depends to a large degree on the specific regulatory design and its practical application. Whether the Italian initiative can offer meaningful empirical insights for the debate remains doubtful, as of March 2026, no public authority had yet applied for registration, raising questions as to whether proceedings initiated by public bodies will in fact be pursued.

II.1.d)aa)(4) Different options for individual consumers and commercial actors

In principle, it would have been possible to make the national collective action mechanisms implementing the RAD available to actors other than QEs, such as commercial actors or individual

⁵² XIX LEG - Schema di D.Lgs. - Recepimento della direttiva (UE) 2020/1828 del parlamento europeo e del consiglio del Nov. 25, 2020 relativa alle azioni rappresentative a tutela degli interessi collettivi dei consumatori e che abroga la direttiva 2009/22/CE - Consiglio dei ministri Mar. 9, 2023, Relazione illustrativa, available at https://www.giustizia.it/giustizia/it/mg_1_2_1.page?contentId=SAN426528#rel (last visited Mar. 2, 2026).

⁵³ See R. Donzelli, *Audizione informale dinanzi alle Commissioni riunite II e X*, Jan. 12, 2023; G. De Cristofaro, *Audizione informale dinanzi alle Commissioni riunite II e X*, Jan. 12, 2023, available at https://www.camera.it/leg19/1104?shadow_organo_parlamentare=3507&id_tipografico=&annomese=202301 (last visited Mar. 2, 2026).

⁵⁴ See A.-K. Mayrhofer, *Die Versicherungsaufsicht als Klägerin im Verbandsklageverfahren? Am Beispiel der Prämienanpassung privater Krankenversicherungen*, cit., at pp. 89–91.

consumers—who would typically require the support of such commercial actors—provided that such actions do not undermine the effectiveness of the RAD.⁵⁵ Commercial actors cannot replace non-commercial QEs, as their primary interest lies not in representing “consumers’ interests” (see Art. 3(4) RAD), but in pursuing their own goals. Nevertheless, non-altruistic redress actions could serve as a *complement* to those brought by QEs. Neither Italy nor Germany extends redress actions to these actors. However, while German law does not provide them with any other mechanisms of collective redress either, Italian law allows individual consumers to bring general collective actions under the Italian Civil Procedure Code, which mitigates the limitations of the redress action (see already I).

In Germany, commercial actors and individual consumers are confined to the general procedural framework. In particular, legal tech companies, which rely on standardised and often automated procedures to collect and enforce individual claims, play a considerable role in the enforcement of consumer law, for example, in the fields of air passenger rights, tenancy law, and data protection.⁵⁶ In some instances, claims are bundled into a single action;⁵⁷ in others, numerous parallel actions are brought.⁵⁸ Business models vary: some commercial actors operate on a contingency-fee basis, while others make use of the widespread coverage of legal expenses insurance in Germany, which increases individuals’ willingness to litigate.⁵⁹ The principal concerns associated with such claims relate to the burden they place on the judiciary and the structural weakness of consumers in enforcing their interests vis-à-vis the companies.⁶⁰ These models are unlikely to be displaced by the new redress actions under the VDuG, as consumer associations, due to their limited financial resources (see IV), can cover only a fraction of the cases.⁶¹ Prior to the enactment of the VDuG, it had been proposed—including by one of the authors—not only to implement the RAD but also to introduce a group action allowing individuals to seek redress on behalf of a group.⁶² The aim was to empower both consumers and businesses to engage in “bundled legal enforcement in a self-determined manner”.⁶³ Some mechanisms provided for in the VDuG—such as the implementation

⁵⁵ It follows from Art. 1(2) RAD that Member States are allowed to adopt additional procedural means for the protection of the collective interest of consumers at national level.

⁵⁶ Cf. the explanations accompanying the draft Legal Tech Act, BT-Drs. 19/27673, pp. 14, 15.

⁵⁷ See, for example, BGH Jun. 13, 2022 – VIa ZR 418/21, in *Neue Juristische Wochenschrift*, p. 3350 (2022), financialright, where 2004 claims were bundled.

⁵⁸ Recent examples include online gambling and premium adjustments of insurance companies, cf. T. Riehm, *Massenverfahren und kein Ende?*, in *JuristenZeitung*, p. 945, at p. 946 (2025).

⁵⁹ See T. A. Heiß, *Massenverfahren und die Zukunft des deutschen Zivilprozesses*, in *Neue Juristische Wochenschrift*, p. 1625, at pp. 1627–1629 (2025).

⁶⁰ For more details, see K. Engler, *Kollektives Legal Tech in Zeiten der Abhilfe-Verbandsklage*, in *Legal Tech Zeitschrift*, p. 15, at pp. 19–21 (2023).

⁶¹ For more details, see K. Engler, *Kollektives Legal Tech in Zeiten der Abhilfe-Verbandsklage*, cit., at pp. 22–23.

⁶² B. Gsell and C. Meller-Hannich, *Die Umsetzung der neuen EU-Verbandsklagenrichtlinie, Folgegutachten über die Umsetzung der europäischen Richtlinie über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher – (RL (EU) 2020/1828) – ins deutsche, Recht*, pp. 11–27 (2022), available at https://www.vzbv.de/sites/default/files/2022-02/22-02-23_vzbv_EU-Verbandsklage_Folgegutachten_final.pdf (last visited Mar. 2, 2026); see also the 2017 proposal of the German parliamentary group “BÜNDNIS 90/DIE GRÜNEN“, BT-Drs. 19/243; in support of group actions, see also Neue Richtervereinigung, *Stellungnahme zum Referentenentwurf eines Gesetzes zur Umsetzung der Richtlinie (EU) 2020/1828 über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher und zur Aufhebung der Richtlinie 2009/22/EG (Verbandsklagenrichtlinienumsetzungsgesetz – VRUG)*, p. 5 (2023), available at https://www.bundestag.de/resource/blob/947200/Stellungnahme-Weiss_NRV.pdf (last visited Mar. 2, 2026); A. Stadler, *Die neue Verbands(abhilfe)klage – Umsetzung der Richtlinie 2020/1828*, cit., at p. 137.

⁶³ B. Gsell and C. Meller-Hannich, *Die Umsetzung der neuen EU-Verbandsklagenrichtlinie, Folgegutachten über die Umsetzung der europäischen Richtlinie über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher – (RL (EU) 2020/1828) – ins deutsche, Recht*, cit., p. 54.

procedure (see III.8)—could have been applied to such a group action,⁶⁴ whereas others would have required modification, for example regarding consumer participation in the costs of the proceedings and the funding by commercial actors⁶⁵. The latter would have been essential for making the group action a viable alternative to the current practice of mass bundled or parallel individual claims, pursued or supported by commercial actors. A group action could make collective redress in Germany more effective and efficient; yet it appears unlikely that such a mechanism will be introduced in the foreseeable future.

In Italy, the general collective actions under the Civil Procedure Code may be introduced both by individual class members and by associations or non-profit organisations registered in a public list maintained by the Ministry of Justice. As for the former consumer class action, ex art. 140-bis conferred standing on consumers and users, who could sue individually or through *ad hoc* associations or committees to which they granted authority. In practice, this sometimes resulted in actions being filed by individual consumers rather than by the most nationally representative consumer associations.⁶⁶ Under the current legislative framework, in cases of unlawful conduct by a trader affecting the collective interests of consumers in one of the matters listed in Annex II-septies of the Consumer Code, individual consumers retain the right to bring independent claims and may also seek collective redress under the Civil Procedure Code, instead of opting into a representative action initiated by a QE. This dual possibility can give rise to overlapping collective proceedings for the same unlawful conduct: one initiated by a QE under the Consumer Code, and another brought directly by individual consumers under the Civil Procedure Code. Without effective mechanisms to coordinate these parallel regimes, such overlaps risk inefficiencies and potentially inconsistent outcomes⁶⁷.

II.1.d)bb) Qualified entities designated to bring cross-border redress actions

According to Art. 6(1) RAD, Member States must ensure that QEs designated in advance in another Member State for the purpose of bringing cross-border representative actions can also bring such representative actions before their respective courts or administrative authorities. Art. 4(3) RAD sets out specific criteria which must be fulfilled by an organisation to be designated as QE for cross-border actions. These include substantive requirements concerning a minimum period of activity (12 months), the consumer protective statutory purpose, non-profit character, the absence of insolvency proceedings, independency, and freedom from external influence, as well as formal requirements relating to the publication of information. In Germany and Italy alike, the

⁶⁴ B. Gsell and C. Meller-Hannich, Die Umsetzung der neuen EU-Verbandsklagenrichtlinie, Folgegutachten über die Umsetzung der europäischen Richtlinie über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher – (RL (EU) 2020/1828) – ins deutsche, Recht, cit., pp. 19–23.

⁶⁵ B. Gsell and C. Meller-Hannich, Die Umsetzung der neuen EU-Verbandsklagenrichtlinie, Folgegutachten über die Umsetzung der europäischen Richtlinie über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher – (RL (EU) 2020/1828) – ins deutsche, Recht, cit., pp. 12–13.

⁶⁶ E.g., among the most recent cases: Tribunale di Genova Apr. 2, 2023, Joyce Ruinon c. Costa Crociere spa; Tribunale di Venezia ord. Oct. 21, 2021, D’Amico et al. c. Evolve srl., available at https://www.mimit.gov.it/images/stories/normativa/class_action_evolve_link_2021.pdf (last visited Mar. 2, 2026); Tribunale di Cagliari ord. Feb. 8, 2017, Vincenzo Sileu et al. C. ABBANOIA S.p.a., available at <https://www.mimit.gov.it/images/stories/documenti/Ordinanza-8-febbraio-2017-Tribunale-ord-di-Cagliari.pdf> (last visited Mar. 2, 2026).

⁶⁷ Art. 140-ter, par. 2, Consumer Code provides that in a similar situation (unlawful conduct carried out by a trader harming the collective interest of consumers in one of the matters listed in Annex II-septies Consumer Code), if the plaintiff is a QE, it is obliged to seek protection through the consumer representative action and cannot bring a collective action under the Civil Procedural Code rules.

implementation of these requirements⁶⁸ results in QEs for cross-border actions being, at least in some respects, subject to lighter substantive requirements than QEs for domestic actions.

In Germany, for example, only QEs for domestic actions are required to have a minimum number of members and to have been not only active but also registered for at least one year. In addition, the 5%-limit concerning financing applies only to QEs for domestic actions. In Italy, QEs for domestic actions must demonstrate three years of activity compared to only 12 months for QEs for cross-border actions. Furthermore, only QEs for domestic actions are required to demonstrate a minimum period of establishment, national relevance, and a minimum membership threshold. Additionally, QEs designated for the purpose of bringing cross-border representative actions only need to establish a legitimate interest in protecting consumers, as opposed to having an exclusive statutory purpose. This asymmetry is difficult to justify, given that cross-border disputes are generally more complex and resource-intensive than domestic ones. The resulting inconsistencies not only create unnecessary confusion but also impose additional hurdles for organisations seeking accreditation.

As of March 2026, the Commission's list of QEs for cross-border representative actions (Art. 5(1) subpara. 4 RAD) included only one German entity but six Italian entities.⁶⁹ By that date, three redress actions in Germany have been brought by foreign QEs,⁷⁰ whereas none appeared to have been initiated in Italy⁷¹.

II.2 Collective element

The RAD regulates representative actions for the protection of the “collective interests of consumers” (Art. 2(1) RAD), meaning “the general interest of consumers and, in particular for the purposes of redress measures, the interests of a group of consumers” (Art. 3(3) RAD). Neither the German nor the Italian rules on redress actions require courts to explicitly determine whether a “collective interest” is at stake.⁷² The distinction between the assertion of a “collective interest” and mere individual interests is rather drawn by reference to mediating factors: in Germany, the “group of consumers” eligible for redress actions is delineated through the requirements of similarity (*Gleichartigkeit*) and a quorum. In Italy, no numerical threshold is required for admissibility; instead, the claim must identify the criteria for determining the group of affected consumers and the homogeneity (*omogeneità*) of their individual rights.

⁶⁸ See § 4d(2) UKlaG; Art. 140-*quinquies* Italian Consumer Code.

⁶⁹ See the list of the European Commission, available at <https://representative-actions-collaboration.ec.europa.eu/cross-border-qualified-entities> (last visited Mar. 2, 2026).

⁷⁰ See the list of the Federal Office of Justice, available at https://www.bundesjustizamt.de/DE/Themen/Verbraucherrechte/VerbandsklageregisterMusterfeststellungsklagenregister/Verbandsklagenregister/Verbandsklagen/Verbandsklagen_node.html (last visited Mar. 2, 2026). The Dutch “*Stichting Onderzoek Marktinformatie (SOMI)*” has brought redress actions against TikTok Technology Limited and against X Internet Unlimited Company. The Austrian “*Verein zum Schutz von Verbraucherinteressen*” has brought a redress action against Meta Platforms Ireland Limited.

⁷¹ See the information of the Ministry of Enterprises and Made in Italy, available at <https://www.mimit.gov.it/it/mercato-e-consumatori/tutela-del-consumatore/class-action/azioni-rappresentative-transfrontaliere> (last visited Mar. 2, 2026).

⁷² Against the introduction of such a criterion, see B. Gsell and C. Meller-Hannich, Die Umsetzung der neuen EU-Verbandsklagenrichtlinie, Gutachten über die Umsetzung der europäischen Richtlinie über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher (RL (EU) 2020/1828) ins deutsche Recht, cit., p. 23.

II.2.a) *Similarity*

The representative action, as conceived by the RAD, “should offer an effective and efficient way of protecting the collective interests of consumers” (Recital 9 sent. 1). The efficiency of a redress action requires a certain degree of similarity between the claims covered by the action.⁷³ Bundling heterogeneous claims—for example, damages claims relating to different goods and defects—may still benefit consumers who would not have taken action on their own initiative due to a “rational apathy” in pursuing small claims.⁷⁴ However, such aggregation could lead to complex proceedings, placing a considerable burden on the courts and potentially slowing down the judicial system. In such cases, referring consumers to individual proceedings may be preferable, even though some claims might ultimately remain unenforced. At the same time, a redress action does not necessarily require absolute homogeneity. Not all differences prevent redress actions from being the more effective and efficient instrument.⁷⁵ Examples include cases where the damages differ but can be calculated on the basis of easily ascertainable criteria, such as the price paid by the individual consumer.⁷⁶ The RAD leaves it to the Member States “to decide on the required degree of similarity of individual claims”, provided that national rules do not hamper the effectiveness of representative actions (Recital 12). In making this decision, the German legislator was confronted for the first time with the need to codify a similarity requirement due to the absence of prior collective redress mechanisms (see I.1). By contrast, the Italian legislator was able to draw upon earlier experience with collective redress instruments (see I.2).

In Germany, similarity is addressed in § 15(1) VDuG: a redress action is admissible only if the claims of consumers affected by the action are essentially similar (*im Wesentlichen gleichartig*). Such similarity requires that the claims are based on the same facts or on a series of essentially comparable facts, and depend on essentially the same questions of fact and law. The QE’s statement of claim must include specific information regarding the similarity of the consumer claims concerned (§ 15(2) sent. 1 VDuG). The requirement of similarity aims to ensure that redress actions are efficient and that the implementation procedure following the court proceedings (see III.8) remains effective.⁷⁷

§ 15(1) VDuG does not require complete homogeneity—only that the claims are “essentially”⁷⁸ similar. It appears that this assessment must be made on a case-by-case basis, taking into account the RAD’s requirement that the redress action must offer an effective and efficient instrument of

⁷³ See the explanations accompanying the draft VDuG, BT-Drs. 20/6520, p. 77; see also A. Stadler, § 15 VDuG, in H.-J. Musielak and W. Voit, *Zivilprozessordnung*, mn. 1 (22nd ed. 2025): “The similarity of the claims asserted is internationally recognised as a criterion for the suitability of collective redress actions. It serves to distinguish these instruments from cases in which specific individual issues predominate and the consolidation of claims in a single proceeding is therefore not appropriate.” (translation by the authors).

⁷⁴ On this “rational disinterest”, see B. Gsell and C. Meller-Hannich, *Die Umsetzung der neuen EU-Verbandsklagenrichtlinie, Gutachten über die Umsetzung der europäischen Richtlinie über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher* (RL (EU) 2020/1828) ins deutsche Recht, cit., p. 5.

⁷⁵ Cf. the explanations accompanying the recommendation of the Committee on Legal Affairs of the German Bundestag, BT-Drs. 20/7631, p. 109.

⁷⁶ Cf. S. F. Thönissen, *Schadensersatz in der Verbandsabhilfeklage*, in *Recht und Schaden*, p. 749, at p. 754 (2023).

⁷⁷ See the explanations accompanying the draft VDuG, BT-Drs. 20/6520, p. 77.

⁷⁸ The original draft legislation did not contain this restriction, see BT-Drs. 20/6520, p. 15.

protection.⁷⁹ Ultimately, courts must conduct a “feasibility test”.⁸⁰ They must assess whether the differences between claims can adequately be addressed in the collective court proceedings, in the implementation procedure, or even left to individual actions after the conclusion of the collective proceedings (see III.8). Where this is possible, differences between the claims should not preclude the admissibility of the redress action.⁸¹ The court should likewise not be allowed to dismiss the action where it is able to divide the claims into sub-groups that are internally sufficiently homogeneous and separable from one another.⁸²

The exact requirements thus depend on the capacities of both the court and the trustee to deal with differences between individual claims.⁸³ As will be illustrated in a subsequent section (see III.6 and III.8), these capacities are limited, largely due to the limited scope for lump-sum estimation in German law. Unfortunately, the legislator did not take the introduction of the VDuG as an opportunity to assess whether the general rules of substantive and procedural law are suitable for handling mass actions, or whether new mechanisms for estimation should be introduced.⁸⁴

Another difficulty in German law is that § 15 VDuG deals only with the similarity of claims forming part of the redress action but is silent on the separability of these claims from others that do not form part of it.⁸⁵ Being aware of the need for similarity, a QE may try to limit the action to clearly similar claims, for example, by including in a contractual liability action only those buyers whose goods manifested a defect, thereby excluding those whose goods function properly. The claims included in the action would certainly be similar, but it might not be possible to define specific prerequisites in the basic judgment (§ 16(1) sent. 1, (2) VDuG) that the trustee could verify by means of formal proof (see III.8).⁸⁶ In view of its purpose to ensure effective and efficient redress

⁷⁹ On the necessity of a flexible procedural framework, see C. Meller-Hannich, *Stellungnahme zum Entwurf eines Gesetzes zur Umsetzung der Richtlinie (EU) 2020/1828 über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher und zur Aufhebung der Richtlinie 2009/22/EG (Verbandsklagenrichtlinienumsetzungsgesetz – VRUG)*, cit., p. 9; for an overview of different approaches in German legal doctrine to the interpretation of § 15(1) VDuG, see I. Scherer, *Die Gleichartigkeit der Ansprüche bei der Abhilfeklage*, in *Verbraucher und Recht*, p. 335, at pp. 337–338 (2025).

⁸⁰ A.-K. Mayrhofer and T. Koller, *Die „Gleichartigkeit“ als Nadelöhr der Abhilfeklage - Zur Bedeutung des Gleichartigkeitserfordernisses im Regierungsentwurf eines Gesetzes zur Umsetzung der Verbandsklagenrichtlinie*, in *Zeitschrift für Wirtschaftsrecht*, p. 1065, at p. 1072 (2023): „Handhabbarkeitsprüfung“.

⁸¹ For more details, see A.-K. Mayrhofer and T. Koller, *Die „Gleichartigkeit“ als Nadelöhr der Abhilfeklage - Zur Bedeutung des Gleichartigkeitserfordernisses im Regierungsentwurf eines Gesetzes zur Umsetzung der Verbandsklagenrichtlinie*, cit., at pp. 1068–1072.

⁸² B. Gsell, *Die Umsetzung der Verbandsklagenrichtlinie – Effektiver Rechtsschutz für Verbraucher und Entlastung der Justiz durch die neue Verbands-Abhilfeklage?*, cit., at p. 983.

⁸³ A.-K. Mayrhofer and T. Koller, *Die „Gleichartigkeit“ als Nadelöhr der Abhilfeklage - Zur Bedeutung des Gleichartigkeitserfordernisses im Regierungsentwurf eines Gesetzes zur Umsetzung der Verbandsklagenrichtlinie*, cit., at p. 1072.

⁸⁴ B. Gsell, *Die Umsetzung der Verbandsklagenrichtlinie – Effektiver Rechtsschutz für Verbraucher und Entlastung der Justiz durch die neue Verbands-Abhilfeklage?*, cit., at p. 991.

⁸⁵ B. Gsell, *Die Umsetzung der Verbandsklagenrichtlinie – Effektiver Rechtsschutz für Verbraucher und Entlastung der Justiz durch die neue Verbands-Abhilfeklage?*, cit., at p. 983; see also A.-K. Mayrhofer and T. Koller, *Die „Gleichartigkeit“ als Nadelöhr der Abhilfeklage - Zur Bedeutung des Gleichartigkeitserfordernisses im Regierungsentwurf eines Gesetzes zur Umsetzung der Verbandsklagenrichtlinie*, cit., at pp. 1067–1068.

⁸⁶ B. Gsell, *Die Umsetzung der Verbandsklagenrichtlinie – Effektiver Rechtsschutz für Verbraucher und Entlastung der Justiz durch die neue Verbands-Abhilfeklage?*, cit., at p. 983.

actions,⁸⁷ § 15 VDuG should also be applied to such cases.⁸⁸ The requirement of similarity ought to be supplemented by a requirement of “separability”. Consequently, the QE must not only provide information on the similarity of the consumer claims concerned (§ 15(2) sent. 1 VDuG), but also on their separability from consumer claims not covered by the action. Where such separation is not possible, the redress action should be inadmissible.⁸⁹

In Italy, the legislator addressed this problem of separability by requiring that a claim must not only identify the homogeneity of the individual rights, but also the criteria for determining the group of consumers. Furthermore, unlike German courts, Italian courts already have experience in assessing whether individual claims are sufficiently alike to be dealt with in an action for collective redress. Due to the specific structure of the German redress action procedure—which involves an implementation phase and potentially subsequent individual proceedings—it appears that the Italian standards cannot be directly transposed to German law. However, as will be demonstrated in the following, they may nevertheless support the idea of pursuing a flexible approach, taking into account the feasibility of the action.

In Italy, homogeneity functions as a key admissibility condition (Art. 140-septies, paras. 5 and 8, Consumer Code): in order to be admissible, a redress action must be grounded in the “homogeneity of individual rights”. Under the previous consumer class action framework, defining what constitutes “homogeneous individual rights” was subject to discussion. Initially, the requirement was that the rights needed to be identical in nature. Over time, however, judicial interpretation of the notion of homogeneity gradually shifted toward a more flexible and functional approach⁹⁰. Initially, courts adopted a restrictive reading that resulted in the exclusion of several claims from collective proceedings. For example, in *Unione Nazionale Consumatori/Maggi v. Wecantour di GOA s.r.l.*⁹¹, 30 consumers were excluded because their damages, arising from the defendant’s misconduct concerning the non-conformity of an “all-inclusive” travel package, differed in amount. Likewise, in *Altroconsumo/Bianchi (et al.) v. Trenord s.r.l.*⁹², the Milan Court declared the class action inadmissible, finding that the railway company’s inefficiencies had led to the non-performance of numerous transport contracts, each entailing distinct financial consequences for

⁸⁷ See the explanations accompanying the draft VDuG, BT-Drs. 20/6520, p. 77.

⁸⁸ B. Gsell, *Die Umsetzung der Verbandsklagenrichtlinie – Effektiver Rechtsschutz für Verbraucher und Entlastung der Justiz durch die neue Verbands-Abhilfeklage?*, cit., at p. 984; see also A.-K. Mayrhofer and T. Koller, *Die „Gleichartigkeit“ als Nadelöhr der Abhilfeklage – Zur Bedeutung des Gleichartigkeitserfordernisses im Regierungsentwurf eines Gesetzes zur Umsetzung der Verbandsklagenrichtlinie*, in *Zeitschrift für Wirtschaftsrecht*, p. 1065, at p. 1068 (2023).

⁸⁹ B. Gsell, *Die Umsetzung der Verbandsklagenrichtlinie – Effektiver Rechtsschutz für Verbraucher und Entlastung der Justiz durch die neue Verbands-Abhilfeklage?*, cit., at p. 984.

⁹⁰ This choice was confirmed by the Decree 1/2012 (Law 27/2012), which has definitively replaced throughout the rules any reference to “identity” with “homogeneity”. Regarding the new wording of Art. 140-bis Consumer Code: E. Cesaro and F. Bocchini, *La nuova class action a tutela dei consumatori e degli utenti* (Padova 2012); A.D. De Santis, *La tutela giurisdizionale collettiva* (Napoli 2013) 532; R. Donzelli, *Art. 140 bis c. cons.*, in G. De Cristofaro and A. Zaccaria (eds), *Commentario breve al diritto dei consumatori* (Padova 2013), p. 1039.

⁹¹ Trib. Napoli, Feb. 18, 2013, in *Danno e Resp.*, 2013, 8–9, p. 907, comment by L.C. Paolo, *Tutela del consumatore*; App. Torino, Jan. 23, 2011, in *Foro it.*, 2011, p. 3422.

⁹² Trib. Milano, Nov. 08, 2013, *Giur.it.*, 2014, 3, p. 603, comment by A. Giussani, *Intorno alla tutelabilità con l’azione di classe dei soli diritti «omogenei»*. This judgment was reformed in appeal: App. Milano, Mar. 03, 2014, *Giur. it.* 2014, p. 1910, comment by A. Giussani *Ancora sulla tutelabilità con l’azione di classe dei soli diritti «omogenei»*; The appeal against admission of the class action was rejected: Cass., Mar. 23, 2018, mn. 7244 and 7245. App. Milano, Aug. 25, 2017, n. 3756, *Giur. it.* 2018, p. 105, comment by A. Dondi and A. Giussani, *Commonality all’italiana e avvio (timido) della nostra azione di classe*. Cass. civ., sez. III, May 31, 2019 n. 14886, in *Nuova giur. Civ.*, 2019, 5, p. 1002, comment by G. Ponzanelli, *Il danno non patrimoniale dei pendolari all’esame della Corte di Cassazione*; in *Riv. Dir. Proc.*, 2020, 1, p. 356, comment by A. Giussani, *Diritti omogenei e omogeneizzati nell’azione di classe*.

the affected passengers. In response to these shortcomings, courts progressively adopted a more functional and pragmatic understanding of homogeneity⁹³, emphasising the existence of a shared cause of action and common features among the claims sufficient to justify collective adjudication⁹⁴, while allowing flexibility in the quantification of damages for individual consumers⁹⁵. The concept of “homogeneous rights” remains inherently flexible within the framework of the new representative action, interpreted as rights arising from a common factual or legal matrix rather than requiring identical damages or circumstances.

II.2.b) *Quorum*

Recital 12 RAD also leaves it to the Member States to determine the required “minimum number of consumers concerned by a representative action for redress measures”, provided that its effective functioning is not hampered. Germany, in contrast to Italy, has made use of this option. Establishing a quorum of consumers aims to ensure that redress actions—which generally demand more judicial resources than individual proceedings—are worth the effort, and that QEs make use of their (limited) resources to bring those actions that promise to achieve a broader impact.⁹⁶ However, the risk of low-impact actions in the absence of a (high) quorum appears to be negligible. In their own interest, QEs are unlikely to focus their resources on individual cases; rather, they will prioritise groups of consumers that are sufficiently large.⁹⁷ Overall, it appears that effective collective redress does not necessarily require a (high) quorum. This finding is supported by the Italian experience: the lack of a quorum requirement in the general collective action and in the former class action has not caused any difficulties, and the Italian legislator did not deem it necessary to introduce such a requirement in the new redress action.

In Germany, a redress action is admissible only if the QE demonstrates in a comprehensible manner that the redress action may affect the claims of at least 50 consumers (§ 4(1) VDuG). In the case of a joint action by more than one QE or against more than one trader (§ 7 VDuG), it is the total number that counts. The same should apply in the case in which a single QE sues a single trader, but on behalf of different groups of consumers.⁹⁸

Prior to and during the German legislative process, the question of the quorum was subject to significant debate.⁹⁹ The previous provisions on the model declaratory action required, first, that the QE demonstrate to the satisfaction of the court that the action affected at least ten consumers, and, second, that at least 50 consumers actually registered their claims within two months of the

⁹³ E.g., *App. Torino*, ord. Sept. 23, 2011, in *Resp. civ. prev.*, 2012, p. 186, comment by G. Schiavone, *Sulla legittimazione a proporre l'azione di classe e altre questioni*; *Trib. Napoli*, ord. 9.12.2011, in *Foro it.*, 2012, 6, I, 1909; *Trib. Roma* 27.04.2012, in *Danno e resp.*, 2012, 12, p. 1243, comment by L. Frata, *L'art. 140 bis Consumer Code al vaglio del legislatore e della giurisprudenza di merito*.

⁹⁴ Cass, sez. III, May 31, 2019 n. 14886, in *Nuova giur. Civ.*, 2019, 5, p. 1002, comment by G. Ponzanelli, *Il danno non patrimoniale dei pendolari all'esame della Corte di Cassazione*; in *Riv. Dir. Proc.*, 2020, 1, p. 356, comment by A. Giussani, *Diritti omogenei e omogeneizzati nell'azione di classe*. See, B. Randazzo and A. Maglica, *La disciplina generale delle class action italiane alla prova delle garanzie costituzionali ed europee*, in *Federalismi.it*, 2025, p. 156, spec. at p. 176.

⁹⁵ *Trib. Di Venezia*, ord. Oct. 21, 2021, *D'Amico et al. c. Evolve srl*, available at https://www.mimit.gov.it/images/stories/normativa/class_action_evolve_link_2021.pdf (last visited Mar. 2, 2026).

⁹⁶ P. Röthemeyer, *Verbraucherrecht durchsetzungsgesetz*, § 4 mn. 2 (2024).

⁹⁷ See B. Gsell and C. Meller-Hannich, *Die Umsetzung der neuen EU-Verbandsklagenrichtlinie, Gutachten über die Umsetzung der europäischen Richtlinie über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher (RL (EU) 2020/1828) ins deutsche Recht*, cit.

⁹⁸ But see A. Halfmeier, P. Rott, in P. Rott, A. Halfmeier, W. Vandenbussche, L. Bugatti and J. Mucha, *Comparative Legal Study on Procedural Rules and their Impact on Collective Redress Actions in Europe*, cit., p. 49, who hold the view that each sub-group must consist of at least 50 consumers each.

⁹⁹ For more details, see P. Röthemeyer, *Verbraucherrecht durchsetzungsgesetz*, § 4 mn. 2 (2024).

publication of the action.¹⁰⁰ The abolition of the second condition is a favourable development. Considering that consumers may now register up to three weeks after the conclusion of the oral hearing (§ 46(1) VDuG, see III.3), such a condition would have caused practical difficulties, as an action might have been found inadmissible only after significant resources—especially for the taking of evidence—had already been invested. Moreover, a requirement of actual registrations could discourage QEs from bringing redress actions, as they can hardly predict the number of registrations in advance.¹⁰¹

At the same time, the threshold of 50 affected consumers seems to be too high. It is not apparent why the legislator raised this number compared to the former model declaratory action.¹⁰² Demonstrating that at least 50 potential consumers can be affected requires considerable effort on the part of the QE.¹⁰³ Furthermore, such a high number limits the potential of the redress action to offer effective and efficient judicial protection: bundling ten cases for claims that would otherwise be brought individually could already relieve courts and promote more coherent decisions. For claims that would otherwise not be pursued at all (due to rational apathy), enabling ten consumers to enforce their rights could equally justify a redress action.

At least the legislator lowered the evidentiary requirements during the legislative process:¹⁰⁴ contrary to the initial draft,¹⁰⁵ QEs must no longer demonstrate to the satisfaction of the court (*glaubhaft machen*) that a sufficient number of consumers are affected, but rather make this sufficiently comprehensible (*nachvollziehbar darlegen*). However, the exact evidentiary requirements remain unclear. It is certainly not required to mention the consumers by name.¹⁰⁶ In general, to avoid discouraging QEs from bringing redress actions, the courts should not impose high standards in this regard.

II.3 Competent courts

Both the German and the Italian legislators have sought to assign redress actions to judicial bodies composed of experienced judges and to promote specialisation.

In Germany, § 3(1) VDuG provides for the exclusive jurisdiction of the Higher Regional Court (*Oberlandesgericht*) in whose district the trader has their general venue, i.e. usually their place of residence or registered seat (§§ 13, 17 ZPO). In Germany, civil cases are ordinarily heard in the first instance by Local Courts (*Amtsgerichte*) or Regional Courts (*Landgerichte*). However, the legislator considered that the broad impact of redress actions justifies the jurisdiction of the Higher Regional Courts,¹⁰⁷ which usually serve primarily as appellate courts. This assessment is

¹⁰⁰ § 606(2) nos. 2 and 3 ZPO (former version).

¹⁰¹ In particular, the trader cannot render the action inadmissible by “buying consumers out” of it (cf. R. Janal, *Die Umsetzung der Verbandsklagenrichtlinie*, in *Gewerblicher Rechtsschutz und Urheberrecht*, p. 985, at p. 988 (2023)); but see B. Gsell, *Die Umsetzung der Verbandsklagenrichtlinie – Effektiver Rechtsschutz für Verbraucher und Entlastung der Justiz durch die neue Verbands-Abhilfeklage?*, cit., at p. 981, who argues that the previous quorum of 50 registered consumers did not impose administrative burdens on consumer organisations; see also the explanations accompanying the draft VDuG, BT-Drs. 20/6520, p. 71, noting that the previous quorum was always met.

¹⁰² C. Meller-Hannich, *Kollektiver Rechtsschutz im Privatrecht und die Umsetzung der Verbandsklagenrichtlinie*, in *Versicherungsrecht*, p. 1321, at p. 1328 (2023); B. Gsell, *Die Umsetzung der Verbandsklagenrichtlinie – Effektiver Rechtsschutz für Verbraucher und Entlastung der Justiz durch die neue Verbands-Abhilfeklage?*, cit., at p. 981; A. Stadler, *Die neue Verbands(abhilfe)klage – Umsetzung der Richtlinie 2020/1828*, cit., at p. 135.

¹⁰³ Cf. B. Gsell, *Die Umsetzung der Verbandsklagenrichtlinie – Effektiver Rechtsschutz für Verbraucher und Entlastung der Justiz durch die neue Verbands-Abhilfeklage?*, cit., at pp. 981–982.

¹⁰⁴ C. Meller-Hannich, *Kollektiver Rechtsschutz im Privatrecht und die Umsetzung der Verbandsklagenrichtlinie*, in *Versicherungsrecht*, p. 1321, at p. 1325 (2023); B. Gsell, *Die Umsetzung der Verbandsklagenrichtlinie – Effektiver Rechtsschutz für Verbraucher und Entlastung der Justiz durch die neue Verbands-Abhilfeklage?*, cit., at p. 981.

¹⁰⁵ See BT-Drs. 20/6520, p. 11.

¹⁰⁶ R. Janal, *Die Umsetzung der Verbandsklagenrichtlinie*, in *Gewerblicher Rechtsschutz und Urheberrecht*, p. 985, at p. 988 (2023).

¹⁰⁷ See the explanations accompanying the draft VDuG, BT-Drs. 20/6520, p. 71.

persuasive.¹⁰⁸ Redress actions may be complex and resource-intensive and have the potential to replace numerous individual proceedings. It is therefore appropriate that such cases are directly heard by higher courts, avoiding dispersal across several lower courts. In addition, higher courts have judicial panels composed of experienced judges, and are less frequently affected by changes in judicial composition than lower courts.¹⁰⁹ For judges of the Higher Regional Courts, however, this allocation of jurisdiction may prove challenging, insofar as they have less experience with fact-finding, as this task is otherwise typically entrusted to the Local and Regional Courts at first instance.

According to § 3(2) VDuG, German federal states (Länder) with several Higher Regional Courts may assign jurisdiction for redress actions from the districts of multiple Higher Regional Courts to a single court, provided that such concentration promotes the effective conduct of representative action proceedings. Such concentration can foster both organisational and substantive specialisation, thereby increasing the efficiency of redress actions.¹¹⁰ It appears that, as of March 2026, two of the sixteen German federal states—the two most populous ones—had made use of this option.¹¹¹

The jurisdiction of the Higher Regional Courts is accompanied by a reduction in the number of instances. In contrast to ordinary proceedings, where parties are typically allowed to lodge both an appeal (Berufung) and, subsequently, a further appeal on points of law (Revision), a judgment in a redress action issued by the Higher Regional Court may only be challenged once, namely before the German Federal Court of Justice (Bundesgerichtshof, BGH).¹¹² This two-tier system can further accelerate proceedings.¹¹³ It should be noted in this context that the VDuG always allows remedies to be sought against both the basic judgment and the final judgment. It is therefore essential to ensure an efficient system of judicial review.

In Italy, the representative action is initiated through a “ricorso” (petition) filed exclusively before the Commercial Division of the court where the respondent entity is headquartered. In cases where the respondent is an individual, jurisdiction lies with the court of their residence or domicile. If these are unknown, the competent court is determined by the respondent’s place of stay, or, failing that, the headquarters of the claimant entity. In legal scholarship, it has been noted that while assigning jurisdiction to the Specialised Business Divisions is intended to ensure ad hoc expertise

¹⁰⁸ Cf. C. Meller-Hannich, Kollektiver Rechtsschutz im Privatrecht und die Umsetzung der Verbandsklagenrichtlinie, in *Versicherungsrecht*, p. 1321, at p. 1328 (2023); A. Halfmeier, P. Rott, in P. Rott, A. Halfmeier, W. Vandenbussche, L. Bugatti and J. Mucha, *Comparative Legal Study on Procedural Rules and their Impact on Collective Redress Actions in Europe*, cit., p. 47.

¹⁰⁹ On the difficulties, notably the delays, associated with changes in judicial composition, see C. Meller-Hannich *et al.*, *Der Rückgang der Eingangszahlen bei den Zivilgerichten*, pp. 288–290 (2023).

¹¹⁰ See the explanations accompanying the draft VDuG, BT-Drs. 20/6250, p. 71.

¹¹¹ Bavaria and North Rhine-Westphalia, see G. Lutz, § 3 VDuG, in V. Vorwerk and C. Wolf, *Beck’scher Online-Kommentar ZPO*, mn. 6 (Munich 59th ed. 2025) with further references.

¹¹² See §§ 16(5), 18(4) VDuG; cf. the explanations accompanying the draft of the similar provision in § 6 UKlaG, BT-Drs. 20/6520, p. 118.

¹¹³ Cf. the explanations accompanying the draft of the similar provision in § 6 UKlaG, BT-Drs. 20/6520, p. 118.

and a higher degree of specialisation for complex collective proceedings,¹¹⁴ concerns have been raised regarding the actual efficiency of this solution, given the considerable workload already borne by these Divisions.¹¹⁵

II.4 Comparative insights on prerequisites and admissibility

It seems that some of the differences between the German and Italian prerequisites for the admissibility of the redress action may be explained by their divergent experiences with collective redress. While Germany previously lacked a legal framework for collective actions seeking remedies, the Italian legislator could build on prior experience with the former consumer class action and the still-existing general collective action under the Civil Procedure Code. This different background may explain why the Italian legislator—unlike its German counterpart—confined the scope of application to the minimum requirements of the RAD, both in terms of the infringements covered by the redress action and the potential beneficiaries. In Italy, claims falling outside the new regime may still be pursued through the general collective action under the Civil Procedure Code, whereas in Germany, claims excluded from the VDuG's scope of application are not eligible for any mechanism of collective redress at all.¹¹⁶ Nevertheless, even in Italy, the restrictions on the scope of application of the new redress action may still give rise to inconsistencies, as the two collective redress regimes are not perfectly aligned.

In both Italy and Germany, QEs designated in advance for domestic redress actions are subject to more stringent substantive requirements than those for cross-border actions, and neither jurisdiction provides for ad hoc QEs. This choice appears to reflect a general scepticism towards the new redress action: both Member States made use of the discretion afforded by the RAD to make the designation of QEs for domestic actions subject to stricter requirements than those set out by the RAD with regard to QEs for cross-border actions. In both countries, a restrictive approach was thus preferred over coherence. The involvement of public bodies as potential claimants in redress actions only in Italy, but not in Germany, may again be explained by different traditions: whereas German consumer law generally emphasises private enforcement by individuals and consumer organisations, Italian consumer law has traditionally relied on public enforcement—however, such public enforcement has typically been realised through administrative procedures rather than through collective actions before civil courts. Neither the German nor the Italian redress action can be initiated by individual consumers or commercial actors. Yet, in Italy, individual consumers may still rely on the general collective action, while the German system of collective redress continues to lack a group action capable of filling this gap and will therefore most likely continue to be complemented by legal tech class actions.

¹¹⁴ The legislature has justified this choice with the aim of fostering the specialisation of judges handling representative actions, a field characterised by various peculiarities—particularly in terms of case management, which also requires the use of the electronic services portal, established specifically for the implementation of class actions as provided under Arts. 840-bis ff. of Civil Procedure Code: See XIX LEG - Schema di D.Lgs. - Recepimento della direttiva (UE) 2020/1828 del parlamento europeo e del consiglio del 25 novembre 2020 relativa alle azioni rappresentative a tutela degli interessi collettivi dei consumatori e che abroga la direttiva 2009/22/CE - Consiglio dei ministri 9 marzo 2023, Relazione illustrativa, available at https://www.giustizia.it/giustizia/it/mg_1_2_1.page?contentId=SAN426528#rel (last visited Mar. 2, 2026).

¹¹⁵ E. Silvestri, *Rebooting Italian class action*, cit., p. 207; C. Consolo, *L'azione di classe di terza generazione*, in V. Barsotti, F. De Dominicis, G. Pailli and V. Varano (eds.), *Azione di classe: la riforma italiana e le prospettive europee*, cit., p. 19, at pp. 21 ff.

¹¹⁶ According to A. Halfmeier, P. Rott, in P. Rott, A. Halfmeier, W. Vandenbussche, L. Bugatti and J. Mucha, *Comparative Legal Study on Procedural Rules and their Impact on Collective Redress Actions in Europe*, cit., p. 47, the extension can be explained by the diesel emissions scandal, where claims were based on national tort law and were also brought by small enterprises.

As regards the collective element, both Germany and Italy provide for a criterion of similarity and—although not explicitly stated in German law—of separability. By contrast, the question of a quorum is addressed very differently in the two countries: whereas the German legislator still appears to fear floods of representative actions and has established a very high quorum, Italy's experience does not seem to indicate any need for such a requirement. However, given that the former model declaratory action in Germany clearly fell short of expectations in quantitative terms,¹¹⁷ it would also have been reasonable for the VDuG to provide for a lower quorum—or even none at all.

In terms of jurisdiction, both the German and Italian legislators sought to ensure that redress actions are heard by experienced judges and to promote judicial specialisation. While this approach is generally favourable, in Italy, concerns have been raised that the business divisions responsible for hearing redress actions may face excessive workloads. Whether this concern is justified largely depends on which mechanisms are available to the courts to handle redress actions efficiently. The following section will address this issue and, more generally, the procedure for redress actions in Germany and Italy.

III. COURSE OF PROCEEDINGS AND JUDGMENTS

III.1 Requirements and challenges

The RAD is characterised by the principle of respecting the different legal traditions of the Member States. With regard to the course of proceedings and the types of judgments, the Directive's regime is therefore open in many respects, granting Member States considerable discretion in its implementation. For instance, Member States can organise representative actions as either a judicial or administrative procedure, or both (Art. 4(9), Recital 19 RAD). In principle, both an opt-in and an opt-out mechanism, or a combination of both, can be used to grant QEs the power to act on behalf of consumers; Member States can also decide at which stage of the proceedings individual consumers may exercise their right to opt-in or -out (Recital 43 RAD). Furthermore, for “reasons of expediency and efficiency”, Member States are permitted to allow representative actions for redress to benefit consumers independently of a mandate (Recital 47 RAD). In any case, the Directive expressly provides that consumers should be granted measures such as reparation, product replacement, price reduction and contract termination (Recital 37 RAD). Furthermore, consumers must be able to obtain compensation without having to take further individual legal action (Recital 50 RAD).

Against this backdrop, the biggest challenge for Germany in implementing the Directive was probably to develop a procedure and types of judgments that would generate financial or other compensation for the consumer group. As described above (see I.1), German civil procedural law did not yet provide for a genuine collective action for redress, which would enable a representative to assert the claims of the group members collectively by way of an action for performance. Accordingly, it was necessary to establish new regulations—absent a concrete model in the previous German civil procedural law—on how remedies to be obtained by an association in collective proceedings can benefit the affected individual consumers and how such benefits can be enforced without the need for a separate individual action by the consumer. The problem,

¹¹⁷ When drafting the former rules on the model declaratory action, the German legislator estimated that around 450 such actions would be filed each year (see BT-Drs. 19/2439, p. 3). However, between November 2018 and September 2023, only 36 actions were actually filed, see P. Röthemeyer, Ein Jahr Abhilfeklage nach der Verbandsklagen-RL – nach der Reform ist vor der Reform, in Zeitschrift für Bank- und Kapitalmarktrecht, p. 977, at p. 980 (2024).

therefore, was not only to determine the group (see II.2), but also how the liability of the defendant company should be assessed on its merits and how the amount to be paid should be ascertained; and, in addition, how and by whom the entitlement of the individual consumer should be determined and the amount attributable to them distributed. The German system opted for a multi-stage examination and judgment procedure.

The aim was, in any case, to create a system that was effective, yet at the same time as simple and practicable as possible, respecting the principle of a fair trial, accommodating the variety of possible remedies and the needs of justice, and doing so without overburdening the associations entitled to bring actions. But with respect to the result, which will be discussed shortly, one could be reminded of the proverb: “Bisogna sempre dire francamente e chiaramente le cose al proprio avvocato: sarà lui ad imbrogliarle”. This leads to the challenges faced in Italy:

In Italy, alongside the traditional forms of redress, such as compensation and restitution, which are already covered by the general class action rules (Art. 840-bis, par. 2, Civil Procedure Code) and the previous consumer class action (Art. 140-bis Consumer Code), the new regulation introduces a broader spectrum of remedial measures in accordance with the RAD provisions.¹¹⁸ As mentioned earlier, these now include measures such as reparation, product replacement, price reduction and contract termination¹¹⁹, thereby enhancing the scope of consumer protection¹²⁰. The procedural regime governing the Italian consumer representative action closely mirrors the framework established for general collective action under the Civil Procedure Code, insofar as compatible. The resulting system is a composite mechanism that attempts to align national civil law traditions with EU requirements, while also responding to the long-standing structural weaknesses of Italian consumer collective litigation. However, the final configuration reveals a legislative approach characterised by caution and continuity rather than innovation.

The new Italian mechanism for collective redress is designed to be a multifaceted procedural instrument that pursues several fundamental aims. The most important of these is the consolidation of parallel proceedings, which reduces litigation costs for consumers as well as for the judiciary. Centralising disputes of a similar nature also mitigates the risk of divergent judicial outcomes. Furthermore, the procedure strengthens individuals' procedural standing vis-à-vis professionals and businesses, thereby fostering a more balanced and equitable dispute resolution environment.¹²¹

III.2 Procedural steps and types of judgements

In Germany, legal proceedings start with the filing of the lawsuit by an authorised association (§§ 1–5 VDuG). As explained above, the Higher Regional Court at the defendant's venue has exclusive jurisdiction (see II.3). The admissibility of the action depends on the similarity of the claims and on the fact that at least 50 consumers are affected (see II.2). At this stage, the merits of the case are not yet assessed.

QEs are obliged to provide information on their websites about planned and already filed representative actions and the respective status of the proceedings (§ 12 VDuG). The action is

¹¹⁸ F. De Franceschi, *Le «azioni rappresentative» di cui agli artt. 140-ter ss. Consumer Code: ambito di applicazione, legittimazione ad agire e rapporti con la disciplina generale delle azioni di classe di cui agli artt. 840-bis ss. c.p.c.*, in *Le Nuove Leggi Civili Commentate*, p. 1 (1, 2024).

¹¹⁹ Art. 140-*novies*, Art. 140-*ter*, comma 1, h) Consumer Code.

¹²⁰ F. De Franceschi, *Le «azioni rappresentative» di cui agli artt. 140-ter ss. c.cons.: ambito di applicazione, legittimazione ad agire e rapporti con la disciplina generale delle azioni di classe di cui agli artt. 840-bis ss. c.p.c.*, cit.

¹²¹ See the explanations of the Ministry of Enterprises and Made in Italy, <https://www.mimit.gov.it/index.php/it/component/content/article?id=2009676> (last visited Mar. 2, 2026).

entered in a register of representative actions (§ 43 VDuG). Consumers have up to three weeks after the conclusion of the hearing to register their claim in the register (§ 46 VDuG, see 3). The register is not maintained by the court, but by the Federal Office of Justice.¹²² Registration in the register is free of charge. Consumers do not incur any legal costs, meaning that they can benefit from the effects of the action with relatively little effort.¹²³ However, it should be noted that the practical relevance of the register for determining the identity of the eligible consumers is limited, as eligibility requirements are not checked during registration. Nevertheless, it forms the basis for the basic judgment and the collective total amount. There is therefore a considerable need for corrections within the procedure.

The further course of the procedure depends on the type of collective action. This article primarily focuses on actions for redress. Nevertheless, actions for injunctions and model declaratory actions (see I.1) remain available as alternative remedies. In addition, as will be shown in the following, there are also differences among actions for redress:

On the one hand, there is the possibility of a redress action in favour of named consumers (§ 16(1) sent. 2 VDuG). If the court orders the defendant to pay the named consumers, it will directly issue a positive judgment if the claimant prevails. This judgment will be enforced by the association. More importantly, however, on the other hand, is the non-individualised redress action. This is an action for a benefit to a group of consumers determined not by their names but on the basis of uniform characteristics (§ 16(1) sent. 2 VDuG). In this case, the claim is for a group whose individual identities need not be known. In these proceedings, if the claim is successful, a basic judgment will first be given (§ 16(2) VDuG). This judgment must set out specific conditions for determining who is entitled and what evidence must be provided.¹²⁴ If the claim is for an order for payment,¹²⁵ the basic judgement must also state the amount to which each consumer is entitled, or provide a method of calculation. The basic judgement would therefore set out the conditions under which consumers are entitled to compensation, as well as the evidence they must provide to prove their entitlement. Additionally, either a specific amount or a calculation method would have to be specified. After issuing the basic judgment, the court should ask the parties to propose a settlement on how to implement the basic judgment (§ 17 VDuG, see also 7). If no agreement is reached, the court will issue a final judgment to provide redress (§ 18 VDuG). This judgment will include an order for implementation and payment of the sum to a trustee. If a final judgment is issued, the corresponding sum would therefore have to be paid to the trustee, who subsequently administers its distribution through an implementation procedure (see III.8). If the action is dismissed, it would always be by judgment.

¹²² See

https://www.bundesjustizamt.de/DE/Themen/Verbraucherrechte/VerbandsklageregisterMusterfeststellungsklagenregister/Verbandsklagenregister/Verbandsklagen/Verbandsklagen_node.html (last visited Mar. 2, 2026).

¹²³ F. Reuschle, § 46 VDuG, in F. Reuschle, H. Großerichter and F. Kruis, *Verbraucherrecht durchsetzungsgesetz*, mn. 4 (2025).

¹²⁴ F. Reuschle, § 16 VDuG, in F. Reuschle, H. Großerichter and F. Kruis, *Verbraucherrecht durchsetzungsgesetz*, mn. 10 (2025).

¹²⁵ Strangely enough, even an individualised claim for compensation for other (non-pecuniary) damage leads to a basic judgment and subsequently to a final judgment. This does not really make sense, but the wording of § 16(1) sent. 2 is clear; C. Althammer, § 16 VDuG, in R. Zöller, *Zivilprozessordnung*, mn. 2 (2025). Enforcement of this judgment is only selectively regulated, with the court being able to order coercive measures against the trader at the request of the trustee.

In Italy, jurisdiction is vested in the Commercial Division of the court where the trader is headquartered (see II.3) The process unfolds in three distinct phases.

In particular, the procedural structure maintains the two-stage model originally experimented with under the former consumer class action: an initial certification phase devoted to assessing the admissibility of the action, followed (should admissibility be granted) by a merit phase governed by a summary procedure. Consistent with the 2019 reform of the general collective action, a third phase has been introduced. This post-judgment stage concerns the management and assessment of the requests of consumers who opted in. In the last stage, the regulatory framework assigns distinct functions to two figures: (i) the delegated judge, who oversees the opt-in process and supervises the liquidation phase, and (ii) the consumer representative (“rappresentante comune degli aderenti”), who acts as the interlocutor for adherents and participates in structuring settlements and post-certification administration. The common representative is selected from individuals qualified to serve as a kind of “bankruptcy trustee” (“curatore fallimentare”) and acts as a public official.

As pointed out, representative actions must be commenced by petition (*ricorso*) before the competent Commercial Division. The petition must include: 1) clear identification of the consumer group affected by the trader’s conduct; 2) establishment of jurisdiction and applicable law; 3) disclosure of any third-party funding for the action¹²⁶.

Upon filing, both the petition and the decree fixing the first hearing must be published in the public section of the Ministry of Justice’s Telematic Services Portal.¹²⁷ This ensures that the action is publicly accessible and adheres to notification requirements under the procedural rules. This online platform (introduced in 2019 to modernise publicity for collective proceedings) serves as the exclusive channel through which information about representative actions is disseminated and through which consumers may submit opt-in statements electronically (see III.4).

The action follows the simplified procedure outlined in Book II, Title I, Chapter III-quater of the Civil Procedure Code, adapted as necessary to suit the specific nature of representative actions. Notably: a) the expedited timeline excludes the application of Art. 281-duodecies, par. 1: this provision ordinarily allows judges to switch from the simplified procedure to the ordinary procedure in specific circumstances; b) the right to pursue individual actions remains unaffected, barring exceptions under Art. 840-undecies, par. 9; c) third-party interventions under Art. 105 are not permitted.

Certification (decision on the admissibility of the action) must occur within 30 days from the first hearing, although the court may suspend the proceedings where parallel investigations by independent authorities or pending administrative proceedings are ongoing.

The action is inadmissible where: a) the claim is manifestly unfounded; b) it lacks the necessary elements to identify the group of consumers affected by the representative action; c) the claims lack homogeneity; d) the qualified entity lacks the requirements necessary for standing to sue; e) there is a conflict of interests with the defendant, including when the entity financing the action is a competitor of the defendant or depends on the defendant; and f) the statutory purpose of the qualified entity that filed the application does not justify the exercise of the action (Art. 140-septies, par. 8, Consumer Code). The court’s decision regarding admissibility must be published on the

¹²⁶ Art. 140-septies Consumer Code.

¹²⁷

See https://servizipst.giustizia.it/PST/it/pst_2_16.wp?actionPath=/ExtStr2/do/classaction/ricercaClassAction¤tFrame=8 (last visited Mar. 2, 2026).

public section of the Telematic Services Portal managed by the Ministry of Justice within 15 days. If a claim is deemed inadmissible due to manifest unfoundedness, the petitioner may re-bring the action should new circumstances arise or new factual or legal arguments be presented.

Once the redress action is certified as admissible, all potential beneficiaries are notified of the proceedings. They are afforded an opportunity to join the action within a predetermined timeframe ranging from a minimum of 60 to a maximum of 150 days from the publication of the certification order. Upon expiry of this period, the court proceeds to adjudicate the merits of the claim. Should the action be upheld on the merits, a second adhesion window opens: consumers holding homogeneous individual rights may join the action through the late opt-in mechanism, again within a mandatory period of no fewer than 60 and no more than 150 days.

This stage is followed by the third phase dedicated to the quantification of the compensation claims. In its final merits judgment, the court appoints a delegated judge to supervise the opt-in procedure and designates a common representative to act on behalf of the group. During this phase, the common representative prepares a preliminary assessment for the delegated judge, who will subsequently render the final determination.

Specifically, within 90 days from the expiry of the deadline granted to the defendant to file its memorandum of defence (where the defendant responds to the factual allegations underlying each claim and raises any extinguishing, modifying, or impeding objections), the common representative must compile and file a report on the homogeneous individual rights of the registered consumers, formulating reasoned conclusions for each claim. Where necessary, the common representative may petition the court for the appointment of one or more experts possessing the technical skills required to evaluate the factual foundations of the claims. The report is then communicated to both the defendant and the registered consumers.

The defendant and the consumers have 30 days from the notification of the common representative's report to submit written observations and supplementary documents. The common representative then has 60 days to incorporate any changes into the report on homogeneous individual rights and file the revised report in the case's digital file.

The delegated judge, by means of a reasoned decree, when granting all or part of the opt-in claims, orders the defendant to pay the sums or deliver the items owed to each consumer as compensation or restitution. This decree constitutes an enforceable title.

III.3 Opt-in/opt-out

German law provides for an opt-in system, albeit one that permits consumers to make a relatively informed decision: a "late opt-in" allows them to incorporate the findings from the oral hearing into their decision (§ 46 VDuG). In the German legislative process¹²⁸, this was a compromise between mandatory early opt-in, i.e. a binding decision to participate already when the representative action was filed, and an opt-in only after a judgment had been issued.¹²⁹ Under the latter approach, consumers could have opted in with full knowledge of the outcome of the

¹²⁸ See especially Empfehlung 145/1/23, pp. 10-13, available at <https://dserver.bundestag.de/brd/2023/0145-1-23.pdf> (last visited Mar. 2, 2026).

¹²⁹ Proposal of B. Gsell and C. Meller-Hannich, Die Umsetzung der neuen EU-Verbandsklagenrichtlinie, Gutachten über die Umsetzung der europäischen Richtlinie über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher (RL (EU) 2020/1828) ins deutsche Recht (2021), available at https://www.vzbv.de/sites/default/files/downloads/2021/02/03/21-02-04_vzbv_verbandsklagen-rl_gutachten_gsell_meller-hannich.pdf (last visited Mar. 2, 2026).

proceedings (which would have been allowed by the RAD (Recital 47)). As the register forms the basis for both the initial judgment and the total amount to be distributed to consumers, and as there is a considerable need for corrections within the procedure (see III.2), it would actually have been more sensible to open registration only after the judgement had been delivered, so that it could be tailored precisely.

Despite the flexibility permitted under the RAD, which authorises Member States to adopt opt-in, opt-out, or hybrid systems, Italy has chosen to retain the opt-in model introduced in 2019 for general collective actions. This model combines an early opt-in (post-certification) with a late opt-in (after the decision on the merits), thereby extending the temporal window for consumer participation.

The adherence to opt-in is traditionally and in both jurisdictions justified by reference to the civil-law principle of private autonomy: individuals should retain full control over the enforcement of their claims and cannot be represented without explicit authorisation. This rationale (often framed as the “blocking argument”) continues to dominate domestic debates, despite the gradual acceptance of opt-out mechanisms across several continental jurisdictions¹³⁰ and the growing recognition that pecuniary rights may be effectively adjudicated under such schemes.

The introduction of a “late opt-in” mechanism seeks to address the problem of low consumer participation due to rational apathy and to secure both compensatory and deterrent objectives. Extending the timeframe for consumers to join a collective action should increase the likelihood of involvement from those impacted by the defendant's misconduct.

Nevertheless, while the late opt-in mechanism undoubtedly expands the opportunities for participation, its capacity to counteract the chronic phenomenon of rational apathy remains doubtful. Italian experience under the former consumer class action demonstrated that consumers rarely opt in unless strongly incentivised, particularly in small-value claims¹³¹.

Collective litigation is fundamentally aimed at securing redress for affected parties, but it also plays a critical role in influencing trader behaviour. The prospect of expensive legal proceedings can act as a deterrent, discouraging legal violations,¹³² while court decisions can establish standards that eliminate harmful practices and corporate misconduct from the market¹³³. However, concerns persist about whether the opt-in system is effective not only in delivering compensation to consumers but also in achieving sufficient deterrence to fulfil its dual purpose. The success of this system depends heavily on the level of consumer participation, which, as already pointed out, has historically been low.

¹³⁰ See C. Nagy, *The European collective redress debate after the European Commission's recommendation. One step forward, two steps back?*, in 22–4 *Maastricht Journal of European and Comparative Law*, p. 530, pp. 541–542 (2015); A. Stöhr, *The implementation of collective redress – A comparative approach*, in 21 *German Law Journal*, p. 1606 (2020), who underlined that “In Europe, the opt-out principle is implemented by the United Kingdom and the Netherlands. Hybrid systems of either opt-in or opt-out, depending on the type of action or the specifics of the case, can be found in Belgium, Bulgaria, Denmark, and competition cases in the United Kingdom”; British Institute of International and Comparative Law (BIICL), *State of Collective Redress in the EU in the Context of the Implementation of the Commission Recommendation*, JUST/2016/JCOO/FW/CIVI/0099, 2018.

¹³¹ G. Afferni, *La nuova azione di classe*, in *Mercato concorrenza regole*, p. 437, at p. 439 (2021).

¹³² Contra see C. Hodges, *Evaluating Collective Redress: Models, Evidence, Outcomes and Policy*, in A. Uzelac and S. Voet, *Class Actions in Europe: Holy Grail or a Wrong Trail?*, cit., p. 19, at p. 22, who underlines that the classic economic theory according to which the “enforcement of law through imposing financial consequences (fines or damages) and public shaming (be adjudged to be in the wrong) increases deterrence” is not supported by strong evidence, while ‘extensive evidence now exists that “regulating through culture” offers the most effective way of affecting future behaviour (...)’.

¹³³ G. Howells, *EU consumer access to justice and enforcement*, in G. Howells, C. Twigg-Flesner and T. Wilhelmsson (eds.), *Rethinking EU Consumer Law*, p. 290, at p. 294 (London, 2017).

On the other hand, traders' associations have sharply criticised the late opt-in model, arguing that it generates unacceptable levels of uncertainty regarding potential liability exposure, thereby discouraging settlement and undermining procedural efficiency¹³⁴.

III.4 Publicity

Publicity is intrinsically linked to the functioning of any opt-in mechanism. In Germany, registration is carried out via a platform at the Federal Office of Justice, but as mentioned above (see III.2), the register is not very informative and the courts have to check the registration and its validity, which can be time-consuming, especially since they do not maintain the register themselves.¹³⁵ The officially maintained register is supplemented by information from consumer associations and, where applicable, the courts.

In Italy, under the previous Italian consumer class action, notice requirements were costly and ineffective, relying even on publication in national newspapers. The 2019 reform radically modernised this system by establishing a digital platform integrated into the Ministry of Justice's Telematic Services Portal. This platform centralises all information concerning pending collective actions and allows consumers to submit opt-in requests electronically. This digital infrastructure significantly reduces costs, enhances visibility, and removes logistical barriers to participation. The same system has been extended—unchanged—to consumer representative actions, thereby creating a unified technological environment for all forms of collective redress. This platform simplifies access to information, enabling consumers to review case details and submit opt-in requests online, thereby reducing procedural barriers and increasing transparency. While these measures may address some concerns about low participation rates, it remains uncertain whether they can fully counteract the inertia often observed among consumers.

III.5 Combination of different types of collective actions

As already mentioned (see III.1), a significant advancement both the Italian and the German legal frameworks is the expansion of available remedies under the new provisions. In Italy, the novelty lies in the qualitative expansion of available remedies under the new provisions; in Germany, before the RAD was implemented, there was no possibility of bringing a redress action at all.

In Italy and Germany, to protect the collective interests of consumers, QEs are empowered to pursue both compensatory and injunctive relief, either independently or in combination. This includes the possibility of seeking interim injunctions. The distinctive feature of the redress action is that it allows not only for the determination and cessation of, for example, the charging of an excessive price, but also for an order requiring payment to all affected consumers of the excess amount paid.

Since associations can proceed flexibly when filing applications in accordance with the general rules of civil procedure, in Germany, it is also possible to initiate combined declaratory and redress proceedings, in particular for the purpose of comprehensively suspending the limitation periods.

¹³⁴ Confindustria, *Schema di decreto legislativo di recepimento della Direttiva Ue n. 1828/2020 sulle azioni rappresentative a tutela degli interessi collettivi dei consumatori – Osservazioni – Position Paper*, 6 (January 2023); see the statements made in the *Legal Affairs Committee of the German Bundestag*, available at <https://www.bundestag.de/dokumente/textarchiv/2023/kw19-pa-recht-verbandsklage-945426> (last visited Mar. 2, 2026).

¹³⁵ C. Meller-Hannich, *Möglichkeiten und Grenzen der Digitalisierung bei Massenverfahren*, in *Göttinger Kolloquium zum Zivilverfahrensrecht*, p. 27, at p. 33, available at https://univerlag.uni-goettingen.de/bitstream/handle/3/isbn-978-3-86395-587-8.3/GKDZ02_03_meller-hannich.pdf?sequence=1 (last visited Mar. 2, 2026).

III.6 Evidence

One of the major difficulties in representative actions in Germany is proving the circumstances of the damaging event, particularly when the group entitled to compensation is undefined at the start of the proceedings, as is the case with non-individualised redress actions.¹³⁶ In other mass proceedings, courts have repeatedly ruled in favour of a reversed burden of presenting the facts (*Darlegungslast*, not burden of proof), thus helping to apply the law in situations where it is difficult for the claimant to present and prove the facts justifying the claim.¹³⁷ This will likely also apply to redress action; however, the implementation of the Directive has not addressed the general problem of the information gap in consumer cases. Although the court can order the defendant to submit documents, files or objects and impose administrative fines for violations (§ 6 VDuG and §§ 142–144 ZPO), this will not be much help in practice, as associations particularly struggle to present the relevant facts, and the rules on submitting documents, which also apply in ordinary civil proceedings, are applied very cautiously by German courts. At least the latest coalition agreement for the 21st legislative term¹³⁸ provides for an expansion of the courts' powers of estimation and standardisation, but how this will be implemented and applied in redress actions remains to be seen.

In Italy, one of the most significant innovations introduced by the 2019 reform (Art. 840-quinquies Civil Procedure Code), mirrored by the representative action provisions (Art. 140-novies Consumer Code), concerns the rules on evidence, which were designed to make the proceedings more claimant-friendly. Courts are now vested with broad discretionary powers to facilitate the establishment of liability and to counterbalance the structural informational asymmetry between parties. The court is entitled to dispense with any formalities not essential to the adversarial process and to conduct the proceedings as it deems appropriate to address the relevant evidence pertaining to the case. Furthermore, the court may rely on statistical data and simple presumptions to determine liability.

Moreover, courts may order disclosure of relevant documents or data held by the defendant, upon a reasoned request by the claimant, detailing facts and evidence reasonably available to the opposing party and sufficient to support the plausibility of the claim. The court must clearly and precisely specify the individual elements or categories of evidence (such as shared characteristics, their nature, the period in which they were produced, their subject matter, or the content they encompass) that are subject to a disclosure request or order. Any disclosure order must remain proportionate to the needs of the case. In particular, the court must: a) assess whether the facts and evidence already available sufficiently substantiate the claim so as to justify the disclosure order; b) evaluate the scope, burden, and cost of the disclosure process; and c) consider whether the requested materials contain confidential information, particularly that of third parties. Where disclosure involves confidential information, the court must adopt appropriate protective measures. These may include the imposition of confidentiality obligations, redaction of sensitive material, holding private hearings ("closed-door-hearings"), restricting access to the disclosed evidence to a limited number of individuals, or appointing experts to produce aggregated or non-confidential summaries. Confidential information covers personal, commercial, industrial, or

¹³⁶ T. Koller, *Die Tatsachenfeststellung bei Klagen nach dem Abtretungsmodell* (Baden-Baden, 2024).

¹³⁷ BGH Mar. 8, 2021 – VI ZR 505/19, in *Neue Juristische Wochenschrift*, p. 1669 (2021).

¹³⁸ Koalitionsvertrag CDU, CSU, SPD, 21. Legislaturperiode, available at https://www.koalitionsvertrag2025.de/sites/www.koalitionsvertrag2025.de/files/koav_2025.pdf (last visited Mar. 2, 2026).

financial data pertaining to individuals or businesses, as well as trade secrets. Attorney–client communications remain privileged and are excluded from disclosure. Prior to issuing a disclosure order, the court must verify that the opposing party had the opportunity to present its observations, thus affording the right to be heard.

In situations of non-compliance with a disclosure order or destruction of relevant evidence, the court is empowered to impose monetary sanctions. Specifically, where a party, without legitimate justification, refuses or fails to comply with a disclosure order, the court may levy an administrative fine between €10,000 and €100,000, payable to the Cassa delle Ammende. The same penalty may be imposed if a party or a third party destroys evidence pertinent to the proceedings. Additionally, when a party unjustifiably disregards a disclosure order or eliminates relevant material, the court, after considering the remaining evidence, may draw adverse inferences and treat the facts to which such evidence relates as established.

The legislation further contemplates the appointment of court experts and sets out specific rules regarding the allocation of related costs. In Italy, as a general principle, the obligation to advance the expenses and to provide the initial payment for the expert's fees lies with the defendant. Failure to comply with this financial obligation does not, however, constitute valid grounds for the expert to refuse the assignment. In Germany, by contrast, it is generally the party who has adduced evidence by means of an expert opinion that is required to pay the advance—just as in individual proceedings.¹³⁹

III.7 Settlements

In collective proceedings, settlements frequently offer an effective means of reconciling the tension between the need for swift and efficient proceedings and the accurate adjudication of individual claims. The German implementation of the RAD, which itself expressly provides for the possibility of settlement (Art. 11 RAD), also relies on settlements and regulates them in §§ 9, 17 VDuG. These provisions diverge from the general rules on court settlements in several respects. For example, the settlement is concluded by the association and the company, but not by the consumers themselves, who benefit from the settlement. In addition, there are strict deadlines for concluding a settlement; it cannot be concluded at any stage of the proceedings. In particular, it is intended for the implementation of the remedial judgment and can only be concluded once the deadline for late opt-in has expired (§§ 16, 17, 9, 46 VDuG). The procedure is such that, after the basic judgment (see III.2), the court requests the parties to submit a settlement proposal and can subsequently approve this proposal. In doing so, the court examines the appropriateness of the compensation, the relationship between performance and consideration, the various groups of consumers and the benefits of the proposed compensation. If a settlement is reached, the proceedings are terminated. If no settlement is reached, the proceedings continue and a final judgment on the remedy and distribution proceedings is issued (see III.2). Consumers may reject the settlement, whereby there is no minimum quorum. Consumers who do not participate in the settlement may assert their claims individually. Looking at the details of German legislation, it becomes clear that the timeframe for reaching a settlement is not very well chosen, as it is only opened late in the proceedings. Nevertheless, there are good prospects that proceedings will end in a settlement, since

¹³⁹ See § 13(1) VDuG, §§ 379, 402 of the German Code of Civil Procedure (Zivilprozessordnung, ZPO).

the subsequent payment and distribution procedures are complex to implement for both the association and the defendant company (see III.8).

In Italy, Art. 140-*decies* of the Consumer Code defines the regulatory framework for settlement and conciliation agreements. In line with the general principles governing collective actions, the representative consumer procedure places particular emphasis on the role of settlements and voluntary dispute resolution. Agreements of this kind may be concluded at various procedural stages, with the involvement of multiple stakeholders throughout the process.

Specifically, paragraph 1 of Art. 140-*decies* allows the parties to submit a settlement or conciliation proposal, while paragraph 2 empowers the court to encourage and facilitate settlement discussions between them. Under paragraph 3, the court is required to verify that any proposed agreement complies with the applicable legal standards and does not contain unenforceable provisions or obligations.

Up to the stage of oral discussion, the QE and the trader may jointly submit to the court a proposal for settlement or conciliation concerning the claim. Likewise, until the case is heard, the court itself retains the authority to propose settlement or conciliation initiatives. Following the issuance of the judgment, the common representative (acting on behalf of the consumers) may negotiate a settlement with the defendant; in any case, after consulting the consumers, this proposal must be reviewed and approved by the delegated judge.

This regulatory model signals a gradual evolution away from Italy's traditionally adversarial legal culture, long rooted in courtroom-based dispute resolution. The Italian system is progressively adopting a more consensual orientation, incorporating procedural mechanisms that actively promote negotiated and cooperative solutions.

III.8 Implementation of the judgment

As a reminder, in German proceedings, following the basic judgment and failed settlement negotiations, a final judgement is issued in which the trader is ordered to pay a collective total amount to a trustee (see III.2). It is only this final judgment that is enforceable by the association. The estimated amount is to be paid to a fund managed by the trustee and distributed to all consumers who provide the evidence determined necessary by the court. The collective amount awarded is therefore distributed to the registered consumers who can prove their entitlement in accordance with the conditions set out in the basic judgment (§§ 22-38 VDuG). All claims must be satisfied in full; hence, the defendant may be obliged to increase the fund. The trustee assesses the eligibility of each individual consumer. Both traders and consumers can appeal against the trustee's decision and (if the appeal is unsuccessful) apply for a court decision.

The implementation procedure is characterised by certain features of insolvency law. To be clear: it is intended for liquid traders. However, since the court estimates the total collective amount to be paid into the fund, the result is a quasi-fictitious insolvency estate. Therefore, the implementation procedure is a distribution procedure. In addition to this similarity with insolvency law, the trustee appointed for the implementation of the final judgment is functionally equivalent to the insolvency administrator in many respects.

However, a major difference between the implementation of collective judgments and insolvency proceedings is that individual consumers are not paid on a pro rata basis, but rather in full. These are therefore "insolvency proceedings" with the peculiarity of a 100% quota. If the estimated collective amount is insufficient, additional contributions are required; if it is excessive, the excess

is returned (§§ 21, 37 VDuG). Therefore, the total amount estimated by the court, on which the implementation procedure is based, is not a fixed liability amount.

Clearly, this is a precautionary withdrawal of capital from a solvent trader, which could continue for years. Neither consumers nor the trader benefit from this payment to a fund. Consumers do not benefit because they do not receive any money until distribution occurs. The trader derives no advantage, as they are deprived of liquid assets without any discharging effect. In some cases, this could even push the trader to the brink of insolvency. If there is an overpayment, the money will be returned to the trader, but it may take a long time to receive it.

It should also be noted that the trader may, of course, become insolvent during the implementation process (see § 38 VDuG). In this case, the liquidation and distribution procedures ultimately overlap, which complicates matters further given the complexity of the legal issues involved.¹⁴⁰

With German thoroughness, these rules have probably become too complex, and it remains to be seen how the courts will deal with this multi-stage procedure. In many cases, settlement will probably be the only possible solution. The involvement of a neutral third party, i.e. neither the association nor the court, in the enforcement of a collective judgment is appropriate. However, this third party could also have achieved the actual satisfaction of the consumers concerned without setting up a liability fund, which impairs liquidity and is also not insolvency-proof. Therefore, the multi-stage nature of the procedure according to German law is particularly problematic. It would have been favourable to adopt a single-stage approach, whereby a trustee reviews the collective judgment and uses it as the basis for distribution. This would also pave the way for individual enforcement.

III.9 Comparative insights on the course of proceedings and judgments

Comparing the German and Italian systems, both had to face the challenge of making new compensation obligations accessible to collective proceedings. In Italy, however, there was at least some experience with asserting monetary claims in collective proceedings, which had been completely lacking in Germany.

In implementing the Directive, both legal systems opted for a number of deviations from the general civil procedure system. This begins with the statement of claim, which also allows to refer to a group of similarly affected consumers, without individualising them by name. Both legal systems opted for a multi-stage procedure. The German system appears particularly complex and formalistic, especially with regard to the distribution procedure. This is largely attributable to the absence of a genuine departure from the individual procedural perspective. Even in collective action proceedings, the German implementation law is primarily concerned with the precise determination of individual claims; collectivisation ends with the transfer of the right to sue to the association.

Both countries have opted for an opt-in system. German law has the advantage that consumers do not have to “buy a pig in a poke”, but can exercise their opt-in quite late, after the remedial judgment has been issued. The same applies to Italy, given the opt-in after the judgment. Both legal systems also allow combinations of different types of legal action, although Germany's model declaratory action has no equivalent in Italy. A combination of injunctive relief and remedial actions is possible in both countries.

¹⁴⁰ C. Meller-Hannich, *Die Insolvenz im Umsetzungsverfahren nach dem Verbraucherrecht durchsetzungsgesetz (VDuG)*, in *Neue Zeitschrift für Insolvenz- und Sanierungsrecht*, p. 745 (2024).

Both countries place great trust and emphasis on the settlement of disputes. In Germany, however, the externally managed register is hardly suitable as a basis for settlement and any settlement must await the expiry of the registration obligation.

IV. COSTS AND FUNDING

The effectiveness and success of representative actions are closely dependent on the existence of adequate incentives to bring proceedings, as well as on the availability of appropriate funding mechanisms. Without sufficient financial support, the practical accessibility and viability of collective redress instruments are significantly undermined.¹⁴¹

In consumer representative actions, the allocation of legal costs is generally governed by the “loser-pays principle”. According to Art. 12(1) RAD, Member States must ensure that the unsuccessful party bears the costs of the proceedings arising from the redress action, in accordance with their general procedural law.

This principle allows QEs to recover litigation expenses in the event of success and, at the same time, encourages a careful ex ante assessment of the merits of a case.¹⁴² However, the prospect of having to assume the full costs of litigation in the event of failure may also exert an overly strong deterrent effect, particularly on QEs with limited financial capacity, potentially discouraging them from pursuing redress actions. Moreover, even where QEs can be confident of success and full recovery of costs, costs may still dissuade them from bringing a claim, as QEs are required to pre-finance the litigation.

For this reason, adequate financing constitutes a prerequisite for effective collective redress.¹⁴³ Furthermore, funding is not only decisive in determining whether a lawsuit can be brought at all, but also influences how it can be conducted and, ultimately, its chances of success: defendants (especially large companies) are typically able to deploy substantial financial resources in legal representation and expert evidence.¹⁴⁴ In order to counterbalance this structural asymmetry, QEs must likewise have access to sufficient and reliable funding.

In this regard, Art. 20(1) RAD requires Member States to adopt measures ensuring that costs do not prevent QEs from effectively exercising their right to seek redress measures. Art. 20(2) refers, by way of example, to public funding (see below IV.4), limitations on court or administrative fees (see IV.2), and access to legal aid (see IV.3). Furthermore, while individual consumers are, in principle, not required to bear the costs of the proceedings (Art. 12(2) RAD)¹⁴⁵, Art. 20(3) RAD allows Member States to lay down rules that permit QEs to require consumers to pay a modest entry fee or similar charge in order to participate in the representative action (see IV.1). Moreover,

¹⁴¹ Recalling M. Cappelletti and B. Garth (eds.), *Access to Justice: A World Survey* (Sijthoff 1978) 1, see E. Silvestri, S. Voet, T. Arruda Alvim and A. Biard, *Overreaching Issues in Representative Actions*, in B. Hess, M. Woo, L. Cadiet, S. Menétrey and E. Vallines García (eds.), *Comparative Procedural Law and Justice* (Part X Chapter 3), available at cplj.org/a/10-3 (last visited Mar. 2, 2026), who define the funding rules as “an essential precondition for the proper functioning of any civil justice system”.

¹⁴² Cf. D. Wendt, *Kollektiver Rechtsschutz in Europa – Kompetenzen, Alternativen und Safeguards*, in *Europäische Zeitschrift für Wirtschaftsrecht*, p. 616, at p. 622 (2011).

¹⁴³ See B. Gsell and C. Meller-Hannich, *Die Umsetzung der neuen EU-Verbandsklagenrichtlinie, Gutachten über die Umsetzung der europäischen Richtlinie über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher* (RL (EU) 2020/1828) ins deutsche Recht, cit., p. 45; A. Stadler, *Die neue Verbands(abhilfe)klage – Umsetzung der Richtlinie 2020/1828*, cit. at p. 147.

¹⁴⁴ Cf. B. Gsell and C. Meller-Hannich, *Die Umsetzung der neuen EU-Verbandsklagenrichtlinie, Gutachten über die Umsetzung der europäischen Richtlinie über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher* (RL (EU) 2020/1828) ins deutsche Recht, cit., p. 45.

¹⁴⁵ Art. 12(3) RAD provides for an exception: in exceptional circumstances, an individual may be ordered to pay the costs of proceedings that were incurred as a result of the individual consumer’s intentional or negligent conduct.

the Directive recognises the possibility for Member States to allow third-party litigation funding (TPLF), while at the same time laying down specific provisions governing its application. Member States must ensure that conflicts of interests are prevented and that funding by third parties that have an economic interest in the initiation or outcome of the action does not divert the representative action away from the protection of the collective interests of consumers (Art. 10(1) RAD) (see IV.5).

IV.1 “Loser-pays” principle and consumers’ fees

Both in Italy and in Germany, according to the “loser-pays” rule, the allocation of costs is linked to the outcome of the proceedings.¹⁴⁶ While national rules may differ as to which specific costs may be recovered, representative actions invariably involve significant financial risks for QEs, which remain responsible (as the formal claimant) for the procedural costs despite acting in the collective interest of consumers.

In line with the Directive, individual consumers who are not formal parties to a representative action are not required to bear any costs of the proceedings. In fact, in the event of an unsuccessful outcome, consumers may be required to reimburse expenses to the respondent only in the case of bad faith or gross negligence.¹⁴⁷ However, this provision has been implemented in Italy, but not in Germany. As regards the relationship between the QE and the consumers, national approaches diverge. In Germany, as in most Member States, the legislator has not made use of the option under Art. 20(3) RAD allowing participation or entry fees. By contrast, under the Italian transposition, QEs may require consumers who opt in to a redress action to pay a modest charge to contribute to litigation costs.¹⁴⁸

However, requiring consumers to contribute financially remains an exception within the EU¹⁴⁹ and does not, in practice, offer a comprehensive solution to the broader issue of funding. Modest participation fees are insufficient to finance representative actions in their entirety or even to cover a substantial portion of their overall costs.¹⁵⁰

IV.2 Reduction of court and lawyers’ fees

As mentioned above, possible measures contemplated by the RAD to reduce the financial risks of QEs include, *inter alia*, the limitation of applicable court or administrative fees.

Both Germany and Italy have sought to introduce caps on court fees, albeit through different approaches. Italy opted to reduce court fees by half, irrespective of the value of the dispute. Germany, by contrast, introduced an absolute maximum cap on court fees.

¹⁴⁶ See § 13(1) VDuG, §§ 91, 92 ZPO; Art. 840-*novies* Italian Civil Procedure Code, Art. 140-*novies* Italian Consumer Code.

¹⁴⁷ Art. 140-*novies*, par. 3 Consumer Code.

¹⁴⁸ Art. 140-*novies* Consumer Code, Art. 20(3) RAD. The solution of providing for an entry fee has also been adopted in other national contexts. In Poland, for example, QEs are permitted to charge participating consumers up to 5% of the claimed amount, subject to a maximum cap of PLN 2,000 (approximately €500). Similarly, in Austria, the participation fee is capped at €250 pursuant to § 9(4) of the Austrian Qualified Entities Act (Qualifizierte-Einrichtungen-Gesetz, QEG). See A. Halfmeier, P. Rott, in P. Rott, A. Halfmeier, W. Vandenbussche, L. Bugatti and J. Mucha, Comparative Legal Study on Procedural Rules and their Impact on Collective Redress Actions in Europe, cit.

¹⁴⁹ See A. Halfmeier, P. Rott, in P. Rott, A. Halfmeier, W. Vandenbussche, L. Bugatti and J. Mucha, Comparative Legal Study on Procedural Rules and their Impact on Collective Redress Actions in Europe, cit., p. 136.

¹⁵⁰ L. Visscher, M. Faure, *A Law and Economics Perspective on the EU Directive on Representative Actions*, cit.

In particular, in Italy, court costs are fixed amounts established by law. Specifically, under Art. 13(1) of Presidential Decree No. 115 of May 30, 2002¹⁵¹, the unified court contribution is calculated on the basis of a progressive scale linked to the value of the claim, ranging from relatively low amounts for small-value cases (around €40 for claims up to €1,100) to well over €1,500 for high-value claims (exceeding €520,000).¹⁵² Pursuant to Art. 140-*quaterdecies* Consumer Code, in the case of a representative action, the unified court contribution is reduced by half. However, in light of these amounts, it is clear that although the reduction of court fees may provide some relief to QEs, it represents only a minimal portion of the overall costs associated with a representative action. Similarly, in Germany, both statutory court and lawyers' fees generally depend on the value of the claim: the higher the value, the higher the fees.¹⁵³ However, to protect QEs from unlimited risks,¹⁵⁴ the legislator has capped the maximum value at €300,000.00.¹⁵⁵ This cap reduces both the court fees¹⁵⁶ and the lawyers' costs that the losing party must reimburse. Yet it can only slightly reduce, but not eliminate, the cost problem. The downside of this cap is that, in the event of success, QEs will usually not be fully reimbursed. This is because lawyers typically charge more than the statutory fees when the latter are limited (which they are permitted to do), and the difference between the statutory and the agreed fees is not recoverable from the opposing party under §§ 91, 92 ZPO. The cap, in effect, attenuates the "loser-pays" principle.¹⁵⁷ Furthermore, in the event of failure, the cap provides only limited relief for the QE: where the value in dispute amounts to €300,000, the QE would, in a straightforward proceeding, still have to bear costs of approximately €30,000, even if its own lawyers' fees do not exceed the statutory fees.¹⁵⁸ In more complex proceedings involving witnesses and experts, the costs will be considerably higher. The cap can therefore only constitute

¹⁵¹ Decreto del Presidente della Repubblica, 30 May 2002, n. 115, Testo unico delle disposizioni legislative e regolamentari in materia di spese di giustizia, in GU n.139 del 15-06-2002 - Suppl. Ordinario n. 126.

¹⁵² In particular: a) €43 for cases valued up to €1,100, as well as cases concerning mandatory social security and assistance disputes (except as provided by Art. 9, paragraph 1-bis, for joint applications under Art. 473-bis.51 of the Civil Procedure Code);

b) €98 for cases valued above €1,100 and up to €5,200, voluntary jurisdiction cases, as well as contentious proceedings under Art. 473-*bis* of the Civil Procedure Code and special proceedings under Book IV, Title II, Chapter VI, of the same Code;

c) €237 for cases valued above €5,200 and up to €26,000, as well as contentious cases of indeterminate value under the exclusive jurisdiction of the justice of the peace;

d) €518 for cases valued above €26,000 and up to €52,000, as well as civil cases of indeterminate value;

e) €759 for cases valued above €52,000 and up to €260,000;

f) €1,214 for cases valued above €260,000 and up to €520,000;

g) €1,686 for cases valued above €520,000.

¹⁵³ See §§ 3, 48(1) sent. 1 of the German Court Costs Act (Gerichtskostengesetz, GKG) in conjunction with §§ 3–10 ZPO, §§ 1, 23(1) sent. 1 of the German Act on the Remuneration of Lawyers (Rechtsanwaltsvergütungsgesetz, RVG).

¹⁵⁴ On this objective of introducing caps of the value in dispute, see the report of the Committee on Legal Affairs of the German Bundestag on the former ABGB, BT-Drs. 7/5422, p. 13.

¹⁵⁵ § 48(1) sent. 3 GKG. In the original draft of the VDUG, an amount of €410,000 was provided (BT-Drs. 20/6520, p. 130). With regard to the model declaratory action and actions for injunctive relief, a maximum of €250,000 applies (§ 48(1) sent. 2 GKG). The difference is explained by the argument that redress actions have a broader impact, as they are directed towards a performance in favour of consumers (*ibid.*).

¹⁵⁶ Cf. on such reduction Art. 20(2) RAD.

¹⁵⁷ See B. Gsell and C. Meller-Hannich, Die Umsetzung der neuen EU-Verbandsklagenrichtlinie, Gutachten über die Umsetzung der europäischen Richtlinie über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher (RL (EU) 2020/1828) ins deutsche Recht, cit., pp. 45–46, also on the compatibility with the RAD.

¹⁵⁸ For the calculation, see <https://www.juris.de/jportal/nav/services/prozesskostenrechner/index.jsp> (last visited Mar. 2, 2026).

one element in a broader set of measures designed to make it financially feasible for QEs to bring redress actions.¹⁵⁹

As a result, when considered in isolation, neither the reduction of court fees in Italy nor the cap applied in Germany eliminates, or substantially mitigates, the financial risk borne by QEs.

IV.3 Legal Aid

Recourse to legal aid schemes, which exist in both legal traditions, although theoretically available to non-profit entities, does not appear to constitute a viable or preferential route for QEs in representative proceedings. This is largely due to the restrictive conditions governing access to legal aid.

In Italy, legal aid funded by the State (*patrocinio a spese dello Stato*) is available not only to natural persons who satisfy the statutory requirements, but also to “entities or associations that do not pursue profit-making purposes and do not carry out economic activities” (Art. 119 DPR 115/2002). Conversely, entities and associations, including those belonging to the so-called “third sector”, are excluded if, despite the absence of a profit motive, they engage in economically relevant activities. An Italian State Legal Aid Commission has clarified that fundraising activities carried out to finance litigation may qualify as economic activity and thus preclude access to legal aid, regardless of the voluntary nature or limited amount of the collected resources.¹⁶⁰

Furthermore, the mere combination of a lack of profit motive and non-engagement in economic activity is not sufficient. The additional conditions established by law must also be met. Specifically, the applicant’s taxable income for personal income tax purposes, as reported in the most recent tax declaration, must not exceed €13,659.64.¹⁶¹ In addition, the claim must not be manifestly unfounded, as required by Art. 122 of DPR 115/02.¹⁶² Accordingly, the admission of entities that do not engage in economic activity to state-funded legal aid is subject to an assessment of financial capacity, which cannot focus solely on income. This assessment must take into account various factors, including the entity’s assets and extraordinary contributions. It is therefore the responsibility of the applicant to demonstrate compliance with the statutory requirements in order to be granted the benefit.

Similarly, in Germany, in principle, a QE can apply for legal aid pursuant to §§ 114–127 ZPO, § 13(1) VDuG. According to § 116 sent. 1 no. 2 ZPO, assistance with court costs shall be granted to organisations if the costs cannot be borne either by the organisation itself or by the parties economically involved in the subject matter in dispute, and if a failure to bring an action would contradict the public interest. In addition, the action must have sufficient prospects of success and must not appear frivolous (§§ 116 sent. 2, 114(1) sent. 1 ZPO). Yet this provision is rarely discussed in relation to redress actions. The reason may be that the requirement of indigence is interpreted rather strictly. It seems that consumers, although benefiting from the action, cannot be regarded as “economically involved,” as it is generally not possible to make them contribute financially to

¹⁵⁹ Cf. B. Gsell and C. Meller-Hannich, Die Umsetzung der neuen EU-Verbandsklagenrichtlinie, Gutachten über die Umsetzung der europäischen Richtlinie über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher (RL (EU) 2020/1828) ins deutsche Recht, cit., p. 46.

¹⁶⁰ The State Legal Aid Commission at the TAR Emilia Romagna – Bologna (Commissione per il patrocinio a spese dello Stato presso il TAR Emilia Romagna – Bologna), decision n. 601 of 10 March 2022, held that the applicant entity did not meet the requirements of Art. 119 of DPR 115/2002 because it had conducted a fundraising campaign to finance its legal defence. The Commission emphasised that such fundraising constitutes an economic activity aimed at generating resources, even if voluntarily contributed, and that the resources actually collected, regardless of their amount, demonstrate engagement in economic activity.

¹⁶¹ Art. 76 of DPR 115/02 and the Decree of 22 April 2025, in Official Gazette 11/07/2025, N. 159.

¹⁶² See also Constitutional Court in Ordinance, No. 128/2016.

the redress proceedings (Art. 12(2) RAD). However, it is generally required that the applicant exhausts its available assets and, where appropriate, takes out loans,¹⁶³ which may prevent QEs from being considered sufficiently needy. Moreover, even if legal aid is granted, the party is usually not entirely exempted from court costs but must pay them, at least in part, by instalments (§ 120 ZPO). And while the party receiving legal aid may itself be assigned counsel free of charge (§ 121 ZPO), it would still be liable to reimburse the opposing party's costs (particularly statutory lawyers' fees) in the event of failure. Given that Art. 20(1) RAD requires Member States to support QEs, it may be conceivable to apply the provisions on legal aid in a less restrictive manner in the context of redress actions. However, drawing a line between needy and non-needy QEs would still be difficult. Under the current legal framework, it does not appear possible simply to grant legal aid to all QEs.

In general, legal aid is not intended as a tool to systematically promote litigation in the public interest, but rather as an exceptional measure. If the State seeks to support redress actions through public means, this objective should primarily be pursued either by providing public funding to QEs or by establishing a dedicated public fund to financially support such actions¹⁶⁴ (see IV.4). In the absence of support through public funding to QEs and through multiple collective litigation funds, alternative mechanisms may be explored, including the assumption of litigation risks by actors already involved in the process, such as lawyers, or by external parties, such as third-party litigation funders (see IV.5 and IV.6).

IV.4 Private and public funding of qualified entities and collective litigation funds

In many legal systems, including the Italian one, consumer associations tend to largely self-finance, often through consumers' membership fees, donations, or occasional grants. In some jurisdictions, including Germany, consumer associations may, in principle, also receive contributions by businesses. However, in Germany, the possibility of QEs to receive private funding from businesses is considerably limited: according to § 2(1) no. 1 point b VDuG, qualified consumer organisations are only entitled to bring a redress action if no more than five per cent of their financial resources derive from business contributions. If there is doubt, as to whether this requirement is met, the court shall require the organisation to disclose its financial resources (§ 2(2) VDuG). The rationale for this limitation, which is inspired by the former rules governing the model declaratory action,¹⁶⁵ is to prevent companies from exerting covert influence on such organisations through financial contributions and from using the instrument of representative action to harm a competitor or a company on which they are economically dependent.¹⁶⁶ The rule reflects the traditional German scepticism towards the commercialisation of litigation. However, one may question whether this concern could not be adequately addressed through a more flexible approach, such as that set out in Art. 4(3)(e) RAD. Under this provision, QEs that are designated for the purpose of bringing cross-border actions must not be influenced by persons other than consumers who have an economic interest in bringing a representative action and must therefore establish procedures to prevent such influence and to avoid conflicts of interest. These requirements may also be fulfilled if an organisation receives more than 5% of its financial resources from business contributions. Considering that, when enacting the former rules on the

¹⁶³ D. Wache, § 116 ZPO, in W. Krüger, T. Rauscher, Münchener Kommentar zur Zivilprozessordnung, vol. 1, mn. 23 (7th ed. 2025), with further references.

¹⁶⁴ A. Stadler, Die neue Verbands(abhilfe)klage – Umsetzung der Richtlinie 2020/1828, cit., at pp. 148–149.

¹⁶⁵ See § 606(1) no. 5 ZPO (former version) and the explanations accompanying the draft VDuG, BT-Drs. 20/6520, p. 70.

¹⁶⁶ See the explanations accompanying the draft law on the introduction of the model declaratory action, BT-Drs. 19/2439, p. 23.

model declaratory action, the legislator appeared to be particularly concerned about foreign QEs,¹⁶⁷ it seems inconsistent to apply stricter standards to QEs designated for domestic actions than to foreign QEs.¹⁶⁸ Moreover, as previously noted (see II.1.d)), the 5%-limit does not apply to actions seeking injunctive relief, although such actions may also be used to harm competitors. In any case, when financial support relies primarily on membership fees, donations, or occasional grants, consumer associations often face the inability to undertake significant collective actions precisely because they are frequently under-resourced.¹⁶⁹ These types of funding are unpredictable, and their amounts can fluctuate over time, complicating even medium- to long-term planning, which is necessary for the planning and preparation of a collective claim.

Alongside the model of self-financing by the claim organisation, or, more generally, private funding of QEs, Germany proposes a model in which associations, organised as private-law entities, are partially or predominantly financed by the government.¹⁷⁰ In particular, consumer organisations may receive funding from both the federal states and the federal government, depending on their field of activity.¹⁷¹ The consumer organisations predominantly funded by public means, such as the Federation of German Consumer Organisations (Verbraucherzentrale Bundesverband, vzbv), are irrebuttably presumed to meet the 5%-limit (§ 2(3) VDuG).¹⁷² So far, domestic redress actions in Germany have been brought exclusively by such consumer organisations.¹⁷³

In 2024, for instance, the vzbv—which, as of March 2026, had brought most domestic redress actions¹⁷⁴—received approximately €25.3 million in public funding from the federal government.¹⁷⁵ The significance of such funding for the consumer organisation is underscored by the fact that other income contributing to the vzbv's institutional budget amounted to only about €0.5 million.¹⁷⁶

¹⁶⁷ See the explanations accompanying the draft law on the introduction of the model declaratory action, BT-Drs. 19/2439, p. 23.

¹⁶⁸ Critically P. Röthemeyer, *Das Verbraucherrecht durchsetzungsgesetz (VDuG) zur Umsetzung der Verbandsklagen-Richtlinie – Die neue Abhilfeklage*, cit., at p. 333.

¹⁶⁹ BEUC, *Justice Unchained*. BEUC's view on third party litigation funding for collective redress (BEUC, 2024). According to BEUC's view on third-party litigation funding for collective redress (2024), crowdfunding is also emerging as a potential secondary source of financial support for associations. However, the success of such campaigns often depends on the extent to which a particular action can attract public attention. This mechanism is further complicated by the fact that associations are often reluctant to disclose information about the actions they intend to launch in advance, as would be required by the timelines for public fundraising (ibid., p. 6).

¹⁷⁰ See also VKI (Verein für Konsumenteninformation) in Austria. In Europe, there are also systems in which the promotion of representative actions is entrusted to specific government institutions, funded by taxpayers' money and forming part of the governmental structure, such as the Financial Ombudsman and the municipal consumer ombudsmen in Poland: See P. Rott, A. Halfmeier, W. Vandenbussche, L. Bugatti and J. Mucha, *Comparative Legal Study on Procedural Rules and their Impact on Collective Redress Actions in Europe*, cit., p. 137.

¹⁷¹ *Verbraucherpolitischer Bericht der Bundesregierung 2024*, Nov. 28, 2024, pp. 86–88, available at https://www.bmu.de/fileadmin/Daten_BMU/Download_PDF/Verbraucherschutz/verbraucherpolitischer_bericht_bf.pdf (last visited Mar. 2, 2026).

¹⁷² See already B. Gsell and C. Meller-Hannich, *Die Umsetzung der neuen EU-Verbandsklagenrichtlinie, Folgegutachten über die Umsetzung der europäischen Richtlinie über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher – (RL (EU) 2020/1828) – ins deutsche Recht*, cit., pp. 29–30.

¹⁷³ See the list of the Federal Office of Justice, available at https://www.bundesjustizamt.de/DE/Themen/Verbraucherrechte/VerbandsklageregisterMusterfeststellungsklagenregister/Verbandsklagenregister/Verbandsklagen/Verbandsklagen_node.html (last visited Mar. 2, 2026). As of March 2026, domestic redress actions in Germany have been brought by the vzbv, by the “Verbraucherzentrale Sachsen” and by the “Verbraucherzentrale Nordrhein-Westfalen”.

¹⁷⁴ See the list of the Federal Office of Justice, available at https://www.bundesjustizamt.de/DE/Themen/Verbraucherrechte/VerbandsklageregisterMusterfeststellungsklagenregister/Verbandsklagenregister/Verbandsklagen/Verbandsklagen_node.html (last visited Mar. 2, 2026).

¹⁷⁵ Verbraucherzentrale Bundesverband, *Rechenschaftsbericht, Gesamtübersicht zum Jahresabschluss 2024*, p. 1, available at <https://jahresbericht.vzbv.de/2024/bericht/rechenschaftsbericht> (last visited Mar. 2, 2026).

¹⁷⁶ Verbraucherzentrale Bundesverband, *Rechenschaftsbericht, Gesamtübersicht zum Jahresabschluss 2024*, cit.

In 2023—the year in which the VDuG was enacted—the federal government increased its funding of consumer organisations to reflect the growing needs in the areas of collective legal enforcement, market monitoring, and consumer education.¹⁷⁷ However, consumer organisations are naturally able to devote only a limited share of this funding to collective actions. In 2024, the vzbv spent approximately €650,000 on such actions.¹⁷⁸ Overall, public funding of consumer organisations has its limits,¹⁷⁹ particularly in the current climate of strained public budgets.

IV.5 Lawyers' fees

The U.S. experience has demonstrated that lawyers who participate in litigation not only professionally but also financially (by assuming the costs of the litigation in exchange for a share of the outcome or a success fee) can be sufficiently incentivised to pursue even complex collective redress mechanisms. Nevertheless, the U.S. class action system, in which lawyers act as entrepreneurs and make substantial investments with the expectation of a generous fee if successful, has also revealed an increased risk of abuses, including frivolous lawsuits and premature settlements.¹⁸⁰ Although the RAD does not directly and explicitly disapprove of contingency fee arrangements,¹⁸¹ they are still perceived as potentially encouraging “vexatious lawsuits” and rewarding “unscrupulous attorneys”¹⁸² in most EU civil law countries, including Italy and Germany. Consequently, contingency fees remain either prohibited or strongly restricted, reflecting enduring concerns over the “commercialisation of the attorney–client relationship”¹⁸³. In Germany, a 2021 reform slightly expanded the scope for stipulating contingency fees;¹⁸⁴ however, the implementation of the RAD did not prompt the German legislator to permit contingency fees to a greater extent.

Even where permitted, albeit in a more restricted form, within the framework of representative actions an additional structural obstacle emerges. In such actions, the lawyer ordinarily maintains a direct contractual relationship with the formal claimant, namely the QE, rather than with the consumers on whose behalf the action is pursued. As a result, any agreement concluded directly between the QE and the lawyer cannot operate to deprive the consumers (who are not parties to the contractual arrangement) of their substantive rights. In the absence of alternative regulatory mechanisms outside the contractual domain, such as the imposition of a court order mandating a specific payment to the lawyer akin to the U.S. system (cf. U.S. Federal Courts, FRCP Rule 23(h)), the application of contingency fee arrangements encounters significant practical and legal challenges in the context of European representative actions.¹⁸⁵

¹⁷⁷ *Verbraucherpolitischer Bericht der Bundesregierung 2024*, 28.11.2024, p. 87, available at https://www.bmu.de/fileadmin/Daten_BMU/Download_PDF/Verbraucherschutz/verbraucherpolitischer_bericht_bf.pdf (last visited Mar. 2, 2026).

¹⁷⁸ Verbraucherzentrale Bundesverband, *Rechenschaftsbericht, Gesamtübersicht zum Jahresabschluss 2024*, p. 2, cit.

¹⁷⁹ See B. Gsell, C. Meller-Hannich, *Die Umsetzung der neuen EU-Verbandsklagenrichtlinie*, Gutachten über die Umsetzung der europäischen Richtlinie über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher (RL (EU) 2020/1828) ins deutsche Recht, cit., p. 46.

¹⁸⁰ See R. Van den Bergh, *Private enforcement of European competition law and the persisting collective action problem*, in *Maastricht Journal of European and Comparative Law*, p. 12 (20, 2013).

¹⁸¹ See also *Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law*, 2013, para 30.

¹⁸² H. Buxbaum, *Class Actions, Conflict and the Global Economy*, in *Indiana Journal of Global Legal Studies*, p. 585, at p. 590 (21-2, 2014).

¹⁸³ C. Lemke, *Legal Tech-Gesetz: Vom Ansatz verfehlt und nicht verbrauchergerecht*, in *Recht Digital*, p. 224, at p. 226 (2021).

¹⁸⁴ See the German Act to Promote Consumer-Friendly Offerings in the Legal Services Market (Gesetz zur Förderung verbrauchergerichteter Angebote im Rechtsdienstleistungsmarkt), BGBl. 2021 Teil I, p. 3415.

¹⁸⁵ A. Halfmeier, in P. Rott, A. Halfmeier, W. Vandenbussche, L. Bugatti and J. Mucha, *Comparative Legal Study on Procedural Rules and their Impact on Collective Redress Actions in Europe*, cit.

Overall, the European system's reluctance to embrace contingency fee arrangements, combined with the procedural complexities characteristic of civil law procedures, precludes treating this as a viable solution to the financing challenges inherent in representative actions. Accordingly, the funding of such actions cannot be effectively addressed through this mechanism.¹⁸⁶

In line with this broader European context, it is noteworthy that the Italian prohibition of contingency fee arrangements (*patto quota lite*), which prevents lawyers from receiving remuneration calculated as a percentage of the damages awarded, has historically reduced the attractiveness of collective actions for legal professionals. The significant organisational and procedural complexity associated with such proceedings has not been matched by commensurate economic incentives, thereby discouraging lawyers from engaging in this form of litigation. To address this issue and incentivise lawyers to engage in collective actions despite the ban on contingency fees, the Italian legislator sought to establish adequate financial incentives designed to attract practitioners and foster the development of a specialised legal sector. The new framework—which has no equivalent in German law¹⁸⁷—reflects the “reward fee” system established for collective actions under the Civil Procedure Code in 2019. Under this system, in the event of a successful action, the defendant is required to pay the claimant's lawyer an additional fee, calculated as a success-based premium, by applying a progressive percentage determined according to the number of class members to the total amount due to all class members, in addition to the lawyer's ordinary fees¹⁸⁸. The reward fee system has, however, attracted criticism, particularly from trade associations, which have highlighted the excessive and arguably unjustified financial burden imposed on defendant traders. Further objections concern the allegedly punitive nature of the reward system, which represents a significant departure from a legal tradition that views compensation as the primary objective of the redress system.¹⁸⁹ Additionally, some commentators have warned that the prospect of additional remuneration could encourage legal professionals to initiate representative actions in an overly assertive manner, even in cases where such proceedings may not be fully justified. A closer examination of the broader regulatory framework, however, considerably mitigates these concerns. The economic appeal of the reward fee, its purported punitive effect, and the risk of incentivising opportunistic or abusive litigation strategies—potentially transforming lawyers into so-called “bounty hunters”¹⁹⁰—appear limited in light of statutory caps on such remuneration and the judge's discretionary power to reduce, though not increase, the awarded amount by up to one half.¹⁹¹ In practice, this legal fee regime appears

¹⁸⁶ See the opposition of the Commission to the contingency fee agreements, defined as one of the components of the “toxic cocktail” represented by the U.S. Class Action (together with the punitive damages and the pre-trial discovery): E. Silvestri, *Towards a common framework of collective redress in Europe? An update on the latest initiatives of the European Commission*, in *Russ. L.J.*, 46, pp. 148–50 (2013); European Commission, *Green Paper on Consumer Collective Redress – Questions and Answers* MEMO/08/741, para 9.

¹⁸⁷ German law does not provide for any comparable additional fee; QEs are required to raise the necessary funds themselves in order to ensure adequate remuneration for the lawyer, potentially with the assistance of third-party funding, which, however, as will be shown in Section IV.6., is subject to significant restrictions.

¹⁸⁸ A similar remuneration mechanism also applies to the *rappresentante comune degli aderenti* (common representative of the class members), whose compensation is calculated by applying a progressive percentage determined according to the number of class members to the total amount due to all class members. The common representative is also entitled to reimbursement of documented expenses (Art. 140-novies Civil Procedure Code).

¹⁸⁹ Contra see C. Consolo, *L'azione di classe di terza generazione*, in V. Barsotti, F. De Dominicis, G. Pailli and V. Varano, *Azione di classe: la riforma italiana e le prospettive europee*, cit., p. 28.

¹⁹⁰ J. Coffee, Jr., *Rescuing the private attorney general: Why the model of the lawyer as bounty hunter is not working*, in *MD. L. Rev.*, p. 215, at p. 218 (42, 2, 1983).

¹⁹¹ C. Consolo, *L'azione di classe di terza generazione*, in V. Barsotti, F. De Dominicis, G. Pailli, V. Varano, *Azione di classe: la riforma italiana e le prospettive europee*, cit., pp. 28–29.

insufficient to provide a genuinely strong incentive for legal professionals, particularly when weighed against the substantial investment of time and financial resources required to conduct representative proceedings, compared with the relatively modest potential economic returns.

IV.6 Third-party litigation funding

In recent years, increasing attention has been devoted to the potential of third-party litigation funding (TPLF) as a means of enhancing access to justice, particularly in complex and resource-intensive forms of collective litigation.¹⁹² As anticipated, the RAD affords Member States discretion as to whether to allow third-party funding as a mechanism for financing representative actions (see Art. 10 RAD). TPLF is commonly understood as a business model whereby a third party, with no direct interest in the underlying dispute, finances the litigation costs in exchange for a share of the benefit in the event of success, while bearing the risk of loss in the event of an adverse outcome.¹⁹³ Originally developed in common law jurisdictions, which are traditionally more open to market-oriented approaches to professional legal services¹⁹⁴, TPLF has progressively gained acceptance also within civil law systems. Recent comparative research, including a 2025 study conducted by the British Institute of International and Comparative Law¹⁹⁵, shows that several specialised funds are now active in Europe highlighting the widespread presence of litigation funding across European markets. Despite this expansion, TPLF remains largely under-regulated in Europe, with only a limited number of jurisdictions having adopted a specific and comprehensive regulatory framework¹⁹⁶. However, the increasing prominence of TPLF has drawn sustained attention from both European institutions and legal scholarship, with a view to exploring the desirability and contours of a more structured regulatory framework at EU level.¹⁹⁷ Although the adoption of a

¹⁹² F. Bertelli, *Gli accordi di finanziamento della lite*, (Napoli, 2024); M. Paglietti, *Il mercato delle controversie. Il Third Party Litigation Funding come strumento di finanziamento responsabili dell'accesso alla giustizia*, in *Banca borsa tit. cred.*, p. 821 (2023); E. D'Alessandro and C. Poncibò, *European Parliamentary Research Service, Responsible Private Funding of Litigation. European Added Value Assessment*, in *Riv. trim. dir. proc. civ.*, p. 919 (2021); E. D'Alessandro, *Prospettive del Third Party Funding in Italia*, (Milano, 2019); G. Solas, *Alternative Litigation Funding and the Italian Perspective*, in *Eur. Rev. Priv. Law*, p. 253 (2016); G. De Nova, *Il finanziamento della lite: il «Litigation Funding Agreement»*, in *Riv. trim. dir. proc. civ.*, 2, pp. 267 ff. (2022).

¹⁹³ ELI (European Law Institute), *Principles Governing the Third-Party Funding of Litigation*, Dec. 10, 2024, available at

https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_Governing_the_Third_Party_Funding_of_Litigation.pdf (last visited Mar. 2, 2026).

¹⁹⁴ L. Bugatti, *La professione forense tra tradizioni e innovazione, Un'analisi storico-comparatistica*, (Torino, 2022), pp. 161 ff.

¹⁹⁵ The British Institute of International and Comparative Law, *Mapping Third Party Litigation Funding in the European Union, 2025*, available at <https://www.biicl.org/projects/mapping-third-party-litigation-funding-in-the-european-union> (last visited Mar. 2, 2026).

¹⁹⁶ Most notably Slovenia: Art. 59 Slovenian Law of Collective Action (2019).

¹⁹⁷ See EU Parliament, *Resolution of 13 September 2022 with Recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL))*, available at https://www.europarl.europa.eu/doceo/document/TA-9-2022-0308_EN.pdf (last visited Mar. 2, 2026).

harmonised, Union-wide regime currently appears to have been postponed, debates remain lively as to the appropriate scope, limits, and potential risks of the phenomenon. Concerns are frequently raised about the potential influence of funders over litigation strategy, conflicts of interest, transparency deficits, and the overall compatibility of TPLF with the traditional objectives of civil justice. Against this background, while allowing the use of third-party funding in representative actions for the protection of consumers, the RAD introduces a number of safeguard mechanisms. Pursuant to Art. 10(1) and (2), Member States are required to ensure, first, that decisions taken by QEs in the context of a representative action (including strategic choices and decisions concerning settlement) are not unduly influenced by a third-party funder in a manner detrimental to the collective interests at stake. Second, the Directive expressly seeks to prevent structural conflicts of interest by prohibiting funding arrangements where the representative action is brought against a defendant that is either a competitor of the funding provider or an entity on which the funder is economically dependent. To give practical effect to these principles, Art. 10(3) empowers courts or administrative authorities, in representative actions seeking redress measures, to assess compliance with the aforementioned requirements whenever justified doubts arise. For this purpose, QEs are subject to a disclosure obligation: they must provide the court or authority with a financial overview identifying the sources of funding used to support the representative action. Art. 10(4) strengthens this supervisory framework by granting courts or administrative authorities the power to adopt appropriate corrective measures where non-compliance is identified, such as requiring the QE to refuse or make changes in respect of the relevant funding and, if necessary, denying the QE's legal standing.

Both Italy and Germany, like the majority of Member States,¹⁹⁸ have exercised the discretion afforded by the RAD by allowing representative actions to be financed by third parties, while incorporating, albeit to differing degrees, the related safeguards. In the Italian legal system, although the national legislator did not closely mirror the mechanisms set out in Art. 10 RAD, it nonetheless introduced functionally equivalent safeguards aimed at ensuring transparency and preventing conflicts of interest. In particular, Italian law requires the QE to disclose to the court, in the claim (*ricorso*), any funding received or promised by third parties in support of the proceedings. This disclosure obligation enables judicial scrutiny of the financial structure underlying the action from its very outset. Moreover, Art. 140-septies of the Consumer Code provides that a representative

See also ELI LI/Unidroit Model European Rules of Civil Procedure, 2020, available at <https://www.unidroit.org/instruments/civil-procedure/eli-unidroit-rules> (last visited Mar. 2, 2026). ELI Third Party Funding of Litigation Project, available at <https://www.europeanlawinstitute.eu/projects-instruments/instruments/eli-third-party-funding-of-litigation> (last visited Mar. 2, 2026); S. Augenhöfer, ELI (European Law Institute), *Principles Governing the Third-Party Funding of Litigation*, 10. December 2024, available at https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_Governing_the_Third_Party_Funding_of_Litigation.pdf (last visited Mar. 2, 2026); D'Alessandro, C. Poncibò, *State of play of the EU private litigation funding landscape and the current EU rules applicable to private litigation funding*, Research Paper for the European Parliament Research Service ('EPRS'), March 2021; A. Stadler, *Third-Party Funding in Collective Redress*, in X. Kramer, S. Voet, L. Ködderitzsch, M. Tulbacka, B. Hess (eds.), *Delivering Justice, A Holistic and Multidisciplinary Approach. Liber Amicorum in Honour of Christopher Hodges*, p. 151, at pp. 156–159 (Hart 2022); R. Mulheron, *Third Party Funding, Class Actions, and the Question of Regulation*, in *Mass Claims*, p. 5 (2022); A. Cordina, E. Storskrubb, *The Future Regulation of Third-Party Funding in Europe, Conference Report*, Erasmus University Rotterdam, pp. 1–8 (2023); T. Trapp, Z. Hlady, H. Abildgaard, O. Mokko, *Third-Party Legal Standing under European Union Law: A Comparative Review of Selected EU Law and National Implications*, in *Amsterdam Law School Research Paper no. 2024/01*. On this issue, see also the position of BEUC, which considers it not necessary at this stage to introduce additional EU rules regulating TPLF beyond the existing regulatory framework established by the RAD: BEUC, *Justice Unchained. BEUC's view on third party litigation funding for collective redress* (BEUC, 2024).

¹⁹⁸ A contrary approach has been adopted in Greece and Ireland, where third-party litigation funding remains prohibited.

action is inadmissible where it is brought in a situation of conflict of interest, notably where the entity financing the action is a competitor of the defendant or is economically dependent on it. In such cases, the court is empowered to raise the issue *ex officio* and must grant the QE a time limit within which to reject or amend the relevant funding arrangement.

By contrast, the German legislator has gone beyond what is required by the RAD. In addition to providing that third-party funding is prohibited where the funder is a competitor of the defendant trader or is economically dependent on the latter, German law has introduced a statutory cap on the remuneration of litigation funders, limiting it to a maximum percentage of the benefit (§ 4(2) VDuG). This percentage, set at 10%, appears rather arbitrary¹⁹⁹ and risks constituting a significant obstacle to the effective use of third-party litigation funding. As is well documented in the literature and practice, funders typically require a share of between 25% and 35% of the benefit, depending on the level of litigation risk assumed and the extent of capital committed.²⁰⁰ Against this background, the German cap may render third-party funding largely unattractive, if not practically unviable.²⁰¹ Once again, German concerns about the commercialisation of litigation appear to have prevailed over the objective of facilitating representative actions, without a fully balanced assessment of the actual risks associated with litigation funding.

Further practical difficulties may arise from the application of Art. 10(2)(a) RAD, which excludes funding arrangements where the funder is expected to unduly influence the QE's conduct of the proceedings. While the underlying objective of protecting consumers against undue external influence (particularly in the context of settlement negotiations) is undoubtedly legitimate, the provision is framed in very broad terms. In practice, any third-party funder will necessarily retain a certain degree of control over the proceedings in order to manage its financial exposure,²⁰² for example when deciding whether to finance an appeal. Such forms of involvement could easily be construed as prohibited influence. Art. 10(2)(a) RAD at least qualifies the prohibition by referring to “undue” influence, thereby leaving some room for a more nuanced and balanced judicial assessment. By contrast, the German provision in § 4(2) VDuG does not explicitly contain such a qualification.

Finally, German law also imposes a strong disclosure obligation on QEs, requiring them to inform the court of the origin of the funds used to finance the representative action as well as to disclose any agreements concluded with third-party funders (§ 4(3) VDuG). This obligation enables the court to assess whether the third-party funding meets the admissibility criteria.²⁰³ However, the

¹⁹⁹ A. Stadler, (Fehlende) Finanzierung der neuen Verbandsabhilfeklage nach dem VDuG, in *Verbraucher und Recht*, p. 321 (2023); critically also C. Meller-Hannich, *Kollektiver Rechtsschutz im Privatrecht und die Umsetzung der Verbandsklagenrichtlinie*, in *Versicherungsrecht*, p. 1321, at pp. 1327–1328 (2023); B. Gsell, *Die Umsetzung der Verbandsklagenrichtlinie – Effektiver Rechtsschutz für Verbraucher und Entlastung der Justiz durch die neue Verbands-Abhilfeklage?*, cit., at p. 982. See also P. Rott, in P. Rott, A. Halfmeier, W. Vandenbussche, L. Bugatti and J. Mucha, *Comparative Legal Study on Procedural Rules and their Impact on Collective Redress Actions in Europe*, cit. Similar limitations on funders' remuneration have also been introduced in other Member States. In Estonia and Poland, however, the permissible share is set at a higher threshold, with the funder's return capped at 30% of the proceeds. By contrast, Portugal and Slovenia have opted for a more flexible approach, refraining from fixing a specific percentage and instead requiring that the funder's remuneration be fair and proportionate.

²⁰⁰ See A. Stadler, (Fehlende) Finanzierung der neuen Verbandsabhilfeklage nach dem VDuG, cit. A study found that, across Europe, funded claims typically have a minimum value ranging from €1 million to €14 million, with funders generally receiving a share of 20–30% of the proceeds: The British Institute of International and Comparative Law, *Mapping Third Party Litigation Funding in the European Union*, cit.; see also https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/civil-justice/civil-and-commercial-law/third-party-litigation-funding-tpLf_en (last visited Mar. 2, 2026).

²⁰¹ A. Stadler, (Fehlende) Finanzierung der neuen Verbandsabhilfeklage nach dem VDuG, cit.

²⁰² Cf. B. Gsell and C. Meller-Hannich, *Die Regulierung privater Prozessfinanzierung in der EU*, in *Anwaltsblatt Online*, p. 160, at p. 163 (2023).

²⁰³ See the explanations accompanying the draft VDuG, BT-Drs. 20/6520, p. 71.

German rule again goes beyond the RAD, which merely requires the disclosure of a financial overview listing the sources of funding (Art. 10(3) sent. 2 RAD), rather than the production of the funding agreement itself. It therefore remains open to question whether this additional disclosure requirement is appropriate,²⁰⁴ particularly given the uncertainty as to whether the defendant may gain access to the funding agreement, thereby potentially obtaining an unjustified strategic advantage in the proceedings²⁰⁵.

Beyond the possible shortcomings resulting from the national transposition of RAD safeguards, the use of third-party litigation funding in representative actions raises broader concerns, both in terms of the attractiveness of this form of litigation for funders and its practical operability.

Funders typically evaluate several key criteria, including the likelihood of success of the case (including the probability of settlement), the estimated legal fees and procedural costs, and the solvency of the defendant. From an economic perspective, funders generally favour large-scale disputes capable of generating returns sufficient to offset the risks assumed²⁰⁶ (such as high-value antitrust litigation). In the field of consumer law, although certain representative actions may offer the potential for relatively high economic returns (such as cases concerning unlawful practices by large digital platforms²⁰⁷), the vast majority of actions rely on the aggregation of relatively modest individual claims, which may significantly limit their appeal to third-party investors. Moreover, even when private funders confine their interest to redress actions, it is important to note that many of the remedies envisaged by the RAD—including repair, replacement, price reduction and contract termination—do not align neatly with the monetary relief sought by funders.²⁰⁸ This divergence between the structure of consumer redress and the economic objectives of third-party investors may further reduce the practical feasibility of funding representative actions.

²⁰⁴ A. Stadler, Die neue Verbands(abhilfe)klage – Umsetzung der Richtlinie 2020/1828, cit., at p. 150.

²⁰⁵ It seems that the legislator assumes that the information is not generally disclosed to the trader (BT-Drs. 20/6520, pp. 70 - 71). However, the trader might invoke their right to be heard, which would then need to be balanced against the principle of equality of arms, cf. A. Stadler, (Fehlende) Finanzierung der neuen Verbandsabhilfeklage nach dem VDuG, cit., at p. 322; see also B. Gsell, C. Meller-Hannich, Die Regulierung privater Prozessfinanzierung in der EU, in *Anwaltsblatt Online*, p. 160, at p. 163 (2023); but see H. Schläpke, T. Lühmann, Kollektiver Rechtsschutz nach der Umsetzung der EU-Verbandsklagen-RL, in *Neue Juristische Wochenschrift*, p. 3385, at p. 3386 (2023), who argue in favour of general disclosure to the trader.

²⁰⁶ See also E. D'Alessandro, C. Poncibò, *State of play of the EU private litigation funding landscape and the current EU rules applicable to private litigation funding*, Research Paper for the European Parliament Research Service (EPRS), pp. 45 ff., (March 2021): Legal scholarship has pointed out that litigation funders generally focus on claims in which the estimated value is at least ten times higher than the financial resources required to fund the proceedings.

²⁰⁷ See, for example, the redress action brought against Meta, <https://www.meta-klage.de/> (last visited Mar. 2, 2026) and <https://www.padronus.at/meta-klage> (last visited Mar. 2, 2026).

²⁰⁸ A. Stadler, *Are class actions finally (re)conquering Europe? Some remarks on Directive 2020/1828*, in 30 *Juridica International*, p. 14 (2021). Moreover, it has been suggested that: “It remains to be seen, however, whether in practice there will be much appetite on the part of qualified entities to seek external funding; indeed, the not-for-profit nature of these entities makes their seeking external funding somewhat unlikely (and frowned upon in some jurisdictions) and would probably require some elaborate financial engineering to achieve”, D. Fairgrieve, *Collective redress in Europe: Moving forward or treading water?*, in *International and Comparative Law Quarterly*, 71, p. 476 (2020).

At the same time, the structural design of representative actions complicates the practical operation of funding agreements.²⁰⁹ This issue is particularly pronounced in jurisdictions that rely on late opt-in mechanisms, such as Italy and Germany, because these mechanisms add an additional layer of uncertainty regarding the size of the consumer group. Such uncertainty may be exacerbated by other phenomena like rational apathy and free-riding among consumers, while also complicating the practical implementation of funding agreements, particularly in relation to the procedures for entering into the agreement and securing the funder's share of any eventual recovery.

Currently, a specific difficulty arises from the absence of any mechanism under the Italian and German law to address the payment of the success fees that are promised to the third-party funders.²¹⁰ In fact, because funders are remunerated through a share of the proceeds, it is, in principle, the consumers who would be required to relinquish part of their recovery in order to compensate the funder. Some jurisdictions allow these costs to be shifted to other parties. In the Netherlands, for example, the funder's remuneration may be shifted to the defendant; it may be treated as part of the litigation costs subject to the "loser-pays" principle.²¹¹ However, such a rule raises its own concerns, as it could impose an excessive and arguably unjustified burden on the defendant. In German legal scholarship, it has been proposed that the losing defendant should bear the funder's costs up to a certain amount depending on the value in dispute.²¹² Nevertheless, this proposal has not been adopted in practice.

Given the functioning of typical TPLF agreements, consumers are expected to forego part of their redress in order to remunerate the funder. However, it remains unclear how consumers can meaningfully participate in the financial arrangement, since QEs lack the authority to dispose of consumers' substantive rights.²¹³ In the absence of pre-action mechanisms such as book-building or the implementation of credit-assignment models, there is no pre-existing agreement between the QE bringing the redress action and the consumers. As already indicated, this issue is further exacerbated by the German and Italian late opt-in mechanisms, which enable consumers to join the action up to three weeks after the oral hearing in Germany, or even after the judgment on the

²⁰⁹ It should be noted that in Germany, third-party litigation funding gives rise to difficulties not only in relation to redress actions, but also in other types of proceedings—in particular, those introduced or supported by legal tech companies. When addressing this issue, the legislator should therefore not confine its focus to representative actions, but establish a general framework ensuring greater legal certainty, see B. Gsell, C. Meller-Hannich, *Die Umsetzung der neuen EU-Verbandsklagenrichtlinie, Gutachten über die Umsetzung der europäischen Richtlinie über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher (RL (EU) 2020/1828) ins deutsche Recht*, cit., pp. 46–49; for a detailed analysis, see T. Domej, *Gutachten A zum 74. Deutschen Juristentag Stuttgart 2024, Effektive Zivilrechtsdurchsetzung: Zugang zur Justiz, Prozessfinanzierung, Legal Tech – Welcher rechtliche Rahmen empfiehlt sich?*, pp. A 17–65 (2024).

²¹⁰ A. Stadler, *(Fehlende) Finanzierung der neuen Verbandsabhilfeklage nach dem VDuG*, cit., at p. 322; B. Gsell, *Die Umsetzung der Verbandsklagenrichtlinie – Effektiver Rechtsschutz für Verbraucher und Entlastung der Justiz durch die neue Verbands-Abhilfeklage?*, cit., at p. 982.

²¹¹ In particular, according to Art. 1018(2) Dutch Code of Civil Procedure, the court may order the unsuccessful party to pay the successful party's reasonable and proportionate legal and other costs, unless fairness dictates otherwise. This provision is interpreted as enabling courts to order the defendant to pay the funder's remuneration, see O. Furter, M. Jacobs and I. Brinkhof, *Netherlands*, in S. Friel and J. Barnes, *Litigation Funding 2025*, p. 5, at p. 13 (2025), available at <https://nivalion.com/wp-content/uploads/2025/04/Netherlands.pdf> (last visited Mar. 2, 2026).

²¹² See B. Gsell and C. Meller-Hannich, *Die Umsetzung der neuen EU-Verbandsklagenrichtlinie, Gutachten über die Umsetzung der europäischen Richtlinie über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher (RL (EU) 2020/1828) ins deutsche Recht*, cit., p. 50; but see A. Stadler, *Die neue Verbands(abhilfe)klage – Umsetzung der Richtlinie 2020/1828*, cit., at p. 148.

²¹³ Whether such deduction would be permissible under Art. 20(3) RAD is unclear; see B. Gsell, C. Meller-Hannich, *Die Umsetzung der neuen EU-Verbandsklagenrichtlinie, Gutachten über die Umsetzung der europäischen Richtlinie über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher (RL (EU) 2020/1828) ins deutsche Recht*, p. 49 (2021), available at https://www.vzbv.de/sites/default/files/downloads/2021/02/03/21-02-04_vzbv_verbandsklagen-rl_gutachten_gsell_meller-hannich.pdf (last visited Mar. 2, 2026).

merits in Italy. Moreover, in Italy, consumers might be dissuaded from entering into a contract with funders since they can join the action through an online procedure,²¹⁴ either through early or late opt-in,²¹⁵ without having to pay any success fee at the end: in fact, at this stage, consumers who opt in are not obliged by law to accept the funding agreement to join the representative action.²¹⁶ In Germany, where online registration is equally possible, it appears technically feasible that the trustee verifies whether the consumers have concluded the contracts during the implementation procedure; however, it remains unclear whether the VDuG permits collective redress actions to be limited to consumers who are willing to enter into such contracts.²¹⁷

Overall, while the increasing use of TPLF offers a promising avenue for enhancing access to justice in collective litigation, its practical implementation within European representative actions remains fraught with challenges. Nonetheless, given the key role that TPLF can play in ensuring that collective redress does not remain merely aspirational but achieves tangible impact, further reflection is warranted on how to make it operational in light of the specificities of national representative procedures. At the same time, any such framework must continue to maintain strict safeguards to ensure transparency, prevent conflicts of interest, and protect the weaker consumer parties from the risk of being exploited by funders.

IV.7 Comparative insights on costs and funding

The analysis of the Italian and German contexts demonstrates that the financing of representative actions remains one of the most critical determinants of the effectiveness of collective redress. Both jurisdictions operate under the “loser-pays” principle, ensuring procedural accountability and discouraging frivolous litigation, yet they face financial challenges that complicate practical access to collective redress.

Italy adopts a relatively flexible approach, allowing modest consumer participation fees as well as reductions in court costs, and implementing the reward-fee system for lawyers and the consumers’ common representative. It also permits third-party litigation funding under disclosure and conflict-of-interest safeguards. However, all these mechanisms, although potentially capable of alleviating the financial burden on QEs, are insufficient to fully address the challenges of financing collective redress actions.

Germany appears better equipped in terms of public funding. It provides QEs with state support, albeit subject to uncertainties and fluctuations in available resources. However, Germany has taken a more cautious approach as regards private funding options. It imposes strict limits on funders’ remuneration and restricts private contributions to QEs, reflecting a legal culture deeply concerned with limiting the commercialisation of litigation. While this approach reduces the risk of undue external influence, it may also constrain the practical viability of representative actions, particularly those requiring substantial resources to counter well-funded defendants.

In both legal traditions, TPLF has the potential to provide QEs with the financial means necessary to ensure that enhanced protection of consumers’ substantive rights does not collapse in the face of underenforcement. However, opening the door to TPLF without a more thorough reflection on its practical operability within the procedural framework of representative actions, and without carefully calibrating safeguards to preserve procedural fairness, transparency, and the protection of

²¹⁴ See *supra* Section III.4.

²¹⁵ On the relationship between the opt-out model and TPLF in the context of collective redress, see A. Piletta Massaro, *The new directive on an EU-wide representative action and third-party litigation funding: An opportunity for European consumers?*, in *Revija Kopaniške Škole Prirodnog Prava*, p. 95 (1, 2021).

²¹⁶ G. Afferni, *Bundling of claims by way of assignment in Italy*, in *Mass Claims*, p. 30 (2, 2022).

²¹⁷ See P. Röthemeyer, *Verbraucherrecht* (Baden-Baden, 2024), § 4 mn. 17 (2024).

consumers as weaker parties, risks undermining these very objectives. It is therefore imperative to design TPLF frameworks in a way that balances financial feasibility with the effective safeguarding of collective interests, ensuring that funders' involvement supports, rather than distorts, the pursuit of justice.

V. CONCLUSION

In summary, it can be said that both Italy and Germany impose relatively high requirements for the admissibility of the new redress actions. This applies to both the similarity/homogeneity of the claims and the associations entitled to bring legal action. Although public authorities can bring representative actions in Italy, this option is not considered very impactful at present.

In both countries, there is a discrepancy between the intended effects of the Directive and the actual possibilities regarding the financing of associations and redress actions. The representatives bringing the action need an efficient and well-funded legal system. This also applies if they are acting primarily for altruistic reasons. It applies all the more so if they are expected to bring about genuine market corrections in the collective interest of consumers.

The question of a quorum is approached quite differently in the two countries: while the German legislator still seems to fear an influx of collective actions and has set a very high quorum, Italy's experience has revealed no such necessity. The differing starting points of the two legal systems are also reflected in differing scopes of application of the new redress action: The scope of the German implementation extends beyond the claims covered by the directive; in Italy, by contrast, this is not the case. Nevertheless, claims that are not covered by the new regime can be pursued collectively through alternative redress mechanisms. However, this could lead to overlaps between two distinct regimes in Italy.

Both countries have established special judicial jurisdictions for the new legal proceedings. The German and Italian legislators sought to ensure that redress actions are heard by experienced judges and to promote judicial specialisation. However, it is difficult to be more than cautiously optimistic about the ability of courts that are not yet experienced in this area and are already heavily burdened with other tasks to handle these proceedings. In Germany, this is particularly noteworthy given the traditional focus of judicial training on individual dispute resolution and the corresponding self-image of judges.

Both jurisdictions have decided for a late opt-in procedure, although there are differences in the timing of the opt-in. In any case, the easier it is to access the procedure, the more likely consumers are to participate. Italy's system, where late opt-in occurs after the outcome of the proceedings is known, is an example of this. This system would also be more attractive in Germany as an alternative to privately organised and advertised legal tech class actions.

The Italian system seems to offer some procedural advantages to the consumer associations with regard to the facts of the case and the collection of evidence. By contrast, the German system is more or less confined to applying the rules governing individual proceedings.

Both countries have opted for a multi-stage system for conducting proceedings. In both systems, the distribution of redress to consumers may entail significant administrative complexity and costs. These difficulties are, however, particularly accentuated in the German model, due to the coexistence of different types of judgments and the formalised structure of the distribution mechanism.

Against this background, both countries allow for the settlement of legal disputes to a considerable extent. In the case of collective redress actions, this is also a sensible approach to resolving the conflict of objectives between adjudicating individual claims and achieving procedural streamlining and efficiency. Although the period for reaching a settlement in German redress proceedings is short and begins late, the complicated German distribution system has a deterrent effect which can, nevertheless, promote settlement.

Considering the complexity of redress actions, resulting from both the requirements for admissibility and the procedure, it becomes apparent that they will be costly and that the effectiveness of the new representative action regimes ultimately hinges on their financial sustainability. In both Italy and Germany, the gap between the Directive's enforcement-oriented objectives and the practical ability of QEs to bring and pursue collective proceedings remains significant. Existing funding measures (whether based on public support, limited private contributions, modest consumer participation fees, reductions in court costs, or an award mechanism for lawyers) appear insufficient to ensure that representative actions can be used systematically and effectively, particularly against well-resourced defendants. As a result, there is a concrete risk that collective redress will continue to suffer from structural underenforcement, despite the formal expansion of procedural tools. This situation makes it imperative to look more seriously at alternative financing solutions, including third-party litigation funding. While TPLF cannot be regarded as a panacea and must be accompanied by appropriate safeguards, its potential to enhance access to justice and the practical enforceability of consumer rights cannot be ignored.

DISCLOSURE OF EVIDENCE IN REPRESENTATIVE ACTIONS UNDER GERMAN LAW¹

Malte Jochem

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I. INTRODUCTION - II. DISCLOSURE OF EVIDENCE PURSUANT TO SECTIONS 142, 144 ZPO - III. POSSIBLE IMPLEMENTATION DEFICIT COMPARED TO ART. 18 OF THE REPRESENTATIVE ACTIONS DIRECTIVE - IV. CONCLUSION

This paper addresses the implementation of Article 18 of the Representative Actions Directive in Germany and, in this context, the possibilities for obtaining a disclosure of evidence by the opposing party or third parties in representative action proceedings under German law. It outlines the requirements imposed by the German Code of Civil Procedure on the disclosure of evidence and the sanctions available to the court if a disclosure order is not complied with. It also highlights the restrictive attitude taken by courts towards the disclosure of evidence by the opposing party and the limited practical significance of this instrument in German civil proceedings.

Keywords: Representative Actions Directive – Evidence – Disclosure of evidence – Civil Procedure – Germany

I. INTRODUCTION

Access to information and evidence is a decisive factor in the success of legal proceedings and, if not available, can deter potential plaintiffs from bringing a lawsuit in the first place. Due to the principle generally applicable in the procedural law systems of EU Member States, and in particular in Germany, that each party must present and prove the facts favourable to it in a trial, the procedural disclosure of evidence by the opponent or a third party is only an exception in European legal systems. This circumstance is particularly serious in areas where at least one person is subject to a structural information deficit, while another has a corresponding information advantage. Such information asymmetries occur in various areas of law, most prominently in the field of industrial property rights or antitrust law. Similarly, it can be observed that consumers are also structurally disadvantaged vis-à-vis traders, both in the market in general and in civil proceedings. A defining aspect of this disadvantage is the existence of information asymmetries and thus a typical information deficit for consumers. This has a negative impact on consumers in that, in the event of damage caused by a trader, they either do not file legal actions or have considerable difficulty proving this damage in court, as the relevant evidence is often exclusively in the hands of the defendant trader.

The EU legislator has responded to this problem, among others, with the Directive (EU) 2020/1828 of 25 November 2020 on representative actions (the Representative Actions Directive). Article 18 of this directive provides for a mechanism that is intended to enable qualified entities, which are exclusively entitled to bring legal action pursuant to Art. 7 para. 1 of the Representative Actions Directive, to obtain the disclosure of evidence by the opposing trader or third parties. Conversely, this right is also available to the defendant traders. Furthermore, Article 19 of the Representative Actions Directive provides for the introduction of sanctions in the event of non-compliance with a court order to disclose evidence. According to Article 24 of the Representative

¹ This paper was written in connection with a presentation given at the workshop “Harmonising and Enhancing the Enforcement of Consumer Law: A Comparative Analysis” at Villa Vigoni in May 2025.

Actions Directive, these provisions were to be implemented by the Member States by 25 December 2022.

In Germany, the Representative Actions Directive was implemented on 1 October 2023 with the Act Implementing the Representative Actions Directive (*Verbandsklagenrichtlinienumsetzungsgesetz*). The core component of this implementation act is the new Consumer Rights Enforcement Act (*Verbraucherrecht durchsetzungsgesetz, VDuG*), which implements the essential components of the Representative Actions Directive. With regard to the disclosure of evidence under Article 18 of the Representative Actions Directive, the German legislature decided against introducing new regulations. Instead, in the explanatory memorandum to the implementation act, it merely refers to Sections 142 to 144 of the German Code of Civil Procedure (*Zivilprozessordnung, ZPO*) and thus to existing law.² The only innovation is found in Section 6 VDuG, which, by implementing Article 19 of the Representative Actions Directive, introduces new sanctions in the event of non-compliance with court disclosure orders.

Based on the decision of the German legislature to refer to existing law for the disclosure of evidence in representative actions, this article aims to provide an overview of the existing provisions on the disclosure of evidence in German representative action proceedings by focusing on Sections 142 and 144 ZPO. Section 143 ZPO is not dealt with, even though the legislature has referred to it, as it is a provision that is practically irrelevant.

II. DISCLOSURE OF EVIDENCE PURSUANT TO SECTIONS 142, 144 ZPO

In German civil proceedings, Sections 142 and 144 ZPO enable the court to order the disclosure of evidence in relation to a party to the proceedings or a third party. The provisions are rooted in Roman law³ and have remained largely unchanged since their initial introduction in 1877. However, a substantive amendment and extension was made in 2001 in the course of the Civil Procedure Reform Act (*Zivilprozessreformgesetz*).⁴ At the time, this change led to mixed reactions in legal literature. On the one hand, considerable concerns were expressed about the extension of disclosure, as it was feared that this could lead to situations similar to those under US discovery rules.⁵ On the other hand, the changes in content were expressly welcomed with regard to the associated strengthening of the possibilities for determining the material truth.⁶

The fears of critics of the Civil Procedure Reform Act have not materialised. However, very similar reactions have been seen again in the course of the implementation of the Representative Actions Directive. The statements of some trade associations on the draft bill of the Act Implementing the Representative Actions Directive in particular refer to the perceived danger of “American conditions” should the implementation of Article 18 of the Representative Actions Directive lead

² German Parliament printed document (*Bundestagsdrucksache, BT-Drs.*) 20/6520, 73.

³ For details, see: V. Kern, *Urkundenvorlage bei Kartellschadensklagen*, Tübingen, 2020, 7 et seqq., 23 f.

⁴ Civil Procedure Reform Act of 27 July 2001, Federal Law Gazette I 2001, No. 40, 1887, 1890.

⁵ T. Lüpke and R. Müller, „Pre-Trial Discovery of Documents“ und § 142 ZPO – ein trojanisches Pferd im neuen Zivilprozessrecht?, in *Neue Zeitschrift für Insolvenz- und Sanierungsrecht*, 588, 589 (2002); S. Steuer, *Justizreform – von außen betrachtet*, in *Zeitschrift für Wirtschafts- und Bankrecht*, 1889 (2000).

⁶ R. Greger, *Zwischen Mediation und Inquisition – Neue Wege der Informationsbeschaffung im Zivilprozess*, in *Deutsches Steuerrecht*, 479, 484 (2005); A. Stadler, *Inquisitionsmaxime und Sachverhaltsaufklärung: erweiterte Urkundenvorlagepflichten von Parteien und Dritten nach der Zivilprozessrechtsreform*, in H. Nakamura, H. W. Fasching, H. F. Gaul and A. Georgiades, *Festschrift für K. E. Beys, Dem Rechtsdenker in Attischer Dialektik*, Volume Two, Athens, 2003, 1625, 1645; G. Wagner, *Urkundenedition durch Prozeßparteien – Auskunftspflicht und Weigerungsrechte*, in *JuristenZeitung*, 706, 719 (2007).

to an extension of the obligations to disclose evidence imposed by Sections 142 and 144 ZPO.⁷ Ultimately, there has been no change in content, which means that the existing provisions are to be reviewed with regard to their requirements.

II.1 Purpose and general procedure

With Section 142 ZPO, the legislature wanted to give the court the opportunity to obtain a comprehensive overview of the facts of the case at the earliest possible stage.⁸ The primary purpose of the provision is therefore to clarify inadequate party submissions and serves in particular to facilitate the conduct of the proceedings.⁹ The same applies to Section 144 ZPO, which enables the court to form an opinion of specific evidence on which a party has based its submissions through direct observation. In addition, Sections 142 and 144 ZPO can also serve to prove disputed facts, which is particularly relevant from the parties' point of view.¹⁰

The possibility of ordering the disclosure of evidence under Sections 142 and 144 ZPO is opened by one of the parties referring to certain evidence in its submissions. This is a necessary requirement as stipulated in the wording of Section 142 ZPO and is also seen as a general precondition regarding Section 144 ZPO. After that, the court has the option to order the disclosure of such evidence in its own discretion. Parties may request such disclosure, but the court is not obliged to comply with this request. Should the court order the disclosure, but the respective party does not comply with such order, the court may impose sanctions on this party.

II.2 Types of evidence

A court order issued pursuant to Section 142 ZPO may extend to records (*Urkunden*) and other documents (*sonstige Unterlagen*). Records are those within the meaning of Sections 415 et seq. ZPO and include all written statements of thought.¹¹ The decisive factor here is that records must be *directly legible*, i.e. they do not require the use of additional (technical) aids to be read.¹² Consequently, this covers all documents that are usually in written form and are not held in electronic form. The term "other documents" is broader and can include family trees, plans, other drawings, photographs or X-rays, also as long as they are not held in electronic form.¹³ Copies of the

⁷See for example: Deutsche Wirtschaft, *Stellungnahme der deutschen Wirtschaft*, available at: https://www.bmj.de/SharedDocs/Downloads/DE/Gesetzgebung/Stellungnahmen/2023/0303_Stellungnahme_GDV_VRUG.pdf?__blob=publicationFile&v=1, 5 f (last visited 9 March 2026); Verband der Chemischen Industrie e.V., *Referentenentwurf für ein Verbandsklagenrichtlinienumsetzungsgesetz (VRUG)*, available at: https://www.bmj.de/SharedDocs/Downloads/DE/Gesetzgebung/Stellungnahmen/2023/0303_Stellungnahme_VCI_VRUG.pdf?__blob=publicationFile&v=1, 9 (last visited 9 March 2026).

⁸ BT-Drs. 14/4722, 78.

⁹ BGH, judgment of 27 May 2014, XI ZR 264/13; R. Greger, in Zöller, *Zivilprozessordnung*, Cologne, 2026 (36th Ed.), Section 142, margin no. 1.

¹⁰ This is the prevailing view, see, for example: BGH, decision of 26 October 2006, III ZB 2/06, cited from juris, margin no. 5; OLG Frankfurt, decision of 25 June 2018, 8 W 28/18, cited from juris, margin no. 17; OLG Saarbrücken, decision of 27 July 2020, 5 W 33/20, cited from juris, margin no. 7; D. Leipold, *Die gerichtliche Anordnung der Urkundenvorlage im reformierten deutschen Zivilprozess*, in E. Schilken, G. Kreft, G. Wagner and D. Eckardt, *Festschrift für Walter Gerhardt*, Cologne, 2004, 563, 585; R. Koch, *Mitwirkungsverantwortung im Zivilprozess*, Tübingen, 2013, 156; A. Stadler, in H.-J. Musielak and W. Voit, *Zivilprozessordnung*, Munich, 2025 (22nd Ed.), Section 142 ZPO, margin no. 1 with further references; G. Wagner, see fn. 6, 710; a different view is held by: U. P. Gruber and E. Kießling, *Die Vorlagepflichten der §§ 142 ff. ZPO nach der Reform 2002*, in *Zeitschrift für Zivilprozess*, 305, 311 et seqq. (Issue 116, 2003); I. Saenger, *Grundfragen und aktuelle Probleme des Beweisrechts aus deutscher Sicht*, in *Zeitschrift für Zivilprozess*, 139, 148 f. (Issue 121, 2008).

¹¹ Cf. BGH, judgment of 28 November 1975, V ZR 127/74, cited from juris, margin no. 6.

¹² C. Berger, in Stein/Jonas, *Kommentar zur Zivilprozessordnung*, Volume Five, Tübingen, 2015 (23rd Ed.), Section 415 ZPO, margin no. 1.

¹³ C. Althammer, in Stein/Jonas, *Kommentar zur Zivilprozessordnung*, Volume Two, Tübingen, 2016 (23rd Ed.), Section 142 ZPO, margin no. 13; R. Greger, see fn. 9, margin no. 4.

respective records of documents are also covered and are therefore equivalent to the originals.¹⁴ The scope of evidence is expanded by Section 144 ZPO, which allows for the disclosure of visual evidence, being all objects that can be perceived by sight, hearing, smell, taste or touch. According to the explicit legal provision in Section 371 para. 1 sentence 2 ZPO, electronic documents, such as text, audio or video files as well as emails, chat histories, screenshots, software or websites, are also considered visual evidence. The obligation to disclose evidence only applies to evidence in the possession of a party to the proceedings or a third party. It follows that only evidence that already exists at the time of the disclosure order is covered. Accordingly, the creation of records, other documents or visual evidence cannot, in principle, be ordered within the framework of Sections 142 and 144 ZPO.¹⁵

II.3 Requirements for party submissions

A significant barrier to excessive disclosure orders is the burden of presentation and substantiation incumbent on the parties for their respective submissions. Specifically, this means that a court can only order the disclosure of evidence in accordance with Sections 142 and 144 ZPO if the parties' submissions are conclusive (*schlüssig*). It is therefore necessary that the respective evidence relates to facts presented by a party that are relevant to the decision and that the party responsible for presenting these facts has fulfilled the requirements of the burden of substantiation incumbent upon it.

II.4 Statement of facts

In accordance with the principle of party submission (*Beibringungsgrundsatz*), the court may only rule on the facts presented by the parties. The prerequisite for taking evidence is therefore always that evidence is to be taken on a fact previously presented by one of the parties. In addition, the court may not derive anything from it that has not already been presented by the parties.¹⁶ If a party seeks the disclosure of evidence pursuant to Sections 142, 144 ZPO, it must first present the facts to which the respective evidence relates. In addition, it must justify the significance of the evidence for the desired decision, i.e. the relevance of the evidence to the proceedings or the decision, as well as its suitability as evidence.¹⁷ In contrast, it is irrelevant to the possibility of a disclosure order whether the facts presented here are disputed or undisputed between the parties.

II.5 Conclusiveness (Schlüssigkeit)

The standard civil procedural requirements apply to the presentation of facts by a party. This is therefore not a distinctive feature of the disclosure of evidence under Sections 142 and 144 ZPO. This means in particular that the order to disclose evidence can only be issued on the basis of conclusive submissions (*schlüssiger Vortrag*).¹⁸ Conclusiveness is always given if the facts presented, assuming they are true, in conjunction with a legal principle, are suitable for making the alleged legal consequence appear to have arisen,¹⁹ whereby the standard to be applied is the subsumption

¹⁴ J. Fritsche, in W. Krüger and T. Rauscher, *Münchener Kommentar zur Zivilprozessordnung*, Volume One, Munich, 2025 (7th Ed.), Sections 142-144 ZPO, margin no. 9.

¹⁵ BGH, judgment of 4 May 2018, V ZR 266/16, cited from juris, margin no. 12; H. Prütting, in H. Prütting and M. Gehrlein, *Zivilprozessordnung*, Hürth, 2024 (16th Ed.), Section 142 ZPO, margin no. 5.

¹⁶ BGH, judgment of 27 May 2014, XI ZR 264/13, cited from juris, margin no. 28.

¹⁷ BGH, judgment of 27 May 2014, XI ZR 264/13, cited from juris, margin no. 28; R. Greger, see fn. 9), margin no. 7; V. Kern, see fn. 3, 35.

¹⁸ BT-Drs. 14/6036, 121; BGH, judgment of 26 June 2007, XI ZR 277/05, cited from juris, margin no. 20.

¹⁹ BGH, decision of 14 March 2017, VI ZR 225/16, cited from juris, margin no. 7.

capability (*Subsumtionsfähigkeit*) of the submission.²⁰ In other words: If, according to the submissions of one party, which are assumed to be true, all factual requirements of the asserted claim are fulfilled, these submissions are deemed to be conclusive. The aim of the parties is thus to describe the respective facts so precisely that the court is able to examine their conclusiveness.²¹ The burden of substantiation therefore describes the necessity of presenting all the facts that are necessary for the examination of conclusiveness with sufficient precision.²² In this context it is not sufficient for a party to merely recite the elements of the asserted legal norm.²³ Rather, it must sufficiently substantiate its submission, i.e. explain the facts presented in more detail or analyse them in greater depth.²⁴

However, there are no strict guidelines regarding the scope or specific level of detail of the submissions. The Federal Court of Justice (*Bundesgerichtshof*, *BGH*) assumes in principle that this question must be answered on the basis of the circumstances of the individual case and depends on what is reasonable and possible for the respective party, particularly with regard to the opponent's submissions.²⁵

Thus, there is no blanket answer to the question of the scope of the burden of substantiation. It depends specifically on the individual case and can range from rather general statements to very detailed submissions. Clarity can only be gained from a reverse perspective: This is because a party's submission will in any case be unsubstantiated if the facts are described so imprecisely that the court is unable to subsume them.²⁶ Furthermore, a broadly general submission may initially be insufficient if the (detailed) submissions of the opposing party make the respective statement of facts appear "unclear" in terms of its conclusiveness.²⁷

As a result, the requirement to substantiate with respect to the disclosure of evidence can significantly limit a party's legal protection options if the requirements for the conclusiveness test are set (too) high. In practice, it is often the case that the party requesting the disclosure of evidence is not only not in possession of this evidence, but also has no knowledge of the facts to be proven that underlie the respective elements of the relevant legal norm. In such cases, such party will often be unable to do more than make relatively vague assertions, which may not be sufficient to enable a complete subsumption.

II.6 Prohibition of "fishing expeditions"

In this regard, it should be noted that, according to general opinion, all measures under German law aimed at obtaining information or evidence that require the cooperation of the non-risk-bearing opponent or third parties must not lead to "fishing expeditions".²⁸ According to the prevailing

²⁰ D. von Selle, in V. Vorwerk and C. Wolf, *Beck'scher Online-Kommentar Zivilprozessordnung*, Munich, 2025 (59th Ed.), Section 138 ZPO, margin no. 10 f. with further references.

²¹ M. Rust, *Die Substantiierungslast im Zivilprozess*, Baden-Baden, 2021, 26.

²² M. Rust, see fn. 21, 37.

²³ D. von Selle, see fn 20, margin no. 1.1.

²⁴ W. Scheuerle, *Zivilprozessrecht*, in *JuristenZeitung*, 32, 33 (1963).

²⁵ BGH, judgment of 27 September 2001, IX ZR 281/00, cited from juris, margin no. 14 with further references; BGH, judgment of 15 January 2004, I ZR 196/01, cited from juris, margin no. 25.

²⁶ D. von Selle see fn 20, margin no. 10.1 with further references.

²⁷ M. Rust, see fn. 21, 27 et seqq.

²⁸ Cf. G. Chudoba, *Der ausforschende Beweis Antrag*, Berlin, 1993, 17 f.; R. Stürner, *Die Aufklärungspflicht der Parteien im Zivilprozess*, Tübingen, 1976, 108 with further references.

view, this applies in particular to the area of Sections 142 and 144 ZPO.²⁹ The legislature has also emphasised that motions aimed at issuing a disclosure order pursuant to Section 142 ZPO must not lead to a “fishing expedition” as this would violate procedural rules.³⁰ Investigative motions for evidence (*ausforschende Beweisanträge*) in connection with the disclosure of records, other documents or visual evidence are therefore generally inadmissible. Difficulties already exist in this problem area because the term “investigative evidence” (*Ausforschungsbeweis*) is not legally defined and has a history of over a century of inconsistent and controversial development in case law and literature.³¹ Essentially, investigative evidence and the investigative motion for evidence aimed at it concern the behaviour of the party bearing the burden of proof, which is aimed at exploring facts or evidence previously unknown to it in order to subsequently base its submission on them or make them the subject of further evidence-taking.³² For Sections 142 and 144 ZPO, this means that an investigative motion for evidence, and thus a “fishing expedition”, is to be assumed if the party requesting the disclosure order does not intend to prove unknown facts, but rather wishes to learn about them for the purpose of its further submission.³³

If the prohibition of “fishing expeditions” were to be regarded as indispensable and understood in an absolute sense, very high requirements would have to be placed on the presentation of facts for this reason alone. However, this is not possible for factual reasons, because it can never be ruled out that a previously unknown piece of evidence also contains information that is not (yet) part of the parties’ submissions. This assumption is also made by case law in connection with documentary evidence when it states that the court may not infer anything from the document that has not *yet* been presented by the parties.³⁴ On the other hand, under German civil procedural law, it is also recognised that there are situations in which a party can only present its case to a limited extent due to a lack of information. It is precisely for these reasons that there are voices in the legal literature that consider investigative motions for evidence to be permissible to a limited extent.³⁵ Permissible investigative motions for evidence associated with reduced conclusiveness requirements must therefore be distinguished from impermissible investigative motions for evidence. Ultimately, it is simply a matter of setting reasonable limits for when a statement of facts is (still) conclusive according to the principles described above and when these requirements have not been met, meaning that the statement is no longer conclusive.

There are various constellations that are discussed in connection with these kinds of “fishing expeditions”. The most relevant case of this is the so-called “allegation in the blue” (*Behauptung ins Blaue hinein*).

²⁹ BGH, decision of 29 November 2016, VI ZB 23/16, cited from juris, margin no. 15; BGH, decision of 14 June 2007, VII ZR 230/06, cited from juris, margin no. 10; OLG Stuttgart, judgment of 15 August 2024, 2 U 30/22, cited from juris, margin no. 144; OLG Frankfurt, judgment of 28 November 2024, 6 U 79/19, cited from juris, margin no. 196; U. P. Gruber and E. Kießling, see fn. 10, 318; T. Lüpke and R. Müller, see fn. 5, 588; H. Prütting, see fn 15, margin no. 2; T. Klink, *Der Commercial Court nach dem Justizstandort-Stärkungsgesetz – ein Modellprojekt für grenzüberschreitende Gerichtsverfahren*, in *Praxis des Internationalen Privat- und Verfahrensrechts*, 349, 350 (2024); B. Dombeck, *ZPO-Novelle*, in *BRAK-Mitteilungen*, 122, 124 (2001).

³⁰ BT-Drs. 14/6036, 121.

³¹ In detail: G. Chudoba, see fn. 28, 18, 21 et seqq., 43 et seqq.

³² G. Chudoba, see fn 28, 61.

³³ V. Kern, see fn 3, 48 with further references; R. Koch, see fn 10, 159 f.

³⁴ BGH, judgment of 27 May 2014, XI ZR 264/13, cited from juris, margin no. 28; OLG Stuttgart, judgment of 15 August 2024, 2 U 30/22, cited from juris, margin no. 144; OLG München, decision of 1 March 2021, 8 U 4122/20, cited from juris, margin no. 67.

³⁵ P. F. Schlosser, *Französische Anregungen zur Urkundenvorlagepflicht nach § 142 ZPO*, in M. Coester, D. Martiny and K. A. Prinz von Sachsen Gessaphe, *Privatrecht in Europa, Festschrift für Hans Jürgen Sonnenberger*, Munich, 2004, 135, 148 f.; G. Wagner, see fn. 6, 709.

This refers to motions for evidence or, in connection with Sections 142 and 144 ZPO, factual statements that are made “at random” or “on a whim”. Primarily, this refers to statements of fact that are substantiated and therefore conclusive, but are ultimately based on arbitrary assumptions and were therefore made “at random”.³⁶ According to the prevailing opinion, such arbitrary assertions constitute an abuse of law which is ultimately justified by a lack of need for legal protection.³⁷ From this it is argued that there is a need to limit the admissibility of submissions based on assumptions with the aim of protecting against abuse.³⁸ For this reason, restrictive standards must apply to the assumption of prohibited “fishing expedition” in this sense. In this regard, the Federal Court of Justice repeatedly emphasises that restraint is required when assuming arbitrariness and that, in principle, it can only be assumed in the absence of *any evidence* for the accuracy of the assertion made.³⁹ For Sections 142 and 144 ZPO, this means that a disclosure order can only be rejected on the grounds of arbitrariness if there is nothing to support the accuracy of the relevant facts presented other than an abstract possibility.⁴⁰ If, on the other hand, a party has presented actual evidence, these are not, correctly, “at random”.

However, it should be noted that courts sometimes tend to set the requirements higher than that. For example, the Higher Regional Court of Frankfurt argued in a decision from 2024 that the requirements for conclusiveness should not be set too low in order to avoid a “fishing expedition”.⁴¹

II.7 Example of restrictive stance taken by courts

The restrictive stance taken by the courts with regard to the conclusiveness required for disclosure is particularly evident in a ruling by the Higher Regional Court of Karlsruhe from 2018.⁴² In this case, the plaintiff asserted claims in connection with defectively manufactured breast implants. The defectiveness of the implants was undisputed, and the responsible persons at the manufacturing company were convicted of criminal offences in France in connection with this matter. One of the defendants was the entity responsible for monitoring and certifying the manufacturer of these breast implants under Directive 93/42/EEC. In its action, the plaintiff argued that this defendant had found numerous deviations during its audits and, in particular, had uncovered irregularities in the implants. In support of this submission, the plaintiff requested the disclosure of the audits and deviation reports by the defendant in accordance with Section 142 ZPO. The defendant, on the other hand, argued that it had not violated any obligations and that the deviations did not relate to the points alleged by the plaintiff. Also, it admitted that it found deviations although it did not specify which deviations these were.

The court rejected the plaintiff's application and did not order the disclosure of evidence on the grounds that the requirements for conclusiveness of the submissions had not been met. In the

³⁶ BVerfG, decision of 14 April 2003, 1 BvR 1998/02, cited from juris, margin no. 13; BGH, judgment of 23 April 1991, X ZR 77/89, cited from juris, margin no. 20; K. Kiethe, *Zulässigkeit von Beweisantritten bei Behauptungen auf Grundlage einer zivilrechtlichen Vermutungsbasis*, in *Monatsschrift für Deutsches Recht*, 1325, 1328 (2003).

³⁷ In detail: M. Rust, see fn 21, 59 et seqq.

³⁸ BVerfG, decision of 14 April 2003, 1 BvR 1998/02, cited from juris, margin no. 13; BGH, decision of 12 September 2023, VI ZR 371/21, cited from juris, margin no. 13 with further references; G. Baumgärtel, *Zwei wichtige BGH-Entscheidungen zu Ausforschungsbeweis und „Behauptung ins Blaue hinein“*, in *Monatsschrift für Deutsches Recht*, 987 with further references (1995); R. Koch, see fn 10, 161 with further references; M. Rust, see fn 21, 59 with further references.

³⁹ BGH, decision of 12 September 2023, VI ZR 371/21, cited from juris, margin no. 14 with further references; BGH, judgment of 25 April 1995, VI ZR 178/94, cited from juris, margin no. 13 with further references; BGH, judgment of 23 April 1991, X ZR 77/89, cited from juris, margin no. 20 with further references.

⁴⁰ M. Rust see fn 21, 70.

⁴¹ OLG Frankfurt, judgment of 28 November 2024, 6 U 79/19, cited from juris, margin no. 195.

⁴² OLG Karlsruhe, judgment of 27 June 2018, 7 U 96/17.

court's view, the plaintiff would have had to explain whether the defendant's audits were generally completed without any deviations being identified or whether finding a certain number of deviations was usual.⁴³ The court also held that the plaintiff failed to show that the investigations by the French supervisory authorities or the criminal proceedings against those responsible provided any indication with regard to the alleged violation of duty by the defendant.⁴⁴ The court concluded that the plaintiff was merely seeking to obtain new information and held that this is inadmissible. In the opinion of the court, the defendant was therefore not obliged to disclose the requested evidence or to provide any other information on the deviations found in the audits. It should be noted that, in its decision, the court did find that the plaintiff was dependent on information from the defendant's sphere but nevertheless stated that this did not mean that the court had to take these interests into particular account in its discretionary decision.⁴⁵

II.8 Description of relevant evidence

Furthermore, it is necessary for a party to have referred to the evidence in question. One of the parties (or an intervener pursuant to Section 67 ZPO) must explicitly or implicitly name the evidence in their submission.⁴⁶ It is therefore necessary to identify and thus specify the relevant evidence. However, the exact degree of specificity required for the issuance of a disclosure order remains unclear from the wording of the law. Due to the sanctions that may be imposed on a party or third party in the event of non-compliance with a disclosure order, it must be evident to the opponent of the disclosure order which evidence is to be produced. It is therefore necessary to precisely identify the evidence to be disclosed or, at least, to ensure that it is identifiable.⁴⁷ The requirement for specificity in this regard allows for a certain degree of leeway. In principle, both the designation of a specific file folder containing several documents and the designation of a single document can make the requested documents identifiable. As a first step, it must therefore be clarified what this requirement for specificity refers to.

In case law and legal literature, reference is made in relation to Section 142 ZPO to the fact that the significance of a specifically identified record or other document for the requested decision must be apparent from the conclusive submission of the party. From this, it is concluded that ordering the disclosure of entire collections of documents or categories of documents is inadmissible within the framework of Section 142 ZPO.⁴⁸ Without further justification, the term “the” or “a” document is always used here, which is why, in principle, only a *single* record or other document is the object of reference for the requirement of specificity. The wording of the law does not provide for this restriction and instead refers only to “records or other documents to which a party has referred”. However, the legislature also refers exclusively to “one” or “the” record.⁴⁹ According to the prevailing opinion, this means that the disclosure of collections of documents or categories of documents cannot be requested. The submission of the party requesting the

⁴³ OLG Karlsruhe, judgment of 27 June 2018, 7 U 96/17, cited from juris, margin no. 33.

⁴⁴ OLG Karlsruhe, judgment of 27 June 2018, 7 U 96/17, cited from juris, margin no. 33.

⁴⁵ OLG Karlsruhe, judgment of 27 June 2018, 7 U 96/17, cited from juris, margin no. 33.

⁴⁶ R. Greger, see fn 9, margin no. 6.

⁴⁷ BGH, judgment of 16 March 2017, I ZR 205/15, cited from juris, margin no. 30; R. Greger, see fn 9, margin no. 6; A. Stadler, see fn. 10, margin no. 4a.

⁴⁸ BGH, judgment of 27 May 2014, XI ZR 264/13, cited from juris, margin no. 28; OLG Koblenz, judgment of 23 August 2018, U 311/17 Kart, cited from juris, margin no. 33; OLG Stuttgart, decision of 29 March 2023, 20 Kap 2/17, cited from juris, margin no. 1063; C. Althammer, see fn. 13, margin no. 11; J. Fritsche, see fn 14, margin no. 11; A. Stadler, see fn 10, margin no. 4a with further references; D. von Selle, in V. Vorwerk and C. Wolf, *Beck'scher Online-Kommentar Zivilprozessordnung*, Munich, 2025 (59th Ed.), Section 142 ZPO, margin no. 10; J. Zekoll and G. A. Haas, *Ausweitung ohne Ausforschung – zur Urkundenvorlagepflicht nach § 142 ZPO*, in *JuristenZeitung*, 1140, 1145 (2017).

⁴⁹ BT-Drs. 14/6036, 121.

disclosure of evidence must therefore be precise enough to identify *individual* records or documents. The same applies to visual evidence within the framework of Section 144 ZPO which means that a disclosure of evidence under German law can generally only relate to a single individual piece of evidence or several individually identified pieces of evidence.

With regard to the specific degree of identification, the prevailing opinion is based on a restrictive understanding and thus on a high degree of identification. It is pointed out, for example, that the respective evidence must be “easily” identifiable,⁵⁰ that a precise description and summary of the content of the evidence is necessary,⁵¹ or that, in the case of text-based evidence, a description of the type, date and content is generally necessary.⁵² In the past, the Regional Court of Berlin, for example, applied a very strict standard and, in connection with a request for the disclosure of an entire loan file held by a bank pursuant to Section 142 ZPO, demanded a precise description only of an individual document, the content of which must be at least vaguely described.⁵³ Furthermore, the court demanded that the party requesting disclosure must be certain of the existence of such individual document based on *its own perception*.⁵⁴ Moreover, if the scope of evidence requested is particularly large, courts sometimes assume that there has been insufficient specification.⁵⁵ Ultimately, in order to prevent “fishing expeditions”, it is pointed out that general assumptions that certain evidence would normally exist and therefore must also exist in the specific case to be decided are not sufficient for the necessary specification.⁵⁶ There are only a few decisions in which the courts have accepted lower requirements for specification. This includes a decision by the Regional Court of Ingolstadt, in which the court deemed it sufficient to refer to a specific file folder in which the requested document was located.⁵⁷ In addition, the Higher Regional Court of Saarbrücken also considered the order to submit “the medical records” to be admissible.⁵⁸

II.9 Protection of legitimate interests

As shown above, the disclosure of evidence is already limited by the (strict) requirements imposed on the parties to conclusively present and substantiate the facts necessary for a disclosure order and to specify the evidence sought. However, this does not specifically protect the legitimate interests of the addressees of a disclosure order, but rather limits the possibility of evidence disclosure as a whole. For this reason, it may happen that a party fulfils all the requirements of Sections 142 and 144 ZPO, but that the legitimate interests of the addressee, such as the protection of confidentiality, nevertheless argue against the order to disclose evidence. If the addressee is a third party, their interests are protected in accordance with Sections 142 para. 2 and 144 para. 2 ZPO by making the submission dependent on reasonableness and the absence of rights to refuse to give evidence. If, on the other hand, a party is the addressee of the order to disclose evidence, their interests are not specifically taken into account according to the wording. However, according to the legislative intention, the interests of a party are protected in connection with the exercise of judicial discretion.⁵⁹

⁵⁰ A. Meier-Hoffmann, *Informationsbeschaffung qua Vorlageanordnung im reformierten Kapitalmusterverfahren*, in Zeitschrift für Wirtschaftsrecht, 418, 420 (2025).

⁵¹ A. Stadler, see fn. 10, margin no. 4a.

⁵² J. Zekoll and G. A. Haas, see fn 48, 1145.

⁵³ LG Berlin, judgment of 1 September 2010, 10 O 471/09, cited from juris, margin no. 82.

⁵⁴ LG Berlin, judgment of 1 September 2010, 10 O 471/09, cited from juris, margin no. 82.

⁵⁵ LG Köln, judgment of 27 February 2008, 4 O 272/07, cited from juris, margin no. 96.

⁵⁶ C. Althammer, see fn 13, margin no. 18; A. Stadler, see fn. 10, margin no. 4a; D. von Selle, see fn 20, margin no. 10.

⁵⁷ LG Ingolstadt, decision of 22 March 2002, 4 O 1729/01; W. Uhlenbruck, *Gerichtliche Anordnung der Vorlage von Urkunden gegenüber dem Insolvenzverwalter*, in Neue Zeitschrift für Insolvenz- und Sanierungsrecht, 589 f. (2002).

⁵⁸ OLG Saarbrücken, judgment of 30 April 2003, 1 U 682/02 - 161; D. Leipold, see fn10, 571.

⁵⁹ BT-Drs. 14/6036, 120.

II.10 Parties

According to the wording of Sections 142 and 144 ZPO, orders to disclose evidence can be issued to the parties without particular restrictions if the above conditions are met. There is no provision similar to that applying to third parties under Sections 142 para. 2 and 144 para. 2 ZPO and referring to the right of witnesses to refuse to give evidence. The legislature has not forgotten to refer to the parties' general rights to refuse to give evidence. These simply do not exist in the same form as for witnesses, since the German Code of Civil Procedure only allows parties to act as witnesses in exceptional cases and they are therefore not usually obliged to give evidence as witnesses. Accordingly, there was originally no perceived need to expressly standardise the parties' rights to refuse to give evidence.⁶⁰ Nevertheless, the parties have legitimate interests in not participating in the proceedings, in particular in not disclosing evidence, and these interests must be taken into account in connection with the order to disclose evidence.

The legislature has also recognised this and, in connection with an amendment to Section 142 ZPO by the Civil Procedure Reform Act (*Zivilprozessreformgesetz*) in 2001, pointed out that parties must also be able to legitimately refuse to disclose evidence under certain circumstances, for example when secrets worthy of protection are involved.⁶¹ However, the legislature has not provided any guidelines on how exactly and, above all, at what stage of the proceedings the court must take these legitimate interests into account.

While the Federal Court of Justice in some cases has referred to a general reservation of reasonableness (*Zumutbarkeit*) in this regard,⁶² it is generally assumed that this must be taken into account in the context of the court's discretionary decision. Since the court cannot be obliged to order the disclosure of evidence but decides at its own discretion, the legitimate interests of a party in non-disclosure can be easily examined there.⁶³

The most relevant case groups of legitimate interest that may justify a refusal to disclose evidence include the interest in protecting the sphere of trust between lawyers and their clients and the interest in protecting secrets (in particular trade secrets).

Legal literature rightly points out on numerous occasions that documents which fall within the sphere of trust between lawyers and their clients – regardless of who possesses them and in what context they were drafted – must be exempt from disclosure.⁶⁴ In some cases, it is also pointed out that this protection can only apply within the limits of what is also provided for in Section 383 No. 6 ZPO for the right to refuse to give evidence.⁶⁵

With regard to the protection of secrets, in representative action proceedings in which the disclosure of evidence by the trader is sought, the protection of documents prepared for the trader's own legal defence and of trade secrets is particularly relevant. In the first case, protection is to be affirmed insofar as it concerns a legal assessment and a substantive legal defence.⁶⁶ This also includes preventive conflict avoidance, which may include obtaining information about the legal situation or consulting the company's internal legal department.⁶⁷ With regard to the second case,

⁶⁰ G. Wagner see fn 6, 715.

⁶¹ BT-Drs. 14/6036, 120.

⁶² BGH, judgment of 1 August 2006, X ZR 114/03 (*Restschadstoffentfernung*), cited from juris, margin no. 42.

⁶³ BGH, judgment of 17 July 2014, III ZR 514/13, in *Deutsche Notar-Zeitschrift*, 837, margin no. 27 (2014); D. von Selle, see fn 20, margin no. 15.

⁶⁴ S. Konrad, *Der Schutz der Vertrauenssphäre zwischen Rechtsanwalt und Mandant im Zivilprozess*, in *Neue Juristische Wochenschrift*, 710, 713 (2004); J. Kraayvanger and M. C. Hilgard, *Urkundenvorlegung im Zivilprozess*, in *Neue Justiz*, 572, 574 (2003); G. Wagner, see fn 6, 716 et seq.; for a detailed discussion of this topic, see G. Rühl, *Die Begrenzung des § 142 ZPO durch das Anwaltsprivileg*, in *Zeitschrift für Zivilprozess*, 25 et seq. (Issue 125, 2012).

⁶⁵ A. Stadler, see fn. 10, margin no. 7 with further references.

⁶⁶ S. Konrad, see fn 64, 713.

⁶⁷ S. Konrad, see fn 64, 713.

the protection of trade secrets, the possibility of a legitimate interest is also generally affirmed.⁶⁸ In this case, a legitimate interest in refusing disclosure will generally be recognised if disclosure would result in a lasting distortion of competition.⁶⁹

II.11 Third parties

II.12 Right to refuse to give evidence

Regarding the explicitly standardised rights to refuse to give evidence, Sections 142 para. 2 and 144 para. 2 ZPO refer to Sections 383 to 390 ZPO and thus to the rights of refusal applicable to witnesses. In terms of content, the legally standardised cases of justified refusal to give evidence relate to personal (Section 383 ZPO) and factual (Section 384 ZPO) reasons.

One of the most important cases in the area of personal reasons is the protection of professionals who are bound to secrecy in accordance with Section 383 para. 1 No. 6 ZPO. Persons who have been entrusted with a special position of trust by public or private law and who are obliged to protect that trust are therefore not obliged to disclose evidence.⁷⁰ This includes, in particular, lawyers, tax advisers, auditors and, in principle, notaries. For the right of refusal to apply, it is irrelevant how and from whom the third party acquired their knowledge.⁷¹ In this respect, it is sufficient if they have obtained knowledge of objectively confidential facts in connection with their mandate.⁷² If the evidence requested relates to such facts, there is no obligation to disclose it. The situation is different only if the professional bound by professional secrecy has been released from his duty of confidentiality by the protected person. In this case, the obligation to disclose the evidence is reinstated in accordance with Sections 142 para. 2 sentence 1, 144 para. 2 sentence 1 and 385 para. 2 ZPO.

In the area of factual reasons, pursuant to Section 384 No. 1 ZPO, there is no obligation to disclose evidence if this would lead to direct financial damage to the third party. It is sufficient for the assumption of such financial damage if the enforcement of an existing claim against the third party would be facilitated by the disclosure of the respective evidence.⁷³ This rather low threshold for assuming a right of refusal can be justified by the fact that, otherwise, the court would have to conduct a conclusiveness review of the possible bases for the claim, which might require further information from the third party, which they are not actually obliged to provide due to their right to refuse to give evidence.⁷⁴ Furthermore, the risk of criminal prosecution precludes an obligation to disclose evidence as a factual reason pursuant to Section 384 No. 2 ZPO. In the context of representative actions, the protection of trade secrets of companies that are obliged as third parties to disclose evidence might be particularly relevant. Such confidentiality interests are conclusively protected by Section 384 No. 3 ZPO – and thus not in connection with other unreasonableness⁷⁵.

⁶⁸ A. Stadler, see fn. 10, margin no. 7 with further references; G. Wagner, see fn 6, 716 et seqq.; J. Kraayvanger and M. C. Hilgard, see fn 64, 574.

⁶⁹ J. Kraayvanger and M. C. Hilgard, see fn 64, 574.

⁷⁰ R. Greger, see fn 9, margin no. 16.

⁷¹ BGH, decision of 16 February 2011, IV ZB 23/09, cited from juris, margin no. 10.

⁷² R. Greger, see fn 9, margin no. 20a.

⁷³ BGH, decision of 26 October 2006, III ZB 2/06, cited from juris, margin no. 7 with further references; C. Althammer, see fn 13, margin no. 26; E. Schneider, *Die Zumutbarkeit der Urkundenvorlage durch Dritte*, in *Monatsschrift für Deutsches Recht*, 1, 2 with further references (2004).

⁷⁴ E. Schneider, see fn 73, 2.

⁷⁵ A. Stadler, see fn. 10, margin no. 8 (there, fn. 118); R. Greger, see fn 9, 483; a different view is held by: K. Schmidt, N. Schwab and M. Wildschütz, *Die Auswirkungen der Reform des Zivilprozesses auf das arbeitsgerichtliche Verfahren (Teil 1)*; in *Neue Zeitschrift für Arbeitsrecht*, 1161, 1164 (2001).

II.13 Unreasonableness

In addition to the above-mentioned rights of refusal, the legislature has included the criterion of (general) unreasonableness in Sections 142 para. 2 and 144 para. 2 ZPO. The focus of the reasonableness requirement here is on the practical concordance of individual interests to be guaranteed by the state, which generally requires a weighing of interests between general legal obligations and reasons for deviating from them.⁷⁶ Due to the apparent similarity to the principle of proportionality and to hardship and equity clauses, general principles of proportionality are ultimately decisive here.⁷⁷ When weighing up the interests involved, the court must take into account, for example, the right to effective legal protection, the significance of the proceedings for the parties, the actual effort involved in disclosing the evidence and the interference with the constitutionally protected interests of third parties.⁷⁸ Here, the interest of the party to the proceedings who benefits from the disclosure of evidence in being granted effective legal protection will be weighted more heavily the greater the expected gain in knowledge from the evidence and the more important the evidence is for determining the facts of the case in dispute.⁷⁹ In connection with unreasonableness, two cases are primarily discussed, in addition to interests protected by fundamental rights that must be taken into account in individual cases: The first case concerns the considerable time and personnel costs associated with a disclosure that could be incurred by the third party. In particular, if the requested evidence relates to events that occurred a long time ago or if the scope of the disclosure order is very large, this could mean a considerable amount of time and expense for the third party. One justification for assuming unreasonableness on these grounds was sometimes seen in the fact that Sections 142 and 144 ZPO do not explicitly provide for compensation for the third party and that the provisions of the law on the compensation of witnesses and experts applicable until 30 June 2004 (*Gesetz über die Entschädigung von Zeugen und Sachverständigen*) did not provide for this either.⁸⁰ With the introduction of Section 23 para. 2 of the German Judicial Remuneration and Compensation Act (*Justizvergütungs- und -entschädigungsgesetz, JVEG*), which now expressly covers court orders for the disclosure of evidence pursuant to Sections 142 and 144 ZPO, this justification does no longer apply. In theory, a considerable amount of time or expense can still justify unreasonableness.⁸¹ However, due to the existing compensation mechanism for third parties, this can only be considered if the specific expense is not covered by Sections 23 para. 2 and 19 JVEG or if the amount of compensation obtained under the JVEG falls significantly short of the actual costs.⁸² In this context, it should also be considered that the scope of disclosure orders will generally be very limited due to the strict requirements for the identification of individual pieces of evidence. Cases that constitute unreasonableness for these reasons are therefore likely to be rare.

The second case relates to disruptions to the third party's business operations that would occur if the order to disclose evidence were complied with. This could include contract documents or deeds of security that are essential for the third party's professional activities and whose disclosure, even

⁷⁶ C. Basler and K. Meßerschmidt, *Zumutbarkeit von Beweiserhebungen und Wohnungsbetroffenheit im Zivilprozess*, in *Neue Juristische Wochenschrift*, 3329, 3330 (2014).

⁷⁷ C. Basler and K. Meßerschmidt, see fn 76, 3330; U. P. Gruber and E. Kießling, see fn 10, 326.

⁷⁸ J. Zekoll and J. Bolt, *Die Pflicht zur Vorlage von Urkunden im Zivilprozess – Amerikanische Verhältnisse in Deutschland?*, in *Neue Juristische Wochenschrift*, 3129, 3132 (2002); A. Kapoor, *Die neuen Vorlagepflichten für Urkunden und Augenscheinsgegenstände in der Zivilprozessordnung*, Baden-Baden, 2009, 207 et seqq.

⁷⁹ A. Kapoor, see fn 78, 207.

⁸⁰ J. Zekoll and J. Bolt, fn 78, 3133.

⁸¹ C. Althammer, see fn 13, margin no. 27; R. Greger, see fn. 9, 483; D. von Selle see fn 20 margin no. 14; J. Zekoll and J. Bolt, see fn 78, 3133.

⁸² A. Kapoor, see fn 78, 210.

for a short period of time, would cause massive disruption.⁸³ Even if the interests of the third party are to be recognised in these cases, ultimately these will only be rare cases in which a disclosure can be completely omitted. This is because even in cases where such evidence is indispensable, it is in many cases still possible to submit a copy that is equivalent to the original and is therefore also covered.⁸⁴

II.14 Disclosure despite the involvement of trade secrets

In connection with the protection of trade secrets, the question often arises as to whether disclosure can be ordered even though such secrets are involved, if sufficient protection is otherwise possible. For a long time now, there have been calls for the creation of an “in camera” procedure for civil proceedings in this context.⁸⁵ Such a procedure would allow the conflicting interests of the parties, i.e. the interest in legal protection of the party seeking disclosure on the one hand and the interest in confidentiality of the opponent on the other, to be appropriately balanced. Since disclosure would only be made to the court or an expert, the evidence in question could be used in full for the proceedings without being disclosed to the public or another party to the proceedings.⁸⁶

Such a procedure would not be entirely foreign to German law. In administrative law, for example, Section 99 para. 2 of the German Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*) already contains a provision that allows for in camera proceedings in certain cases. The Federal Constitutional Court (*Bundesverfassungsgericht*) has also dealt with in camera proceedings in connection with this provision. It has stated that fundamental constitutional principles, such as in particular the right to a fair hearing under Article 103 para. 1 of the German Constitution (*Grundgesetz*), do not preclude in camera proceedings.⁸⁷ However, in the opinion of the Federal Constitutional Court, an explicit legal basis is required for such proceedings.⁸⁸ In civil procedural law, and thus also for representative actions, the legislature has not yet made use of this option, meaning that no genuine in camera proceeding is available for representative actions.

However, it should be noted that the Federal Court of Justice generally considers it permissible to take confidentiality interests into account by allowing the party obliged to disclose evidence to redact the evidence to be disclosed (in particular textual documents) to the extent required by confidentiality interests.⁸⁹

Since 1 April 2025, this option of redaction has been supplemented by Section 273a ZPO, which was newly added to the German Code of Civil Procedure. This generally provides for the protection of trade secrets in civil proceedings and enables the court to classify certain information as confidential at the request of a party. The prerequisite for this is that the information in question is a trade secret within the meaning of Section 2 No. 1 of the Act on the Protection of Trade Secrets (*Gesetz zum Schutz von Geschäftsgeheimnissen, GeschGehG*). For the confidentiality procedure and the possible measures to be taken by the court, Section 273a ZPO references Sections 16 to 20 *GeschGehG*. The court may, among other things, impose special confidentiality obligations on the

⁸³ E. Schneider, fn 73, 2; C. Althammer, see fn 13, margin no. 27 with further references; R. Greger, see fn 9, 483; J. Zekoll and J. Bolt, see fn 78, 3132 (in the event of imminent serious damage).

⁸⁴ J. Fritsche, see fn 14, margin no. 9.

⁸⁵ J. Kraayvanger and M. C. Hilgard (fn. see fn 64, 574 f.; G. Wagner, see fn 6, 717 f.; A. Stadler, see fn. 10, margin no. 7a

⁸⁶ A. Stadler, see fn. 10, margin no. 7a

⁸⁷ BVerfG, decision of 27 October 1999, 1 BvR 385/90, cited from juris, margin no. 90; BVerfG, decision of 14 March 2006, 1 BvR 2087/03, cited from juris, margin no. 112.

⁸⁸ BVerfG, decision of 14 March 2006, 1 BvR 2087/03, cited from juris, margin no. 113.

⁸⁹ BGH, judgment of 1 August 2006, X ZR 114/03 (*Restschadstoffentfernung*), cited from juris, margin no. 42. See also: A. Stadler, see fn. 10, para. 7a (there, footnote 104), who points out that this will often not provide sufficient protection.

parties, their legal representatives or witnesses, the violation of which may be punished with a fine of up to EUR 100,000 (Sections 16 para. 2, 17 GeschGehG). Furthermore, Section 19 GeschGehG provides for the limited possibility of excluding persons (for example the public) from the oral hearing or from access to certain documents requiring confidentiality.⁹⁰ Finally, Section 19 para. 1 sentence 4 GeschGehG allows for further measures which the court may take at its own discretion.

II.15 Enforceability and sanctions

If a party to the proceedings or a third party fails to comply with the court's disclosure order without a legitimate interest in the above sense being established, the question arises as to what measures the court can then take. If the addressee of the disclosure order is a third party, the possible legal consequences of refusal to comply are derived from the provisions on the right to refuse to give evidence. Due to the reference in Sections 142 para. 2 and 144 para. 2 ZPO, Section 390 ZPO applies. According to this, in the event of an unjustified refusal, the third party may be required to bear the costs incurred as a result of the refusal and a fine of up to EUR 1,000 may be imposed. In the event of repeated refusal, the court may order coercive detention for a maximum of six months pursuant to Sections 390 para. 2, 802j ZPO.⁹¹

The situation is different if the disclosure order is directed against a party to the proceedings and that party refuses to cooperate without justification. In this case, the law does not provide for any means of enforcing disclosure. While this continues to be the case for general civil proceedings, the legislature has changed this for representative action proceedings by means of Section 6 VDuG (based on Art. 19 of the Representative Actions Directive). The court now has the option of threatening the refusing party with a fine in representative action proceedings and imposing it if the refusal persists. This may amount to a maximum of EUR 250,000 and may be imposed repeatedly.⁹² With regard to the possibility of imposing an administrative fine, its proportionality is also criticised on the grounds that there are insufficient safeguards for sensitive company information.⁹³ In particular, it is argued that there is a lack of protective mechanisms such as "legal professional privilege", which is known from common law jurisdictions.⁹⁴ In fact, however, the current legislative framework allows a large amount of relevant information worthy of protection to be protected from disclosure. As explained above, the court has the option (especially regarding parties) to take *generally* legitimate interests into account in its discretionary decision. Even if further protective mechanisms for a fairer balance of interests, such as a genuine in camera procedure, are desirable, it seems questionable whether there is actually a significant gap in protection regarding legitimate confidentiality interests.

Furthermore, it should be noted that the newly introduced possibility of imposing a fine on parties is criticised on the grounds that it is alien to German civil proceedings.⁹⁵ In this regard, there are isolated opinions that this constitutes a violation of the principle of the rule of law

⁹⁰ See also A. Stadler, see fn. 10, margin no. 7a with further references.

⁹¹ R. Greger, in Zöller, *Zivilprozessordnung*, Cologne, 2026 (36th Ed.), Section 390 ZPO, margin no. 7.

⁹² However, there are doubts as to whether the fine can be repeated an unlimited number of times: H. Wais, in D. Skauradszun, *Verbraucherrecht durchsetzungsgesetz (VDuG)*, Munich, 2024, Section 6 VDuG, margin no. 9 (exactly once); H. Großerichter, in F. Reuschle, H. Großerichter and F. Kruis, *Verbraucherrecht durchsetzungsgesetz (VDuG)*, Berlin, 2025, Section 6 VDuG, margin no. 7 with further references.

⁹³ M. Mekat and A. Amrhein, *Die Umsetzung der Verbandsklagen-RL in Deutschland nach dem Referentenentwurf*, in *Recht Automobil Wirtschaft*, 23, 27 (2023).

⁹⁴ M. Mekat and A. Amrhein, see fn 93, 27.

⁹⁵ A. J. Baumert, in *Zeitschrift für Zivilprozess*, 235, 236 f. (Issue 137, 2024); *id.*, *Ermessensreduzierung auf Null bei § 6 VDuG*, in *Zeitschrift für Wirtschaftsrecht*, 1955, 1962 (2025); A. Bruns, *Die neue deutsche Verbandsklage auf Abhilfeleistung im Spiegel der ELI-UNIDROIT Model Rules und der Prozessrechtsdogmatik*, in *Zeitschrift für Zivilprozess International*, 293, 311 (Issue 27, 2022).

(*Rechtsstaatsprinzip*) under Article 20 para. 3 of the German Constitution in the form of fair trial and the right to justice (*Justitzgewähr*).⁹⁶ However, no specific justification for this assertion is provided. Finally, it is argued that the court must *mandatorily* refrain from threatening and imposing a fine if it is already clear beforehand that the party concerned will not comply with the disclosure order despite a fine (for example, because it has stated this when asked by the court).⁹⁷ However, this argument alone is not convincing, as the party addressed could otherwise simply *claim* that it would continue to refuse to cooperate even if a penalty payment were imposed. Furthermore, the special situation involving the disclosure of evidence is not sufficiently taken into account here. In representative action proceedings, Sections 142 and 144 ZPO, which serve to implement Article 18 of the Representative Actions Directive, also expressly serve to reduce information asymmetries to the detriment of consumers.⁹⁸ It is precisely this interest of consumers and the qualified entity bringing the action in compensating for the information asymmetry and thus in the enforcement of disclosure that must be taken into account. Unlike Section 141 para. 3 ZPO, which is invoked to restrict the possibility of imposing fines,⁹⁹ this is not merely a matter of better understanding the subject matter of the proceedings.¹⁰⁰ Ultimately, the restrictive view discussed here is apparently based on the assumption that, in the event of an unjustified refusal to disclose, even if a fine is imposed, the party obliged to disclose will *inevitably* lose the case.¹⁰¹ However, as will be shown shortly, this is not the case. The concerns about Section 6 VDuG are therefore misguided.¹⁰² The second option available to the court – irrespective of the imposition of a fine – is the free assessment (*freie Würdigung*) of the party's unjustified refusal by the court in accordance with Sections 286, 427 sentence 2 ZPO and Section 371 para. 3 ZPO.¹⁰³ According to this, the court may consider assertions about the nature and content of the evidence in question by the party requesting disclosure to be proven. This may result in the refusing party losing the case. However, this outcome is not mandatory, especially since the court is not obliged to draw a *specific* conclusion from the refusal to disclose evidence.

II.16 Practical relevance

The above considerations show that German law does in principle provide for provisions that allow for the disclosure of evidence by the opposing party or third parties in representative actions, but that these are associated with considerable difficulties. Qualified entities seeking disclosure of evidence are confronted with relatively high requirements in substantiating their request for disclosure (and thus the underlying claim). Also, courts generally require a very detailed description of only individual pieces of evidence. Entire categories of evidence cannot be requested. These strict requirements are a manifestation of the principle of “*nemo tenetur edere contra se*” applicable in German civil proceedings, which is (unfortunately) often adhered to very strictly and which is repeated mantra-like when it comes to the obligations of the party not bearing the burden of proof

⁹⁶ A. J. Baumert, in *Zeitschrift für Zivilprozess*, 235, 236 (Issue 137, 2024); *id.*, *Ermessensreduzierung auf Null bei § 6 VDuG*, in *Zeitschrift für Wirtschaftsrecht*, 1955, 1959 f. with further references (2025).

⁹⁷ A. J. Baumert, *Ermessensreduzierung auf Null bei § 6 VDuG*, in *Zeitschrift für Wirtschaftsrecht*, 1955, 1961 f. (2025).

⁹⁸ Recital 68 of the Representative Actions Directive.

⁹⁹ A. J. Baumert, *Ermessensreduzierung auf Null bei § 6 VDuG*, in *Zeitschrift für Wirtschaftsrecht*, 1955, 1957 f. (2025).

¹⁰⁰ On the purpose of Section 141 ZPO, see R. Greger, in Zöller, *Zivilprozessordnung*, Cologne, 2026 (36th Ed.), Section 141 ZPO, margin no. 1 with further references.

¹⁰¹ A. J. Baumert, *Ermessensreduzierung auf Null bei § 6 VDuG*, in *Zeitschrift für Wirtschaftsrecht*, 1955, 1960 (2025).

¹⁰² Similarly: A. Stadler, in H.-J. Musielak and W. Voit, *Zivilprozessordnung*, Munich, 2025 (22nd Ed.), Section 6 VDuG, margin no. 1 (there, fn. 3).

¹⁰³ BGH, judgment of 26 June 2007, XI ZR 277/05, cited from juris, margin no. 20; R. Greger, see fn. 9, margin no. 15 with further references; D. von Selle, in V. Vorwerk and C. Wolf, *Beck'scher Online-Kommentar Zivilprozessordnung*, Munich, 2025 (57th Ed.), Section 144 ZPO, margin no. 10.

to cooperate in clarifying the facts of the case. According to this principle, no party is obliged to provide the opponent with the material for winning the case that it does not already have at its disposal.¹⁰⁴ It is often pointed out that this principle has already been breached many times in civil procedure law and has therefore actually become obsolete.¹⁰⁵ Therefore, this principle cannot be used to justify strict requirements for the admissibility of disclosure orders. Rather, it would already be possible under the existing legal framework to allow disclosure of evidence even under less stringent conditions. This is demonstrated, for example, by the case law of the Federal Court of Justice on technical property rights. There, the Federal Court of Justice had to assess Section 142 ZPO in the context of Directive 2004/48/EG. This ultimately led to a differentiated interpretation of Section 142 ZPO, according to which – unlike in other cases – it is sufficient for a disclosure order if a “certain probability” of the underlying claim is demonstrated.¹⁰⁶ However, the Federal Court of Justice has explicitly ruled out the transfer of these lower requirements to general civil proceedings.¹⁰⁷

In addition, courts rarely make use of the possibility of issuing a disclosure order pursuant to Sections 142 and 144 ZPO. This was made clear, for example, in a public hearing of the Committee on Legal Affairs and Consumer Protection (*Ausschuss für Recht und Verbraucherschutz*) in the German Bundestag on 9 September 2020. A judge questioned there as an expert explained with regard to Section 142 ZPO that it is “unusual” to issue such an order and that judges rarely make use of it.¹⁰⁸ In practice, Sections 142 and 144 ZPO are therefore only relevant to a very limited extent. As a rule, requests aimed at these provisions will not result in the actual disclosure of evidence. Rather, this is the exception. For this reason, in practice, other regulations whose (primary) purpose is different are more likely to be used, for example the request for disclosure of information and documents (insofar as the case allows) under Art. 15 GDPR.

III. POSSIBLE IMPLEMENTATION DEFICIT COMPARED TO ART. 18 OF THE REPRESENTATIVE ACTIONS DIRECTIVE

To date, it remains unclear whether Sections 142 and 144 ZPO actually implement the provisions of Article 18 of the Representative Actions Directive completely and accurately. In any case, the legislature has assumed this to be the case, and this has not yet been analysed in depth in legal literature. I believe that there may be a shortfall in implementation in various areas. For example, it could be argued that the issuance of a disclosure order under Article 18 of the Representative Actions Directive is not at the discretion of the court, but rather a binding decision. If the applicant can meet all the requirements for disclosure and proportionality is also maintained, the court would have to order the disclosure. In this case, the German provisions, which provide for a discretionary decision, would not be in line with the Representative Actions Directive.

¹⁰⁴ BGH, decision of 26 October 2006, III ZB 2/06, cited from juris, margin no. 7; BGH, judgment of 7 December 1999, XI ZR 67/99, cited from juris, margin no. 16; BGH, judgment of 17 October 1996, IX ZR 293/95, cited from juris, margin no. 17; BGH, judgment of 11 June 1990, II ZR 159/89, cited from juris, margin no. 9; BGH, judgment of 26 June 1958, II ZR 66/57, in *Neue Juristische Wochenschrift*, 1491, 1492 (1958).

¹⁰⁵ R. Greger, in Zöller, *Zivilprozessordnung*, Cologne, 2026 (36th Ed.), before Section 284 ZPO, margin no. 34e; C. Katzenmeier, *Aufklärungs-/Mitwirkungspflicht der nicht beweisbelasteten Partei im Zivilprozeß*, in *JuristenZeitung*, 533, 540 (2002); A. Stadler, in H.-J. Musielak and W. Voit, *Zivilprozessordnung*, Munich, 2025 (22nd Ed.), Section 138 ZPO, margin no. 11; *id.*, see fn. 10, 1627; R. Koch, see fn 10, 176; D. Waterstraat, *Informationspflichten der nicht risikobelasteten Partei im Zivilprozess*, in *Zeitschrift für Zivilprozess*, 459, 484 (Issue 118, 2005).

¹⁰⁶ BGH, judgment of 1 August 2006, X ZR 114/03, cited from juris, margin no. 43 (*Restschadstoffentfernung*).

¹⁰⁷ BGH, judgment of 28 February 2008, IX ZR 177/05, cited from juris, margin no. 21.

¹⁰⁸ German Bundestag, verbatim transcript of the 103rd meeting of the Committee on Legal Affairs and Consumer Protection on 9 September 2020, 25.

Another point concerns the types of evidence covered. Even though the types of evidence covered by Sections 142 and 144 ZPO are very extensive and typically cover the most important types (physical and electronic documents), not all types of evidence known in civil procedure law are covered. In particular, the type of evidence “witness” is not covered. Since Article 18 of the Representative Actions Directive refers to “evidence” in general terms, it can be assumed, at least according to the wording, that in principle all types of evidence admissible under the respective national civil procedure law must be subject to a disclosure order. In this case, it would also be necessary to clarify how the evidence “witness” can be “disclosed”. In this respect, it would be conceivable, for example, to require the naming of further witnesses.

The last point I would like to address in this context is the description and identification of the evidence to be disclosed by the applicant. Article 18 of the Representative Actions Directive only states that the applicant must have “indicated” that further evidence lies in the control of the opposing party or a third party. However, based on the wording, a mere “indication” is less than the specific identification of individual pieces of evidence required under German law.

IV. CONCLUSION

Considering all of the above, the possibilities for the disclosure of evidence in representative actions under German law ultimately paint a rather sobering picture:

1. German law generally allows for orders by the court to disclose evidence addressed at the opposing party or a third party pursuant to Sections 142 and 144 of the German Code of Civil Procedure (*Zivilprozessordnung*). Furthermore, the scope of types of evidence covered by these provisions is broad and includes any type of document or file held physically or electronically as well as other visual evidence. In addition, the court can enforce disclosure orders issued against the opponent or third parties by imposing fines, ordering coercive detention (third parties only) or assessing any refusal to comply to the detriment of the non-cooperating party (parties to the proceedings only).
2. However, German courts generally uphold the restrictive principle of “*nemo tenetur edere contra se*” and require relatively strict requirements to be met by the party seeking disclosure. In this respect, the request for disclosure must be as detailed and substantiated as possible. Furthermore, a precise description of the individual pieces of evidence to be disclosed is required. Ultimately, judges rarely make use of the possibility of issuing a disclosure order. For these reasons, these two provisions are unfortunately only of limited significance in practice.
3. There are aspects that give rise to the question of whether German law already fully implements the provisions of Article 18 of the Representative Actions Directive. Further analysis will be required to determine whether this is the case and, if so, to what extent.

DISCLOSURE OF EVIDENCE IN COLLECTIVE ACTIONS: THE ITALIAN MODEL IN A COMPARATIVE PERSPECTIVE

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Collective redress represents one of the most powerful tools provided in the interest of consumers and, more generally, individuals to recover the damages in case of a mass tort. This topic stimulated a quite copious academic debate and brought to various reforms issued by both national legislators and the European Union. One of the most impactful aspects has regard to the disclosure of evidence in the context of collective claims, given the imbalance between the parties which usually characterise such actions. Therefore, particular rules are needed to facilitate the collection of evidence in favour of plaintiffs, thus safeguarding the rights of defendants. Additionally, the increased scholarly and regulatory interest over the Third Party Funding of collective claims also raised the issue of the disclosure of such agreements in the context of these disputes. Therefore, this article will scrutinise how the Italian legislator addressed these issues in the recently enacted measures on collective actions. This study will be conducted through a comparative approach, in particular with reference to the model introduced by means of Directive (EU) 2020/1828 by the European legislator, and the French system.

Keywords: Collective Redress – Representative Actions – Disclosure of Evidence – Italy – France

I. INTRODUCTION: CONTEXTUALISING THE ISSUE

Collective or representative actions now constitute a cornerstone in the ‘portfolio’ of remedies available to consumers, citizens or companies affected by the so-called mass torts. The importance of these tools stems from the nature of the latter torts, given that the same behaviour may harm a multitude of subjects (e.g., in case of competition law infringements, product liability issues and, as recently recognised, damages related to climate change¹). Therefore, although this kind of actions was a peculiar trait of common law jurisdictions,² they progressively became part of the continental Europe legal systems, as well. In this realm, a twofold parallel reception of this tool underwent: From one side, each member State tried to introduce its own collective or representative action

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¹See European Court of Human Rights, Grand Chamber, decision 9 April 2024, case no. 53600/20, *Verein Klimasenioren Schweiz and others v. Switzerland*. The action was brought by an association representing older women worried about the possible negative consequences of climate change on their health, and the ECHR recognised the responsibility of the Swiss State, under Article 8 of the European Convention on Human Rights, for not having respected its obligations related to greenhouse gases' reduction. See N. Burnett, J. Dawson, *A new precedent for climate change in human rights law*, House of Commons Library, 1 May 2024, available at <https://commonslibrary.parliament.uk/a-new-precedent-for-climate-change-in-human-rights-law/> (last visited Aug. 6, 2026). More generally, see Salim, *Collective Redress and Climate Change Litigation in the EU: A Promising Future or More of the Same?*, in I. Alogna, C. Billet, M. Fermeglia, A. Holzhausen (Eds.), *Climate Change Litigation in Europe* (2025).

²For an overview about class actions in common law systems, see G. Scarchillo, *Class action. Dalla comparazione giuridica alla formazione del giurista: un caleidoscopio per nuove prospettive* 27-88 (2024).

system, whilst a debate started developing at the EU Institutions level.³ This led to the introduction of a multitude of collective redress schemes across the Single Market, thus creating a certain level of ‘procedural fragmentation’, given the differences among the various national civil procedure legal traditions. These divergencies were ranging from the configuration of the tool itself (for instance, as collective or representative action regimes), to more truly procedural issues, such as the formalities to be carried out, the intersection with decisions of administrative Authorities (an aspect which is crucial in claims stemming from violations of competition rules), the adhesion mechanisms and, not less importantly, disclosure of evidence. This led to a high degree of regulatory competition, with certain systems being the preferred *forum* for these actions due to a more favourable procedure, whilst others were characterised by mechanisms too burdensome to manage and not providing effective results to the claimants.

The collective redress models introduced in the European context have of course some commonalities with the American ‘ancestor’, the properly defined *class action*, but they generally tend towards a system referred to as representative action, given the fact that the introduction and the management of the claim is generally devolved to a representative entity, usually an association which is active in protecting a certain kind of interests, e.g., consumers’ interests.⁴ This is the model, for instance, promoted by Directive (EU) 2020/1828,⁵ by the French *action de groupe*⁶ and also by the Italian consumeristic representative action recently included in the Italian *Codice del Consumo* (Consumer Code).⁷ Similarly, but also contrarily, the ‘generalist’ Italian collective redress scheme contained in the *Codice di Procedura Civile* (Civil Procedure Code, henceforth Cpc), although designed for providing standing to the cited representative associations, allows also single class members to file a collective claim,⁸ more in the spirit of a proper class action model.

In the context of these claims, overcoming the evidentiary burden is one of the main challenges. This proves essential in two moments. First, during the proceeding on the merit of the claim it is necessary to establish the existence of a common violation (and according to the *commonality* requirement). For this purpose, the representative body must demonstrate that a defendant’s practices have produced a common harm that affects a group of consumers, users, citizens, etc. This typically involves gathering documents, expert reports, statistics, and other forms of aggregate evidence, which might include official records, industry audits, and consumer complaints that support the existence of a recurring or systematic breach. On the other hand, once the decision on the merit of the case is issued and the class perimeter is defined, each party who aims at being included in the class must substantiate the relevant individual harm. In this sense, parties must show that individual members of the group have been affected in a way that traces back to the

³ Commission Recommendation (2013/396/EU) of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, published in OJ 26 July 2013, L 201/60.

⁴ E. Camilleri, *La Dir. 2020/1828/UE sulle azioni rappresentative e il “sistema delle prove”. La promozione dell’interesse pubblico attraverso la tutela degli interessi collettivi dei consumatori: verso quale modello di enforcement?*, in NLCC 1064-1065 (2022).

⁵ Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, published in OJ 4 December 2020, L 409. See M. Bona, *La direttiva UE 2020/1828 sulla tutela rappresentativa dei consumatori*, in E. Dalmotto (Ed.), *Profili della tutela individuale dei consumatori e della riforma di quella collettiva*, in Giur. It. 252-262 (2021).

⁶ Given the complex stratification of the discipline, which cannot be referred to a single legislative act, detailed references will be provided in footnotes *infra*.

⁷ Legislative decree 6 September 2005, no. 206, published in OJ 8 October 2005, no. 235.

⁸ G. De Cristofaro, *Le «azioni rappresentative» di cui agli artt. 140-ter ss. Cons.: ambito di applicazione, legittimazione ad agire e rapporti con la disciplina generale delle azioni di classe di cui agli artt. 840-bis ss. C.P.C.*, in NLCC 5-6 (2024). An interesting reflection on this profile is provided by F. Auletta, *L’azione rappresentativa come strumento di tutela dei diritti*, in NLCC 1674-1676 (2022).

common cause. If the initial phase may focus on a broad factual picture, the eventual personal claim often requires additional evidence detailing the individual harm.

Whilst the latter described phase should not present particular issues to the adherent parties, given that they have ‘just’ to demonstrate that they are part of the class perimeter outlined in the decision on the merit of the claim (therefore showing the relevant causal nexus),⁹ the former one appears much more challenging. Indeed, the imbalance between the parties which generally characterizes collective actions is particularly felt in the field of evidence’s disclosure, given that essential pieces of evidence are usually kept by the defendant and, without *ad hoc* means, it would result particularly difficult for plaintiffs to reach these proofs, thus undermining the essential principle of effectiveness declined in judicial proceedings.

Therefore, the purpose of this article is that of analysing how the Italian legislator, under the input of the European one, refined the relevant disclosure rules in order to make collective actions more effective. In doing so, the article will provide a comparative analysis on the topic object of the investigation, with reference – in particular – to the French model and the Slovenian *ZKoIT*.¹⁰

II. THE 2019 ITALIAN REFORM: TOWARDS A ‘GENERALIST’ AND ‘DEFORMALIZED’ COLLECTIVE ACTION MODEL

The first collective action model was introduced in Italy in 2007, planned to enter into force in 2010,¹¹ and envisaging the creation of Article 140-*bis* of the Italian Consumer Code. However, in 2009 a new model was enacted and started being applied (with the consequence that the previous set of rules never entered into force).¹² The relevant provisions were always contained under Article 140-*bis* Consumer Code and slight amendments were brought in 2012.¹³ Given its systematic collocation, this tool was available in the field of consumer protection claims only. However, it proved to be particularly demanding for plaintiffs to succeed in reaching a favourable outcome in this kind of proceedings, especially because of the high procedural hurdles and evidentiary requirements characterising this system.¹⁴ Therefore, after a long debate, a totally brand new collective action model was passed into law in April 2019, although it entered into force in May 2021.¹⁵ This marked a very important shift in respect to the previous regime, since it moved the

⁹ On the disclosure during this phase, see A. Mengali, *La fase istruttoria della nuova azione di classe*, in A. Carratta (Ed.), *La Class action riformata*, in Giur. It. 2310-2316 (2019).

¹⁰ In force since 2018 and reformed in 2023 (with the latter reform's entry into force in January 2024). Law on Collective Actions (*Zakon o kolektivnih tožbah – ZKoIT*), published on the OJ of the Republic of Slovenia 6 October 2017, no. 55, available at https://www.uradni-list.si/_pdf/2017/Ur/u2017055.pdf (last visited Dec. 10, 2025). The 2023 reform text is contained in the OJ of the Republic of Slovenia 27 December 2023, no. 133, available at https://www.uradni-list.si/_pdf/2023/Ur/u2023133.pdf (last visited Dec. 10, 2025). See C.I. Nagy, *European models of collective actions*, in C.I. Nagy (Ed.), *Collective actions in Europe* 71-112 (2019); A. Piletta Massaro, *Towards an EU-Wide Collective Redress Model: An Opportunity for Strengthening Eastern Europe's Countries Access to Justice*, in *Zbornik Radova Kopaniške Škole Prirodnog Prava – Slobodan Perović* 205-206 (2020).

¹¹ Article 2, Subs. 446, Law 24 December 2007, no. 244, published in OJ 28 December 2007, no. 300.

¹² Article 49, Subs. 1r, Law 23 July 2009, no. 99, published in OJ 31 July 2009, no. 176.

¹³ Article 6, Law Decree 24 January 2012, no. 1, published in OJ 24 January 2012, no. 19, then converted into Law 24 March 2012, no. 27, published in OJ 24 March 2012, no. 71. See G. Afferni, “Opt-in” Class Actions in Italy: Why are They Failing, in *Journal of European Tort Law* 82 (2016); G. Afferni, *Recenti sviluppi nell'azione di classe*, in *Cont. Imp.* 1275 (2013); E. Corapi, *Appunti sull'ambito di applicazione soggettivo ed oggettivo della class action nella legge di riforma*, in F. Capriglione (Ed.), *Liber Amicorum Guido Alpa* 481 (2019).

¹⁴ A. Piletta Massaro, *The Italian Class Action Reform: A Redesigned Tool Beyond Consumer Law*, in *European Review of Private Law* 845 (2020); G. Ponzanelli, *La nuova class action*, in *Danno Resp.* 306 (2019).

¹⁵ Law 12 April 2019, no. 31, published in OJ 18 April 2018, no. 92. It is worth reminding that this reform's entry into force has been postponed several times, until it became effective on 19 May 2021 (see Law Decree 28 October 2020, no. 137, published in OJ 28 October 2020, no. 269, converted by Law 18 December 2020, no. 176, published in OJ 24 December 2020, no. 319).

collective actions rules from the Consumer code to the Cpc, thus making the new tool available as a ‘generalist’ collective action, *c’est à dire* for every kind of claim, also outside the scope of consumer protection. Moreover, it introduced a completely redesigned procedure, especially with regard to the adhesion mechanism for class members and the overall procedural management of the whole claim, therefore also with reference to the collection of evidentiary materials.¹⁶

Having regard to the first profile, the innovation was significant, since one of the main obstacles of the previous system was the fact that class members should have joined the action through an *opt-in* mechanism just in the preliminary stage of it, therefore before the decision on the merit, thus carrying a quite high degree of uncertainty about its outcome. Contrarywise, the reformed regime allowed class members to join the action both during the initial stage – alike the previous system – but also after the relevant decision on the merit of the case, thus rendering the adhesion much easier and based on a favourable judgement on the main claim. This system, that we labelled elsewhere as a *postponed opt-in*,¹⁷ was transplanted from the French *action de groupe* introduced in 2016 and has the merit of finding a quite balanced compromise between a pure *opt-in* scheme and an *opt-out* adhesion mechanism.¹⁸

However, the reform brought also very important innovations from the evidentiary viewpoint, given that one of the main obstacles for plaintiffs under the previous regime was exactly related to such a profile. This hurdle has been simplified by the reform, since Article 840-ter Cpc provides that the entire proceeding is regulated by the *rito semplificato di cognizione*. This is a simplified procedural scheme provided for by Articles from 281-decies to 281-terdecies Cpc,¹⁹ whose deformatized structure, also with regard to the collection of evidence, should simplify the plaintiff’s tasks. Furthermore, Article 840-ter Cpc specifies that the possibility to mutate the procedure – as generally envisaged by Article 281-duodecies Cpc – is not available in cases involving a collective action. Therefore, the described deformatized procedure represents the only possibility in this kind of claims. In the end of the initial phase, a decision on the action’s admissibility is released within 30 days from the filing of the same. The action may be deemed inadmissible if, *inter alia*, it results manifestly unfounded.

However, it is worth mentioning that the proceeding can be suspended in case of an ongoing investigation in front of an independent Authority or an administrative Court (which could be the case especially when proceedings related to the infringement of competition rules are concerned). In the evidentiary context, this creates an interaction between the collective action and the eventual administrative proceeding, in order to reach a decision which is based upon and not contrasting with the same administrative decision.²⁰ This is of particular importance, as already mentioned, in competition law cases, where, according to Article 7 of Legislative Decree no. 3/2017²¹ (which implements Directive 2014/104²² into the Italian legal system), the decision of the Autorità Garante per la Concorrenza e il Mercato (AGCM), once definitive – usually after being appealed in front of

¹⁶ For an overview of the new regime see, A. Carratta, *I nuovi procedimenti collettivi: considerazioni a prima lettura*, in A. Carratta (Ed.), *La Class action riformata*, cit., 2297-2300.

¹⁷ A. Piletta Massaro, *The Italian Class Action Reform*, cit., 862.

¹⁸ *Ibidem*, 841.

¹⁹ Being this procedure introduced by means of Legislative Decree 10 October 2022, no. 149 (published in OJ 17 October 2022, no. 243), as modified by Law 29 December 2022, no. 197 (published in OJ 29 December 2022, no. 303). See, in particular Article 31, comma 1), these provisions apply from 28 February 2023. Therefore, proceedings pending before that date are subject to the previous regime.

²⁰ A. Piletta Massaro, *The Italian Class Action Reform*, cit., 853.

²¹ Legislative Decree 19 January 2017, no. 3, published in OJ 19 January 2017, no. 15.

²² Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, published in OJ 5 December 2014, L 349.

the TAR Lazio and the Consiglio di Stato – establishes, without further possibility of being put into question, the relevant violation of competition law.²³

Having regard to evidence, Article 281-*duodecies* Cpc delineates a quite deformed admission of evidentiary materials led by the court, without providing further details on the matter, but just that the judge admits the proofs which are relevant for the decision and s/he proceeds with their gathering. Having particular regard to collective actions, Article 840-*quinquies* Cpc further specifies this phase,²⁴ thus delineating a structure of the disclosure phase aimed at favouring the equality between the parties: The Tribunal, omitted any formality which is not essential for the adversarial procedure, acts in the way it deems more appropriate with regard to evidence collection. The formulation of this provision evidently leaves a quite high degree of power to the judge over the evidence gathering phase's management.²⁵

Furthermore, the same Article 840-*quinquies* Cpc provides for peculiar rules regarding specific evidentiary items. In particular, in case a technical consultancy would be necessary, the relevant expenses should be anticipated by the defendant. This, of course, shifts the financial burden of this evidentiary means on the defendant, which usually is a more financially capable subject than the plaintiff. In fact, whilst the technical consultancy could be essential to establish the plaintiff's claim from an evidentiary standpoint, s/he could find it very difficult to perform it, with the consequence of almost making practically impossible for the proposed collective action to succeed. Moreover, always with the aim of easing the plaintiff's evidentiary burden, the reformed scheme plainly allows the admission of rebuttable presumptions and statistical evidence into the proceeding. Of course, this is dictated by the fact that such items could generally be pivotal in proving a damage arising out of a mass tortious behaviour.

However, what is for sure most penetrant from the procedural viewpoint is the fact of allowing the judge to order the exhibition of evidence kept by the defendant. In order to do so, a motivated request should be filed by the plaintiff, indicating facts and proofs reasonably in the availability of the defendant and sufficient to sustain the plausibility of the lawsuit itself.²⁶ It is worth underlining that the mentioned plausibility should not be interpreted as a sort of anticipated evaluation on the merits of the plaintiff's action, but simply as an assessment of the fact that the claim is not manifestly unfounded.²⁷ Of course, the described tool acquires particular importance in cases where evidence regarding the tort is contained in corporate records or in internal documentation, which can be very difficultly in the plaintiff's availability. Anyhow, this *favor* towards the claimant is tempered by a certainty and proportionality requirement, designed by means of the fact that the judge, in her/his request, must specifically indicate the items of evidence or the category of evidence object of the exhibition order. Such order shall also be granted upon having first analysed whether the plaintiff's request is sustained by facts or evidence which justify the same. Furthermore, the judge must take into account the extension and costs of disclosure and if

²³ On this point see also the reflections conducted by E. Camilleri, *L'azione rappresentativa e il raccordo imperfetto con il diritto privato regolatorio. Le decisioni delle Authorities tra libero apprezzamento e presunzioni giurisprudenziali: spunti dall'arrêt Repsol*, in NLCC 457-463 (2024). In the same vein, Article 15 of Directive (EU) 2020/1828 establishes that the final decision of a court or administrative Authority of any Member State concerning the existence of an infringement harming collective interests of consumers can be used by all parties as evidence in the context of any other action before their national courts or administrative authorities to seek redress measures against the same trader for the same practice. See E. Camilleri, *La Dir. 2020/1828/UE sulle azioni rappresentative e il "sistema delle prove"*, cit., 1065-1073.

²⁴ A detailed analysis is provided by A. Mengali, *La fase istruttoria della nuova azione di classe*, cit., 2310-2316.

²⁵ E. Camilleri, *L'azione rappresentativa e il raccordo imperfetto con il diritto privato regolatorio*, cit., 453.

²⁶ BEUC, *Comparative Legal Study on Procedural Rules and their Impact on Collective Redress Actions in Europe*, cit., 87-92. See also E. Camilleri, *L'azione rappresentativa e il raccordo imperfetto con il diritto privato regolatorio*, cit., 454-455.

²⁷ E. Camilleri, *L'azione rappresentativa e il raccordo imperfetto con il diritto privato regolatorio*, cit., 454-455; A. Mengali, *La fase istruttoria della nuova azione di classe*, cit., 2312-2314.

confidential information are concerned. In the latter case, a tempered solution has been found by the legislator through the prescription that parties can be asked to carry out confidentiality obligations, to prepare redacted versions of the concerned documents or by means of synthesis prepared by experts, as well as through attending private hearings or establishing confidentiality rings. The same Article 840-*quinques* Cpc includes in the concerned category confidential information from the personal, commercial, industrial or financial point of view, related to both people or firms, including trade secrets. The same provision specifies that the legal privilege is protected.²⁸

In light of the analysed judicially-led disclosure procedure, it is prescribed the right to be heard of the party who must disclose the relevant pieces of evidence. However, particularly interesting is the sanction envisaged in case such a party fails to comply with the judge's order or whether the relevant evidence is destroyed. At the occurrence of these events, the Cpc gives the judge the power to impose a sanction ranging from 10,000 to 100,000 €. Of course, someone can object that, especially in case a mass tort is involved and whether the evidence concerned represents a key element for establishing the defendant's liability, no pecuniary sanction could be sufficiently effective, in particular if directed towards a very affluent defendant firm. Exactly to cover this possibility and in line with the principle of effectiveness, the same provision grants the judge the power to deem proved the fact which should have been object of the evidence destroyed or not disclosed. This solution ought to be positively welcomed, although the pecuniary sanction tool – also as a medium possibility between the two provided ones in case of non-disclosure – could have been reinforced with the power to impose a periodical payment (*i.e.*, *astreinte*) on the non-compliant party.

It is finally worth underlining that an almost coincident set of rules regarding the disclosure of evidence has been provided for by the mentioned Legislative Decree no. 3/2017 with reference to actions pertaining to the domain of private enforcement of competition law.²⁹ This is of interest since this field represents – as already noted – one of the main possible venues for collective actions. However, no conflicts should arise between general and special norms, since Article 3 of the mentioned Legislative Decree almost coincides with the dictum of Article 840-*quinques* Cpc, and the same can be said for the Legislative Decree's Article 6 regarding sanctions in case of non-disclosure (although slightly higher). However, what is interesting and should be integrated as *lex specialis* in case of a collective action pertaining to the competition law domain are the provisions contained in Articles 4 and 5 of the same Legislative Decree and dealing with the disclosure of evidence contained in the National Competition Authority (NCA)'s file. In particular, and in synthesis, the disclosure of elements contained into a NCA's file should be granted only in case that such evidence cannot reasonably be provided by both the concerned parties or third ones. In the specific case governed by the provisions at stake, a balance is needed between the exigencies of the private proceeding on one side and the public enforcement of competition provisions on the other one. In detail, the NCA is highly sensitive with regard to the disclosure of elements contained in its file and related to the so-called *leniency applications*. The latter are a very powerful whistleblowing instrument into the toolbox of competition Authorities, which allows them to grant immunity from fines to the first company which is part of a cartel and 'blows the whistle', thus allowing the same Authority to discover the collusive practice concerned. Of course, this tool's effectiveness would be put under serious discussion in case the whistleblower's statements (*leniency statements*) could be in the availability of private parties in a parallel and related private enforcement

²⁸ A. Piletta Massaro, *The Italian Class Action Reform*, cit., 857.

²⁹ *Ibidem*, E. Camilleri, *L'azione rappresentativa e il raccordo imperfetto con il diritto privato regolatorio*, cit., 452.

action, and especially in case of a collective one. To avoid this contrast of tools in the enforcement of competition rules, Directive 2014/104, and consequently Legislative Decree no. 3/2017, provided that these statements are part of a so-called *black list* of elements which can never be disclosed in a private proceeding. The same treatment is provided for settlement submissions to the relevant NCA. Contrariwise, information rendered during a proceeding conducted by the same NCA, together with the information transmitted to the parties by the same NCA or revoked settlement proposals form part of a *grey list*, *c'est à dire* they can be disclosed after the conclusion of the NCA's proceeding. All the other elements can be disclosed, if duly requested.

III. THE DISCIPLINE CONTAINED IN DIRECTIVE (EU) 2020/1828 AND ITS IMPLEMENTATION IN ITALY

As already mentioned, a possible solution to the fragmented situation across the EU showed in the introductory paragraph was brought by the European legislator through the enactment of Directive (EU) 2020/1828. This instrument aims at creating a sort – by using a quite recurring expression nowadays – of 28th regime establishing an EU-wide representative action scheme in the field of subjects related to consumer protection (the complete scope of the Directive can be found in its Annex I). In particular, the Directive's aim is for sure that of providing an harmonised tool, given the plethora of different regimes across the Single Market (Article 1, paragraph 1), but also that of introducing a procedure which can be used in cross-border representative actions (Article 6).

Turning the focus into the rules related to disclosure of evidence, it can first be mentioned the same Directive's Article 18.³⁰ This provision states that *Member States shall ensure that, where a qualified entity has provided reasonably available evidence sufficient to support a representative action, and has indicated that additional evidence lies in the control of the defendant or a third party, if requested by that qualified entity, the court or administrative authority is able to order that such evidence be disclosed by the defendant or the third party in accordance with national procedural law, subject to the applicable Union and national rules on confidentiality and proportionality. Member States shall ensure that, if requested by the defendant, the court or administrative authority is also able to equally order the qualified entity or a third party to disclose relevant evidence, in accordance with national procedural law.*

A careful reading of the Directive's provision, in combination with what already illustrated above with regard to the new Italian collective action regime, should conduct to the conclusion that the previously enacted Italian reform is in line with the Directive requirements. However, it is worth bearing in mind that the Italian legislator implemented the same Directive through the creation of an additional representative action regime, this time contained (back) in the Consumer Code. In particular, whilst the previous consumer class action was disciplined by Article 140-*bis* of the Consumer Code, the new model, introduced in 2023, is contained in Articles from 140-*ter* to 140-*quaterdecies* of the same Code.³¹ The first Article's paragraph 2 specifies that this regime constitutes a *lex specialis* with regard to the subjects listed in the Code's Annex II *septies*, which reproduces the Directive's Annex I.³² Moreover, Article 140-*quinquies* provides some specifications regarding the entities which are authorised to file cross-border actions. The proceeding is also regulated by the *procedimento semplificato di cognizione* (Article 140-*septies* of the Consumer Code). Also in this case, an admissibility decision is envisaged and the proceeding can be suspended in the event that a case is pending in front of an administrative Authority (and a direct reference is made to the already

³⁰ For a comparative perspective see BEUC, *Comparative Legal Study on Procedural Rules and their Impact on Collective Redress Actions in Europe*, cit., 130-133. See also E. Camilleri, *La Dir. 2020/1828/UE sulle azioni rappresentative e il "sistema delle prove"*, cit., 1073-1075.

³¹ Legislative Decree 10 March 2023, no. 28, published in OJ 23 March 2023, no. 70.

³² Although the mentioned Annex II *septies* contains a certain number of inconsistencies, as highlighted by G. De Cristofaro, *Le «azioni rappresentative» di cui agli artt. 140-ter ss. Cons.*, cit., 12-19.

mentioned Legislative Decree no. 3/2017, although a clarification will be provided about this just *infra*).

However, by shifting to the scope of this paper (*i.e.*, disclosure of evidence), the relevant rules are contained in Article 140-*octies* with regard to inhibitory proceedings, whilst the following provision is related to compensatory ones. In the first case, the Consumer Code provides that the requesting party is not called to prove the fault or wilful misconduct of the professional, nor the actual losses or damages suffered by the individual consumers concerned. However, the same Article 140-*octies* of the Consumer Code then specifies that during the inhibitory proceeding the rules on disclosure of evidence contained in Article 840-*quinquies* of the Code of civil procedure find application. The same recall is made by the following Article 140-*novies* of the Consumer Code with regard to compensatory proceedings. This, in a way, establishes a sort of ‘procedural parallelism’ on the rules regarding disclosure of evidence between the ‘general’ collective action and the newly introduced consumeristic one.

To conclude with the newly adopted ‘consumeristic’ Italian representative action, it is worth mentioning that although the reference made about the suspension of the proceeding by Article 140-*septies* of the Consumer Code, the subject regulated by Legislative Decree no. 3/2017, *c’est à dire* the private enforcement of competition law, is not included into the scope of this specific representative action tool (Annex II *septies* to the Consumer Code, and analogously to Annex I to Directive 2020/1828, which do not mention Directive 2014/104).³³ As already expressed elsewhere,³⁴ this constitutes for sure a (difficultly explainable) weakness of the mentioned Directive, which is indirectly addressed in the Italian context by the possibility to file a general class action under the regime contained in the Cpc. However, this does not solve the issue of cross-border collective proceedings, which are highly likely to happen in competition law cases. Furthermore, the mentioned reference made to Legislative Decree no. 3/2017 by Article 140-*septies* of the Consumer Code could generate some interpretative confusion.

Furthermore, and curiously, Directive 2020/1828 (and, consequently, the Italian ‘consumer’ representative action) includes the recently enacted Regulation (EU) 2022/1925, better known as Digital Markets Act (DMA)³⁵ into its scope (see Article 42 DMA). For sure, this can first reinforce the logical doubts regarding the exclusion of private enforcement of competition law from the scope of Directive 2020/1828, given the complexity of proceedings related to the DMA.³⁶ However, from the evidentiary standpoint this does not raise particular issues, apart from the value to be attributed in a collective claim to decisions issued by the European Commission in relation to the DMA in this sense, Article 39, paragraph 5, DMA provides that national courts shall not give a decision which runs counter to a decision adopted by the Commission under the same DMA. They shall also avoid giving decisions which would conflict with a decision contemplated by the

³³ *Ibidem*, 11.

³⁴ A. Piletta Massaro, *The New Directive on an EU-Wide Representative Action and Third-Party Litigation Funding: An Opportunity for European Consumers?*, in *Revija Kopaoničke Škole Prirodnog Prava* 100 (2021). It is worth highlighting that the inclusion of private enforcement of competition law in the scope of the directive was requested, *inter alia*, by the European Consumer Organisation (BEUC) in the position paper *Proposal for a Directive on Representative Actions*, 7-8, 2018, available at https://www.beuc.eu/publications/beuc-x-2018-094_representative_actions_beuc_position_paper.pdf (last visited Dec. 10, 2025).

³⁵ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), published in OJ 12 October 2022, L 265.

³⁶ A. Piletta Massaro, *The Rising Market Power Issue and the Need to Regulate Competition: A Comparative Perspective Between the European Union, Germany, and Italy*, in *Conc. Merc.* 28-29 (2023).

Commission in proceedings it has initiated under the DMA. To that effect, the national court may assess whether it is necessary to stay its proceedings.

IV. A COMPARATIVE PERSPECTIVE: THE REFORMED FRENCH ‘ACTION DE GROUPE’

The analysis conducted with regard to the Italian collective action regime should be complemented with a comparative study, especially in light of the recently enacted reforms in the collective redress field in various Member States, especially for the purpose of implementing Directive 2020/1828. A parallelism ought first to be established with the French *action de groupe*, given some relevant similarities with the Italian model. In particular, as already mentioned, the scheme introduced by the Italian legislator in 2019 abandoned the adhesion mechanism for class members configured as an *opt-in* whose window was only in the initial phase of the dispute.³⁷ In fact, the reform opted for what we called a *postponed opt-in*, where class members could join the collective claim also after the relevant decision on the case’s merit. This, as said, can for sure increase the number of adherents to a collective action by reducing the risk for parties interested in joining the lawsuit and therefore by increasing its appeal. Indeed, these parties do not bear the risk of a defeat as a result of the decision on the merit. Of course, this, in turn, also constitutes an advantage for the entity – or, in the Italian case, also the class member – introducing the claim, since it is likely that, if successful, the class will be composed by quite a large number of participants. This innovation, which tried to address one of the main hurdles of the first Italian class action scheme, was transplanted by the *action de groupe* introduced by the French legislator in 2014 in the consumer law field³⁸ and extended to other sectors in 2016.³⁹ It is anyway worth specifying that the French model does not provide for a double adhesion window, like the Italian one, but just for the one opening after the main judgement is delivered. Moreover, the French scheme has been recently reformed by Article 16 of Law 2025-391, issued on 30 April 2025 and in force since 3 May 2025 (so-called *Loi DDADUE*).⁴⁰ The first impression on this reform is that of a peculiar drafting style, since a single, long, article contained into a generic law reforms a complex procedure. By putting it into sarcasm, it seems that the French legislator took the Italian *milleproroghe* laws’ drafting style as a model for this reform.⁴¹ However, the overall evaluation of the reform should be positive, since, in a similar vein to the 2019 Italian act, one of the main innovations brought by the French reform is the extension of the *action de groupe*’s scope. Indeed, the reformed scheme is applied *ratione personae* to damages suffered by a plurality of physical or moral persons (therefore, without specification of the quality, for

³⁷ A. Piletta Massaro, *The Italian Class Action Reform*, cit., 841.

³⁸ Law 2014-344 of 17 March 2014 (the so-called *Loi Hamon*), published in the OJ 18 March 2014, no. 0065, p. 5400. The *Loi Hamon* added Articles from L623-1 to L623-32 to the French Consumer Code. The latter legislative provisions were supported, in the context of the same French Consumer Code, by the regulatory provisions provided for by Articles from R623-1 to R623-33. See V. Rebeyrol, *La nouvelle action de groupe*, in *Recueil Dalloz* 940 (2014).

³⁹ Law 2016-1547 *de modernisation de la justice du XXI^e siècle*, title V. In particular, this ‘extension’ concerned the fields of health, environment, labour discrimination and protection of personal data. See S. Mraouahi, *L’action de groupe rénovée : nouvelle ère pour le contentieux social ?*, in *Revue du Droit du Travail* 564 (2025); O. Kafi Cherrat, *La réforme de l’action de groupe française, ou l’art de « couper la poire en deux »*, in *Gazette du Palais* 3 (2025); *D’une pluralité d’actions de groupe à un régime à vocation universelle*, in *Le Lamy droit économique* 1 (2025); A. Piletta Massaro, *The Italian Class Action Reform*, cit., 846.

⁴⁰ Published in OJ 2 May 2025, no. 0103.

⁴¹ About the difficulties in properly systematising the new procedural tool, see S. Mraouahi, *L’action de groupe rénovée : nouvelle ère pour le contentieux social ?*, cit., 564-565; J.-D. Pellier, *Regard sur la nouvelle action de groupe à la lumière du droit de la consommation*, in *Revue des contrats* 2-3 (2025); O. Kafi Cherrat, *La réforme de l’action de groupe française, ou l’art de « couper la poire en deux »*, cit., 3-4. See Conseil d’État, Avis 9 February 2023, no. 406516, paragraph 8, available at <https://www.conseil-etat.fr/avis-consultatifs/derniers-avis-rendus/a-l-assemblee-nationale-et-au-senat/avis-sur-une-proposition-de-loi-relative-au-regime-juridique-des-actions-de-groupe> (last visited Dec. 9, 2025).

instance, of consumers),⁴² and *ratione materiae* to all the torts committed by a professional in the framework of its activity and it can give rise also to the compensation of non-patrimonial damages (whilst the previous regime was limited just to patrimonial ones and to specific subjects),⁴³ therefore by extending the action's scope to all the domain of the so-called *contentieux social*.⁴⁴ The creation, likewise, of a common model was deemed necessary in light of the previous scheme's scarce success, given that since 2014 only 32 *actions de groupe* were started, and only 20 in the consumer law field.⁴⁵

Analogously to the consumer representative action in Italy, also the French model distinguishes between inhibitory and compensatory actions and, from the evidentiary point of view, in the former one the plaintiff is required nor to prove a damage suffered by the group members nor the defendant's negligence or wilful conduct.

In case compensatory representative claims are concerned, the action follows the provisions contained in the *Code de procédure civile* under Articles from 848 to 849-2-2 and from 849-11 to 849-20. These rules were introduced by means of the *Décret* no. 2019-1333 of 11 December 2019 and they were then partially amended by *Décret* no. 2025-734 of 30 July 2025, issued after the enactment of the cited Law 2025-391. Having regard to the main procedural aspects, Article 849-2 of the *Code de procédure civile* simply states that the judicial demand is formed, instructed and judged along the rules applicable to the ordinary written procedure. This, according to Article 10 of the *Code de procédure civile*, provides that the judge has the power to order *ex officio* all the measures legally admissible (detailed in Articles from 132 to 322 of the same Code). The following Article 11, interestingly, provides that the judge can order the exhibition of a piece of evidence required by a party and in possession of the counterparty and that, in case of non-compliance, s/he can impose a periodical payment, known as *astreinte*.

Therefore, differently from the Italian context, there is not a specific procedure governing the disclosure of evidence aimed at addressing the peculiarities which can stem from a collective action. Relying on the ordinary civil procedure rules with regard to evidence is also the solution envisaged by another quite scholarly discussed collective action model, which is the Slovenian *ZKoIT* (Article 34). However, we deem preferable the approach followed by the Italian legislator: For sure, the creation of a special proceeding might cause a certain degree of confusion, but collective actions are peculiar from the point of view of the parties and the claims involved and less formal rules can ease their success.

In addition, a critical reflection must be reported also with regard to the French model. We already mentioned the absence of Directive 2014/104 from the scope of Directive 2020/1828. In a similar vein, the 2025 reform, at point VIII of the analysed Article 16, maintained one of the most illogical – in our view – limitations present in the French *action de groupe*, *c'est à dire* the fact that in the field of competition law representative actions are allowed just as *follow-on* claims and not as *stand-alone* ones (in other words, they are available just in case a previous infringement decision has been issued).

⁴² J.-D. Pellier, *Regard sur la nouvelle action de groupe à la lumière du droit de la consommation*, cit., 3-5.

⁴³ It is worth noticing that the award of such damages was already recognised by Italian Courts: *Inter alia*, Corte di Cassazione, III civil section, 31 May 2019, no. 14886, *Trenord v. Altroconsumo*; Corte d'Appello di Milano, decision 25 August 2017; Tribunale di Napoli, 18 February 2013, no. 2195. See BEUC, *Comparative Legal Study on Procedural Rules and their Impact on Collective Redress Actions in Europe*, cit., 79-87; G. Afferni, *Recenti sviluppi nell'azione di classe*, cit., 1275; G. Ponzanelli, *Il danno non patrimoniale dei pendolari all'esame della Corte di Cassazione*, in NGCC 1002 (2019); C. Consolo, *La terza edizione dell'azione di classe è legge ed entra nel c.p.c. Uno sguardo d'insieme ad una amplissima disciplina*, in Corr. Giur. 737 (2019); A. Piletta Massaro, *The Italian Class Action Reform*, cit., 849.

⁴⁴ J.-D. Pellier, *Regard sur la nouvelle action de groupe à la lumière du droit de la consommation*, cit., 5-6; S. Mraouahi, *L'action de groupe renouvelée : nouvelle ère pour le contentieux social ?*, cit., 565. O. Kafi Cherrat, *La réforme de l'action de groupe française, ou l'art de « couper la poire en deux »*, cit., 4-5.

⁴⁵ J.-D. Pellier, *Regard sur la nouvelle action de groupe à la lumière du droit de la consommation*, cit., 2.

by the NCA or ascertained by a court).⁴⁶ Given that competition law is one of the fields where collective actions would prove most effective and useful, this ‘limitation’ of the power of collective claims vis-à-vis *stand-alone* actions appears without a solid logical ground. An objection can be raised with regard to the possibility of abusive litigation, based on insufficient evidentiary ground (*i.e.*, without the previous administrative or judicial ascertainment of the competition law infringement). However, this – at least by considering the *law in the books* – should not happen, since the judge is granted the power, during the preliminary phase of the judgement, to evaluate the soundness of the claim and, if not properly grounded from the evidentiary standpoint (although at a preliminary stage), to reject it as manifestly unfounded.

V. TO DISCLOSE OR NOT TO DISCLOSE: THE CASE OF TPLF AGREEMENTS

An aspect which is not totally related to the disclosure of evidentiary materials, but which can anyway be of particular interest in the context of the present analysis, has regard to the eventual obligation of disclosing Third Party Litigation Funding (hereinafter, TPLF) agreements in a collective proceeding.⁴⁷ TPLF proves to be a very important tool in collective litigation, given the fact that it can compensate what is usually the main imbalance in this kind of lawsuits, *c’est à dire* the difference in financial resources between the parties. In this sense, its aim is that of easing access to justice, also according to the related constitutional principles.⁴⁸ Although it is a typical feature of common law systems, it is now gaining pace also in civil law jurisdictions. In this sense, the already mentioned Slovenian *ZKoIT* already regulated it since its enactment and a provision regarding the management of TPLF agreements in representative actions is also provided for by Directive 2020/1828.

The reason why TPLF is mentioned in the context of the present article is that one of the main issues regarding this tool is the fact of disclosing or not disclosing the TPLF agreement during a proceeding.⁴⁹ In fact, two contrasting points arise: On the one hand, the TPLF agreement is a private contract between a party in the litigation and its funder, but, on the other hand, the presence of a TPLF agreement drastically changes the position of that party vis-à-vis the counterparty in the case’s management. Therefore, among other issues – such as the role of the funder in decisions regarding the claim management, possible conflicts of interest,⁵⁰ the relationship between the

⁴⁶ E. Claudel, *La procédure d’action de groupe explicitée*, in RTD Com. 81 (2015); A. Piletta Massaro, *The Italian Class Action Reform*, cit., 853.

⁴⁷ On the topic, see the conclusions provided by the Author of this paper (as rapporteur for paragraph 3.4) in European Parliamentary Research Service, Research Paper, *State of play of the EU private litigation funding landscape and the current EU rules applicable to private litigation funding*, March 2021, 77-81, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU\(2021\)662612_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU(2021)662612_EN.pdf) (last visited Dec. 10, 2025). See also U.S. Chamber Institute for Legal Reform, *Uncharted Waters, An Analysis of Third Party Litigation Funding in European Collective Redress*, October 2019, available at https://instituteforlegalreform.com/wp-content/uploads/2020/10/Analysis_of_TPLF_Funding_in_the_European_Collective_Redress.pdf (last visited Dec 10, 2025); European Law Institute, *Principles Governing the Third Party Funding of Litigation*, 2024, available at https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_el/ELI_Publications/ELI_Principles_Governing_the_Third_Party_Funding_of_Litigation.pdf (last visited Aug. 6, 2026). A. Burri, G.M. Solas, *Third-party funding under the EU’s New Representative Actions Directive*, in Global Competition Litigation Review 29 (2022); G.M. Solas, *Third Party Funding, Law, Economics and Policy* 266-268 (2019).

⁴⁸ M.C. Paglietti, *Il mercato delle controversie. Il third party litigation funding come strumento di finanziamento responsabile dell’accesso alla giustizia*, in Banca Borsa 821 ff. (2023).

⁴⁹ E. D’Alessandro, *Prospettive del third party funding nel processo civile italiano: il progetto fundIT e le iniziative del Parlamento europeo*, in Riv. Trim. Dir. Proc. Civ. 273 ff. (2022).

⁵⁰ A. Giussani, *Class actions e finanziamento delle liti*, in Riv. Trim. Dir. Proc. Civ. 303 ff. (2022); M.C. Paglietti, cit.

funder and the party's lawyer,⁵¹ etc. – the fact of having an obligation to disclose such an agreement constitutes a focal point, which needs to be regulated.

In this sense, Article 10, paragraph 3, of Directive 2020/1828 requires the class representatives to disclose to the court or administrative authority a financial overview listing the sources of funds used to support the action. However, this formulation does not clarify, *inter alia*, a) when the disclosure must take place (logically in the early stages of the action), b) if the disclosure concerns only the existence of a TPLF agreement or the name of the funder, and c) if the details of the funding must only be disclosed to the court (as appears to be the case from reading Recital 52: *Qualified entities should be fully transparent vis-à-vis courts or administrative authorities*) or also to the counterparty.

A comparative analysis could ease the interpretation of such a quite generic provision. As a starting point, Article 140-*septies*, paragraph 5, of the Italian Consumer Code establishes that the representing entity must indicate a certain number of elements in the claim form, including the action's funding, received or promised by third parties. The same Article's paragraph 8 provides that the action is inadmissible in case, *inter alia*, the funder is competitor of or dependant on the defendant. This formulation appears to provide for a total disclosure, *i.e.*, also towards the counterparty.

In a similar vein, the reformed French model provides that TPLF is object of a publication whose conditions are determined by a judge's decree. In this sense, the judge can order the relevant party to disclose elements proving that there is no conflict of interest with regard to TPLF.⁵² Anyway, the judge is endowed with the power to declare the action unreceivable and to refuse the homologation of any funding agreement between the parties.

Accordingly, Article 59 of the Slovenian *ZK o IT* states that the claimant must publicly disclose and declare to the court the source of the funds that s/he will use to finance the legal proceedings. If the claimant so requests when submitting the financing agreement, the court shall redact the part of the financing agreement that contains business secrets, if it is not relevant for the assessment of the conditions referred to in the same Article.

The analysed measures appear also in line with Rule 237 of the *ELI-UNIDROIT Model European Rules of Civil Procedure*.⁵³ The mentioned Rule provides that the court may require disclosure to the court and *insofar as appropriate, to the parties*. If, after the disclosure, a conflict of interest emerges, the court or administrative authority should be empowered to take the appropriate measures, such as requiring the qualified entity to refuse or change the relevant funding and, if necessary, rejecting the legal standing of the qualified entity or declaring a specific representative action inadmissible. Anyhow, what can be generally highlighted is a pivotal role of courts in the management of this issue.

Finally, and in relation to the funding of collective proceedings, the reformed French model introduced a civil sanction at Article 1254 of the Code Civil. In particular, this provision provides that in case a person is found liable for a breach of the legal or contractual obligations relating to her/his/its professional activity, s/he/it can be condemned to the payment of a civil sanction, the proceeds of which are allocated to a fund dedicated to actions de groupe's financing. In order to

⁵¹ E. D'Alessandro, cit.

⁵² P. Vignal, *L'action de groupe généralisée en droit du travail. Enfin*, in Les Cahiers Lamy du CSE 2 (2025); S. Amrani-Mekki, *L'action de groupe : source d'inspiration pour le droit commun processuel ?*, in Gazette du Palais 1 (2025); O. Kafi Cherrat, *La réforme de l'action de groupe française, ou l'art de « couper la poire en deux »*, cit., 5.

⁵³ *ELI/UNIDROIT Model European Rules of Civil Procedure*, 2020, available at <https://www.unidroit.org/english/principles/civilprocedure/eli-unidroit-rules/200925-eli-unidroit-rules-e.pdf> (last visited Dec 10, 2025).

get this sanction, the *faute* must be committed with a view to obtaining an unjust gain or saving. The interesting aspect has regard to the fact that the amount of the sanction shall be proportionate to the seriousness of the offence committed and to the profit derived. In case the offence was put in place by a natural person, such amount may not exceed twice the profit realised, whilst, in case a legal person is concerned, the sum may not exceed five times the amount of the profit realised.⁵⁴ Additionally, the risk related to this payment explicitly cannot be insured. The introduction of such a public fund for collective actions deserves particular attention, although its operativity is still not clear. Anyhow, it could represent a valid solution aimed at, in a way, restoring the strength positions' balance between the parties in collective claims, as a sort of public aid to the enforcement of private rights. In this sense, it could induce a certain deterrent effect, such as the well-known *treble damages* do in U.S. antitrust litigation.

VI. CONCLUSION

The analysis conducted through the present article tries to enlighten an aspect which is peculiar to every national civil procedure system, but which constitutes one of the key points on which every lawsuit, and especially collective claims, are based, that is the disclosure of evidentiary material. The fact that this aspect of collective claims is deeply embedded in each Country's civil procedure rules leads to the presence of different regimes and to a lack of harmonisation in the context of the various jurisdictions, especially if reference is made to the European Union's member States. This could represent an obstacle for the creation of a proper *level playing field* regarding the disputes which arise in the Single Market, especially in the consumer law field, which is deeply harmonised from a substantive law standpoint.

Therefore, during the years, with regard to collective redress, and disclosure of evidence therein, regulatory competition among the various national regimes was the rule.⁵⁵ Subsequently, Directive 2020/1828 tried to reach a sufficient level of harmonisation, by incentivising member States to issue or reform rules in the field of collective claims.⁵⁶ This impulse brought to new or revised pieces of legislation where – as it can be seen from the analysis conducted in this article – a certain degree of rapprochement with regard to disclosure of evidence has been reached, notwithstanding the fact that national peculiarities will – at a certain extent obviously – continue to persist. The distinctive trait of the reformed or newly introduced regimes is, under a sort of common law flavour, the pivotal role played by the courts in managing the disclosure of evidence phase, given the quite deformed rules prescribed by the various legislative schemes. This could lead to a 'common practice' or increase local or national praxis. The only way to overcome the latter possible negative outcome is, together with the enactment of the mentioned rules, an effort by the European Institutions directed at training national judges in the management of collective redress actions, as it already happens in specific and highly harmonised fields such as IP or competition law litigation.

⁵⁴ S. Mraouahi, *L'action de groupe rénovée : nouvelle ère pour le contentieux social ?*, cit., 569; E. Poisson, J. Metois, *L'action de groupe réformée et unifiée par l'article 16 de la loi du 30 avril 2025*, in *Revue Lamy droit des affaires* 2 (2025); O. Kafi Cherrat, *La réforme de l'action de groupe française, ou l'art de « couper la poire en deux »*, cit., 5-6. Having regard to punitive damages and collective claims in civil law systems (in particular, France and Italy) see Cour de Cassation, First Civil Chamber, 1 December 2010, no. 1090 and Corte di Cassazione, Sezioni Unite, 5 July 2017, no. 16601, *Axo Sport v. Nosa*. See also B. Pozzo, *The enforcement of foreign decisions concerning punitive damages*, in *European Review of Private Law* 661 (2018); C. Salvi, *Le funzioni della responsabilità civile e il volto italiano dei danni punitivi*, in *Foro It.* 2504 (2018); P.G. Monateri, *I danni punitivi al vaglio delle sezioni unite*, in *Foro It.* 2648 (2017); A. Piletta Massaro, *The Italian Class Action Reform*, cit., 863.

⁵⁵ A. Piletta Massaro, *The Italian Class Action Reform*, cit., 843-844.

⁵⁶ M. Bona, *La direttiva UE 2020/1828 sulla tutela rappresentativa dei consumatori*, in E. Dalmotto (Ed.), *Profili della tutela individuale dei consumatori e della riforma di quella collettiva*, cit., 252-254.

Exactly with reference to competition law claims – which, as observed, are one of the main arenas where collective redress could play an essential role – the mentioned exclusion from the scope of Directive 2020/1828 could represent an unsolved issue in the just described harmonisation process. However, some legislators, and the Italian one probably provides the best example, found a practical solution, by doing at the national level what the European legislator – inexplicably – did not do.

Finally, the article touched the issue of 'TPLF agreements' disclosure. Although not constituting pieces of evidence, the presence of a funder behind a party's claim is a quite important element, which can concretely determine the success possibilities of a lawsuit. In this case, the European legislator provided for a generic provision in Directive 2020/1828, which for sure represents a good starting point, but it still leaves a quite wide margin of manoeuvre to each national legislator. As we observed, there are still few points to be addressed on this issue. The latter aspects might find interesting solution proposals in model laws, such as the mentioned *ELI-UNIDROIT Model European Rules of Civil Procedure*.

All in all, the legal landscape described in the present paper shows a tendency from a fragmented status towards an always increasing harmonisation, promoted by the European legislator and the need to provide always more 'Europeanised' instruments to firms, consumers and people acting in the Single Market, like the debate around a 28th system for business transactions stimulated by the Letta Report⁵⁷ showed.⁵⁸

In conclusion, being the Italian collective redress model the main focus of the present analysis, it can be concluded that the 2019 reform, and its subsequent amendments, provides now one of the most interesting collective action reference models in the European landscape, also – and especially – with regard to evidentiary issues. This legislation could for sure constitute a reference model for other national legislators in the described 'stimulated harmonisation' process occurring in the analysed field.

⁵⁷ E. Letta, *Much more than a market. Speed, security, solidarity. Empowering the Single Market to deliver a sustainable future and prosperity for all EU Citizens*, April 2024, available at <https://www.consilium.europa.eu/media/ny3j24sm/much-more-than-a-market-report-by-enrico-letta.pdf> (last visited Dec. 10, 2025). See also E. Letta, *Molto più di un mercato. Viaggio nella nuova Europa* (2024).

⁵⁸ See, *inter alia*, A. Piletta Massaro, *A 28th Legal Regime for Market Transactions in the EU: A Long-Awaited Opportunity?*, in *Revija Kopaoničke Škole Prirodnog Prava* 29 ff. (2025).

COLLECTIVE REDRESS AND STRUCTURAL TENSIONS: FOCUSING ON (NON-MATERIAL) DAMAGES

Veronica Montani

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The paper examines the structural tensions that arise when collective redress is used to compensate non-material damage. After briefly setting out how the Italian system has developed, from Article 140-bis of the Consumer Code to the class action under Articles 840-bis ff. of the Code of Civil Procedure and the representative action implementing Directive (EU) 2020/1828, the analysis focuses on the homogeneity of individual rights. This requirement is treated as the fulcrum of collective proceedings, and the paper argues that it should be read functionally in both procedural models as a common causal matrix, not as identical legal positions. Non-material damage puts this construction under particular strain, since the variability of individual repercussions is easily mistaken for structural heterogeneity of the claims. The Trenord and Dieselgate litigation, and the restrictive position of the Corte di Cassazione, show how uncertain both admissibility and quantification remain. The author argues that homogeneity lies in the serial infringement of the same protected interest, not in uniform subjective suffering. On this view, subclasses, equitable assessment and presumptions make it possible to reconcile the prohibition of damage in re ipsa with effective protection, and to strengthen the deterrent function of civil liability without resorting to punitive damages.

Keywords: Collective Redress; Representative Action; Homogeneity of Individual Rights; Non-Material Damage; Presumptions; Deterrence.

I. THE CLASS ACTION: A CONCEPTUAL FRAMEWORK

At the turn of the new millennium, the film *Erin Brockovich*³⁸⁴ played a decisive role in projecting the class action into the global collective imagination, offering a portrayal that was both symbolic and culturally resonant.

Inspired by real events, the film recounts the discovery of severe environmental contamination in the Californian town of Hinkley, caused by the unlawful use and disposal of hexavalent chromium by Pacific Gas and Electric Company, with dramatic consequences for the health of the local population.

The narrative culminates in the award of 333 million dollars in compensation, at the time one of the largest environmental settlements in the United States. In doing so, the film presents the class action as a procedural device capable of transforming a plurality of individual harms into a powerful form of collective legal redress.

The depiction offered by *Erin Brockovich*, however, is not an isolated example. American cinema has repeatedly drawn on similar narratives, gradually constructing what may aptly be described as

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³⁸⁴ The film, released in 2000 and directed by Steven Soderbergh, recounts how Erin Brockovich-Ellis, despite having no formal legal training, succeeded in building a case against Pacific Gas and Electric Company (PG&E) for the contamination of groundwater in Hinkley with hexavalent chromium. The underlying litigation (*Hinkley v. Pacific Gas and Electric Company* (PG&E)) concluded in 1996 with a settlement in the amount of \$333 million.

a genuine “legal myth” of the class action. Prominent examples include *Class Action*, centred on the liability of an automobile manufacturer for a concealed defect; *A Civil Action*, portraying a complex case of industrial groundwater contamination in Massachusetts; *North Country*, one of the earliest cinematic representations of collective litigation concerning workplace sexual harassment; and, more recently, *Dark Waters*, which revisits the issue of environmental pollution and the accountability of major chemical corporations through a contemporary lens.

Across these narratives, the class action is consistently portrayed as the procedural instrument through which structurally weaker parties may confront, before a Court, economic actors endowed with vastly superior organisational and financial resources. Beyond its media resonance, the U.S. class action has established itself as a significant instrument of social justice. It enables the aggregation of multiple individual claims which, if pursued separately, would often be insufficient to justify litigation but which, when combined, acquire the legal and economic significance necessary to render judicial protection rational and viable. It is therefore unsurprising that the class action has been employed across a wide range of sectors characterised by serial harm and pronounced informational asymmetries: from liability for defective products and unfair commercial practices to environmental protection and public health; from labour litigation involving systemic discrimination and wage violations to financial and banking disputes concerning market fraud. More recently, the mechanism has expanded further into areas such as data protection and cybersecurity, particularly in response to phenomena such as data breaches, unlawful tracking practices, and the unauthorised use of sensitive personal information.

The entrenchment of the class action within the U.S. legal system results from a combination of socio-cultural and legal factors that have been widely examined in the literature³⁸⁵. These include the opt-out mechanism, whereby all members of the class are automatically included in the proceedings and bound by the outcome, unless they expressly withdraw; the availability of punitive damages; and the structural characteristics of the legal profession, which permit forms of advertising, solicitation, and contingency fee arrangements³⁸⁶.

Taken together with the absence of a strict loser-pays rule, these elements substantially reduce the economic risk associated with bringing a class action and encourage the identification and pursuit of disputes with significant social and economic implications³⁸⁷. One consequence has been the

³⁸⁵ Without any claim to being exhaustive: G.P. Miller, *Punti cardine in tema di “class action” negli Stati Uniti e in Italia*, in *Analisi giur. econ.*, 211 (2008); A. Giussani, “Le mass tort class actions negli Stati Uniti?”, in *Riv. crit. dir. priv.*, 331 (1988); Id., *Studi sulle class action*, Padova, (1996); Id., *Le azioni di classe dei consumatori dalle esperienze statunitensi agli sviluppi europei*, in *Riv. trim. dir. proc. civ.*, 160 (2019); C. Consolo, *Class Action fuori dagli USA? (Un’indagine preliminare sul versante della tutela dei crediti di massa: funzione sostanziale e struttura processuale)*, in *Riv. dir. civ.*, 609 (1993); N. Trocker, *La class action negli Stati Uniti: lo stato dell’arte*, in *Riv. dir. proc.*, 752 (2020). Moreover, see, *ex pluribus*, A. Costabel, *Class action negli Stati Uniti d’America. Una camera con vista*, in *Riv. dir. navig.*, 581 (2013); F. Quarta, *Azioni di classe e “mass torts”*. *A proposito di un dibattito statunitense sulla quantificazione del “danno alla società”*, in *Rass. dir. civ.*, 1211 (2013); E. Ferrante, *Opt-out ed incentivi d’oltreoceano: idee per una vera class action in Italia ed in Europa*, in *Contr. impr. Europa*, 483 (2012); L. Ferrarese, *Le norme statunitensi sulle azioni collettive: analisi comparativa con la normativa italiana e spunti di riflessione*, in *Resp. civ.*, 746 (2008); P. Fava, *Class actions*, in *Contr. impr.*, 166 (2004). For more recent scholarship, see: G. Scarchillo, *Dalla comparazione giuridica alla formazione del giurista: un caleidoscopio per nuove prospettive*, Torino, (2024); Id., *La Class Action: Profili di diritto comparato*, in G. Alpa, G. Capilli (eds.), *Lezioni di diritto privato europeo*, Padova, 999 (2007).

For analyses of the historical development of the U.S. class action, see, *ex multis*, R.B. Marcin, *Searching for the Origin of Class Action*, in *Catholic Un. Law Rev.*, 515 (3, 1974); S.C. Yeazell, *From Medieval Group Litigation to the Modern Class Action*, New Haven, 38 (1987); A. Giussani, *Le “mass tort class actions” negli Stati Uniti*, in *Riv. critica dir. priv.*, 355 (1988); Id., *Un libro sulla storia della “class action”*, *ivi*, 171 (1989); M. Taruffo, *Diritto processuale civile nei Paesi anglosassoni*, in *Dig. Disc. Priv.*, sez. civ., VI, Torino, 403 (1990); A. Giussani, *Studi sulle “class action”*, Padova, (1996); G.C. Hazard Jr., J.L. Gedid, S. Sowle, *An Historical Analysis of the Binding Effect of Class Suits*, in *Un. Pennsylvania Law Rev.*, 1849 (6, 1998); P. Pardolesi, A. Bitetto, *Tutela collettiva e azione di classe. Un’analisi comparativa*, Bari, 19 (2020).

³⁸⁶ For a comprehensive and systematic treatment, see L. Bugatti, *La professione forense tra tradizione e innovazione*, Torino, (2022).

³⁸⁷ For a comprehensive analysis see P. Comoglio, *Il processo come fenomeno economico di massa. Problemi di finanziamento e di remunerazione delle controversie civili*, Torino, (2022). About the most recent developments in third-party litigation funding,

emergence of a highly specialised plaintiffs' bar, often described as consisting of "entrepreneurs of litigation", entrusted with a function of considerable relevance in private enforcement.

The central role of private litigation must, moreover, be situated within the broader context of a legal system in which private enforcement has historically compensated for the shortcomings - or, at times, the deliberate weakness - of public enforcement mechanisms. Civil litigation, and particularly the class action, has therefore been entrusted with a form of diffuse market regulation and protection of collective interests. In many European legal systems, by contrast, this regulatory function has traditionally been performed primarily by independent administrative authorities and by structurally stronger forms of public intervention.

From this perspective, the class action has gradually become one of the pillars of American private justice, capable of rebalancing significant power asymmetries, promoting compliance with the law, and ensuring a relatively democratic form of access to judicial protection.

The narrative legitimising class actions, as a form of civic solidarity and justice has nevertheless been subject to increasing scrutiny. The growing "judicialisation" of complex social conflicts, together with concerns about opportunistic litigation and the economic consequences of large-scale liability awards, has, over the past decades, prompted a partial reconfiguration of the U.S. model. This shift has been marked by restrictive developments in case law and by an increasing tendency to channel disputes towards alternative dispute resolution mechanisms.

It is precisely this ambivalence, between foundational myth and crisis of legitimacy, that makes the class action at once compelling and problematic. It also explains why its transplantation into civil law systems raises issues of compatibility that extend far beyond the mere procedural importation of a litigation model.

The class action thus stands as one of the most emblematic and, at the same time, most controversial institutions of the U.S. legal system, whose evolution clearly reflects the economic, social, and cultural transformations that have shaped American society throughout the twentieth century and into the early decades of the new millennium.

Yet it is precisely the success of the class action³⁸⁸ that has generated, over time, significant distortions: strategic lawsuits brought primarily to secure multimillion-dollar recoveries for law firms rather than compensation for injured consumers; pervasive forum shopping and the concentration of litigation in plaintiff-friendly jurisdictions³⁸⁹ even where the underlying controversy had nationwide implications; distributive imbalances in settlement outcomes (most notably in the case of so-called *coupon settlements*³⁹⁰) as well as the emergence of what has been described as a veritable litigation industry.

It was against this backdrop that the *Class Action Fairness Act* of 2005 (CAFA) was enacted. The statute sought to channel class actions of substantial economic magnitude into the federal courts

see P. Frati, G. Scarchillo, Litigation Finance. *Un potente strumento di accesso alla giustizia o un pericoloso tentativo di mercificazione del diritto? Analisi comparatistica e prospettive di regolamentazione*, in *Riv. it. med. legale*, 575 (2025); M.C. Paglietti, *Il mercato delle controversie. Il third party litigation funding come strumento di finanziamento responsabile dell'accesso alla giustizia*, in *Banca borsa tit. cred.*, 821 (2023); A. Giussani, *Class action e finanziamento delle liti*, in *Riv. trim. dir. proc. civ.*, 303 (2022); F. Bertelli, *Gli accordi di finanziamento della lite*, Napoli, (2024).

³⁸⁸ On the historical development of the class action, see R.B. Marcing, *Searching for origin of the class action*, in *Cath. Un. Law Rev.*, 515 (1974); E.F. Sherman, *Group Litigation under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, in *DePaul L. Rev.*, 401 (2002); R.H. Klonoff, *The Decline of Class Actions*, in *Wash. Un. Law Rev.*, 729 (90, 2013); D. Marcus, *The History of Modern Class Action, Part I: Sturm Und Drang, 1953-1980*, in *Wash. Un. Law Rev.*, 587 (90, 2013); A.R. Miller, *The American Class Action: From Birth to Maturity*, in *Theor. Inquiries Law*, 1 (2018).

C. Hodges, *Us Class Actions: Promise and Reality*, in EUI Working Paper LAW, (36, 2015).

³⁸⁹ An emblematic illustration of this drift was the systematic recourse to the jurisdiction of Illinois, and to Madison County, widely regarded as one of the most plaintiff-friendly fora for aggregate litigation and described in the scholarly literature as "the class action capital of the world."

³⁹⁰ See *Re HP Inkjet Printer Litigation* 716 F.3d 1173, 1178 n. 4 (9th Cir. 2013) held that attorney fee awards in class settlements involving coupons must be "attributable to" the value of the coupons awarded to class members.

and to strengthen judicial scrutiny of settlements, thereby curbing the influence of state courts perceived as excessively plaintiff friendly.

If CAFA represents the principal legislative effort to curb perceived excesses, the most decisive restrictive shift has, however, taken place in the case law of the U.S. Supreme Court. Beginning in the early 2000s, the Court progressively raised the standards governing class certification and narrowed access to the collective mechanism. This occurred through an increasingly rigorous interpretation of the requirements of commonality³⁹¹ and predominance³⁹² (as illustrated by *Wal-Mart Stores Inc. v. Dukes*³⁹³, and *Comcast Corp. v. Behrend*³⁹⁴); through the endorsement of mandatory

³⁹¹ Rule 23 sets out the requirements for class certification, yet it does not specify at least at the level of its textual formulation, the evidentiary threshold necessary for those requirements to be deemed satisfied. For a considerable period, this lacuna fostered a judicial practice in which certification was frequently granted based on pleadings and only minimal evidentiary support; a trajectory that, beginning in the early 2000s, was progressively reversed. See. *Szabo v. Bridgeport Machines* 249 F.3d 672, 676 (7th Cir. 2001), and *In re Hydrogen Peroxide Antitrust Litigation* 552 F.3d 305, 316 (3d Cir. 2009), which clarified that certification requires judicial fact-finding - rather than a mere threshold showing - conducted under the *preponderance of the evidence* standard, and that it entails a full examination of the evidentiary record, including expert evidence. In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), the Supreme Court rejected the view that Rule 23 establishes a “mere pleading standard”, holding instead that certification demands a *rigorous analysis* grounded in “significant proof” and in actual, rather than presumed, compliance with the Rule’s requirements.

³⁹² Predominance thus evolves from a criterion concerned with the qualitative superiority of common issues into a requirement of evidentiary homogeneity, anchored in the availability of a coherent, case-specific, and verifiable economic model. The result is a pronounced front-loading of aggregate litigation: the certification stage increasingly becomes the true procedural battleground. Claimants are required to demonstrate, with heightened rigour, not only the cohesion of the proposed class, but also the methodological reliability of their models of damages. This transformation entails broader discovery, higher litigation costs, and an increased risk of early case disposition on ostensibly “procedural” grounds. The centre of gravity of collective litigation consequently shifts to the certification phase, which progressively assumes the features of a preliminary adjudication on the merits. Plaintiffs are thus compelled, from the outset, to assemble a technically sophisticated and comprehensive evidentiary record, with evident selective effects on access to collective redress. For further analysis, see G.E. Speights, M.S. Burkhardt, *Recent Developments in Class Certification and Decertification after Dukes as the Supreme Court’s Composition Changes*, in *Aba Jour. Lab. Employ. Law*, 327 (2017); T. Messer, *We Doubt That Is So: Expert Witness Certification After Wal-Mart and Comcast*, in *Un. Penn. Jour. Bus. Law*, 293 (17, 2014); S.J. Campos, *The Uncertain Path of Class Action Law*, in *Cardozo Law Rev.*, 2223 (40, 2013).

³⁹³ *Wal-Mart Stores*, cit. In the case at hand, a group of Wal-Mart employees brought a class action alleging gender discrimination, contending that the company had systematically denied women promotions and pay increases. The Supreme Court denied class certification, holding that the plaintiffs had failed to demonstrate the existence of a common question of law or fact capable of unifying the individual claims within a single collective controversy. According to the Court, the challenged employment decisions were excessively fragmented and largely entrusted to the discretion of individual managers, thereby precluding the identification of a single discriminatory policy attributable to the enterprise. In the absence of a common corporate practice from which the individual claims could be said to derive, the proposed class could not be certified, as not genuinely shared legal and factual issue capable of collective resolution had been established. S.M. Malveaux, *Class Actions at the Crossroads: An Answer to Wal-Mart v. Dukes*, in *Harv. Law Pol’y Rev.*, 375 (2011); R.W. Reinsch, S. Goltz, *You Can’t Get There from Here: Implications of the Walmart v. Dukes Decision for Addressing Second Generation Discrimination*, in *Nw. Jour. Law Soc. Pol’y*, 264 (9, 2014).

³⁹⁴ In *Comcast Corp. v. Behrend* 6 133 S. Ct. 1426, 1433-35 (2013) the Court further requires that the evidentiary burden extend to the suitability of the damages model itself. If the econometric framework does not coherently isolate the effects attributable to the specific unlawful conduct alleged, the requirement of predominance is not satisfied, and the class cannot be certified. In this vein, the Court reversed the certification of an antitrust class action brought by Comcast subscribers, holding that the plaintiffs had failed to demonstrate the existence of a reliable methodology capable of measuring damages on a class-wide basis in a manner consistent with the theory of liability accepted by the trial court. The econometric model advanced by the claimants, although abstractly capable of estimating an average injury, did not isolate the impact attributable solely to the relevant anticompetitive conduct. As a result, individualised damages issues threatened to overwhelm the common questions. The Court clarified, moreover, that this rigorous scrutiny fully encompasses the predominance requirement. It is not sufficient for plaintiffs merely to propose a damages model framed in class-wide terms; rather, the model must be operationally capable of demonstrating, with methodological reliability, that the injury alleged flows from the same unlawful cause for all members of the class.

arbitration as an alternative to class proceedings³⁹⁵ (as confirmed in *Epic Systems Corp. v. Lewis*³⁹⁶); and through the reaffirmation of a strict conception of standing requiring the demonstration of a concrete and individualized injury (as in *TransUnion LLC v. Ramirez*³⁹⁷).

Recent developments in U.S. case law, by redefining both the scope and the operational parameters of the class action, have in practice raised the “price of entry” to class redress. The result has been a filtering effect whereby only the most well-funded or narrowly circumscribed cases are likely to proceed, leaving a significant portion of diffuse harms without effective judicial protection³⁹⁸. In this way, the progressive tightening of Rule 23 has reshaped the systemic balance, narrowing the space for aggregate adjudication and intensifying the tension between procedural efficiency and enforcement effectiveness. The trajectory thus marks a departure from the expansionary trend that characterised much of the twentieth century.

The once-ascending arc of the class action, at times evocatively compared to the *graphe paranomon* of classical Athens, has accordingly levelled off, giving way to a gradual retrenchment from its perceived “golden age”³⁹⁹. This recalibration has occurred in part because of the rise of so-called Multidistrict Litigation⁴⁰⁰ (MDL), originally conceived as a “younger sibling”, particularly in the field of antitrust litigation. Unlike the class action, MDL does not require compliance with the stringent certification standards of Rule 23; rather, it relies on a more flexible conception of commonality.

Contemporary scholarship now places the class action within a broader constellation of procedural devices that includes MDL, settlement programs, mass arbitration, and hybrid models of aggregate litigation. Collectively, these developments have produced what has been described as an “aggregation ecosystem”, marking a transition from a “Rule-23-centric class action era” to a broader landscape of aggregate litigation in which Rule 23 represents only one procedural tool among several⁴⁰¹. Formally, the class action remains a central feature of the U.S. system. In practice, however, its effectiveness is increasingly shaped (and undoubtedly constrained) by a dense network of statutory and judicial barriers that have significantly curtailed its reach⁴⁰², thereby exposing the

³⁹⁵ A. Palmieri, *Arbitrati individuali coatti e ghetizzazione della class action: la controrivoluzione (a spese del contraente debole) nel sistema di enforcement statunitense*, in *Foro it.*, 81 (V, 2016).

³⁹⁶ *Epic Systems Corp. v. Lewis* 138 S. Ct. 1612 (2018): The Supreme Court has held that arbitration clauses contained in employment contracts - whereby employees waive the possibility of initiating collective proceedings - are fully valid and enforceable, thereby effectively restricting recourse to the class action mechanism. For commentary, see B. Cangelosi, *Arbitration and Class Action Waivers at the Expense of Wage and Hour Claims*, in *Hofstra Law Rev.*, 483 (48, 2019). See also *AT&T Mobility LLC v. Concepcion* 131 S. Ct. 1740 (2011) and *American Express Co. v. Italian Colours Restaurant*: for a commentary, see S.R. Cole, *On Babies And Bathwater: The Arbitration Fairness Act And The Supreme Court's Recent Arbitration Jurisprudence*, in *Houston Law Rev.*, 457 (48, 2011); M. Bolin, *Supreme Court Comment: Fear And Loathing Of Class Action Arbitration, Or How To Dismiss The Effective Vindication Doctrine*, in *Loyola Los Angeles Law Rev.*, 563 (47, 2014).

³⁹⁷ *TransUnion v. Ramirez* 594 US 413 (2021): a group of consumers brought an action against TransUnion, a credit reporting agency, alleging that the company had erroneously flagged certain individuals as potential terrorists. The Supreme Court held that, to be included in a class action, each class member must demonstrate that he or she has suffered a concrete injury, rather than a merely hypothetical or abstract one. Mere exposure to a risk, or the formal violation of a statutory provision, in the absence of a sustained harm, is insufficient to establish standing.

³⁹⁸ R.H. Klonoff, *Reflections on the Future of Class Actions*, in *Loyola Un. Chicago Law Jour.*, 533 (44, 2013).

³⁹⁹ D. Marcus, *The History of Modern Class Action, Part I: Sturm Und Drang, 1953-1980*, in *Wash. U. L. Rev.*, 587 (2013). Within Italian legal scholarship A. Palmieri, *Consumatori, tutela collettiva, arbitrato: di miti (americani) infranti e timidi risvegli europei*, in C.A. D'Alessandro, C. Marchese (eds.), *Jus dicere in a globalized world. A comparative overview*, Roma 637 (2018); F. Benatti, *La fuga verso l'arbitrato: la crisi (ir)reversibile della class action statunitense*, in *Rass. dir. civ.*, 500 (2014); G. Romeo, *Il crepuscolo degli dei: l'azione di classe negli Stati Uniti d'America alla prova del diritto costituzionale*, in *Dir. pub. comp. eur.*, 1134 (2012); G. Casoni, *Le prospettive della “class action arbitration” alla luce delle ultime pronunce della Corte Suprema Americana*, in *Obbl. contr.*, 537 (2012).

⁴⁰⁰ It is clearly explained by M. De Pamphilis, *Dalla Class Action alla Multidistrict Litigation: il caso “Dieselgate” tra U.S.A. e Italia*, in *Jus civile*, 1174 (2022) to which reference may also be made for further bibliographical indications.

⁴⁰¹ A.D. Bradt, *The Looming Battle for Control of Multidistrict Litigation in Historical Perspective*, in *Fordham Law Rev.*, 87 (2018).

⁴⁰² A.R. Miller, *What Are Courts For? Have We Forsaken the Procedural Gold Standard?*, in *Los. Law Rev.*, 787 (78, 2018); Id., *Of Frankenstein Monsters and Shining Knights: Myth, Reality and the “Class Action Problem”*, in *Harvard Law Rev.*, 664 (92, 1979); R.H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, in *Emory Law Jour.*, 1569 (65, 2016).

structural limits of an enforcement model predominantly reliant on private initiative. Understanding this evolution is essential to explaining the caution with which European legal systems, and Italy in particular, have approached the introduction and development of collective redress mechanisms, often favouring institutional arrangements that seek a more balanced interplay between private and public enforcement.

II. THE CLASS ACTION IN ITALY: A HISTORICAL OVERVIEW

The emergence of the class action within the Italian legal system cannot be understood as the result of a coherent and unified legislative choice. Rather, it should be understood as the outcome of a fragmented and uneven trajectory, marked by incomplete reforms, legislative reversals, and persistent cultural resistance, which long prevented the instrument from taking firm root within the legal system⁴⁰³.

This difficulty in securing a stable foothold can be explained, first and foremost, by the structural features of the Italian legal tradition, and, more broadly, of continental European systems, which have historically been shaped by an individualistic conception of judicial protection. Within this framework, the protection of diffuse or collective interests has traditionally been entrusted primarily to public-law mechanisms and injunctive remedies, rather than to forms of aggregated private litigation. The reasons underlying this scepticism have been extensively analysed in both Italian and European scholarship. They must be understood within a broader framework in which the limited development of compensatory collective actions remains a common feature across many continental European systems.

Although numerous legislative proposals were advanced in the early 2000s, they remained without practical effect until Law No. 244 of 24 December 2007, which introduced Article 140-*bis* into the Italian Consumer Code, entitled “Collective Action for Damages.”

From the outset, the legislative choice proved problematic⁴⁰⁴. The instrument was introduced through the annual budget law and was drafted in concise and incomplete terms, leaving significant gaps to be filled by judicial interpretation and case law. These shortcomings, combined with the intrinsic complexity of the mechanism, led to repeated delays in its entry into force⁴⁰⁵ and ultimately prompted a substantial reform even before the original version had been meaningfully applied in practice. With the “hasty experiment of the 2009 reform, followed by the more coherent 2012 revision”⁴⁰⁶, the legislature entirely recast Article 140-*bis*, altering not only its structure but even its heading, which became “Class Action” rather than “Collective Action for Damages”.

⁴⁰³ For an extensive discussion, see F. Santangeli, *Le lacune della nuova azione di classe e i problemi di coordinamento con gli altri strumenti di tutela collettiva*, *www.judicium.it*, 19 (2011); P. Fava, *Studi e contributi sulle class action finalizzati all'introduzione del rimedio anglosassone nell'ordinamento interno*, in *Contr. impr.*, 166 (2004); F. Porcari, *Le continue oscillazioni dell'azione di classe (ancora alla ricerca della sua vera fisionomia)*, in *Resp. civ. prev.*, 1607 (2013); C. Consolo, *Fra nuovi riti e riscoperta delle class actions, alla ricerca di una “giusta” efficienza*, in *Corr. giur.*, 568 (2004).

⁴⁰⁴ A. Bellelli, (a cura di), *Dall'azione inhibitoria all'azione risarcitoria collettiva*, Padova, (2009); A. Briguglio, *L'azione collettiva risarcitoria*, Torino, (2008).

⁴⁰⁵ Thus, Legislative Decree No. 112/2008 (converted into Law No. 133/2008) first postponed the entry into force to 1 January 2009. Subsequently, Legislative Decree No. 207/2008 (converted into Law No. 14/2009) further deferred its entry into force to 1 July 2009. Finally, Law No. 99/2009, approved on 23 July 2009, entirely replaced the text of Article 140-*bis*, providing that the new regime would apply only to unlawful acts committed after the date of its entry into force (15 August 2009).

⁴⁰⁶ C. Consolo, *L'azione di classe di terza generazione*, in V. Barsotti (a cura di), *L'azione di classe: la riforma italiana e le prospettive europee*, Torino, 19 (2020); C. Consolo, M. Bona, P. Buzzelli (a cura di), *Obiettivo class action. L'azione collettiva risarcitoria*, Milano, (2008); A. Giussani, *Azione collettiva*, in *Enc. dir.*, Annali, I, Milano, 132 (2007).

The new framework marked a shift in paradigm on several fronts⁴⁰⁷. In summary, and insofar as relevant here: standing was granted directly to individual consumers or users, either personally or through associations to which they had granted a mandate, as well as through committees in which they participated, thereby overcoming the prior monopoly of representative associations. At the same time, the scope⁴⁰⁸ of the action was broadened to include the protection of “homogeneous individual rights” of consumers and users. The revised wording replaced the earlier reference to “identical rights” with a more flexible standard, better suited to mass harm scenarios, covering, *inter alia*, contractual rights, final consumers’ rights vis-à-vis producers, and claims for compensation arising from unfair commercial practices or anti-competitive conduct.

The model nonetheless remained structured around an opt-in mechanism, coupled with the automatic waiver of any individual restitutionary or compensatory action based on the same grounds, and with binding effects limited exclusively to those who had joined the action.

Despite these innovations, the second phase of the consumer class action (2010⁴⁰⁹–2020) cannot be regarded as successful. The number of actions brought was limited, and in most instances, they failed to pass the admissibility stage⁴¹⁰. The few cases that reached the merits stage attracted only a modest number of opt-ins and produced limited compensation, following lengthy and procedurally complex proceedings. Additional difficulties arose in managing opt-ins and from the limited effectiveness of publicity mechanisms. The principal structural constraints, however, lay in the particularly restrictive interpretation of the requirement of homogeneity of individual rights. Courts tended to construe this requirement in terms approaching near-absolute identity of legal positions, with the effect of excluding from collective redress many situations stemming from the same serial wrongful conduct. Equally problematic was the identification of homogeneous criteria for quantifying the sums due to consumers. With regard to the former, in particular, courts adopted a markedly restrictive approach, recognising its fulfilment only in a very limited number of cases⁴¹¹ and thereby contributing significantly to the overall underperformance of the mechanism.

II.1 The General Collective Action

⁴⁰⁷ For a more detailed analysis, see R. Rordorf, *L'azione di classe nel novellato art. 140 bis cod. consumo: considerazioni (e qualche interrogativo)*, in *Foro it.*, 183 (2010); P. Comoglio, *L'azione di classe italiana: valutazioni di efficienza*, in *Dir. pub. com. eur.*, 1114 (3, 2012); C. Consolo, B. Zuffi, *L'azione di classe ex art. 140-bis cod. cons. Lineamenti processuali*, cit., Padova, (2012); C. D'orta, *La class action tra proclami e deterrence: uno studio di diritto interno e comparato*, Torino, 137 (2014); G. Pailli, C. Poncibò, *The transformation of consumer law enforcement: An Italian perspective*, in *Comp. Law Review*, 19 (2017); S. Brazzini, P. Muià, *La nuova class action alla luce della legge 12 aprile 2019, n. 31*, Torino, 1 (2019); A. Diana, *Azione di classe e inibitoria collettiva. La nuova disciplina*, Padova, 13 (2020).

⁴⁰⁸ More specifically: (i) contractual rights vested in a plurality of consumers and users who stand in a homogeneous position vis-à-vis the same undertaking, including rights arising from contracts concluded pursuant to Articles 1341 and 1342 of the Italian Civil Code; (ii) homogeneous rights belonging to final consumers of a given product or service as against the relevant producer, even in the absence of a direct contractual relationship; (iii) homogeneous rights to compensation for harm suffered by the same consumers and users as a result of unfair commercial practices or anti-competitive conduct.

⁴⁰⁹ Law No. 99/2009 introduced a transitional regime governing the application of the revised class action framework. In particular, article 49(2) provided that the new version of Article 140-bis would apply exclusively to wrongful acts committed after the entry into force of the statute (15 August 2009).

⁴¹⁰ Again see C. Consolo, *L'azione di classe di terza generazione*, in V. Barsotti (ed.), *L'azione di classe*, cit., 25.

⁴¹¹ See L. Bugatti, *The Directive (Eu) 1828/2020 and the Consumer Representative Actions In Italy: A Step Back or Forward?*, in *Revue Européenne de Droit de la Consommation*, 289 (2024); F. De Dominicis, *I numeri e lo stato dell'arte dei primi dieci anni di vita dell'istituto*, in V. Barsotti, F. De Dominicis, G. Pailli, V. Varano (eds), *Azione di classe: la riforma italiana e le prospettive europee*, Torino, 261 (2020); A. Bonafede, *Il “mosaico” della class action italiana: la Legge n. 31/2019*, 2022, <https://www.studiolegalebonafede.it/2022/07/05/mosaico-class-action-italiana-legge-31-2019/>; R. Pardolesi, *La classe in azione. Finalmente*, in *Danno resp.*, 301 (3, 2019).

Considering these outcomes, and against the backdrop of a renewed scholarly debate, the legislature intervened once again - following a series of legislative proposals - by enacting Law No. 31 of 12 April 2019, which marked a radical reform of the institution. The class action was removed from the Consumer Code and relocated to the Code of Civil Procedure, within the newly introduced Title VIII-*bis* of Book IV (Articles 840-*bis* to 840-*sexiesdecies*). In doing so, the reform formally consecrated the class action as a general procedural instrument⁴¹² rather than a sector-specific remedy.

Article 840-*bis* of the Code of Civil Procedure significantly broadened the scope of application of the class action, both subjectively and objectively. On the one hand, the new model abandoned rigid subject-matter limitations and was integrated into the architecture of ordinary civil procedure. On the other hand, it extended the reach of the action to the protection of homogeneous individual rights of any kind (whether contractual or non-contractual) when infringed by businesses, public service providers, or public utilities.

Articles 840-*bis* and following of the Code of Civil Procedure thus establish a composite procedural instrument which, emancipating itself from the predominantly consumer-oriented framework of the previous regime, seeks to provide a generalised form of collective redress for homogeneous individual rights (“including those deriving from contracts concluded on the basis of standard terms” and “from repeated and uniform conduct affecting a plurality of individuals”).

The geographical relocation of the provision, from the Consumer Code to the Code of Civil Procedure⁴¹³, has been widely welcomed in legal scholarship. Commentators have emphasised the appropriateness of situating the regulation of a procedural institution such as the class action within its natural normative framework, thereby facilitating systematic coordination with the broader structure of civil procedural rules.

From this perspective, the new provisions – representing the third phase in the development of the Italian class action⁴¹⁴ – are characterised by a pronounced systemic ambition. This ambition emerges both in terms of standing and the effects of the judgment.

As regards standing, the action may be brought not only by each individual member of the class - according to a “first come, first served” logic, whereby the first claimant effectively shapes the structure of the action - but also by non-profit organisations and associations registered in the relevant ministerial register, whose statutory purposes include the protection of the rights at issue. As regards the effects of the judgment, once a decision on the merits has been rendered, its consequences extend *erga omnes* within the perimeter of the class, according to a logic of expanded

⁴¹² The literature on the subject is vast. Without any claim to exhaustiveness: C. Consolo, *La terza edizione della azione di classe è legge ed entra nel c.p.c. Uno sguardo d'insieme ad una amplissima disciplina*, in *Corr. giur.*, 737 (2019); Id., *Art. 840-bis-840-sexiesdecies. La nuova azione di classe e la nuova inibitoria*, in C. Consolo (ed.), *Codice di procedura civile commentato*, Milano 17 (2019); R. Pardolesi, *La classe in azione. Finalmente*, cit., 305; G. Ponzanelli, *La nuova class action*, in *Danno resp.*, 306 (2019); P. Monateri, *La riforma italiana della class action tra norme speciali e ricostruzione della tutela civilistica*, *ivi*, 312 (2019); M. Franzoni, *Azione di classe, profili sostanziali*, *ivi*, 309 (2019); P. Pardolesi, R. Pardolesi, *La (azione di) classe non è acqua*, in *Foro it.*, 325 (2019); A.D. De Santis, *L'azione di classe a dieci anni dalla sua entrata in vigore*, *ivi*, 2179 (2019); Sassani, *Il difficile cammino dell'azione di classe risarcitoria*, *ivi*, 239 (V, 2022); G. Giussani, *La riforma dell'azione di classe*, in *Riv. dir. proc.*, 1572 (2019); B. Manfredonia, *La nuova legge sulle azioni di classe: un passo avanti per la tutela collettiva?*, in *Rass. dir. civ.*, 1565 (2020); F. Tedioli, *Tra nuove regole e vecchi problemi la class action trova collocazione nel codice di procedura civile*, in *Studium iuris*, 1413 (2019); G. Afferni, *La nuova azione di classe*, in *Merc. concorrenza regole*, 437 (2021); M. Astone, *Azione di classe e tutela del consumatore: dall'art. 140-bis cod. cons. all'art. 840-bis c.p.c.*, in *Pers. mercato*, 110 (2021); as well as, among the monographic studies, A. Palmieri, *Legge n. 31/2019: la riforma della class action*, Milano, (2019); A. Diana, *Azione di classe e inibitoria collettiva. La nuova disciplina*, cit.; V. Barsotti, F. De Dominicis, G. Pailli, V. Varano (eds.), *Azione di classe: la riforma italiana e le prospettive europee*, Torino, 19 (2020); B. Sassani (ed.), *Class action. Commento sistematico alla legge 12 aprile 2019, n. 31*, Pisa, (2019); P. Pardolesi, A. Bitetto, *Tutela collettiva e azione di classe. Un'analisi comparativa*, Bari, 97 (2020); G. Scarchillo, *Class action. Dalla comparazione giuridica alla formazione del giurista: un caleidoscopio per nuove prospettive*, Torino, 133 (2024); U. Ruffolo (ed.), *L'azione di classe e l'azione collettiva: la nuova disciplina*, Milano, (2021).

⁴¹³ Concurrently, Article 140-*bis* of the Consumer Code was repealed.

⁴¹⁴ The entry into force of the reform, initially scheduled for 19 April 2020 (one year after the publication of the statute), was subsequently deferred to 19 November 2020 by Decree-Law No. 162 of 30 December 2019 and then further postponed to 19 May 2021 by Decree-Law No. 183 of 31 December 2020.

subjective effectiveness, albeit one that remains anchored in the consent expressed through the opt-in mechanism.

Equally significant is the abandonment of the “early opt-in” mechanism in favour of a modular system (early and late opt-in) allowing adhesion even *post decisionem*, together with the introduction of a three-stage procedural structure (consisting of (i) admissibility, (ii) determination of the merits, and (iii) quantification and allocation of damages). The final stage is inspired, at least in part, by models derived from insolvency proceedings, in which the common representative operates according to principles of collective administration of compensation.

Following an initial filtering stage, in which the court verifies, during the admissibility phase, the existence of the subjective and objective requirements of the action, the adequacy of the representative, the non-manifest unfoundedness of the claims, as well as the homogeneity of the legal situations invoked, the proceedings move to the merits stage. Although this phase mirrors the structure of ordinary civil litigation, it is profoundly shaped by the collective dimension of the dispute, both in the evidentiary framework and in the formulation of the operative part of the judgment.

The third procedural stage, entrusted to a delegated judge, concerns the management of late opt-ins, now expressly permitted, and the individual quantification of the sums due, or the delivery of the goods owed, to participating class members.

The resulting procedural architecture is therefore tripartite. Within this framework, the progressive delineation of the class - through the opt-in mechanism and the possible creation of subclasses - does not merely perform an organisational function. Rather, it operates as a genuine instrument for managing the risks of heterogeneity and fragmentation, enabling the court to calibrate the subjective reach of the judgment in light of the structure of the serial harm and the replicability of the legal determinations required.

In this context, the requirement of homogeneity serves as a crucial selective fulcrum, no longer interpreted as requiring an absolute identity of legal positions, but rather as the possibility of tracing the claims back to a common factual and legal nucleus capable of justifying a unitary determination.

II.2 The “New” Representative Redress

The entry into force of Legislative Decree No. 28 of 10 March 2023⁴¹⁵ - implementing Directive (EU) 2020/1828⁴¹⁶ - marks the beginning of a fourth phase in the evolution of collective redress

⁴¹⁵ For a comprehensive analysis, see L. Bugatti, *Collective Redress 3.0 in Italy: from Consumer Class Action to Consumer Representative Action*, in *Italian Law Jour.*, 551 (2024). Moreover, see G. De Cristofaro, *Azioni “rappresentative” e tutela degli interessi collettivi dei consumatori. La “lunga marcia” che ha condotto all’approvazione della dir. 2020/1828/UE e i profili problematici del suo recepimento nel diritto italiano*, in *Nuove leggi civ. comm.*, 1010 (2022); Id., *Le «azioni rappresentative» di cui agli artt. 140-ter ss. c.cons.: ambito di applicazione, legittimazione ad agire e rapporti con la disciplina delle azioni di classe di cui agli artt. 840-bis ss. c.p.c.*, ivi, 1 (2024); A. Di Landro, *Le azioni rappresentative a tutela dei consumatori nell’ambito del New Deal for Consumer. Alcune riflessioni*, in *Jus civile*, 986 (2023); E. Camilleri, *L’azione rappresentativa e il raccordo imperfetto con il diritto privato regolatorio. Le decisioni delle authorities tra libero apprezzamento e presunzioni giurisprudenziali: spunti dall’arrêt repsol*, ivi, 437 (2024); Id., *La dir. 2020/1828/UE sulle azioni rappresentative e il “sistema delle prove”. La promozione dell’interesse pubblico attraverso la tutela degli interessi collettivi dei consumatori: verso quale modello di enforcement?*, ivi, 1052 (2022); P. Mezzanotte, *Class action e Costituzione: dimensione metaindividuale dei diritti e ruolo della giurisdizione*, in *Nomos*, 1 (2022); A. Amidei, *Azione di classe e inibitoria collettiva: un bilancio a due anni dall’entrata in vigore della riforma, nella prospettiva del recepimento della Direttiva UE 2020/1828*, in *Riv. dir. priv.*, 407 (2023); A. Tedoldi, *Next generation e rimedi collettivi*, in *Riv. dir. proc.*, 367 (2024).

For a comparative and in-depth examination, see the study commissioned by BEUC and edited by P. Rott, A. Halfmeier, W. Vandenbussche, L. Bugatti, J. Mucha, *Comparative Legal Study on Procedural Rules and their Impact on Collective Redress Actions in Europe*, 2025, available at https://www.beuc.eu/sites/default/files/publications/BEUC-X-2025-026_Study_Procedural_Rules_Impact_on_Collective_Redress_in_EU.pdf

⁴¹⁶ For a detailed commentary on the European legislative framework, see M. Bona, *La direttiva UE 2020/1828 sulla tutela rappresentativa dei consumatori*, in *Giur. it.*, 252 (2021); R. Caponi, *Ultime dall’Europa sull’azione di classe (con sguardo finale sugli Stati Uniti e il “Dieselgate”)*, in *Foro it.*, 332 (2019); L. Bugatti, *“The Directive (Eu) 1828/2020 and the Consumer Representative Actions In Italy: A Step Back or Forward?”*, in *Revue Européenne de Droit de la Consommation*, 289, (2024). See also, extensively, A. Giussani, *Considerazioni sul rapporto fra le azioni collettive del codice di rito e quelle del codice del consumo dopo il d.lgs. n. 28 del 2023*, in *Jus*, 453 (2023).

in Italy, characterised by the coexistence of different models and, in certain respects, by structural tensions that have not yet been fully resolved.

This legislative intervention has consolidated a dual-track framework: on the one hand, the ongoing “de-consumerisation” of the general class action, now governed by Articles 840-*bis* et seq. of the Code of Civil Procedure, continues; on the other hand, the reform simultaneously introduces a deliberate *re-consumerisation* of collective protection. The latter has been channelled through the new consumer representative action established in Articles 140-*ter* et seq. of the Consumer Code, “whose regulatory structure resembles a veritable mosaic, composed of continuous cross-references not only to European sources but also to numerous provisions governing collective proceedings under Articles 840-*bis* of the Code of Civil Procedure”⁴¹⁷.

Viewed from a diachronic perspective, the trajectory of the Italian class action reveals a markedly oscillatory pattern. Initially conceived as a sector-specific instrument for consumer protection, it was progressively expanded until, with the 2019 reform, it assumed the profile of a general procedural remedy for the protection of homogeneous individual rights. Yet the transposition of Directive 2020/1828 has once again placed the consumer at the centre of the regulatory framework, reintroducing, albeit in substantially transformed form, a special regime inspired by partly distinct rationales and objectives from those underlying the codified class action⁴¹⁸. The result is a complex and layered landscape in which collective redress unfolds along two parallel, non-overlapping trajectories, nonetheless destined to interact. On the one hand, the class action under Articles 840-*bis* of the Code of Civil Procedure presents itself as a potentially universal instrument for mass claims, encompassing the full spectrum of homogeneous individual rights, whether contractual or non-contractual. On the other hand, the consumer representative redress further “typifies” the collective dimension by linking it to a closed catalogue of EU and national consumer protection provisions listed in Annex II-*septies*, which, by legislative design, are deemed to entail a diffuse impact on the market.

A similar discontinuity emerges at the subjective level. Whereas standing in the general class action is conferred both upon consumer associations and individual right-holders, in the representative action it is confined to qualified entities entered in the relevant national and European registers (even in the absence of an individual mandate). Consumers themselves, as beneficiaries of the action, are thus relegated to a largely passive role. Article 140-*ter* par. 2 of the Consumer Code, as noted, requires qualified entities to proceed under the consumer representative action where the alleged infringement falls within the matters enumerated in Annex II-*septies*, thereby precluding recourse to Articles 840-*bis* of the Code of Civil Procedure. By contrast, individual holders of homogeneous rights remain free to bring the general class action.

The resulting framework is one of variable geometry⁴¹⁹.

This development also entails a shift in the axis of procedural guarantees: the protection of consumer interests no longer operates primarily through the direct participation of individual claimants in the proceedings, but rather through the *ex ante* selection and *ex post* supervision of the entities authorised to act. The resulting architecture reflects a hybridisation between public-law oversight mechanisms and private-law techniques of judicial enforcement.

As regards the types of remedies available, Article 840-*bis* of the Code of Civil Procedure provides for a combined regime of compensatory and restitutionary relief (alongside injunctive measures), whereas the new Article 140-*ter* of the Consumer Code refers to injunctive and redress measures. These include injunctive remedies (Article 37 of the Consumer Code; Article 840-*sexiesdecies* of the Code of Civil Procedure; Article 140-*octies* of the Consumer Code) as well as compensatory

⁴¹⁷ A. Tedoldi, *Next generation e rimedi collettivi*, cit., 367.

⁴¹⁸ G. Mazzei, *Società digitale e collective redress: azione rappresentativa europea, class action statunitense e azione di classe italiana a confronto*, in *Federalismi*, 120 (2023).

⁴¹⁹ See, among others, B. Zuffi, *Sub art. 140-bis*, in V. Cuffaro, A. Barba, A. Barenghi, *Codice del consumo e norme collegate*, Milano, 1167 (2023).

remedies⁴²⁰, more accurately conceived as a macro-category of contractual relief. These may take the form of the payment of a sum of money, repair, replacement, price reduction, termination of the contract or reimbursement of the price paid. The linguistic and conceptual shift accompanying this fourth phase is particularly noteworthy. Whereas earlier legislation employed the broader expression “collective proceedings”, encompassing both compensatory class actions and collective injunctions, the terminology introduced by the implementing legislature distinguishes between “representative actions” and “compensatory remedies”. This terminological choice is far from neutral⁴²¹. It reflects the EU provenance of the regime and signals a different conception of collective protection, in which the representative action under Article 140-ter of the Consumer Code is conceived as one component within a broader, multi-level “mosaic” of consumer protection. Within this framework, the focus is no longer primarily on procedural aggregation. Instead, it lies in the construction of an integrated enforcement circuit linking administrative authorities, qualified collective entities, and civil courts. The aim is to generate more durable and far-reaching market-shaping effects, as envisaged by the European legislature.

It is precisely within this new bifurcated architecture that the more delicate issue of the configuration and function of compensatory remedies arises, and, in particular, the collective articulation of non-pecuniary damages. This question provides one of the most significant tests of the new system’s capacity to reconcile the system’s capacity to reconcile effectiveness, systemic coherence, and fidelity to the traditional categories of civil liability.

III. THE “HOMOGENEITY OF INDIVIDUAL RIGHTS”: FUNCTIONAL AND PROCEDURAL CENTRALITY

At the substantive level, the notion of “collective consumer interests”, which operates as the gateway to the representative action, is deliberately broad and functionally oriented. It does not denote a “collective” interest in an ontological sense, distinct from and autonomous vis-à-vis the positions of individual right-holders. Rather, it refers to a plurality of individual situations which, while remaining individually vested, share a sufficiently common origin to justify their unitary treatment. In this respect, the consumer regime stands in conceptual continuity with the requirement of homogeneous individual rights under Article 840-bis of the Code of Civil Procedure. In both contexts, as will be explained more fully below, the claims are assumed to originate in the same factual matrix or course of conduct, thereby making possible a collective determination capable of functioning as a “common charter” governing the impaired legal relationships⁴²².

⁴²⁰ A. Tedoldi, *Next generation e rimedi collettivi*, cit., 367, who observes: “a term which *ictu oculi* reveals the deep-seated hostility of continental European law towards sanctioning forms of compensation by way of punitive damages, even within compensatory collective actions.”

⁴²¹ Again, A. Tedoldi, *Next generation*, cit., 367; and also De Cristofaro, *Azioni “rappresentative” e tutela degli interessi collettivi dei consumatori*, cit., 1023.

⁴²² See consistently, M. Libertini, M. Maugeri, *Ancora sul giudizio di ammissibilità dell’azione di classe*, in *Nuova giur. civ. comm.*, 526 (I, 2011).

The homogeneity of individual rights⁴²³ does not merely constitute a technical admissibility requirement⁴²⁴. In essence, it does not presuppose absolute identity among the legal positions of class members, nor a perfect correspondence in the harm suffered. Rather, it suffices that the claims derive from a shared factual and normative core, such as to render the issue of liability amenable to collective adjudication and, for that very reason, capable of grounding a decision endowed with typifying force and broadly binding effects⁴²⁵.

In other words, what emerges is an etiological convergence among the individual positions, enabling the identification of a legal interest that is “common in structure, individual in titularity”; a formulation that captures the compatibility between the plurality of right-holders and the unity of judicial determination. It is precisely this need to reduce a multiplicity of claims to procedural unity that proves central to the architecture of collective proceedings.

For this reason, homogeneity cannot be relegated to a mere technical admissibility requirement. It rises instead to the level of a theoretical cornerstone of the procedural architecture, shaping each stage of the proceedings (admissibility, adjudication on the merits, and the implementation of the judgment through opt-ins and the quantification of individual entitlements).

At the admissibility stage, the court is called upon, within an accelerated procedural timeframe and through a form of scrutiny that often carries substantive weight, to assess the systemic viability of the proposed action. It is at this stage that homogeneity performs its first decisive function: not as a purely nominal criterion, but as a parameter for determining whether individual differences remain compatible with the construction of a unitary adjudication or, conversely, require fragmentation into multiple ordinary proceedings. At this juncture, the law provides for several grounds of inadmissibility which, though heterogeneous in nature, converge on a common rationalising purpose: manifest unfoundedness of the claim, insufficient identification of the group,

⁴²³ For an overview of the different positions advanced in relation to the notion of homogeneity, see R. Donzelli, *L'ambito di applicazione e la legittimazione ad agire*, in B. Sassani (ed.), *Class Action. Commento sistematico alla legge 12 aprile 2019 n. 31*, Pisa, 11 (2019); A. Amidei, *L'ammissibilità dell'azione di classe fra omogeneità dei diritti individuali azionati e garanzie di adeguata gestione del processo*, in U. Ruffolo (ed.), *Class action ed azione collettiva*, Milano, 79 (2021); M. Costanza, *La omogeneità dei diritti individuali*, *ivi*, 105; A. Giussani, *La riforma dell'azione di classe*, in *Riv. dir. proc.*, 1573 (2019); *Id.*, *Efficienza giusta*, Milano, 35 (2022); C. Consolo, *L'azione di classe*, *cit.*, 718, nota 4; P.F. Giuggioli, *L'azione di classe*, Padova, 25 (2019); G. Caruso, *Contributo allo studio delle azioni di classe*, Napoli, 139 (2021); B. Manfredonia, *La nuova legge sulle azioni di classe: un passo avanti per la tutela collettiva?*, in *Rass. dir. civ.*, 1569 (2020); M. Lorenzotti, *Azione di classe e diritti individuali omogenei: opportunità o limite?*, in *Contr. impr.*, 682 (2022); C. Scognamiglio, *La Cassazione delinea presupposti e limiti di risarcibilità del danno non patrimoniale contrattuale nell'azione di classe*, in *Nuova giur. civ. comm.*, 994 (2019); A. C. Di Landro, *Ospitalità ed omogeneità nella nuova azione di classe. Nuove prospettive di riflessione*, in *Jus civile*, 1266 (2020); C. Petrillo, *Situazioni soggettive implicate*, in B. Sassani (ed.), *Class action*, *cit.*, 58; C. Consolo, B. Zuffi, *L'azione di classe*, *cit.*, 66.

On the notion of a homogeneous individual right under the previous regime, see, among others, A.D. De Santis, *La tutela giurisdizionale collettiva. Contributo allo studio della legittimazione ad agire e delle tecniche inibitorie e risarcitorie*, Napoli, 159 (2013); Menchini, *La tutela giurisdizionale dei diritti individuali omogenei: aspetti critici e prospettive ricostruttive*, in *Studi in onore di C. Punzi*, Torino, 77 (2008); N. Trocker, voce *Interessi collettivi e diffusi*, in *Enc. giur.*, vol. XVII, Roma, 1989 and previously, A. Di Landro, *Interessi dei consumatori e azione di classe*, Napoli, 2012, p. 83.

⁴²⁴ As to this issue, E. Pagni, *L'azione di classe nel nuovo art. 140-bis: le situazioni soggettive, l'introduzione del giudizio e l'ammissibilità della domanda*, in *Riv. dir. civ.*, 349 (2010); M. Natale, *Diritti omogenei e potenziamento dell'azione di classe*, in *Danno resp.*, 113 (2019); G. Conte, *I “diritti individuali omogenei” nella disciplina dell'azione di classe*, in *Riv. dir. civ.*, 609 (2011); A. Gentile, *La “class action” italiana. Una gestione congiunta di azioni individuali per la tutela di diritti omogenei*, in *Rass. dir. civ.*, 1301 (2011).

R. Donzelli, *L'azione di classe a tutela dei consumatori*, Napoli, 2011, 209 observes that “the notion of homogeneous individual rights does not, by any means, constitute a fixed or pre-given category; rather, it must be situated within a specific legal system and, above all, within a clearly defined procedural instrument in order to acquire determinate conceptual contours.”

⁴²⁵ G. Costantino, C. Consolo, *Prime pronunce e qualche punto fermo sull'azione risarcitoria di classe*, in *Corr. giur.*, 985 (2010); E. Ferrante, *L'azione di classe nel diritto italiano. Profili sostanziali*, Padova, 2012. *Contra*, M. Natale, *Diritti omogenei e potenziamento dell'azione di classe*, *cit.*, 113.

lack of homogeneity, inadequacy of the authorised claimant, and, under the most recent models, risks of pathological distortion linked to litigation funding.

Judicial scrutiny of homogeneity is necessarily *ex ante*. It is conducted on the basis of the pleadings and the initial documentary evidence, according to a standard of procedural plausibility, aimed at determining whether the dispute can appropriately be adjudicated collectively. Although formally conceived as a preliminary filter, the admissibility phase thus assumes a decisive role. It enables the court to exercise rigorous control over both the configurability of the class and the systemic sustainability of the action: in doing so, the court assesses not only compliance with formal requirements and the adequacy of representation, but also the plausibility of the asserted homogeneity of positions.

Once this preliminary threshold has been crossed, homogeneity continues to operate as an organising criterion at the merits stage. In adjudicating the substantive issues and determining the defendant's liability, the court necessarily - and implicitly - delineates the perimeter of the class. A collective judgment cannot merely ascertain wrongdoing in the abstract; it must articulate the defining features of the rights infringed and thereby identify the characteristics of those who, by virtue of the common factual and legal core, may be deemed members of the class. It is therefore no coincidence that a judgment upholding the claim, even in part, is required to establish uniform criteria and parameters and, in some instances, to specify in detail the documentation necessary to substantiate entitlement. With the appointment of the delegated judge and the common representative, the late opt-in phase is opened. At that stage, the late-joining class member bears the burden of demonstrating both membership in the class and the harm suffered.

It is, however, at the enforcement stage that homogeneity most clearly reveals its dual nature as both a condition of access and a prerequisite for the governability of distribution. At this point, the unitary core of the liability determination must be translated into individual pecuniary entitlements without degenerating into a multiplication of micro-trials on the merits. Acting on the basis of the criteria established in the judgment, the common representative reconstructs, for each participating member, the factual and legal basis of the claim, the nature of the harm, and the amount owed, with the possibility of appointing technical experts. Following a documentary adversarial exchange, the delegated judge then issues an order - upholding the claims in whole or in part - directing payment or delivery in accordance with a distribution plan. This mechanism is workable only insofar as homogeneity has been properly structured upstream. Where individual differences prove excessive, the distribution phase risks collapsing under the weight of variability, generating inefficiencies and uncertainty that effectively reproduce the defects of individual litigation on a much larger scale.

At every stage, moreover, homogeneity interacts with settlement dynamics, which represent another context in which the requirement operates as a criterion of rationality in collective proceedings. The possibility of settlement, both before and after a decision on the merits, presupposes that the perimeter of beneficiaries and the structure of the harm be sufficiently ascertainable. Conversely, the existence of opt-in windows, particularly the late opt-in, shapes negotiation strategies⁴²⁶, increasing the defendant's uncertainty regarding the final size of the claimant pool and complicating the assessment of the cost of a global resolution. It is therefore unsurprising that the rise in entry costs and the complexity of collective management have encouraged increasing recourse to third-party litigation funding, whereby an external funder covers the costs of the proceedings in exchange for a share of any recovery. While this mechanism may rebalance economic asymmetries between the parties and influence settlement dynamics, it

⁴²⁶ E. Gabellini, *Azione di classe e giustizia contrattuale*, in *Riv. trim. dir. proc. civ.*, 143 (2024); A. Giussani, *Le composizioni amichevoli della lite nella nuova disciplina dell'azione di classe*, in *Riv. trim. dir. proc. civ.*, 1291 (2019); and, with specific reference to the representative action, M.A. Astone, *Transazioni collettive e tutela dei consumatori nella previsione dell'art. 140-decies c.cons.*, in *Nuove leggi civ. comm.*, 1212 (2024).

simultaneously necessitates robust safeguards of transparency and independence (emphasised also in Directive 2020/1828) in order to prevent collective enforcement from degenerating into a purely speculative enterprise capable of distorting case selection and, above all, settlement logic⁴²⁷.

Against this background, the requirement of homogeneity of consumers' individual rights clearly emerges as the central criterion of the representative action under Articles 140-*ter* et seq. of the Consumer Code, as well as of the class action under Articles 840-*bis* et seq. of the Code of Civil Procedure. It is the key that enables the transformation of a mere aggregation of individual positions into a single procedural narrative endowed with systemic coherence. Homogeneity operates (i) as a selective criterion at the access stage, determining the very admissibility of aggregation; (ii) as an organising parameter at the merits stage, guiding the definition of the class, the structure of the harm, and the uniform criteria for quantification (both as to the nature and the amount of damage). From a quantitative perspective, the requirement entails the development of uniform metrics - such as percentage overcharges, days of service disruption, investment brackets, and the like - allowing individual harm to be calculated through recurring formulas, possibly organised into subclasses⁴²⁸ corresponding to different levels of harm or different categories of relationship (for example, retail investors versus institutional investors, household users versus business users).

In this way, the collective judgment may confine itself to setting the "rules of the game" - criteria of attribution, parameters of quantification and evidentiary standards - leaving the enforcement phase to translate those rules into individual awards without undermining the unitary character of the liability determination. At the final enforcement stage, homogeneity thus becomes (iii) a condition of practicability, making distribution possible without reopening the merits in atomistic form.

III.1 The Notion of "Homogeneous Individual Rights"

The expression "homogeneous individual rights" first appeared in the original version of Article 140-*bis* and was subsequently incorporated into the codified class action under Article 840-*bis* of the Code of Civil Procedure, which refers to "any homogeneous individual right." By contrast, the consumer representative action introduced in 2023 refers to the "collective interests of consumers"⁴²⁹.

The conceptual distance between "homogeneous individual rights" and "collective interests of consumers" reflects two distinct ways of constructing both the object of collective redress and the very architecture of standing⁴³⁰. In the general codified model of the class action, the framework remains firmly centred on the individual right *uti singuli* - typically a claim for damages or restitution - which, while retaining its individual nature, is procedurally aggregated insofar as it is

⁴²⁷ See the special issue devoted to the topic in *Eur. Rev. Priv. Law*, (34, 2026) and, *ivi*, in particular C. Poncibò, *Justice Comes to a Price: Third Party Litigation Funding in the European Union*; E. D'Alessandro, C. Poncibò, *State of Play of the EU Private Litigation Funding Landscape and the Current Eu Rules Applicable to Private Litigation Funding* (European Parliament Research Service March, 2021).

⁴²⁸ On this point, see the reflections of J.B. Weinstein, *Individual Justice in Mass Tort Litigation*, Evanston, 1995, 92. The same view is shared in Italian scholarship; see, inter alia, F. Santangeli, P. Parisi, *Il nuovo strumento di tutela collettiva risarcitoria: l'azione di classe dopo le recenti modifiche all'art. 140 bis cod. cons.*, in *www.judicium.it*, 29 April 2019; C. Scognamiglio, *Risarcimento del danno, restituzioni e rimedi nell'azione di classe*, in *Resp. civ. e prev.*, 512 (2011).

⁴²⁹ See, in particular, Articles 1, 2, 3, 6, and 10 of Directive (EU) 2020/1828, as well as Article 140-*ter*, letters (c) and (e), of the Consumer Code. Directive 2020/1828 entrusted the Member States with the task of "deciding on the degree of similarity required between the individual claims or the minimum number of consumers concerned by a representative action for redress measures in order for the case to be admissible as a representative action" (Recital 12).

⁴³⁰ On this point, see A. Giussani, *Considerazioni sul rapporto fra le azioni collettive*, cit., 459.

“homogeneous” with respect to a series of serial wrongful acts. Homogeneity thus operates as a selective and rationalising criterion, without altering the intrinsically individual character of the substantive positions asserted.

In the paradigm of representative actions, by contrast, the legislature - consistent with Directive (EU) 2020/1828 - constructs the immediate object of protection as the “collective interest” of consumers. Depending on the *petitum*, this interest may take the form either of a general interest of the category as a whole (in the case of injunctive relief) or of a functional aggregation of the individual interests of consumers concretely harmed (in the compensatory dimension)⁴³¹.

It follows, on the one hand, that the infringement of an interest protected by one of the provisions listed in Annex II-*septies* is, in itself, sufficient to trigger the representative action. In other words, it is enough that the impaired interest receives clear and specific protection under one of the provisions of EU law - or the corresponding national implementing measures - enumerated in that Annex, irrespective of whether that interest crystallises, in substantive private law, into a fully-fledged individual right vested in specific consumers. The protected interest thus functions as a genuine gateway to collective redress, regardless of whether it is formally classified as a subjective right, a legitimate interest, or another legally relevant position.

The centre of gravity of protection accordingly shifts from the structure of the subjective position to the function of the infringed norm. This approach is consistent with the logic of Directive (EU) 2020/1828, which conceives the representative action primarily as an enforcement mechanism for the substantive obligations imposed on traders, rather than merely as a procedural vehicle for aggregating already fully formed individual claims.

Within this framework, the notion of the collective interests of consumers assumes a dual configuration. Where the action seeks injunctive relief, the qualified entity acts in the general interest of the consumer community, exercising its own procedural standing and asserting a claim that belongs to it directly, as an entity designated by the Member State to safeguard the proper functioning of the market. In such cases, the collective interest is not the mere aggregation of individual interests, but rather a unitary interest institutionally vested in the entity itself⁴³², transcending individual subjective positions.

The configuration differs in the case of representative actions seeking compensatory measures. Here, the collective interest takes the form of the interest of a group of consumers that is determined or determinable - namely, a synthesis of the individual interests concretely harmed by the trader’s conduct. In this context, the qualified entity acts as the procedural representative of the group, according to a scheme akin to *Prozessstandschaft*⁴³³, whereby a plurality of individual civil claims is asserted within a single proceeding. Consumers remain the substantive right-holders *uti singuli*, even though they do not assume the status of parties in the strict procedural sense. The collective dimension, therefore, is functional and procedural in character.

It has, moreover, been observed⁴³⁴ that the requirement of “homogeneity” appears almost to recede into the background, insofar as it does not readily attach either to the collective interest as such or to the individual monetary claims that consumers acquire only *ex post*, as a consequence of the infringement of that interest, and which they assert by opting into the proceedings brought by the representative entity. One might thus argue that, whereas homogeneous individual rights constitute both the premise and the immediate object of the codified class action, the collective interests of consumers represent the core requirement of the representative action, not as a mere aggregation of pre-existing rights, but as an autonomous dimension of protection, which only subsequently translates - through the representative mechanism - into (individual) compensatory claims.

Beyond these considerations, which help to capture the systemic logic of the current dual-track model, it has been noted that the compensatory action (under examination here) ultimately rests

⁴³¹ G. De Cristofaro, *Le «azioni rappresentative» di cui agli artt. 140-ter ss. c.cons.*, cit., 1.

⁴³² G. De Cristofaro, *Le «azioni rappresentative» di cui agli artt. 140-ter ss. c.cons.*, cit., 1.

⁴³³ L. Pelle, *Lo status processuale di aderente nell'azione di classe ex art. 140 bis cod. cons.*, in *Riv. dir. proc.*, 955 (2012).

⁴³⁴ Again, G. De Cristofaro, *Le «azioni rappresentative» di cui agli artt. 140-ter ss. c. cons.*, cit., 1.

on the same underlying phenomenological core - namely, serial harm produced by standardised business conduct - particularly in light of the interpretation developed by the courts of the very notion of a homogeneous individual right⁴³⁵.

From an interpretative standpoint, in order to understand what is meant by a “homogeneous individual right,” one must turn to the (limited yet significant) experience accumulated under Article 140-*bis* of the Consumer Code. The few cases that reached the merits arose in that context and thus constitute the principal body of case law on which the new regime inevitably draws.

The practical trajectory of the original consumer class action reveals that the centrality of the homogeneity requirement was often construed restrictively. According to the available data⁴³⁶, in the nearly ten years during which the 2010-2020 framework was in force, fewer than fifty actions were brought, and approximately half failed to pass the preliminary admissibility stage⁴³⁷, frequently precisely on the grounds of a lack of homogeneity or of excessive heterogeneity among the aggregated individual situations.

First and foremost, the notion of homogeneity of rights has been progressively shaped by case law and legal scholarship. In the debate surrounding “homogeneous individual rights,” the case law - rather than immediately providing a positive definition - has more clearly delineated what homogeneity is not, distancing itself from the more rigid readings that had initially been encouraged by the wording of Article 140-*bis* of the Consumer Code and that were definitively abandoned following the enactment of Decree-Law No. 1/2012, which removed any residual reference to the “identity” of rights enforceable in collective form. In truth, even prior to the 2012 reform, both scholarship⁴³⁸ and the courts⁴³⁹ had already moved toward a non-literal understanding of the earlier regime, aware that a mechanical transposition of the notion of identity would have rendered the

⁴³⁵ Emblematic in this regard, Cass., 31 January 2018, n. 2320, in *Danno resp.*, 113 (1, 2019) concerning compensation for damage caused by an unfair commercial practice. In that decision, the Corte di Cassazione held that the unity and multi-offensive character of the unlawful conduct delimit the scope of the evaluative criteria relevant for the admissibility of a class action. Part of the scholarship has criticised this interpretative approach (see, inter alia, M. Natale, *Diritti omogenei e potenziamento dell'azione di classe*, cit., 113), observing that “to reduce the object of the class proceedings to the ascertainment of the unlawful conduct (in the case at hand, the tort constituted by the misleading commercial practice), of the unity/multi-offensive nature of the conduct, and thus to the objective element of the homogeneity of rights, without taking into account the effectiveness of the individual interest of the consumer bringing the action - albeit homogeneous to that of the class - amounts to surreptitiously transforming the ‘class action’ into a ‘collective compensatory action’ (...). Yet the ‘class action’ is anything but a ‘collective action’. The latter, in fact, belongs exclusively to entities representing ‘collective interests’, and it is in that context that the court is called upon to ascertain solely the multi-offensive unlawful conduct, without any cognitive phase concerning the individual rights.” The A. concludes that “the configuration of our class action as an aggregating individual action cannot serve as an alibi for its instrumental (if not abusive) use, ultimately transforming the individual nature of the homogeneous right - conceived as the aggregating criterion of the class - into a mere collective interest.” In the scholarship, see, inter alia, G. Conte, *I “diritti individuali omogenei” nella disciplina dell'azione di classe*, cit., 609; A. Giussani, *Ancora sulla tutelabilità con l'azione di classe dei soli diritti “omogenei”*, in *Giur. it.*, 2014, 1912; M. Libertini, *L'azione di classe e le pratiche commerciali scorrette*, in *Riv. dir. ind.*, 147 (4-5, 2011); P. Porreca, *Ambito soggettivo e oggettivo dell'azione di classe*, in *Europa e dir. priv.*, 541 (2, 2010); M. Taruffo, *La tutela Collettiva nell'ordinamento italiano: lineamenti generali*, *Riv. trim., dir. proc. civ.*, 103 (1, 2011).

⁴³⁶ L. Bugatti, *Collective Redress 3.0 in Italy: from Consumer Class Action to Consumer Representative Action*, cit., 551.

⁴³⁷ M. Carpagano, *Perché le azioni di classe vengono dichiarate (spesso) inammissibili*, in *www.osservatorioantitrust.eu* (19.06.2021).

⁴³⁸ M. Libertini, *L'azione di classe e le pratiche commerciali scorrette*, cit., p. 149 e ss.; D. Amadei, *L'azione di classe italiana per la tutela dei diritti individuali omogenei*, in *Giur. merito*, 940 (4, 2008); P. Porreca, *Ambito soggettivo ed oggettivo dell'azione di classe*, cit., 562-563; M. Bove, *Profili processuali dell'azione di classe*, in *www.judicum.it*, 1016; R. Rordorf, *L'azione di classe nel novellato art. 140 bis*, in *Foro it.*, 183 (2010); M. Guernelli, *La nuova azione di classe: profili processuali*, in *Riv. trim. dir. proc. civ.*, 917 (3, 2010); G. Conte, *I diritti individuali omogenei nella disciplina dell'azione di classe*, cit., p. 613.

⁴³⁹ Among these, see, without any claim to exhaustiveness, Trib. Roma, 25 March 2011, in *Foro it.*, 1889 (I, 2011); Trib. Roma, 11 April 2011, *ivi*, 3424 (I, 2011); Trib. Firenze, 15 July 2011, *ivi*, 1910 (I, 2012); App. Torino, 23 September 2011, in *Giur. it.*, 1581 (2012), annotated by A.D. De Santis, *Spunti in tema di processo di classe*; Trib. Napoli, 9 December 2011, in *Foro it.*, 1909 (I, 2012); Trib. Roma, 27 April 2012, in *Danno resp.*, 1239 (2012).

Contra, ex pluribus, Trib. Torino, 31 October 2011, in *Foro it.*, 1929 (I, 2012); App. Roma, 27 January 2012, *ivi*, 1911 (I, 2012); Trib. Napoli, 18 February 2013, n. 2195, in *Resp. civ. prev.*, 1607 (5, 2013); Trib. Milano, 9 December 2013, in *Foro it.*, 590 (I, 2014). A similarly rigorous position had initially been adopted by S. Menchini, A. Motto, *L'azione di classe dell'art. 140 bis c.cons.*, in *Nuove leggi civ. comm.*, 1420 (6, 2010).

instrument, by definition, unusable. As has been aptly observed, rights that are “perfectly identical” ultimately collapse into “the same right”⁴⁴⁰, thereby depriving the collective action of its very *raison d’être*.

Nor, correspondingly, can homogeneity be conflated with the identity of the immediate *petitum*. In actions for damages, for instance, it is entirely natural for the amounts claimed to differ⁴⁴¹; to demand an arithmetical alignment of the *quantum* would be to confuse comparability of positions with their accounting uniformity.

Precisely because homogeneity does not coincide with identity, attempts have been made to anchor it to other parameters, at times borrowed from traditional procedural categories. Yet these reconstructions have also revealed evident shortcomings. In particular, approaches that sought to define homogeneity through the identity of the *petitum mediato* (for example, the remedy selected in response to a multi-offensive course of conduct) and the *causa petendi* have been found unpersuasive⁴⁴², insofar as they invert the proper line of reasoning⁴⁴³. Rather than beginning with the structure of the substantive rights in order to assess whether they are comparable and capable of aggregation, they infer homogeneity from the procedural forms through which those rights are asserted, thereby conflating the plane of substantive legal positions with that of remedial techniques.

Similar reservations have been raised with regard to the tendency to equate homogeneity with the mere commonality - or predominance - of issues of fact or law⁴⁴⁴. Here too, the centre of gravity shifts from the subjective positions to the decisional problems facing the court, transforming the requirement into a sort of “predominance of common issues” clause, functionally closer to the predominance requirement under Rule 23(b)(3) than to the Italian understanding of homogeneous rights as a threshold criterion for access to collective redress.

Within the United States system, *commonality* has a more strictly procedural reach, requiring not only the existence of common questions of fact or law but, following the shift brought about by the Supreme Court’s case law previously discussed, the presence of a “common contention” whose resolution is capable of meaningfully resolving the claims of all class members. Moreover, judicial scrutiny of predominance has, through this evolution in the Court’s case law, extended beyond the literal text of the rule, effectively demanding a high degree of “isomorphism” between class members’ situations. This has translated into a stringent *ex ante* assessment of the relationship between common and individual issues, verging on an anticipatory evaluation of the merits.

⁴⁴⁰ Trib. Roma, 25 March 2011, cit. where it is observed that “In truth, two identical rights - that is, rights identical in all their constitutive elements, including the subjective ones - would in fact amount to one and the same right. Such a conclusion, by reason of its manifest illogicality - both in abstract terms and considering the objectives pursued by the legislature in introducing the new class action mechanism - cannot be endorsed.”

⁴⁴¹ The very wording of the original Article 140-*bis* of the Consumer Code expressly empowered the court to establish a “homogeneous calculation criterion,” thereby presupposing that the damages suffered by individual claimants might differ in quantum while nonetheless remaining referable to a common factual and legal matrix.

In the case law, see Cass., 31 May 2019, n. 14886, in *Dir. Gius.*, 100 (4, 2019); App. Milano, 25 August 2017, in *Nuova giur. civ. comm.*, 10 (I, 2018); Trib. Venezia, 12 January 2016, in *Foro it.*, 1017 (I, 2016); Trib. Venezia, 25 May 2017, *ivi*, 2432 (I, 2017); App. Venezia, 3 November 2017, in *Dir. Gius.*, 10 November 2017; App. Torino, 17 November 2015, in *Foro it.*, 1017 (I, 2016); App. Milano, 3 March 2014, in *Resp. civ. prev.*, 1284 (4, 2014); Trib. Roma, 25 March 2011, in *Foro it.*, 1889 (I, 2011) in which it is stated that “The different extent of the damage potentially suffered by each account holder is merely a circumstance that does not affect the homogeneity of the rights asserted, but rather lends itself to consideration during the evidentiary phase of the merits proceedings.”

⁴⁴² See Trib. Torino, 28 April 2011, in *Foro it.*, 1888 (I, 2011) (subsequently declared admissible by App. Torino, 23 September 2011, in *Foro it.*, 3422 (I, 2011) e Trib. Torino, 31 October 2011, in *Foro it.*, 1910 (I, 2012) (subsequently declared admissible by App. Torino, 26 January 2012, cit.) and also App. Milano, 3 March 2014, cit.

⁴⁴³ As explained by F. Ruggiero, *Azione di classe e risarcimento del danno non patrimoniale*, 95 (2024), available at <https://www.research.unipd.it/handle/11577/3520321>

⁴⁴⁴ See, in particular, M. Taruffo, *La tutela collettiva nell’ordinamento italiano*, in *Riv. trim. dir. proc.*, 103 (2011).

The scope of the notion of (Italian) homogeneous rights is, however, distinct. Legal scholarship⁴⁴⁵ tends to construe homogeneity as a prospective assessment of the representative claimant's capacity to function as a pole of aggregation for analogous situations, leaving the management of residual heterogeneities - within the limits of their compatibility with the collective procedure - to internal mechanisms of the proceedings (definition of the class, creation of subclasses, differentiated criteria for quantification).

Homogeneity thus refers to individual subjective rights arising from the same multi-offensive wrongful act or from the same factual sequence attributable to the same defendant (for example, an identical standard-form contract, a uniform commercial practice, a single network outage). From this common origin flows the existence of predominant common questions of law and fact (interpretation of a clause, determination of an unfair practice, classification of a systemic default), and consequently the possibility of developing standardised criteria for the assessment of liability and the quantification of damage. The unifying element is therefore the common cause of the harm⁴⁴⁶. What matters is that the *danno-evento* be unitary or at least serial in nature (a shared injurious matrix), and that it be capable of being managed in a unified manner, since its multi-offensive character produces analogous effects on individual positions. The *danno-conseguenza*, by contrast, may vary, provided that its quantification remains governable through standardisable criteria, and that divergences as to the *quantum* or the type of remedy sought⁴⁴⁷ do not undermine homogeneity as such⁴⁴⁸.

It thus becomes apparent that a homogeneous right therefore cannot be defined in rigid and self-contained terms, but instead calls for a relational reconstruction⁴⁴⁹, capable of holding together the

⁴⁴⁵ E. Gabellini, *Azione di classe e giustizia contrattuale*, cit., 143. It has been observed that "rights may be regarded as homogeneous where they find their foundation in the same act or omission, or in a habitual course of conduct attributable to the same defendant," and are characterised by "either a causal connection (identity of title) or an improper connection (identity of issues)," for the protection of situations "sharing such characteristics as to justify serial appraisal and joint procedural management," by reason of the clear predominance of common questions over individual ones. According to certain positions, this entails either excluding altogether the entry of individual issues into the collective proceedings or, as has been authoritatively suggested, entrusting the collective claimant with the task of "filtering" opt-ins so as to exclude holders of excessively heterogeneous individual rights. On this view, disputes whose quantification requires individualised factual assessments would likewise be inadmissible, save where such assessments can be conducted through the documentary procedures expressly provided by law.

⁴⁴⁶ *Contra* M. Natale, *Diritti omogenei*, cit., 113 observed that "to reduce (...) the object of the class proceeding to the mere ascertainment of the unlawful conduct (...) and of the multi-offensive or unitary nature of that conduct, and thus to the objective element of the homogeneity of rights, without taking into account the actual and concrete interest of the consumer-claimant - albeit homogeneous with that of the class - amounts surreptitiously to transforming the 'class action' into a 'collective compensatory action.'"

⁴⁴⁷ Emblematic, in this regard, is App. Torino, 23 September 2011, cit.

⁴⁴⁸ A. D. De Santis, *La crisi dell'azione di classe*, cit., 285. With regard to the homogeneous rights capable of protection through the class action, reference should also be made to G. Conte, *I "diritti individuali omogenei"* cit., 609; F. R. Fantetti, *L'omogeneità della situazione dei proponenti la class action*, in *Obbl. contr.*, 281 (4, 2012); and, with specific regard to class actions arising from unfair commercial practices, to A. Nobile, *Le tutele civilistiche avverso le pratiche commerciali scorrette*, in *Contr. impr. Europa*, 180 (2014); M. Libertini, *L'azione di classe e le pratiche commerciali scorrette*, in *Riv. dir. ind.*, 147 (I, 1, 2011); M. Lorenzotti, *Azione di classe e diritti individuali omogenei: opportunità o limite?*, in *Contr. impr.*, 682 (2022).

In this regard, see further, App. Milano, 25 August 2017, cit.; Trib. Venezia, 12 January 2016, cit.; Trib. Venezia, 25 May 2017, cit.; App. Venezia, 3 November 2017, cit.; App. Torino, 17 November 2015, cit.; App. Milano, 3 March 2014, cit. which emphasises that the "physiological quantitative divergence of the *petitum*" cannot jeopardise the availability of the class action. What matters, rather, is that the same breach (in that case, disruptions in railway services) produces analogous effects upon a plurality of users, referable to recurrent typologies of inconvenience (delays, cancellations, overcrowding, inadequate information), capable of a broadly standardised assessment.

⁴⁴⁹ R. Donzelli, *L'azione di classe a tutela dei consumatori*, cit., 209 observes that "the notion of homogeneous individual rights (...) is by no means a fixed or pre-given concept; rather, it must be situated within a specific legal order and, above all, within a clearly defined procedural instrument in order to acquire determinate conceptual contours."; v. C. Petrillo, *La tutela degli interessi collettivi e dei diritti individuali omogenei nel processo societario*, in *Riv. dir. proc.*, 149 (2006);

common nucleus of liability and the physiologically variable individual repercussions. From this perspective, homogeneity operates as a gateway clause to collective proceedings - scrutinised at the admissibility stage - and its centre of gravity is substantive rather than procedural: serial rights, structurally comparable, capable of joint adjudication, even at the cost of tolerating a certain degree of individual differentiation, provided that such differences can be absorbed through subclasses or equitable criteria of quantification. By contrast, the United States system requires, already at the certification stage, a stringent scrutiny of the compatibility between the structure of the dispute and the predominance requirement, in the awareness that the outcome of that assessment determines the very admissibility of proceedings which, by virtue of the opt-out mechanism, will bind even absent class members.

A comparative glance at developments across the Atlantic further confirms that the centrality of homogeneity, as here understood, in the first phase of the proceedings (admissibility) necessarily entails an *ex ante* assessment⁴⁵⁰. At that stage, the class has not yet been formed, and the only fully defined position is that advanced by the claimant. The evaluation must therefore focus on the applicant's claim, rather than on future and hypothetical opt-ins. The court is not called upon to "photograph" an already constituted class, but rather to determine whether the right asserted is, in the abstract, capable of functioning as an aggregating pole for analogous positions, or whether its excessive singularity, personalisation, or dependence on idiosyncratic circumstances renders aggregation implausible. The resulting homogeneity assessment is, by its nature, summary and prospective. As has been aptly observed, "rather than a judgment of homogeneity, one should speak of a 'programme of work,' destined to be filled with content not only by the contribution of the class representative, but above all by the activity of the court, called upon to delineate the perimeter of protection within which analogous situations pertaining to other class members may be subsumed"⁴⁵¹.

In this light, the preliminary review should not degenerate into a gatekeeping exercise aimed at foreclosing access to collective redress, but should operate in a functional sense, confining inadmissibility to those cases in which the right alleged appears *ictu oculi* incompatible with any possibility of replication in analogous positions and therefore incapable of collective treatment.

As has already been widely observed, the court is fully entitled to shape the contours of the class⁴⁵², reducing it or segmenting it into homogeneous subclasses through the specification of aggregation criteria, just as United States practice demonstrates. Moreover, concerns relating to the fragmentation of adjudication and quantification may be addressed through alternative techniques: recourse to equitable assessment (where damage has been established), the adoption of multiple homogeneous criteria for quantifying harm across different groups of claimants, or, in some instances, the use of presumptions linked to opt-in, even to the point of implicitly deeming waived those components of harm that are strictly personal and not susceptible to standardisation. These are choices pertaining to the efficient management of proceedings and to the modulation of the evidentiary phase; they do not properly belong to the admissibility filter nor to the assessment of homogeneity as such.

Meucci, *Aspetti problematici della nuova azione di classe (art. 140-bis cod. cons.): posizioni giuridiche tutelate e ambito di applicazione del rimedio*, in www.personaemercato.it, 241. A. D. De Santis, *La crisi dell'azione di classe a tutela dei consumatori e utenti*, in *Foro it.*, 285 (V, 2013); R. Caponi, *Azione di classe: il punto, la linea e la discontinuità*, *ivi*, 149 (V, 2012).

⁴⁵⁰ App. Torino, 26 January 2012, in Dejure database, according to which "it appears beyond doubt that the assessment as to identity must be carried out *ex ante*, with reference to the position articulated by the claimants, and certainly not *ex post*, on the basis of any subsequent hypothetical opt-ins following the overcoming of the admissibility threshold."

⁴⁵¹ App. Torino, 26 January 2012, *cit.*

⁴⁵² See, e.g., Trib. Cagliari, 11 April 2018, in giustiziacivile.com.

Recent scholarship accordingly emphasises the need to shift the interpretative centre of gravity away from an overly rigid reading focused on the identity of actions or remedies, and toward a conception of homogeneity understood as the presence of a sufficiently robust common nucleus capable of rendering collective adjudication rational. The aim is twofold: to avoid, on the one hand, the dilution of the requirement (which would transform any mass dispute into a class action), and, on the other, its excessive rigidification, which would risk sterilising the representative remedy (and replicating the substantial failure of the first phase under Article 140-*bis*)⁴⁵³. As has been incisively noted, “the worst defect of all lies in an exasperated and retrograde conceptualism in defining the notion of homogeneity of rights - required for admissibility - which is addressed through the outdated categories of a *Begriffsjurisprudenz*, long thought to have been overcome and abandoned, rather than through an approach centred on the collective interests harmed by multi-offensive conduct, in line with the more modern canons of an updated *Interessenjurisprudenz*, attentive to protection needs rather than to *Dogmengeschichte*, to dusty legal dogmas and their history, and to the theoretical rigidities of civil liability that tend to reproduce, for collective redress, solutions elaborated in the context of individual compensation - manifestly ill-suited to class remedies”⁴⁵⁴. Only in this way can homogeneity avoid becoming a de facto systemic barrier to collective or representative actions, while ensuring that the concrete (and no longer abstract) verification of actual class membership and of the corresponding harm is (properly) deferred to the subsequent stage of the proceedings.

Decisions under Article 140-*bis* demonstrate that, in the earlier phase, very few class proceedings resulted in favourable judgments on the merits. By contrast, more recent statistics⁴⁵⁵ concerning the new class actions appear to reveal a different trend. While the critical nature of the admissibility filter persists, the number of actions declared admissible has increased, and the case law is beginning to consolidate more sophisticated criteria for assessing homogeneity.

In light of the foregoing, a final question is whether these observations, developed in relation to the class action under Article 840-*bis* of the Code of Civil Procedure, can also be extended to the compensatory⁴⁵⁶ representative action under Article 140-*ter* of the Consumer Code. In the latter, as

⁴⁵³ Shares the necessity, as highlighted by E. Alonzo, *Uno, nessuno, centomila. Azione rappresentativa a tutela dei consumatori e risarcimento del danno non patrimoniale*, in *Osservatorio dir. civ. comm.*, 459 (2025).

⁴⁵⁴ A. Tedoldi, *Next generation e rimedi collettivi*, cit., 367.

⁴⁵⁵ A. Pierucci, *La sempre più estesa applicazione e diffusione in Italia delle nuove azioni di classe* in <https://www.cfnews.it/societ%C3%A0-e-impresa/la-sempre-pi%C3%B9-estesa-applicazione-e-diffusione-in-italia-delle-nuove-azioni-di-classe/#:~:text=vigore%20gli%20artt.-,840%20e%20ss.,definite%20con%20un%20accordo%20transattivo> It is reported that, in the period 2021–31 December 2024, a total of 67 actions were brought pursuant to Articles 840-*bis* of the Code of Civil Procedure and Articles 140-*ter* of the Consumer Code. From the very limited numbers recorded in 2021 and 2022, filings increased to 17 actions in 2023 and to 38 in 2024 alone. As of 2025, seven compensatory actions instituted during the current year are listed as pending on the Ministry of Justice’s online platform. The actual number of proceedings is, however, likely higher, since injunctive class actions are often not systematically recorded. Moreover, several cases have already been closed following settlements between the parties, resulting in the termination of the proceedings; in others, a decision on admissibility has been rendered and, in certain injunctive actions, a final judgment has been delivered. A disaggregated reading of the data shows that, as of 31 December 2024, only a minority of actions had reached a fully dispositive outcome: approximately 15% were declared inadmissible, 4% were dismissed on the merits, 10% were upheld, and 21% were resolved through settlement or termination. A residual percentage falls within miscellaneous categories (such as joinder of proceedings or transfers).

⁴⁵⁶ The requirement of homogeneity remains expressly contemplated solely for the purposes of compensatory collective redress, and not for purely injunctive relief, pursuant to Article 140-septies, par. 8, letter (c), of the Consumer Code. For a detailed analysis of the differing considerations applicable to injunctive representative actions, see G. De Cristofaro, *Azioni “rappresentative”*, cit., 1010 and E. Minervini, *Azioni rappresentative e provvedimenti inibitori*, in *Nuove leggi civ. comm.*, 287 (2025).

noted, primary reference is made to the “collective interests of consumers,” and procedural standing is vested in qualified entities⁴⁵⁷.

Although the representative action entrusts qualified entities with the protection of the collective interests of consumers - according to some commentators⁴⁵⁸ perhaps signalling a partial departure from the traditional notion of homogeneity - it must be observed that the very definition of “collective interests of consumers,” as set out in the Directive (Article 3), refers, in the context of redress measures, to “the interests of a group of consumers.” It therefore requires that individual consumers be identified, or at least that the group entitled to the remedies be described (Recital 50 and, correspondingly, Article 140-septies par. 5 of the Consumer Code). The individual dimension thus remains, and the homogeneity of the rights asserted in fact re-emerges⁴⁵⁹, “albeit in a different guise”⁴⁶⁰. The individuality of each consumer is (re)aggregated through opt-in, and the unitary collective interest asserted by the entity necessarily confronts the individual position through the admissibility filter.

While the claimant entity is not required to identify specific consumers, but only to delineate the elements necessary to identify the group - so that the injured party assumes the role of a kind of prototype⁴⁶¹ - it is precisely through the filter of homogeneity of individual rights that the assessment of correspondence takes place, enabling aggregation upon the occurrence of isomorphic circumstances. Accordingly, the foregoing considerations concerning the need for a functional understanding of homogeneity appear equally applicable to the representative action at issue.

IV. DAMAGE: WHAT KIND OF HARM?

It is precisely from a “functional” understanding of homogeneity that the main point of systemic tension within the representative action becomes apparent. This is especially true in the field of compensatory collective redress, where the claim concerns non-pecuniary harm rather than economically measurable loss. Homogeneity of rights does not require identity. It presupposes a common causal matrix and the possibility of a unitary assessment of liability. Yet this balance becomes particularly fragile in the field of non-pecuniary damage, where variability in individual repercussions may easily be mistaken for structural heterogeneity of the underlying legal positions. Under the original version of Article 140-*bis* of the Consumer Code, the compatibility between collective actions and non-pecuniary damage was largely viewed negatively⁴⁶². Even after the reform

⁴⁵⁷ On this distinction, see O. Troiano, *Classe e interesse collettivo: prime riflessioni*, in *Analisi giur. economia*, 65 (2008).

⁴⁵⁸ G. De Cristofaro, *Azioni “rappresentative”*, cit., 1010 who observes, however, that the issue should not be overstated.

⁴⁵⁹ L. Bugatti, in P. Rott, A. Halfmeier, W. Vandenbussche, L. Bugatti, J. Mucha, *Comparative Legal Study on Procedural Rules and their Impact on Collective Redress Actions in Europe*, cit.; M. Martino, *Sulla difficile convivenza tra le azioni rappresentative a tutela degli interessi collettivi dei consumatori e le azioni collettive ex artt. 840- bis e ss. c.p.c.*, in *Riv. dir. proc.*, 1222 (2024) and E. Alonzo, *Uno, nessuno, centomila*, cit., 467.

See also L. Serafinelli, *Appunti comparati sulle diverse funzioni della responsabilità extracontrattuale per danno da cambiamento climatico: distanze e complanarità tra Europa e Stati Uniti*, in *Danno resp.*, 567 (2025), who aptly explains that the operability of the procedural mechanism in question presupposes the existence of homogeneous individual rights, thereby excluding the possibility of advancing climate-change damages through such a device. On this issue, see also A. Giussani, *L'azione inibitoria quasi di classe nel labirinto dell'azione collettiva*, in *Nuova giur. civ. comm.*, 698 (2025). Emphasising the structural differences between the class action and the representative action, see E. Camilleri, *L'azione rappresentativa e il raccordo imperfetto con il diritto privato regolatorio*, cit., 440.

⁴⁶⁰ E. Alonzo, *Uno, nessuno, centomila*, cit., 466. See also A. Giussani, *Considerazioni sul rapporto fra le azioni collettive*, cit., 453.

⁴⁶¹ The expression is drawn from E. Alonzo, *Uno, nessuno, centomila*, cit., 467.

⁴⁶² M. Libertini, *L'azione di classe e le pratiche commerciali scorrette*, cit., 152 ss. observes that “the answer to this question should, in principle, be negative (...) damages relating to the person should never be assessed on a lump-sum basis, but only following an ascertainment of the concrete suffering endured by the injured party and of the capacity that the

of the provision, both scholarship and case law have maintained a markedly cautious stance, observing that non-pecuniary damage rarely exhibits, save in exceptional cases, that “collective” dimension capable of grounding a sufficient commonality, or predominance, of issues even at the level of harm.

It has been argued that the collective remedy is structurally better suited to pecuniary loss, although recent practice has shown⁴⁶³ that even this raises significant difficulties of quantification. By contrast, the mechanism is said to encounter greater obstacles where non-pecuniary damage is at stake. The difficulty arises not only at the stage of quantification, but already at the preliminary stage of establishing the existence of the harm: anxiety, stress, and emotional distress pertain to an inherently intimate projection⁴⁶⁴ of the individual claimant, and “the pain and fear characteristic of moral damage do not appear capable of satisfying the requirement of homogeneity, since pain is ontologically subjective and not shareable with that of other class members”⁴⁶⁵. More radically, it has been suggested that, in the absence of sufficiently certain parameters, the collective quantification of non-pecuniary damage may result in approximate assessments, attributing compensatory relevance to claims which, if scrutinised individually, would not meet the threshold of compensability, thereby surreptitiously expanding the scope of recoverable damage.

These arguments undoubtedly capture a real difficulty, especially if one considers that certain matters included in Annex II-*septies* of the representative action derive from European sources - such as the Directive on unfair commercial practices - whose protective function is confined exclusively to economic interests⁴⁶⁶. Such instruments focus on pecuniary detriment and, conversely, leave non-pecuniary damage outside their scope, entrusting its regulation to national law.

However, these objections do not appear decisive when reconsidered within a broader systemic perspective⁴⁶⁷. If one proceeds from a conception of homogeneity as commonality of factual origin and of the normative parameter governing the infringement, it becomes clear that even non-pecuniary harm may, in certain contexts, be brought within a collective dimension. Nor can it be argued that such damage is inherently incompatible with claims of modest individual value. On the contrary, the limited economic significance of the harm suffered does not affect the structure of liability; rather, it constitutes one of the principal factors justifying - if not necessitating - recourse to aggregate mechanisms of redress.

Moreover, a general exclusion of collective compensation for non-pecuniary damage would sit uneasily with the broader evolution of civil liability over the past decades. Judicial and scholarly developments have progressively expanded the scope of compensable damage. Protection is now

award of a given sum of money may have, in terms of providing genuine redress for the harm sustained.” See also E. Ferrante, *L'azione di classe nel diritto italiano. Profili sostanziali*, Padova, 2012, 256; L. Nivarra, *L'azione collettiva risarcitoria ed il diritto antitrust*, in A.M. Gambino, V. Falce (ed.), *Lineamenti giuridicoeconomici dell'azione di classe*, Roma, 2010, 173; G. Villa, *Il danno risarcibile nell'azione collettiva*, in *Danno resp.*, 11 (2009).

⁴⁶³ Emblematic the Dieselgate saga: see *infra*.

⁴⁶⁴ S. Bradani, G. Navone, *La liquidazione del danno non patrimoniale*, in *Nuove leggi civ. comm.*, 374 (2020).

⁴⁶⁵ G. Ponzanelli, *Risarcimento del danno e class action*, in V. Barsotti (ed.), *L'azione di classe*, cit., 34.

⁴⁶⁶ This was observed by A. Venchiarutti, *Il problema del danno alla persona*, paper delivered at the conference entitled *La nuova disciplina dei rimedi in tema di pratiche commerciali scorrette*, held at the Università Cattolica del Sacro Cuore, Milan, on 23 January 2026 (organised by Prof. A. D'Adda).

⁴⁶⁷ M. Libertini, *L'azione di classe e le pratiche commerciali scorrette*, cit., 158, who ultimately endorses the interpretative solution favouring the compensability of non-pecuniary harm “in order to achieve the result envisaged by the legislature.” On this issue, *ex pluribus*, P. Porreca, *Ambito soggettivo e oggettivo dell'azione di classe*, cit., 564; M.A. Astone, *Il danno non patrimoniale nel diritto interno e sovranazionale tra antiche e nuove questioni*, in *Europa dir. priv.*, 1183 (2018); A. Janssen, *Europa e class action: “stato dell'arte” e delimitazioni di campo*, in *Contr. impr. Europa*, 694 (II, 2009); F. Benatti, *Il danno nell'azione di classe*, in *Danno resp.*, 20 (2011).

recognised not only for non-pecuniary harm arising in tort, particularly where fundamental rights are infringed, but also for non-pecuniary harm resulting from contractual non-performance. In this context, “an interpretation that would preclude, *ab origine*, the collective compensability of non-pecuniary damage would ultimately conflict with the underlying trends of Italian and European civil law, as well as with what may by now be described as the *esprit du temps* in matters concerning the protection of the person”⁴⁶⁸.

The case law has confronted these theoretical and practical issues in emblematic fashion in the well-known *Trenord*⁴⁶⁹ and *Dieselgate* cases, which - by reason of their procedural articulation and the range of legal questions addressed - may be regarded as paradigmatic of the interpretative difficulties accompanying the extension of collective adjudication to non-pecuniary harm.

The divergent decisions reached at different levels of jurisdiction reflect both interpretative and practical uncertainty. That uncertainty concerns not only the configurability of homogeneity where the harm is subjectively characterised, but also the criteria of quantification: “confusion appears to reign supreme with regard to compensable damage”⁴⁷⁰.

In the *Trenord* case, it is worth noting that the Tribunale di Milano⁴⁷¹ (First Instance Court) initially denied admissibility, considering that the diversity of the amounts claimed precluded a unitary assessment. In so doing, it adopted an excessively restrictive conception of homogeneity, equating it with full quantitative overlap of the claims. On the other hand, the Corte d’Appello⁴⁷² (Court of Appeal), adopting a view more consistent with the functional logic of collective proceedings, emphasised the serial nature of *Trenord*’s breach, relegating quantitative differences to the liquidation stage. Yet the Tribunale⁴⁷³, in a subsequent phase, again dismissed the claims, holding that the compensation granted automatically exhausted the “common” component of the harm, while additional damages - deemed heterogeneous - would have required individualised assessment. Significantly, the Corte d’Appello⁴⁷⁴ intervened once more, affirming the compatibility of collective proceedings with compensation for non-pecuniary damage and adopting an equitable and presumptive criterion grounded in the “uniform and generalised” psychological distress resulting from the service disruptions, quantified at €100 per capita⁴⁷⁵.

⁴⁶⁸ C. Scognamiglio, *Risarcimento del danno, restituzioni e rimedi nell’azione di classe*, cit., 512.

⁴⁶⁹ The case arose from a series of service disruptions that occurred in December 2012 on certain railway lines operated by *Trenord*, following the introduction of malfunctioning software used to organise staff shifts. The users’ collective action was grounded in the company’s serial contractual non-performance and sought redress for both pecuniary losses and non-pecuniary harm exceeding the automatic compensation mechanisms provided for under Article 17 of Regulation (EC) No. 1371/2007.

⁴⁷⁰ E. Tuccari, *Private e public enforcement in un sistema multilivello: lezioni a partire dal “Dieselgate”*, in *Riv. dir. priv.*, 576 (4, 2025).

⁴⁷¹ Trib. Milano, 8 November 2013, in *Giur. it.*, 603 (3, 2014) annotated by A. Giussani, *Intorno alla tutelabilità con l’azione di classe dei soli diritti “omogenei”*.

⁴⁷² App. Milano, 3 March 2014, in *Giur. it.*, 1910 (8-9, 2014) annotated by A. Giussani, *Ancora sulla tutelabilità con l’azione di classe dei soli diritti “omogenei”*, according to which homogeneity is both necessary and sufficient with respect to the *an debeat*, that is, the unity of the source of the harm, whereas “divergences at the level of the specific consequences do not undermine homogeneity, but may at most affect the quantum due to each individual claimant”; in *Resp. civ. prev.*, 1281 (4, 2014) annotated by P. Porcari, *Sul rapporto tra causa petendi, “omogeneità” dei diritti e criteri di liquidazione del danno nell’azione di classe*.

⁴⁷³ Trib. Milano, 26 January 2016, in *Dir. marittimo*, 210 (I, 2017), annotated by F. Bartolini, *Il diritto alla puntualità nel trasporto ferroviario di persone: l’azione di classe come possibile strumento di enforcement?*

⁴⁷⁴ App. Milano, 25 August 2017, n. 3756, in *Nuova giur. civ. comm.*, 10 (1, 2018) annotated by F. Saguato, *Azione di classe e risarcimento del danno non patrimoniale “omogeneo”*; in *Giur. it.*, 105 (1, 2018) annotated by A. Dondi, A. Giussani, *Commonality all’italiana e avvio (timido) della nostra azione di classe*; in *Corr. giur.*, 241 (2, 2018) annotated by B. Zuffi, *Arriva la prima maxi condanna di classe, anche se i diritti di molti aderenti risultano prescritti... ma davvero la citazione notificata ex art. 140 bis c. cons. non ha effetto interruttivo istantaneo “collettivo”?*; in *Danno resp.*, 373 (3, 2018) annotated by S. Monti, *Danno da ritardo ferroviario: oltre l’indennizzo per la tutela degli “interessi di classe”*.

⁴⁷⁵ According to App. Milano, 25 August 2017, cit., the serious service disruptions attributable to the transport company were such as to generate, in each adhering class member, “in a uniform and generalised manner, a state of

The subsequent quashing of the appellate judgment by the Suprema Corte di Cassazione⁴⁷⁶ marks, however, a significant moment of retrenchment. The Court reaffirmed - echoing the well-known 2008 case law⁴⁷⁷ - that compensation for non-pecuniary damage must invariably pass through the

anxiety and distress arising from the inconveniences, discomfort, and difficulties encountered, and in some instances even the impossibility of carrying out ordinary travel in order to reach workplaces, places of study, and the like.”

⁴⁷⁶ Cass., 31 May 2019, n. 14886, in *Corr. giur.*, 952 (7, 2020), annotated by V.C. Castaldo, *Il danno non patrimoniale nell'azione di classe: il quantum sul letto di Procuste*, in *Nuova giur. civ. comm.*, 5 (2019) annotated by C. Scognamiglio, *La Cassazione delinea presupposti e limiti di risarcibilità del danno non patrimoniale contrattuale nell'azione di classe*, 993.

Moreover see B. Sassani, *Il difficile cammino dell'azione di classe risarcitoria*, in *Foro it.*, 244 (9, 2022) who describes it as “disconcerting”; F. Valerini, *Il danno non patrimoniale nella class action tra astratta possibilità e rischi operativi*, in *Dir. giust.*, 4 (2019); G. Ponzanelli, *Il danno non patrimoniale dei pendolari all'esame della Corte di Cassazione*, in *Nuova giur. civ. comm.*, 1002 (I, 2019); C. Scognamiglio, *La Cassazione delinea presupposti e limiti di risarcibilità del danno non patrimoniale contrattuale nell'azione di classe*, in *Danno resp.*, 933 (2019); M. Munari, *Azione di classe e risarcimento del danno non patrimoniale*, in *Dir. maritt.*, 794 (2019); A. Pepe, *Class action, risarcibilità del danno non patrimoniale da inadempimento e disservizi nel trasporto ferroviario*, in *Resp. civ. prev.*, 238 (2020); R. Pardolesi, *Inadempimento contrattuale, danno non patrimoniale, azione di classe: note minime su disvalore, disappunto, irrisorietà e altro ancora*, in *Danno resp.*, 95 (2020).

⁴⁷⁷ Cass., Sez. Un., 11 November 2008, n. 26972/3/4/5, in *Resp. civ. prev.*, 38 (2009) annotated by P.G. Monateri, *Il pregiudizio esistenziale come voce del danno non patrimoniale* e di E. Navarretta, *Il valore della persona nei diritti inviolabili e la complessità dei danni non patrimoniali*, in *Riv. dir. civ.*, 97 (II, 2009) annotated by F.D. Busnelli, *Le Sezioni Unite e il danno non patrimoniale*, in *Corr. giur.*, 84 (1, 2001) annotated by M. Franzoni, *Il danno non patrimoniale del diritto vivente*, *ivi*, 5.

To fully understand the decision under consideration, it is necessary to open a systematic excursus on the manner in which Italian civil law has constructed and subsequently transformed the category of non-pecuniary damage.

The starting point lies in the codified framework, which allocates the matter between Article 2043 of the Civil Code and a provision that is apparently typical and restrictive, Article 2059 of the Civil Code. Article 2043, in providing that “any intentional or negligent act that causes unjust damage to another obliges the person who committed the act to compensate the damage,” adopts a deliberately intermediate formula, positioning itself between the French model - structurally open and devoid of intrinsic selective criteria (where damage is not formally qualified and liability flows from an almost unlimited general clause) - and the German model, by contrast analytical and typifying, expressed in § 823(1) BGB, which anchors non-contractual liability to the unlawful infringement of specifically enumerated legal interests (life, body, health, liberty, property, and “other rights,” understood restrictively as absolute rights).

The Italian notion of *unjust damage* thus operates as a balancing device between typicity and atypicality. It allows for a progressive evolution of liability insofar as it enables case law to recognise, over time, new subjective legal situations worthy of protection, without awaiting, for each of them, a specific legislative intervention.

Historically, however, this openness was accompanied, on the plane of non-pecuniary damage, by a corresponding closure. Article 2059, in providing that “non-pecuniary damage shall be compensated only in the cases determined by law,” long functioned as a clause subordinating immaterial harm to criminal wrongdoing. This fostered the traditional interpretation according to which “in the cases determined by law” was essentially identified with Article 185 of the Criminal Code, so that non-pecuniary damage was, in practice, equated with subjective moral damage arising from a criminal offence.

The second phase began with the progressive expansion of the scope of compensable damage under Article 2043 and manifested itself through landmark judicial turning points which, although not directly concerning Article 2059, revealed the expansive potential of the notion of unjust damage. This development runs from the paradigm limited to absolute rights (the “Superga” case - Cass., 4 July 1953, no. 2085, denying compensation for injury to a credit right) to the turning point represented by the “Meroni” case (Cass., 26 January 1971, no. 174), in which the Court recognised the compensability of damage resulting from interference with contractual rights. There, it affirmed that the unjust character of the damage coincides with the infringement of an interest that the legal order considers worthy of protection, even if relative in nature (one may think, today, of the breach of a non-compete agreement; complicity in another’s non-performance; the knowing registration carried out to the detriment of the first purchaser; or damage caused by the poaching of employees).

filter of a serious infringement of a constitutionally protected interest - deemed absent in that case - and that, where such an interest is present, the harm must not amount to mere inconvenience, annoyance, or generic service disruption; in other words, it must not be trivial or *bagatellare*. Moreover, in the collective context, such infringement must be characterised by genuine commonality, rather than by mere similarity among the subjective positions involved.

In effect, the Cassazione “transforms the class action for non-pecuniary damage arising from contractual non-performance into a sort of obstacle course, scarcely capable of being overcome”⁴⁷⁸. The case is particularly significant from two perspectives: first, the compatibility between homogeneity and non-pecuniary damage; second, the identification of the relevant non-pecuniary harm.

As to the first aspect, homogeneity performs a stringent selective function. It is no longer sufficient that the source of the harm be shared. Uniformity in the type of infringement and in the right affected is also required. The difficulty stems from a conceptual overlap between the homogeneity of the right infringed and the uniformity of the harm suffered. As civil-law scholarship has long clarified, compensation for non-pecuniary damage does not require coincidence of the suffering endured, nor perfect overlap of its harmful consequences; rather, it presupposes the ascertainment of a common infringement of a legally relevant interest, accompanied by differentiated individual manifestations. In the collective setting, this distinction requires a clear separation between liability - capable of collective and unitary determination - and that of the concrete emergence of damage, which remains individual but is not, for that reason, incompatible with aggregate treatment.

In other words, the presence of non-pecuniary damage does not dissolve homogeneity. The unifying element lies neither in the intensity of the harm nor in its monetary translation, but in the serial infringement of the same personality right or protected non-pecuniary interest, caused by a uniform course of conduct on the part of the defendant undertaking or entity. It is this common infringement - and not its subjective reverberation - that constitutes the fulcrum of the

This trajectory, subsequently extended to the protection of factual situations such as possession (for example, damage resulting from violent or clandestine dispossession; damage arising from conduct against which one may react through the action for maintenance of possession) and, above all, consolidated with the recognition of compensation for the infringement of legitimate interests (Cass. no. 500/1999), demonstrates how the Italian system developed a structurally progressive vocation, in which civil liability became an instrument for the protection of legal situations progressively recognised as relevant. It is, however, with the third phase that the profile of non-pecuniary damage was radically reconstructed. The Constitutional Court (no. 233/2003) and the “twin” judgments of the Corte di Cassazione (nos. 8827 and 8828/2003) reinterpreted Article 2059 in a constitutionally oriented manner, holding that the expression “cases determined by law” should not be understood as a strict legislative reservation, but rather as also encompassing constitutional provisions recognising and guaranteeing inviolable rights of the person. It followed that non-pecuniary damage is compensable not only where the conduct amounts to a criminal offence, but also where it infringes constitutionally protected fundamental rights. In this development, the relocation of biological damage within the scope of Article 2059 - inasmuch as it constitutes an infringement of the right to health under Article 32 of the Constitution - also assumed particular significance. It was no longer treated solely as damage-event under Article 2043. The protection of the person was thus reorganised along a unitary constitutional axis.

The fourth phase coincides with the intervention of the Joint Sections of 2008 (the San Martino judgments, nos. 26972–26975), which consolidated and systematised the preceding shift. Non-pecuniary damage was characterised as a unitary and comprehensive category, within which the traditional labels (moral, biological, existential) retain merely descriptive value and do not constitute autonomous subcategories susceptible of cumulative awards. At the same time, to prevent an excessive expansion of liability, the Court introduced a selective filter grounded in the seriousness of the injury and the non-triviality of the harm, requiring that the infringement exceed a minimum threshold of tolerability and that the damage not consist merely of minor inconveniences or everyday annoyances (so-called *danni bagatellari*). A further point of systemic relevance, decisive for understanding collective litigation, is the alignment of the regime of non-pecuniary damage in tort and in contract. Where contractual non-performance gives rise, as its immediate and direct consequence, to the infringement of inviolable personal rights, compensation under Article 2059 becomes available also in the contractual sphere, with an evident expansion of compensability in sectors such as transport, tourism, essential services, and mass contracts.

For bibliographical references, see *infra*.

⁴⁷⁸ R. Pardolesi, *Inadempimento contrattuale, danno non patrimoniale, azione di classe: note minime su disvalore, disappunto, irrisorietà e altro ancora*, in *Danno resp.*, 95 (2020).

representative action, making possible a collective decision that establishes the unlawfulness of the conduct and delineates its legal consequences, while deferring to the implementation stage the modulation of compensation⁴⁷⁹.

Naturally, this reorientation of the centre of gravity of homogeneity cannot extend so far as to legitimise a reconstruction of damage requiring full personalisation of each individual situation. Where the ascertainment of harm would necessitate a minute evaluation of the specific conditions of every adherent, the collective action would forfeit its *raison d'être*, dissolving into a sum of micro-disputes⁴⁸⁰ incompatible with unitary adjudication. Where the complaints advanced by the injured parties do not allow for the prospect of a broadly standardised assessment of their prejudicial consequences - both as to the *an* and the *quantum* of damage - the class mechanism must be deemed, for that very reason, impracticable.

What is instead sufficient (and necessary) is that the objective conditions making the infringement legally intelligible be isomorphic. The common element is not to be sought in the subjective measure of distress, but in the typical configuration of the harmful situation (the type of personal data processed in breach of the law; the nature of the travel ticket or contractual relationship affected; the temporal scope of exposure to the unlawful conduct; the standardised modalities of misleading information or omission; the degree and duration of interference with the protected interest). As already noted, it is perfectly possible to subdivide the class into homogeneous subclasses⁴⁸¹, within which differentiated criteria for quantification may be established. In this manner, collective protection may adapt to the peculiarities of various positions without renouncing its aggregative function, confirming that homogeneity is not synonymous with uniformity, but rather a dynamic criterion for rationalising litigation and ensuring the effectiveness of compensatory protection.

In this perspective, the decision rendered in representative proceedings does not seek to capture the entire spectrum of individual repercussions of the harm, but to fix a common core of unlawfulness and legally relevant consequences applicable to all members of the class. Differentiation of subjective positions - within the limits in which it is necessary and feasible - is deferred to a subsequent implementation or distribution phase, without compromising the unity of the determination. Homogeneity, thus understood, becomes a criterion for rationalising conflict: it enables collective adjudication of what is structurally common, while relegating to the margins - rather than the centre of the process - the "personal" variables that merely reflect that common core.

This arrangement reflects the structural compromise inherent in every form of collective redress. That compromise is both its strength and its inherent limitation. The class action drastically reduces the costs of access to justice⁴⁸², concentrates the defence of claims within a single proceeding, and allows serial disputes to be managed collectively and efficiently. Yet it does so at the price of a conscious renunciation of that portion of damage which would emerge only through a fully individualised evidentiary inquiry. In other words, the individual claimant accepts the loss of a potentially higher level of compensation, linked to the full personalisation of the harm, in exchange for a more limited but standardised and realistically attainable remedy.

⁴⁷⁹ C. Consolo, *L'azione di classe, trifasica, infine inserita nel c.p.c.*, in *Riv. dir. proc.*, 714 (2, 2020).

⁴⁸⁰ R. Donzelli, *L'azione di classe dei consumatori*, cit.

⁴⁸¹ C. Scognamiglio, *Risarcimento del danno, restituzioni e rimedi nell'azione di classe*, cit., 512 offers precisely the example of a class action seeking compensation for non-pecuniary damage arising from the marketing of a product harmful to health. The A. argues that "one might envisage a subdivision into subclasses structured around the duration of the administration of the drug, the age of those who had ingested it - where relevant to the harmful consequences of its intake - the presence or absence of pre-existing pathological conditions capable of exacerbating the harmful effects of the drug, and so forth."

Moreover, Trib. Cagliari, 11 April 2018, in *giustiziacivile.com*, annotated by F. De Dominicis, *Ciò che non fa la legge, lo fa il giudice, se capace: azione di classe e previsione delle sottoclassi*.

⁴⁸² G. Ponzanelli, *Risarcimento del danno e class action*, cit., 32; L. D'Acunto, *L'azione di classe dell'art. 140 bis, c. cons.: quale innalzamento della tutela dei consumatori?*, in *Contr. impr.*, 1103 (2011).

The standardisation of compensation does not represent a pathological deviation from the paradigm of civil liability; rather, it is the inevitable outcome of a rational choice to privilege practicability and effectiveness over individual maximisation of the *quantum*. Within these limits, the collective judgment may assume the function of a “normative framework” within which even partially divergent individual harms may be located. In this sense, the claims advanced by adherents are not personalisable, but standardisable⁴⁸³.

Against this background, the analysis may now turn to a second, more strictly substantive issue. This requires engagement with the internal limits in the compensability of non-pecuniary damage, as shaped by the case law of the Sezioni Unite of 2008. It is in relation to that framework (requiring that the interest infringed be of constitutional rank; that the infringement exceed a minimum threshold of tolerability such as to render it objectively serious; and that the harm not amount to trivial damage) - unavoidable point of reference for any discussion of non-pecuniary loss, even in the contractual sphere - that the compatibility of the collective openings outlined above must ultimately be tested.

With regard to the filter of the *contra ius* of constitutional standing, it has been widely observed that, “in the contractual sphere, given the relational nature of the obligatory relationship (the creditor’s interest being assessed in light of the debtor’s performance), the only limits are those laid down in Articles 1174 and 1225 of the Civil Code: the former concerning the pecuniary nature of the debtor’s performance, which may correspond to a non-pecuniary interest of the creditor; the latter relating to the foreseeability of the compensable damage”⁴⁸⁴.

As for the selective criteria of serious infringement and non-*bagatellare* damage⁴⁸⁵, one cannot but agree as to the inappropriateness of a system that would require the seriousness threshold to operate for individual actions but not for collective ones. Such a solution would entail an intolerable duplication of compensatory standards, incompatible with the conceptual unity of civil liability, and would introduce an unjustified differentiation at the level of the substantive prerequisites of compensation. At the same time, one must avoid the fundamental misconception that the modest amount of compensation obtainable is necessarily indicative of the absence of a serious infringement. The limited economic attractiveness of an individual action does not invariably reflect the slightness of the harm; more often, it depends on the difficulty of translating into monetary terms a prejudice that, on a substantive level, significantly affects a legally protected position.

⁴⁸³ A. Giussani, *Diritti omogenei e omogeneizzati nell'azione di classe*, in *Riv. dir. proc.*, 356 (2020); V. C. Castaldo, *Il danno non patrimoniale nell'azione di classe: il quantum sul letto di Procuste*, cit., 954 in which it is convincingly explained that “the quantum of damages is determined through a mechanism of depersonalisation and homogenisation - a *species* within the broader *genus* of ‘rules for the simplification of the factual scenario’ - inasmuch as what is sought is compensation for a form of non-pecuniary damage that is not individualised, but rather, according to the *id quod plerumque accidit*, is grounded on circumstances common to all members of the class, conceived as standard individuals.”

⁴⁸⁴ S. Simone, *Aspetti culturali e applicativi della class action*, in V. Barsotti (a cura di), *Azione di classe*, cit., 117.

See, *ex pluribus*, C. Amato, *Nozione unitaria di danno non patrimoniale e autonomia negoziale*, in Aa.Vv., *Il danno non patrimoniale*, Milano, 24 (2009); C. Scognamiglio, *Il danno non patrimoniale contrattuale*, in S. Mazzamuto (ed.), *Il contratto e le tutele - Prospettive di diritto privato europeo*, Torino, 477 (2002); E. Navarretta, *Il danno non patrimoniale contrattuale*, in *Contr.*, 736 (2010); M. Franzoni, *Il danno non patrimoniale del diritto vivente*, in *Corr. giur.*, 5 (2009); G. Conte, *Il danno non patrimoniale contrattuale*, in *Contr.*, 707 (2010); S. Delle Monache, *Il danno non patrimoniale contrattuale*, *ivi*, 720 (2010).

On this point, G. Ponzanelli, *Il danno non patrimoniale dei pendolari all'esame della Corte di Cassazione*, cit., maintains that “precisely in light of its specificity, rooted in the value of the person, it does not appear persuasive to introduce a regime of complete liberalisation by extending the remedy of non-pecuniary damages to every form of contractual non-performance suffered by the creditor; this also because the parties, within their contractual arrangement, may always provide for the compensability of non-pecuniary damage even beyond the cases expressly contemplated by law.”

⁴⁸⁵ For further discussion, see M. Rossetti, *Valutazione equitativa del danno*, *Sub art. 1226 c.c.*, in P. Schlesinger, F.D. Busnelli, G. Ponzanelli, *Commentario al Codice Civile*, Milano, (2024); D. Spera, *Responsabilità civile e danno alla persona*, Milano, (2024); P.G. Monateri, *La responsabilità civile*, in R. Sacco (ed.) *Trattato di Diritto Civile*, Torino, 305 (1998); F. Mezzanotte, *La valutazione equitativa del danno*, Torino, (2022).

To clarify the point, attentive scholarship⁴⁸⁶ has offered the example of a serious railway disruption attributable to the carrier, resulting in the prolonged immobilisation of a train in an isolated area, without adequate assistance and under highly uncomfortable environmental conditions. In such a case, it would be difficult to deny the existence of a serious infringement of interests protected by the contract of carriage, as the Corte di Cassazione⁴⁸⁷ itself has more recently affirmed in relation to the troubled train journey of commuters on the Rome–Cassino line, which lasted almost twenty-four hours due to a service malfunction. Yet it is equally evident that the compensation reasonably awardable to each passenger would scarcely exceed a few hundred euros: a sum that renders the individual action economically irrational, but which falls squarely within the functional perimeter of the class action.

It is precisely within this space that the criterion of seriousness retains, even in the collective dimension, an essential selective function. It allows one to distinguish - according to a standard informed by fairness - between those prejudices which, however unpleasant, must remain with the person who suffers them as a physiological cost of life in society⁴⁸⁸, and those which exceed the threshold of tolerability and justify activation of the compensatory remedy. The principle of good faith and fairness assumes salience in the area of contractual non-pecuniary loss, where it operates as a relational criterion typical of liability for non-performance, guiding the assessment of the infringement in light of the legitimate expectations and concrete interests involved in the obligatory relationship.

Moreover, the selective criterion of serious infringement should operate with respect to the *an* of the damage, whereas the requirement that the harm not be futile should function exclusively as a parameter for quantifying the detriment, to be applied at the logically subsequent stage of assessing its extent. Were one to anticipate the *non bagatellare* parameter at the stage of selecting the compensable harm, there would be a risk of excluding from the realm of compensation even infringements of fundamental personal rights of limited economic magnitude.

Nor should it be forgotten that the nomophylactic barrier erected in 2008 was intended to exclude claims such as a broken heel, a brief wait, an unsatisfactory haircut, or the annoyance caused by receiving advertising material in one's mailbox - claims that lower courts had increasingly recognised under the label of *danno esistenziale*⁴⁸⁹, treated autonomously and distinctly from biological (*danno biologico*) and moral damage (*danno morale*). The interpretative solution adopted by the Sezioni Unite, through the identification of the dual filter, was designed to curb those tendencies in first-instance case law - particularly in equity-based adjudication - which had begun systematically to award compensation for trivial affronts and to "interrupt a process that seemed destined to transform civil liability into a different system, almost akin to social security"⁴⁹⁰. In effect, what was introduced was "a sort of deductible not entirely persuasive, especially in light of the constitutional relevance of the interests infringed. A deductible that raises more than one legitimate suspicion also with regard to the principle of equality, which would inevitably be violated if compensation for non-pecuniary damage were precluded in the presence of trivial harm, while no such limitation would apply to pecuniary damage, which is always fully compensable even where the prejudice is minimal"⁴⁹¹.

⁴⁸⁶ C. Scognamiglio, *La Cassazione delinea presupposti e limiti di risarcibilità del danno non patrimoniale contrattuale nell'azione di classe*, in *Nuova giur. civ. comm.*, 993 (II, 2019).

⁴⁸⁷ Cass., 9 October 2023, n. 28244, in Dejure database.

⁴⁸⁸ It is precisely this aspect emphasised by E. Alonzo, *Uno, nessuno, centomila*, cit., 459.

⁴⁸⁹ M. Rossetti, *Il danno alla salute*, Padova, (2017); G. Ponzanelli, *Il nuovo danno non patrimoniale*, Padova, (2004).

⁴⁹⁰ G. Ponzanelli, *Risarcimento del danno e class action*, cit., 32-33.

⁴⁹¹ G. Ponzanelli, *Disastri ambientali e danno da metus dei residenti*, in A. Federico, V. Bilardo (eds.), *Ambiente, biodiversità, ecosistemi*, Pisa, 123 (2025). See E. Navarretta, D. Poletti, *Il danno non patrimoniale e la responsabilità contrattuale*, in E. Navarretta (ed.), *Il danno non patrimoniale. Principi, regole e tabelle per la liquidazione*, Milano, 51, 53 (2010).

Moreover, R. Pardolesi, *Inadempimento contrattuale, danno non patrimoniale, azione di classe: note minime su disvalore, disappunto, irrisorietà e altro ancora*, in *Danno resp.*, 95 (2020) observes: "It will suffice, at the outset, to reiterate that between the denial of protection for claims concerning trivial non-pecuniary damage and the aggregative spirit of the class action

The theoretical difficulty does not lie “only” in determining whether the filters of seriousness of the infringement and non-futility of the harm should also apply to collective or representative actions. Substantial continuity between individual and aggregate protection remains an indispensable condition of systemic coherence. Rather, it lies in asking whether, more than eighteen years after its crystallisation in case law, that filter still retains a generalising and undifferentiated vocation, or whether it is progressively changing in status - degrading from a structural principle of the system into a variable-geometry selective technique, conditioned by the specificities of individual substantive sectors and, increasingly, by the demands of effective protection and the conforming constraints deriving from European Union law.

IV.1 Erosion and Expansion: The Internal and External Dynamics of Contemporary Civil Liability

Nearly two decades after its articulation, the framework outlined in the *San Martino* judgments no longer appears immune from internal tensions. It is now marked by an ongoing process of interpretative readjustment that calls into question some of its foundational premises.

What has been described as a season of “compensatory hypertrophy”, and even an “imperialism of civil liability”, can be traced to amendments to the Insurance Code.⁴⁹² As is well known, Article 139 of the Code, in its original version, made compensation for minor permanent injuries (*micropermanenti*) contingent upon the harm being “susceptible to objective clinical instrumental ascertainment,” following a medico-legal finding visually or instrumentally confirming the injury. From 2016⁴⁹³ onwards, however, the case law of the Corte di Cassazione departed from this approach. The Court held that instrumental verification was not indispensable where the injury was established in accordance with the ordinary *leges artis* of personal injury assessment, including through a reasoned use of presumptions. Nor did the revised wording of Article 139, introduced by Law No. 124/2017, trigger a *revirement*: the Corte di Cassazione has consistently reiterated that the instrumental requirement cannot be elevated to a condition for the very existence of minor biological damage.

In parallel, the evolution of Article 138 marked a decisive shift from the original label of “biological damage for non-minor injuries” to the broader notion of “non-pecuniary damage for non-minor injuries,” expressly encompassing not only biological damage *stricto sensu*, but also its moral and dynamic-relational components⁴⁹⁴. Presidential Decree No. 12 of 13 January 2025, by introducing the *Tabelle Uniche Nazionali*⁴⁹⁵, consolidated this approach. It defines biological damage as an impairment of psycho-physical integrity “susceptible to medico-legal assessment” and negatively

there emerges a genuine aporia. There is no doubt that the collective action, as a summation of ‘discrete’ subjective positions arising from the breach of the same original obligation, offers an opportunity to enhance the efficiency of the judicial system through economies of scale capable of substantially reducing administrative costs; yet it is equally clear that the proprium of this coagulation of claims induced by the massification of business activity lies precisely in its ability to prevent individuals, in cases of modest damage, from refraining from bringing suit, with the consequence that the wrongdoer would otherwise escape (compensatory) sanction. In the language of the law-and-economics analyst, this observation becomes a bulwark against the practical non-prosecution of ‘negative expected value claims’, that is, claims for which ‘the anticipated value of recovery is lower than the cost of litigation for the plaintiff.’”

⁴⁹² G. Ponzanelli, *L'imperialismo della responsabilità civile*, in *Danno resp.*, 221 (2016); Id., *La Terza Sezione della Cassazione e la responsabilità civile*, *ivi*, 5 (2024); M. Franzoni, *La responsabilità civile una lunga storia ancora da scrivere*, *ivi*, 1103 (2021).

⁴⁹³ The reference is to Cass., 26 September 2016, n. 18773, in *Foro it.*, 3863 (I, 2016); to the same effect, *ex pluribus*, Cass., 26 May 2020, n. 9865, in *www.cassazione.net*; Cass., 5 October 2018, n. 24564, in *Danno resp.*, 59 (2019); Cass. 4 July 2018, n. 17444, in *pluris-cedam database*; Cass., 11 September 2018, n. 22066, *ivi*. In the literature, see F. Poiatti, *La tabella legale per le lesioni micropermanenti tra uniformità e flessibilità*, in *Danno resp.*, 497 (2020).

⁴⁹⁴ Letter (e) of the provision - already in its 2017 wording and subsequently amended by Decree-Law No. 228/2021 - provides that “for the purpose of taking into account the moral damage component resulting from injury to physical integrity, the portion corresponding to biological damage shall be increased by a percentage on a progressive per-point basis, identifying the percentage increment of such values for the overall personalisation of the award.”

⁴⁹⁵ L. Esposito, *La Tabella Unica Nazionale e il problema della retroattività e della generalità*, in *Danno resp.*, 41 (2026).

affecting daily activities and dynamic-relational aspects, irrespective of any impact on earning capacity, thereby embracing - at least with regard to serious injuries - a logic of full compensation. On the case-law front, this normative restructuring provided the foundation for the “new statute of damage” sketched by the 2018 orders⁴⁹⁶ (notably No. 901 and No. 7513). In those rulings, the Corte di Cassazione drew on the amendments to Article 138 of the Insurance Code and acknowledged the legislative distinction between the dynamic-relational and moral components of non-pecuniary damage. It therefore concluded that the “unitary” model of 2008 could no longer operate in identical terms. Accordingly, it affirmed that, in cases of personal injury, it does not constitute duplication to award, alongside compensation for biological damage, an additional sum for subjective moral damage, even where such prejudice lacks a strictly medico-legal basis (such as anguish, shame, loss of self-esteem, fear, or despair). Where adequately pleaded and proven, these components require autonomous evaluation and distinct quantification, as they cannot be deemed automatically absorbed into the percentage of permanent disability. At the same time, the Court insisted on avoiding automatic multipliers, requiring specific pleading and proof of the moral component, in order to prevent a compensatory drift inconsistent with the principle of full reparation and to avert phenomena of overcompensation.

The first (and perhaps most significant) indicator of a transformation in the perimeter of compensable non-pecuniary damage lies in the trajectory of the Third Civil Section, which has reshaped, through interpretation, the morphology of non-pecuniary damage, giving rise to what has been described as a form of “inverse *nomofilachia*”⁴⁹⁷. Equally significant, because they directly affect the selective filters erected in 2008, are certain subsequent rulings of the same Section in which one discerns a relaxation - if not a torsion - of the idea that non-pecuniary damage must always presuppose the infringement of a constitutionally grounded interest and a “serious” and “grave” prejudice.

In a line of decisions handed down from 2022 onwards (concerning, for example, nuisance emissions⁴⁹⁸, prolonged service disruptions⁴⁹⁹, the impossibility of attending a parent’s funeral due to carrier default⁵⁰⁰, or so-called “ruined holiday” claims⁵⁰¹), the Corte di Cassazione has recognised non-pecuniary compensation for circumscribed inconveniences.

In doing so, the Court effectively opened the door to so-called “small claims” – compensatory claims linked to limited harms nonetheless deemed worthy of recognition. This represents a clear departure from the approach adopted in the 2008 *San Martino* judgments, under which such claims would likely have been confined to the grey area of non-compensable harm, in order to curb the

⁴⁹⁶ Cass., 17 January 2018, n. 901 e Cass., 27 March 2018, n. 7513, in *Resp. civ. prev.*, 863 (2018) annotated by P. Ziviz, *Di che cosa parliamo quando parliamo di danno non patrimoniale*; moreover see Cass., 13 April 2018, n. 9196, in *Foro it.*, 2038 (1, 6, 2018); Cass., 31 May 2018, n. 13770, in *Danno resp.*, 453 (2018), which further broadens the spectrum of compensable harm, and, finally, the *restatement* effected by the ten decisions of the Sezioni Unite San Martino 2019 (Cass., 11 November 2019, from n. 28985 to n. 28994) in R. Pardolesi (ed.), *Responsabilità sanitaria in Cassazione: il nuovo corso tra razionalizzazione e consolidamento*, in *Foro it.*, speciale, 10 (1, 2020) in which G. Ponzanelli, *La Cassazione conferma e completa il nuovo statuto del danno alla persona*, and F. Di Ciommo, *Natura funzionalmente unitaria e onnicomprensiva del danno non patrimoniale e distinzione strutturale tra danno morale e danno dinamico-relazionale. La Cassazione promuove le “tabelle” romane e boccia quelle milanesi?*; in *Foro it.*, 923 (I, 2018) annotated by G. Ponzanelli, *Giudici e legislatore liquidano dopo dieci anni le decisioni di San Martino*.

⁴⁹⁷ A. Palmieri, R. Pardolesi, *Responsabilità sanitaria e nomofilachia inversa*, in *Foro it.*, 1603 (I, 2019); about “nomofilachia decentrata” G. Ponzanelli, *La Terza Sezione della Cassazione e la responsabilità civile*, in *Danno resp.*, 5 (2024).

⁴⁹⁸ Cass., 13 April 2022, n. 11930, in *Foro it.*, 2468 (1, 7-8, 2022); Cass., 21 January 2024, n. 2203, in OneLegale database.

⁴⁹⁹ Cass., 9 October 2023, n. 28244, in *Foro it.*, 258 (1, 1, 2024).

⁵⁰⁰ Cass., 29 November 2023, n. 33276, in *Nuova giur. civ. comm.*, 501 (3, 2024) annotated by A. Negro, *L’art. 2059 cod. civ. sta invecchiando*.

⁵⁰¹ *Ex pluribus*, Cass., 20 February 2023, n. 5271, in *Danno resp.*, 198 (2024) annotated by C. De Luca, *La risarcibilità del c.d. “danno da vacanza rovinata”*.

expansion of civil liability. The result is a further retreat of the selective filters, insofar as a subjectively alleged and proven suffering may now be compensable even absent clinical verification.

Two further factors must be considered alongside this internal development.

The first lies in the recognition - through the transposition of EU directives - of ruined-holiday damages, which, as is well known, consist of a form of non-pecuniary loss not necessarily “serious” in nature, relating to mere psychological discomfort or disappointment in relation to leisure expectations. Its legislative typification has led national courts to acknowledge compensation - often through presumptions linked to contractual non-performance - for a distinct head of non-pecuniary loss, not contingent upon proof of biological injury or moral damage, but grounded instead in the frustration of the recreational, leisure-oriented, and experiential purpose of the package travel contract⁵⁰².

The second factor is Article 82 of Regulation (EU) 2016/679 (GDPR), which governs the right to compensation for infringements of the rules on the processing of personal data⁵⁰³. In a series of recent rulings⁵⁰⁴, the Court of Justice of the European Union (CJEU) has emphasised that the compensatory remedy provided for in that provision - centred on accountability, prevention, and precaution, and structured so that both pecuniary and non-pecuniary liability flows from breaches of rules of conduct - is not primarily designed to protect the object of the “right to the protection of personal data” as such, but rather to safeguard the data subject’s procedural guarantees.

While the Court has clarified that an infringement of the GDPR (*recte*: of its procedural rules) does not automatically entail compensation (thus rejecting any notion of damage *in re ipsa*⁵⁰⁵) it also affirmed that the mere subjective “fear” of improper use of personal data (provided that it is duly alleged and proved) may constitute compensable non-pecuniary damage. According to the CJEU’s interpretation, even the mere breach of the Regulation, absent proof of actual dissemination of the data, may give rise to damage⁵⁰⁶, thereby excluding the need for any *de minimis* threshold⁵⁰⁷ of

⁵⁰² CJEU, 12 March 2002, C-168/00, *Simon Leitner v. TUI Deutschland GmbH & Co. KG*.

⁵⁰³ R. Caterina, S. Thobani, *GDPR tra novità e discontinuità - Il diritto al risarcimento dei danni*, in *Giur. it.*, 2777 (2019); U. Salanitro, *Illecito trattamento dei dati personali e risarcimento del danno*, in *Riv. dir. civ.*, 426 (2023).

⁵⁰⁴ CJEU, 4 May 2023, C-300/21, *Österreichische Post*, in *Foro it.*, 268 (2023) annotated by A. Palmieri, R. Pardolesi, *Mai futile il danno non patrimoniale da violazione della privacy (purché lo si provi!)*; in *Foro it.*, 286 (2023) annotated by S. Pagliantini, *Un altro palcoscenico della guerra tra le Corti: il danno (immaterialmente) bagatellare dell’art. 82 GDPR*. Moreover see, F. Zecchin, *Molteplicità delle fonti e tutela dei diritti. Il danno non patrimoniale nella lesione della proprietà e dei dati personali*, in *Eur. dir. priv.*, 517 (2022); G. Navone, *Ieri, oggi e domani della responsabilità civile da illecito trattamento dei dati personali*, in *Nuove leggi civ.*, 132 (2022); E. Palmerini, *Responsabilità da trattamento illecito di dati personali*, in E. Navarretta (ed.), *Codice della responsabilità civile*, Milano, 2470 (2021); C. Camardi, *Note critiche in tema di danno da illecito trattamento dei dati personali*, in *Jus civile*, 789 (2020); F. Piraino, *Il regolamento generale sulla protezione dei dati personali e i diritti dell’interessato*, in *Nuove leggi civ.*, 369 (2017) e G. Spoto, *Risarcimento e sanzione*, in *Eur. dir. priv.*, 489 (2018).

The decision falls within a consolidated line of authority: C. Giust. UE, 22 June 2021, C-439/19, *Latvijas Republikas Saeima*; CJEU, 10 February 2022, C-595/20, *Sharewood Switzerland*.

⁵⁰⁵ U. Salanitro, *Illecito trattamento dei dati personali e risarcimento del danno nel prisma della Corte di Giustizia*, in *Riv. dir. civ.*, 452 (2023), nt. 81, observes that proceedings concerning requests for a preliminary ruling predominantly address precisely the questions of the admissibility of damage *in re ipsa* and of the relevance of *de minimis* harm, as well as the issue of whether the criteria laid down in Article 83 GDPR in relation to administrative fines may be relied upon, for the purpose of quantifying non-material damage (according to the terminology of the Regulation).

⁵⁰⁶ *Contra*, Cass., 8 February 2017, n. 3311, in *Giur. it.*, 1537 (2017) annotated by S. Thobani, *Invio di comunicazioni indesiderate: il risarcimento del danno non patrimoniale*, according to which the mere unlawful use of an e-mail address for commercial communications is not sufficient; rather, the e-mails must, by their quantity or modalities, have caused a serious disturbance; Cass., 15 July 2014, n. 16133, in *Danno resp.*, 339 (2015) annotated by V. Ceccarelli, *La soglia di risarcibilità del danno non patrimoniale da illecito trattamento dei dati personali* holding that the online publication of personal data accessible to anyone, if not offensive and not concerning the intimate sphere, is not in itself capable of justifying compensation in the absence of proof of serious distress.

⁵⁰⁷ CJEU, 25 January 2024, C-687/21, *BL v. MediaMarktSaturn Hagen-Iserlohn GmbH*; CJEU, 11 April 2024, C-741/21, *GP v. Juris GmbH*; CJEU, 20 June 2024, cause riunite C-182/22 e C-189/22, *Scalable Capital*; CJEU, 14 December 2023, C-456/22, *Gemeinde Ummendorf*; CJEU, 14 December 2023, C-340/21, *VB v. Natsionalna agentsia za pribodite*.

seriousness. In other words, making compensation contingent upon a minimum gravity requirement would be incompatible with EU law, as it would conflict with the broad conception of non-material damage under Article 82 GDPR.

Although the Court does not endorse automatic compensation, it accepts that harm such as fear, anxiety, or concern over potential misuse of personal data may amount to compensable damage (provided it is proven). Non-material damage is thus conceived not as the exceptional outcome of a grave infringement, but as a typical consequence of a regulatory violation.

Admittedly, in a more recent decision the CJEU⁵⁰⁸ stressed that claimants must rigorously prove the damage alleged, suggesting that recourse to presumptions should be excluded, lest compensation without actual harm proliferate: “It has accordingly been observed that such a stringent evidentiary standard may neutralise the potentially disruptive effects of rejecting a *de minimis* threshold, since the boundary between mere annoyance and compensable harm often emerges precisely through the intrinsic and ontological difficulties involved in proving damage”⁵⁰⁹. Yet these two dimensions remain conceptually distinct: the *de minimis* filter operates as a substantive limitation on compensable harm, whereas the exclusion of presumptions concerns the evidentiary plane in relation to a category of damage that is, in principle, fully compensable, even where minimal.

From the perspective of data protection law, it has been argued that national courts are left with no real alternative⁵¹⁰ but to follow the guidance of the Luxembourg Court. That guidance has been described as marking “the beginning of a new season in the European common law of civil liability”⁵¹¹, albeit with the awareness that it concerns not civil liability as a whole, but the specific category of damage at issue - much as has occurred in the field of antitrust law⁵¹² - in accordance with the principle of autonomous interpretation of EU law.

It therefore becomes necessary to question the resilience of the traditional restrictive Italian model⁵¹³, particularly in light of scholarly arguments that excluding compensation for non-serious harm amounts to introducing an arbitrary threshold; one that finds no parallel, for instance, in the law of pecuniary loss or in sectors where even minor injuries are compensated (such as compulsory motor insurance or healthcare liability). Moreover, applying a seriousness threshold as a filter for non-pecuniary damage in collective proceedings risks undermining the very purpose of collective redress.

In this respect, it has been observed that the homogeneity of non-pecuniary damage - a structural requirement for class actions - sits uneasily with the insistence on the seriousness of the harm, which by its very nature tends to personalise the experience of damage. The more serious the harm, the more individual it becomes; the more homogeneous it is, the greater the risk that it be regarded as trivial. The only plausible way out of this aporia appears to lie in a flexibilisation of the concept of seriousness; one that does not exclude *a priori* the compensability of modest but genuine injuries,

⁵⁰⁸ CJEU, 20 June 2024, C-590/22, *T e BT. c. PS GbR, VG, MB, DH, WB e GS*.

⁵⁰⁹ R. Baldini, *Responsabilità da trattamento illecito dei dati personali: verso uno statuto unionale*, in *Danno resp.* 49 (2025).

⁵¹⁰ Unless one were to invoke Article 2 of the Italian Constitution as a non-derogable core principle of constitutional identity (so-called constitutional counter-limits, as articulated by the Constitutional Court in judgment No. 238/2014).

⁵¹¹ G. Navone, Ieri, oggi e domani, cit., 132. See, C. Camardi, *Illecito trattamento dei dati e danno non patrimoniale. Verso una dogmatica europea*, in *Nuova giur. civ. comm.*, 1136 (2023); C. Scognamiglio, *Danno e risarcimento nel sistema gdpr: un primo nucleo di disciplina eurolunitaria della responsabilità civile?*, ivi, 1150 (2023).

⁵¹² E. Camilleri, voce *Responsabilità civile e illecito antitrust*, in C. Scognamiglio (ed.), *Enciclopedia del diritto. La responsabilità civile*, Milano, 920 (2024).

⁵¹³ M. Paradiso, *Il risarcimento del danno. Verso un sistema di responsabilità civile europea?*, in *Danno resp.*, 303 (2025); C. Scognamiglio, *I nuovi percorsi del risarcimento del danno, tra diritto nazionale e disciplina eurolunitaria della responsabilità civile*, in *Lavoro diritti Europa*, 1 (2024); Ar. Fusaro, *Quale modello di responsabilità per la robotica avanzata? Riflessioni a margine del percorso europeo*, in *Nuova giur. civ. comm.*, 1344 (2020).

and that instead entrusts to the phase of quantification and to concrete proof the task of filtering out harm that truly warrants compensation.

It is, however, important to emphasise that, within collective proceedings, the notion of damage, whether pecuniary or non-pecuniary, is not defined differently from the general concept outlined in the Civil Code. This requires that collective and representative compensatory actions be situated within the broader framework of civil liability and that due regard be paid to the rules governing the pleading and proof of the facts giving rise to compensable harm.

In essence, the class action does not presuppose an “alternative” law of damages; rather, it calls for a coherent and functional use of procedural tools capable of rendering the general principles of civil liability effective - without distorting them - where the individual action proves structurally inadequate. As perceptive scholarship has observed, the restrictive outcomes reached in the case law stem from “the convergence of two extreme poles - hardly by coincidence, non-pecuniary damage and the class action - which barely conceal underlying knots of vipers, to borrow the title of François Mauriac’s sombre novel. Their convergence in that litigation could scarcely have produced results other than those liable to disappoint expectations and unsettle the interpreter. Faced with this sedimentation of impulses - whose origins are long-standing, even if not immediately apparent in their implications and practical consequences - it is indeed worth reflecting. In short, looking back to where we come from helps us understand why certain outcomes are foreclosed to us, beyond the reasons specifically advanced to justify the result”⁵¹⁴.

IV.2 (continued): how much damage?

The risk to be avoided is well known: collective quantification, lacking a fully individualised evidentiary inquiry, cannot become a covert punitive device in a system of civil liability grounded in compensation. To avert such a drift, recognition of non-pecuniary damage must be subject to particularly exacting scrutiny, both as to the actual existence of the harm alleged and as to its causal link with the unlawful conduct relied upon in the proceedings.

Within this framework, the collective dimension of the action does not weaken procedural safeguards; on the contrary, it may operate as a factor of evidentiary facilitation. The establishment of causation may benefit from evidentiary tools rarely available in individual litigation: statistical evidence, aggregated data, and analyses based on large samples of the affected population may allow a more reliable assessment of the impact of the wrongful conduct and of its capacity to produce harmful effects. In this sense, collective proceedings do not circumvent the requirement of causation; rather, they recalibrate its evidentiary modalities to match the serial scale of the harmful phenomenon.

It remains settled - and on this point the case law of the *Corte di Cassazione* is consistent and uncompromising - that the Italian legal system leaves no room for automatic compensation: both pecuniary and non-pecuniary damage must be pleaded and proved in their existence.

The well-known *Dieselgate* litigation⁵¹⁵ is emblematic in this regard. It “constitutes a valuable laboratory for reflecting on the structural weaknesses of the Italian class action, particularly with respect to the quantification of pecuniary and non-pecuniary damage in the context of serial disputes”⁵¹⁶.

⁵¹⁴ R. Pardolesi, *Inadempimento contrattuale*, cit., 95.

⁵¹⁵ F. Bertelli, *Profili civilistici del ‘Dieselgate’*. *Questioni risolte e tensioni irrisolte tra mercato e sostenibilità*, Napoli, (2021); F. Bertelli, M.B. Fontana, P. Kindler, D. Paulus (eds.), *La “Dieselgate saga” in Germania e in Italia*, Bologna, (2025); P. Santoro, *Dieselgate italiano: (e)mmission impossible. Il Tribunale di Venezia accoglie la class action e, in sintonia con i Tribunali di Avellino e Genova, riconosce il risarcimento dei danni da illecito antitrust e da pratiche commerciali scorrette*, in *Danno resp.*, 239 (2022).

⁵¹⁶ E. Tuccari, *Riflessioni nazionali della recente giurisprudenza della Corte di Giustizia sul Dieselgate*, in F. Bertelli, M.B. Fontana, P. Kindler, D. Paulus (eds.), *La “Dieselgate saga”*, cit., 105.

The *Venice First Instance Court*⁵¹⁷ identified the compensable damage in the impairment of the consumer's contractual freedom of self-determination, compromised by inadequate information and unfair commercial practices, in breach of the principles of good faith, fairness, and loyalty enshrined in Article 2 of the Consumer Code. Having established the defendants' non-contractual liability⁵¹⁸, the court of first instance proceeded to a uniform quantification of pecuniary damage for all class members, locating the harm in the payment of a price distorted in comparison with the vehicle's "correct" value absent manipulation⁵¹⁹. This was equitably assessed at €3,000 per claimant, based on a standardised criterion corresponding to 15% of the average purchase price of the vehicles concerned.

Following the same compensatory logic, the court also recognised non-pecuniary damage, specifically in the form of non-pecuniary harm deriving from a criminal offence (*frode in commercio* under Article 515 of the Criminal Code). It quantified this component at 10% of the pecuniary damage awarded, through a form of "analogical" application of the criteria laid down in the Venice Court's tables for moral damage, thus granting €300 to each consumer.

The *Venice Court of Appeal*⁵²⁰, however, partially overturned that decision. First, it upheld Volkswagen's appeal with respect to pecuniary damage, finding a lack of proof of consequential loss. According to the appellate court, the first-instance judgment rested on a merely hypothetical difference between the price paid and a notional value of the vehicle, without demonstrating an actual economic loss concretely suffered by each individual consumer. It therefore confined the reference to Article 1226 of the Civil Code - applicable *ratione temporis* under the former Article 140-bis of the Consumer Code - to the determination of the *quantum* alone, and not as a dispensation from pleading and proving the existence of the damage, in accordance with the ordinary rules on the burden of proof.

By contrast, as regards non-pecuniary damage, the Court of Appeal confirmed its compensability, albeit correcting the method of quantification adopted at first instance. The automatic parametrisation of non-pecuniary damage as a percentage of pecuniary damage was deemed logically flawed, since this conflates ontologically distinct heads of loss. Nonetheless, the award of €300 per consumer was upheld, considered perhaps not fully compensatory, yet not subject to an increase in the absence of a cross-appeal.

In July 2024, the matter was ultimately settled through a negotiated agreement. In exchange for the withdrawal of the appeal to the *Corte di Cassazione*, Volkswagen agreed to pay class members a sum ranging between €550 and €1,100, depending on their individual circumstances.

Taken as a whole, the appellate ruling once again highlighted the structural limits of the Italian class action, bringing to the fore the unresolved tension between procedural mechanisms and the substantive law of damages⁵²¹.

⁵¹⁷ Trib. Venezia, 7 July 2021, in *Nuova giur. civ. comm.*, 1335 (I, 2021) annotated by F. Ruggiero, Class action, *pratiche commerciali scorrette e danni non patrimoniali: la recente pronuncia del Tribunale di Venezia*, in *Danno resp.*, 243 (2022) annotated by P. Santoro, *Dieselgate italiano: (e)mission impossible*.

⁵¹⁸ In this regard, C. Scognamiglio, *Il risarcimento del danno e la sua prova nell'azione di classe (a proposito del c.d. Dieselgate)*, in *Nuova giur. civ. comm.*, 169 (I, 2024).

⁵¹⁹ Considering the acknowledged depreciation in the value of vehicles equipped with non-compliant emission control devices, as further corroborated by the sums that VW AG had recognised by way of settlement in other jurisdictions.

⁵²⁰ App. Venezia, 16 November 2024, n. 2260, in *Nuova giur. civ. comm.*, 169 (2024) annotated by C. Scognamiglio, *Il risarcimento del danno e la sua prova nell'azione di classe (a proposito del c.d. Dieselgate)*; B. De Santis, *La scomparsa del danno patrimoniale nel Dieselgate. La Corte d'Appello di Venezia e l'esito infelice della class action italiana*, *ibid.*, 11; see, moreover, A. Palmieri, R. Pardolesi, *Adagi veneziani (ed emissioni truccate): come ridimensionare il Dieselgate all'italiana*, in *Foro it.*, 286 (I, 2024); B. De Santis, A. Sassani, *Il lungo e mesto addio all'azione di classe consumeristica, con un bagliore all'orizzonte*, *ibid.*, 290. On the outcome of the case, see also B. De Santis, A. Sassani, *Cosa resterà dell'accordo che chiude il c.d. Dieselgate?*, in *Foro it.*, 295 (VII, 2024), in which it is emphasised that the notion of actual harm is, in reality, a concept that is difficult to reconcile with the logic of collective redress.; A. Palmieri, R. Pardolesi, *Le incerte virtù del "Dieselgate settlement". E un esame di coscienza della responsabilità civile*, in *Foro it.*, 302 (2024); B. De Santis, *Una transazione chiude la vicenda Dieselgate: riflessioni sull'epilogo della più grande class action italiana*, in *www.judicium.it*, (2024).

⁵²¹ B. De Santis, *La scomparsa del danno patrimoniale nel Dieselgate*, *cit.*, 11.

It should first be noted that the Italian *Dieselgate* litigation displays a complex layering of legal planes, the articulation of which has direct repercussions on the issue of non-pecuniary damage. The grounds of the claims, in fact, developed along three intertwined axes: unfair commercial practices; the infringement of subjective legal positions referable to the right of property (control over the asset, its economic value, and freedom of contractual self-determination); and the criminal offence of fraud in trade under Article 515 of the Criminal Code.

With regard to the first profile, Volkswagen's conduct was classified as an unfair and misleading commercial practice within the meaning of Articles 20, 21, and 22 of the Consumer Code, with specific reference to the provision of false or misleading information concerning the essential characteristics of the product (emission levels and type-approval classification)⁵²².

This first level intersects with the second: the Court resorted to the instruments of non-contractual liability to sanction the violation "of contractual freedom, understood as protection of the integrity of the contracting party's assets, where the latter has not freely determined himself in the conduct of his transactional activity due to the fraudulent or negligent conduct of a third party." The harm, in this perspective, concerns not the asset as such, but the manner in which the consumer exercised his freedom to allocate economic resources, conceived as a projection of the right of property. The right of property is thus read also in its patrimonial dimension and employed as the basis for quantifying pecuniary damage (assessed by the court of first instance in Venice at a fixed percentage of the purchase price).

Finally, the Italian *Dieselgate* litigation includes, as a third foundational axis of liability, the criminal dimension of the conduct, classified as fraud in the exercise of trade under Article 515 of the Criminal Code, which is triggered when a movable good delivered to the purchaser differs, by origin, provenance, quality, or quantity, from that declared or agreed upon. The defeat device - designed to manipulate emission results during approval tests - proved to be ontologically different in its environmental qualities from what had been formally represented; the intrinsic quality promised was thus betrayed, resulting in a genuine distortion of the product's representation on the market. Even in the absence of a prior and final criminal conviction, the civil court may rely on the structure of a criminal offence as the unlawful act grounding non-contractual liability, whenever the concrete facts are abstractly referable to the relevant criminal provision. This interpretative move made it possible to identify - despite the absence of a formal criminal conviction - the emergence of non-pecuniary damage arising from a criminal offence, compensable under Article 2059 of the Civil Code.

Taken together, these three planes operated in a synergistic and intertwined manner, forming the legal backbone for the affirmation of liability and, above all, for the determination of compensable damage.

Thus, whereas at first instance pecuniary damage was identified in the higher price paid and in the depreciation of the vehicle on the market, the Court of Appeal - through reasoning attentive to the systemic constraints of the class action - excluded, in the concrete case, the possibility of recognising compensable pecuniary damage deriving from the alleged difference between the price paid by consumers for Euro 5-approved vehicles and their actual market value in light of the presence of the defeat device. This was due to the lack of sufficient proof of "differential damage"⁵²³.

⁵²² Although the matter might have been framed in terms of pre-contractual liability or, more accurately, liability for breach of the consumer's legitimate reliance on the trader's conduct - consisting in the dissemination of information concerning the product or service placed on the market - the judges structured the claim around the infringement of the consumer's freedom of contractual self-determination, impaired by inadequate information and by unfair commercial practices within the meaning of Articles 20 et seq. of the Consumer Code, in breach of the principles of good faith, fairness, and loyalty enshrined in Article 2 of the Consumer Code. See extensively C. Scognamiglio, *Il risarcimento del danno e la sua prova nell'azione di classe (a proposito del c.d. Dieselgate)*, cit., 169.

⁵²³ Nor can such a basis be identified in the case law relied upon by the court of first instance, since those decisions do not provide an objective, verifiable, and methodologically reliable criterion capable of quantifying the patrimonial diminution allegedly suffered - an element indispensable to the proper conduct of adversarial proceedings.

Although acknowledging, in abstract terms, that the installation of unlawful devices had generated an undue cost saving for the manufacturer, the Court emphasised that the evidence on record did not permit a sufficiently certain determination of the extent of pecuniary damage, especially after the recall campaign carried out by the manufacturer. The question, therefore, arose as to whether any consequential damage persisted after the recall interventions, a question for which adequate proof had not been provided.

Moreover, although more recent scholarship has advanced arguments to the contrary⁵²⁴, the Court held that the mere harmful event - in this case, the impairment of contractual freedom of self-determination - cannot be compensated in the absence of proof of an actual consequential loss.

Otherwise, the principle of *danno conseguenza* would effectively be disregarded.

While acknowledging the need to balance the principle of full compensation with the practical necessity of standardized methods of quantification, the Court of Appeal rejected the view that such an objective could justify any derogation from the general rules of civil liability, and from Article 1226 of the Civil Code. In other words, standardisation may concern the *quantum*, but it cannot dispense with the identification and proof of a concrete loss, even in the context of collective proceedings, absent an express legislative choice to the contrary.

Indeed, the reference to equity contained in the original version of Article 140-*bis* of the Consumer Code - which had fuelled doubts as to whether the class action introduced an autonomous compensatory subsystem⁵²⁵, grounded on lump-sum or standardized criteria and thus potentially derogating from the principle of full reparation - had long been interpreted by the prevailing doctrine not as the creation of a special regime, but as a mere reference to the general rules of the system, applicable whenever proof of the precise amount of damage proves particularly difficult⁵²⁶. It is therefore unsurprising that subsequent legislative reforms of the class action eliminated any express reference to Article 1226 of the Civil Code, thereby underscoring the legislature's intent to avoid any misunderstanding as to the exceptional nature of collective redress at the substantive (and procedural) level. In this perspective, equity does not replace liability or alter its preconditions; it operates merely as a supplementary tool, designed to fill a residual evidentiary gap, without affecting the *an debeatur* or the causal nexus.

With regard to non-pecuniary damage, once it was acknowledged that the conduct abstractly satisfied the elements of the offence under Article 515 of the Criminal Code, consumers were awarded moral damages arising from the impairment of their trust in the proper functioning of the market and in the producer's loyalty. Once pecuniary damage had been excluded for lack of proof,

Nor may it be derived from the settlement concluded in Germany between Volkswagen and consumers, as the content of that agreement cannot be mechanically transposed into a different legal context, nor can it serve as an abstract evidentiary benchmark for the purposes of quantification.

⁵²⁴ P. Sirena, *Danno-evento, danno-conseguenza e relativi nessi causali. Una storia di superfetazioni interpretative e ipocrisie giurisprudenziali*, in *Resp. civ. prev.*, 68 (1, 2023), e Id., *Tre tesi sulla distinzione tra danno-evento e danno-conseguenza*, *ivi*, 1752 (6, 2023).

⁵²⁵ The provision contained in paragraph 12 concerning the equitable assessment of damages was, in fact, open to three distinct interpretative approaches.

It could be argued (i) that the reference to equitable assessment constituted a derogation from the general principle laid down in Article 1223 of the Civil Code, pursuant to which both actual loss (*danno emergente*) and loss of profit (*lucro cessante*) are compensable, on the assumption that, in class actions, damage can never be quantified with exact precision; (ii) that the provision was not intended to depart from general principles at all, but rather to reiterate - albeit with reinforced emphasis - the possibility of resorting to equitable assessment where proof of the actual damage suffered, though theoretically possible, proves difficult within the framework of collective proceedings; or (iii) that the reference to Article 1226 of the Civil Code was meant to allow compensation for heads of damage beyond those contemplated by Article 1223, thereby introducing a quasi-sanctioning dimension into the award of damages: in this sense C. Scognamiglio, *Il risarcimento del danno e la sua prova nell'azione di classe (a proposito del c.d. Dieselgate)*, *cit.*, 169 that endorses the second of these readings. For a different interpretation, see B. Zuffi, *Scandalo Dieselgate e azione di classe: decurtati dei danni patrimoniali i risarcimenti riconosciuti ai consumatori italiani*, in *Giur. it.*, 1355 (2024).

⁵²⁶ With regard to the role of equity, see M. Rossetti, *Sub art.1226 c.c.*, *cit.*; F. Mezzanotte, *La valutazione equitativa del danno*, Torino, (2022).

the combined qualification of the conduct as both an unfair commercial practice and fraud in trade proved necessary to “salvage” at least the non-pecuniary component, thus avoiding the need to apply the selective criteria previously elaborated in the *San Martino* judgments.

As to the criteria for quantification, the Court of Appeal cast doubt on the methodology adopted by the court of first instance for calculating moral damage. The Court criticised the use of a percentage of pecuniary damage as logically flawed, since a technique developed to correlate two homogeneous heads of loss - biological damage and moral damage - cannot be mechanically transposed to link two ontologically heterogeneous harms: pecuniary damage, which concerns economic loss, and moral damage, which is inherently subjective and immaterial.

More convincingly, the Court of Appeal opted for a different approach, grounded in an equitable assessment pursuant to Article 1226 of the Civil Code, considering a series of qualitative elements capable of measuring the seriousness and relevance of the harm suffered by consumers.

Standardization, therefore, may concern the *quantum*⁵²⁷, but it cannot dispense with the identification and proof of a concrete loss. Otherwise, as has been observed, “one moves away from the compensatory function in order to embrace a different functional creed (...); this is not persuasive: the protection of small losses is already ensured by the procedural instrument itself; granting further advantages in evidentiary terms would amount to introducing a special compensatory regime excessively distant from the general one”⁵²⁸.

IV.3 Presumptions and Unfair Commercial Practices: Is There Room for an “Evolving” Compensatory Framework?

Multi-offensive infringements in contemporary market law differ structurally from the wrongs traditionally addressed by private law. By their very nature, they unfold in a serial and diffuse dimension, in which a single act or a uniform corporate strategy may affect an indeterminate plurality of addressees simultaneously, generating harms that are individually modest - often bordering on economic irrelevance - and yet significant when assessed in their aggregate dimension. Applying the criteria set out in Articles 1223 and 1226 of the Civil Code to such multi-offensive violations often creates serious evidentiary and methodological difficulties, and in some cases makes it practically impossible to identify and quantify consumers’ losses.

This tension reveals the limited deterrent capacity of a compensatory system rigidly anchored to a purely restorative function⁵²⁹. It is against this background that the still unsettled debate concerning the nature of civil liability for unfair commercial practices, governed by Directive 2005/29/EC and

⁵²⁷ E. Ferrante, *Diritti soggettivi e processo di massa*, in V. Barsotti (ed.), *Azione di classe*, cit., 82 observes that such assessments tend, in practice, to operate downward, since “the protection obtainable by each member of the class, when compared with that achievable in individual proceedings, is generally inexact: some injured parties may obtain ‘more’, others ‘less’, through a fluid recovery that departs from the principle of perfect correspondence between harm and compensation (and, in the long run, may signal the abandonment of that principle within the sphere of the new procedural regime). This is the price of effectiveness, where bilateral litigation, aimed at exact protection, leaves substantial portions of disputes unaddressed. Fluid compensation is not punitive. On the contrary, it is generally moderating in effect, because approximation is not achieved by elevating awards to their peaks, but by adopting an average benchmark that, by definition, eschews any sanctioning ambition. A well-calibrated class action smooths and accommodates, across large numbers, the quantification of harm.”

⁵²⁸ G. Ponzanelli, *Risarcimento del danno e class action*, cit., 33. He continues by observing that this dynamic “may consist either in the adoption - never openly declared, but cryptic and oblique - of a social security-like system, or in embracing, within the multifaceted character of the rules of civil liability, a punitive-sanctioning identity. In essence, the reasoning is as follows: given the high number of claims for compensation and the consequent objective difficulty in measuring the extent of the harm suffered, one awards (a) a sum of money which, across the infinite variety of concrete situations, may amount to a modest payment closely resembling an indemnity; or, alternatively, (b) a sum exceeding the level of full compensation and approaching a form of punishment.”

⁵²⁹ A. Pisani Tedesco, *Il problema della responsabilità civile compensativa. Studio per un rimedio risarcitorio effettivo*, Torino, (2022) with further doctrinal and case law references; see also Id., *Il problema della responsabilità civile (compensativa) in un mondo asimmetrico*, in *Danno resp.*, 567 (2023) and on Dieselgate, E. Rajneri, *Illeciti lucrativi, efficacia dissuasiva dei rimedi e responsabilità sociale d’impresa*, in *Riv. crit. dir. priv.*, 397 (2017).

its domestic implementation, must be situated. The issue ultimately concerns the very status of the compensatory remedy.

At a recent scholarly conference⁵³⁰, it was persuasively argued⁵³¹ that the regime on unfair commercial practices appears to presuppose a partially autonomous compensatory framework, structured around a dual parameter: on the one hand, the gravity and qualitative features of the conduct; on the other, the harm suffered by the consumer, interpreted in light of the EU principles of proportionality and effectiveness of judicial protection. There is a clear normative basis for this approach. It can be traced both to the Directive itself and to the implementing domestic provisions, which situate consumer protection within a model that consciously intertwines public and private enforcement.

From this perspective, the function of compensation is not exhausted by redressing the individual harm. Rather - without sliding into punitive damages mechanisms that remain foreign to our legal tradition - it contributes to a deterrent rationale⁵³² analogous to that now firmly acknowledged in the field of antitrust law⁵³³, where the individual consumer's loss is often extremely difficult to prove, yet the dissuasion of unlawful conduct constitutes a central objective of the system.

Such a functional reading would give greater weight to elements that traditional private law tends to marginalize, namely, the gravity of the conduct and the nature of the practice, expressly referred to in the legislation, together with the principles of proportionality and effectiveness. It would also make it possible to account for the broader EU dimension, within which identical infringements generate comparable effects across different legal systems and therefore call for non-fragmented responses. This remains so despite the gaps in the European legislative framework, which has harmonized prohibited practices without fully addressing the crucial issue of compensation⁵³⁴, thereby leaving to interpreters the demanding task of constructing criteria capable of systemic coherence and procedural sustainability.

Last but not least, greater emphasis should be placed on the use of statistical data, expressly contemplated by Article 840-*quinquies* of the Code of Civil Procedure⁵³⁵, and on the role of

⁵³⁰ The reference is to the conference entitled *La nuova disciplina dei rimedi in tema di pratiche commerciali scorrette*, held at the Università Cattolica del Sacro Cuore, Milan, on 23 January 2026 (organised by Prof. A. D'Adda).

⁵³¹ Ar. Fusaro, *Il danno risarcibile*, presentation delivered at the conference entitled *La nuova disciplina dei rimedi in tema di pratiche commerciali scorrette*, cit.

⁵³² G. Alpa, *La responsabilità civile*, Torino, 48 (2018); G. Spoto, *Risarcimento e sanzione*, in *Eur. dir. priv.*, 489 (2018); M. Maggiolo, *Microviolazioni e risarcimento ultracompensativo*, in *Riv. dir. civ.*, 1092 (2015). With respect to this matter, see E. Navarretta, *Funzioni del risarcimento e quantificazione dei danni non patrimoniali*, in *Resp. civ. prev.*, 506 (2008); P.G. Monateri, *La responsabilità civile*, cit., 1; A. Di Majo, *La responsabilità civile nella prospettiva dei rimedi: la funzione deterrente*, in P. Sirena (ed.), *La funzione deterrente della responsabilità civile alla luce delle riforme straniere e dei Principles of European Tort Law*, Milano, 18 (2011).

⁵³³ See the special issues *La nuova disciplina del risarcimento del danno per violazione della normativa antitrust (profili sostanziali)*, part I and II, in *Nuove leggi civ.*, 117 e 413 (2018); M. Libertini, *Il ruolo necessariamente complementare di "private" and "public enforcement" in materia antitrust*, in M.R. Maugeri, A. Zoppini (eds.), *Funzioni del diritto privato e tecniche di regolazione del mercato*, Bologna, 171 (2009).

⁵³⁴ G. De Cristofaro, Chair of the morning session of the conference "La nuova disciplina dei rimedi in tema di pratiche commerciali scorrette", cit. On this point, see E. Tuccari, *Riflessioni nazionali della recente giurisprudenza della Corte di Giustizia sul Dieselgate*, cit., 105 e spec. 122-126.

⁵³⁵ See B. Zuffi, *Art. 140-octies*, cit., 1190; A. Giussani, *La riforma dell'azione di classe*, cit., 1572, 1583. F. Ruggiero, *Azione di classe e risarcimento del danno non patrimoniale*, cit., 131 observes that "the reference to statistical data under Article 840-quinquies should be interpreted as shifting the risk of proof concerning individual causation not onto the claimant, but rather onto the defendant. Once the claimant has established statistical or general causation, the defendant may be exempt from liability only if, in the third phase of the proceedings, it succeeds in demonstrating that, with respect to individual opt-in members, the impairment of the protected legal position was caused by an alternative causal factor distinct from the conduct attributed to it (as provided, for example, under Article 40 of the Code of Equal Opportunities and Article 28(4) of Legislative Decree No. 150/2011 on the simplification of procedural rites). Evidently, it is necessary that the statistical evidence submitted by the claimant during the evidentiary phase be sufficiently detailed and reliable."

presumptions⁵³⁶ (following a model already familiar in the field of product liability). This approach has, moreover, been expressly acknowledged in the case law of the Corte di Cassazione with regard both to damages arising from *sine titulo* occupation of immovable property⁵³⁷ and to the loss suffered by a landlord as a consequence of the early termination of a lease due to the tenant's breach⁵³⁸.

In those two rulings, the Sezioni Unite reaffirmed that: (i) damage is never *in re ipsa*; (ii) the claimant's burden of proof may nonetheless be supported by presumptions, which may constitute the sole source of evidence, provided they rest on plausible factual allegations; (iii) for "typical" categories of damage, the court may construct "ordinary" presumptive models (market benchmarks, average rental periods, experience-based indicators), capable of operating as standards, subject to proof to the contrary or proof of any further damages; and (iv) quantification is, almost inevitably, entrusted to a form of structured equity, which is not arbitrariness but rather the guided use of market data and maxims of experience, precisely as occurs in the assessment of non-pecuniary damage (tables, experiential standards concerning the intensity of suffering, ...). Thus understood, presumptions are elevated to an ordinary evidentiary technique within civil liability, enabling the court to bridge the gap between the prohibition of damage *in re ipsa* and the

⁵³⁶ Widely F. Mezzanotte, G. Parisi, *La prova presuntiva del danno (-conseguenza) non patrimoniale*, in *Nuova giur. civ. comm.*, 598 (II, 2023); A. Thiene, *Onere della prova e liquidazione*, in S. Patti, S. Delle Monache (eds.), *Responsabilità civile. Danno non patrimoniale*, Torino, 695 (2010).

See also Cass., 10 November 2020, n. 25164, in *Nuova giur. civ. comm.*, 91 (I, 2021) annotated by G. Ponzanelli, *Rivisitazione delle tabelle milanesi e prova del pregiudizio morale: il nuovo intervento della Cassazione*, in *Resp. civ. prev.*, 117 (2021) annotated by E. Bufano, *L'autonomia del danno morale e la sua liquidazione; c'è vita oltre le tabelle*, in *Danno resp.*, 32 (2021) annotated by F. Zappatore, *La stabile inquietudine del danno non patrimoniale*.

⁵³⁷ Cass, Sez. Un., 15 November 2022, n. 33645 and Cass., Sez. Un., 15 November 2022, n. 33659, in *Danno resp.*, 329 (2022) annotated by G. Longo, *La natura in re ipsa del danno derivante dalla perdita della facoltà di godimento dell'immobile al vaglio delle Sezioni Unite* e F. Ruggiero, *Diritto di proprietà, danno in re ipsa e prova presuntiva: una soluzione alternativa*. Ampiamente sul tema a M.L. Chiarella, *Occupazione sine titulo e danno in re ipsa. Tra soluzioni praticate e implicazioni sistematiche*, Soveria Mannelli, 2023; Id., *Occupazione sine titulo e danno in re ipsa. Tra tutela reale e tutela risarcitoria*, in *Giust. civ.*, 681 (2023). The orders referring the case to the Corte di Cassazione had been commented upon by C. Barberio, *Il danno da occupazione sine titulo di un immobile è in re ipsa?*, in *Nuova giur. civ. comm.*, 775 (2022); M. Maggiolo, *Il danno da occupazione abusiva alle sezioni unite. Problemi di allegazione, problemi di prova e pochi problemi di danno*, *ivi*, 884; G. Ponzanelli, *La falsa alternativa tra danno in re ipsa e danno conseguenza: in attesa delle Sezioni Unite*, *ivi*, 890; M. Franzoni, *Occupazione senza titolo, danno in re ipsa?*, *ivi*, 880.

Sezioni Unite that it is not permissible to speak of damage *in re ipsa*; at the same time, however, they acknowledge the court's power to rely on simple presumptions and maxims of experience to infer the existence of a "typical" loss of profits (measured, for instance, by reference to market rent) resulting from unlawful occupation. They thus recognise that the occupation *sine titulo* of an asset capable of generating income renders it highly probable - according to the *id quod plerumque accidit* - that an economic utility corresponding to its ordinary rental value has been lost.

The claimant must allege the existence of a loss stemming from deprivation of use (whether direct or indirect) and indicate the factual elements supporting it. Where the court considers those elements, in the abstract, sufficient to ground a presumptive inference concerning the reduction in usability, the value of the asset, and the duration of the deprivation, the existence of the damage may be established entirely by way of presumptions. Quantification, in turn, is entrusted to equitable assessment, albeit one anchored in objective data (market rents, OMI values, average yields, and the like).

⁵³⁸ Cass., Sez. Un., 25 February 2025 n. 4892, in *Nuova giur. civ. comm.*, 575 (2025) annotated by C. Rendina, *Risarcimento sostitutivo e risarcimento del danno da risoluzione: due tutele a confronto* and by M. Dellacasa, *Sul danno da risoluzione della locazione: ovvero, sull'incontro tra forza di legge del contratto e autoreresponsabilità del creditore*.

With regard to loss of profit suffered by a landlord following the early termination of a lease due to the tenant's breach, accompanied by the return of the property prior to the contract's natural expiry, the Joint Sections expressly affirm that the legal causal link between the damaging event (early termination) and the loss of rental income is subject to a burden of proof "necessarily incumbent upon the landlord" (Article 2697 of the Civil Code). The landlord must therefore allege and prove - also by means of presumptions - that he or she acted diligently to mitigate the loss (Article 1227 par. 2 of the Civil Code).

In light of such allegations, the court may rely on maxims of experience and objective data (such as the type of property, its location, market trends, and average letting periods) in order to presume that, where the property remained vacant for a certain period despite diligent efforts to re-let it, that circumstance is causally attributable to the original breach and not to any fault on the part of the landlord.

need to avoid making it practically impossible for the injured party to prove both the existence and the extent of the harm.

In short, by interpreting the requirement of homogeneity in a functional sense and by giving due weight to presumptions and to the evidentiary rules governing class and representative actions, it would be possible to enhance the deterrent effect of civil liability without resorting to punitive increases in the quantum of damages.

Within this framework, recent scholarly analysis⁵³⁹ invites us to move beyond the rigid alternative between the strict application of ordinary rules of civil liability and the effective immunisation of the undertaking from responsibility. It instead proposes intermediate solutions based on balanced and reasonable criteria capable of ensuring both procedural sustainability and the practical usability of the remedy, both in individual proceedings and, *a fortiori*, in class actions, which provide a particularly suitable context in which these issues arise. This is especially true given that Directive 2005/29 also extends to financial contracts and to sectors such as telecommunications, gas, and energy.

The Italian Dieselgate litigation vividly illustrates both the difficulties and the potential of this path, where attempts at flat-rate quantification of damage proved unstable. At the same time, the case prompts renewed reflection on the very robustness of the distinction between pecuniary and non-pecuniary damage in the consumer context⁵⁴⁰, particularly where goods and services are intended to satisfy personal, existential, or family-related needs, according to a logic not dissimilar to that which led to the recognition of damages for a ruined holiday.

Ultimately, the experience of unfair commercial practices and of EU-driven mass wrongs calls for further reflection on non-pecuniary damage in consumer law, taking due account of the deterrent function of the remedy and of the need to ensure the effectiveness of protection, especially in light of the specific features of serial harm.

⁵³⁹ G. De Cristofaro, Chair of the morning session of the conference “La nuova disciplina dei rimedi in tema di pratiche commerciali scorrette”, cit.

⁵⁴⁰ Again, G. De Cristofaro, Chair of the morning session of the conference “La nuova disciplina dei rimedi in tema di pratiche commerciali scorrette”, cit.

FINANCING OF COLLECTIVE REDRESS PROCEEDINGS - A MAJOR CHALLENGE FOR QUALIFIED ENTITIES

*Astrid Stadler**

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The article highlights the difficulties of qualified entities to finance collective redress proceedings. It explains that against the background of very limited budgets consumer organisations need access to third-party funding (TPF) in order to take redress actions to court. TPF is, however, a very controversial issue and most Member States have no clear rules on it. The article demonstrates that German law, in particular, has put severe restrictions on TPF for representative actions and it analyses the European Parliament's proposal for a Directive on TPF.

Key words: third-party funding – access to justice – assignment model – funder's success fee – representative actions

I. IT'S ALWAYS ABOUT MONEY ...

I.1 The cost problem with representative actions

After lengthy political wrangling, the Representative Actions Directive 2020/1828¹ (RAD) has entered into force and with considerable delay in some Member States the Directive has been implemented finally across the European Union. For Member States that previously had no comparable procedural instruments, this is good news for consumers. However, the Directive leaves broad scope for implementation, which has been used in different ways by the various states. Truly effective and comprehensive enforcement of consumer claims in cases of mass damage is therefore by no means guaranteed. The options for the institutions authorized to bring legal action vary greatly. One of the most important factors is financing.² As long as those who are entitled to

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¹ Directive (EU) 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

² For a general analysis of the funding problem in Europe see M. Tull/L. Visscher, *New Trends in Financing Civil Litigation in Europe, A Legal, Empirical and Economic Analysis*, Cheltenham 2010; G. Solas, *Third Party Funding*, Cambridge, 2019; B. Hess, Europäische Perspektiven der Prozessfinanzierung, in: A. Fremuth-Wolf (ed.), *Prozessfinanzierung in Österreich*, Vienna 2025, pp. 201-218; W. Hau, Private Funding, in B. Hess/M. Woo/L. Cadet/S. Menétrey/E. Vallines García (eds.), *Comparative Procedural Law and Justice*, Part III Chapter 7, Access to Justice and Costs of Litigation (2024), available at www.cplj.org/publications/3-7-private-funding (last visited 18 February 2026); T. Domej, Effektive Rechtsdurchsetzung, Zugang zur Justiz, Prozessfinanzierung, Legal Tech – Welcher Rechtsrahmen empfiehlt sich? Deutscher Juristentag (ed), *Verhandlungen des 74. Deutschen Juristentages*, Munich 2024, vol 1, part A; C. Poncibò/E. D'Alessandro, State of play of the EU private litigation funding landscape and the current EU rules applicable to private funding, in: European Parliamentary Research Service (eds.), *Responsible private funding of litigation - European added value assessment*, 2021, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU\(2021\)662612_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU(2021)662612_EN.pdf) (last visited 18 February 2026).

bring a representative action do not have sufficient financial resources, there is no guarantee that all or at least the most serious cases will be taken up.

Collective redress litigation is expensive as the aggregation of individual claims very often results in large amounts in controversy. In many Member States, court fees and lawyers's fees depend on the amount in controversy and the higher the aggregated amount of damages is, the more expensive litigation becomes. As very often the loser-pays principle applies, qualified entities which bring a collective action take a high procedural risk. Reimbursement of the opponent's costs is an important aspect. Even where qualified entities have access to legal aid provided by the state, this often only covers their own costs, but not adverse cost orders.³ However, it is often not just a question of the legal costs for the court proceedings themselves. Even before filing an action in the interest of consumers the preparation of a representative redress action can be complex and expensive.

The European legislator decided to give legal standing for representative actions under the Directive primarily to consumer organisations and public regulators, depending on the decision of each Member State. The Directive does not provide for individual victims or consumers to bring legal action on behalf of a whole group of consumers, as is the case with US class actions. As the Directive takes a minimum harmonization approach, Member States are free to introduce this option. However, it is only found in a few Member States.⁴ Apart from the fact that this creates a certain similarity to US class actions, which are often politically contested, the reason is often a practical one. Legal standing of individuals for representative actions depends on a clear commitment to how an individual should finance such a mass action. There is hardly any clear legal framework for third-party litigation funding in any Member State,⁵ and access to such funding is often unclear. The right for individuals to bring a representative action would therefore have been meaningless in many Member States anyway. As will be shown in this article, financing, or rather the lack of financing options, is also a lever that is used politically to avoid burdening the economy with too many representative actions.

1.2 Financial resources of qualified entities

Only where contingency fees are available or third-party funding (TPF) is permitted is it a realistic option for qualified entities (or individuals) to take legal action on behalf of a whole group. According to Article 20 RAD, Member States must ensure that the effective use of representative actions does not fail due to a lack of financial resources.⁶ Article 20 para 2 lists examples of state support such as 'public funding, including structural support for qualified entities, limitation of applicable court or administrative fees, or access to legal aid.' However, this is a vague obligation and does not give consumer associations a direct claim for funding from the state. Most established

³ For example, Sec. 123 German Civil Procedure Code: 'The granting of legal aid does not affect the obligation to reimburse the costs incurred by the opposing party.'

⁴ The most important instrument available for class actions initiated by individuals are group actions before the England and Wales Competition Appeal Tribunal (CAT rules 78 (19)-(4) 2015); in the EU a similar approach has been taken in Denmark (Sec. 254c (1) Administration of Justice Act 2008 - <https://iclg.com/practice-areas/class-and-group-actions-laws-and-regulations/denmark>); and Sweden (Sec. 4 Group Proceedings Act 2002).

⁵ BIICL Study 'Mapping Third Party Litigation Funding in the European Unions' p. 8 ('main findings'): https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/civil-justice/civil-and-commercial-law/third-party-litigation-funding-tplf_en (last visited 18 February 2026).

⁶ Article 20 para 1: 'Member States shall take measures aiming to ensure that the costs of proceedings related to representative actions do not prevent qualified entities from effectively exercising their right to seek the measures referred to in Article 7.'

consumer associations are dependent on receiving state subsidies, as is customary in Austria and Germany, or on financing themselves through membership fees. Insofar as ad hoc founded organizations also have the right to take legal actions⁷, access to funding for legal action is particularly important because they do not regularly receive government subsidies.

German consumer centers are in a comparatively good position in this regard, but they are not in the position to take every mass harm event in consumer law to court. This can be illustrated by the annual report of the „*Verbraucherzentrale Bundesverband – vzbv*“ for 2024.⁸ *Vzbv* is the umbrella organisation of German consumer organisation and the most active in bringing actions in the interest of consumers. In 2024, *vzbv* had a total budget of approx. 26 million Euros with 25,35 million Euros coming from public funds. Approx. 475.000 Euros are independent income such as member fees and approx. 33.000 Euro income have been generated from contract fines and adverse cost orders. Fixed costs (rent, staff etc.) and costs for market screening aggregated to an annual amount of more than 20 million Euros. Less than 700.000 Euros were spent for representative actions (in 2023: approx. 900.000 Euro). The annual report by *vzbv* does not give details on how the 700.000 Euros were spent, but it is very likely that these were payments for adverse costs and costs for their own lawyers. Attorneys who represent the *vzbv* in court are often paid an hourly fee that exceeds the statutory rate which is based simply on the amount in controversy and very low in collective redress proceedings (cf. IV.2.). Only the statutory tariff for the claimant's lawyers are to be reimbursed by the defendant if the case is won. The difference must be borne by the *vzbv* itself. However, if they want to hire well-qualified lawyers, this is often the only alternative. This example of a comparatively well-resourced German consumer association clearly shows that cases can only be brought before the courts on a very selective basis. Experience in recent years has shown that TPF is indispensable for consumer associations, if they want to make a well-balanced use of the budget available to them and offer for example not only court enforcement of consumer claims, but primarily consumer counseling in numerous local advice centers.

II. CONCERNS ABOUT TPF – DIFFICULT TIMES FOR FUNDERS

TPF is a growing market with a global industry worth 40-80 billion Euros per year; approximately 100 funders are active in Europe.⁹ Many disputes can be litigated today only with the help of TPF. This is not only true for consumer law cases, but all the more for many cartel damages actions and

⁷ The RAD leaves this to the decision of the Member States. In Germany, e.g. qualified entities must – among other requirements to be fulfilled – have been registered at least for one year before they can file a representative action (Sec. 4 CREA and Sec. 4 Injunctions Act). This allows in principle to establish a new organisation with the primary goal of enforcing the claims arising from a particular mass harm event. In complex cases the preparation of such an action will take at least a year anyhow.

⁸ Annual Report *vzbv* 2024, available at <https://jahresbericht.vzbv.de/2024/bericht/rechenschaftsbericht> (last visited 18 February 2026).

⁹ BusinessEurope, Position Paper ‘Third Party Litigation Funding: contribution to the Commission study’, p. 2-3, available at https://www.bes-europe.eu/wp-content/uploads/2025/02/2024-09-02_commission_study_third_party_litigation_funding-8ea-1.pdf (last visited 18 February 2025); Poncibò/E. D’Alessandro, State of play of the EU private litigation funding landscape and the current EU rules applicable to private funding, in: European Parliamentary Research Service (eds.), *Responsible private funding of litigation - European added value assessment*, 2021, pp. 3-14, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU\(2021\)662612_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU(2021)662612_EN.pdf) (last visited 18 February 2026).

capital market cases. What is TPF and why is it such a controversial issue? There are many definitions of TPF. A common description is as follows:

„TPF is an arrangement whereby a third-party, typically an independent commercial funder with no prior connection to or legitimate interest in a dispute, agrees to finance all or part of the legal costs of a party to an action in exchange of a share (whether fixed or by way of percentage) of the proceeds, if the claim is successful.“¹⁰

Although the importance of TPF for access to justice cannot be seriously disputed, there are numerous concerns and objections to this type of financing. Should civil litigation be considered an investment with the risk of a „litigation industry“? Does the involvement of an external financier lead to the abuse of court proceedings? Is there a risk that financiers will interfere massively in strategic litigation decisions, thereby not only jeopardizing the independence of the lawyer, but also potentially acting against the interests of the consumers they are supporting? Is there generally a significant conflict of interests between the financier and the financed party, even if their interests appear to coincide at first glance? It has repeatedly been pointed out that conflicts of interests may arise, particularly in settlement negotiations. If, from the funder's point of view, the amount invested in a particular litigation has already been recouped through the proposed settlement, such a settlement may be concluded, even though continuing the proceedings may be in the interests of consumers and may be promising. At this point, the interests of consumers, the qualified entity, and the funder, which are otherwise jointly focused on winning the lawsuit, may diverge. These questions have led to calls for clear legal regulation of TPF or even significant restrictions.¹¹ But even without legislative action, individual court rulings have already expressed skepticism toward TPF.

In Germany, in 2018 and 2019 the Federal High Court decided that some types of representative actions become inadmissible because of the use of TPF by the consumer association bringing the action.¹² Both decisions referred to skimming-off actions under German competition law¹³, which have enabled consumer associations since 2005 to sue traders for illegally gained profits if the defendant has harmed a large number of consumers and the individual damages are trivial. The amount to be recovered from the defendant is not a compensation distributed to consumers but rather goes to the Federal state budget which is administered by a public regulator.¹⁴ The public regulator had agreed in both cases to the funding agreement concluded by the consumer association and had also agreed that the success fee will be deducted from the amount to be paid to the Federal budget. Nevertheless, the court held that funding as such was not acceptable for these actions the number of which the legislator obviously wanted to keep low. In the opinion of the court, the profit-making incentives for the funders tend to override the consumer interest and violate standards of morality and good faith and fair dealing. As a result, the court denied legal standing

¹⁰ Cf. for example European Parliament, Resolution of 13 September 2022 with recommendation to the Commission on Responsible private funding of litigation (2020/2130(INL)), Introduction sub B and similar Article 3 lit. a of the Proposal; ELI Principles Governing the Third Party Funding of Litigation, 2024, pp. 10, 12.

¹¹ For details on the European Parliaments initiative for a Directive on ‘Responsible private funding of litigation’, see below VI.

¹² Federal Court of Justice (*Bundesgerichtshof*), 13 September 2018, I ZR 26/17, *Neue Juristische Wochenschrift* 2018, 3581; Federal Court of Justice, 9 May 2019, I ZR 205/17, *Neue Juristische Wochenschrift* 2019, 2691.

¹³ Sec. 10 German Unfair Competition Act.

¹⁴ Bundesamt für Justiz (BfJ).

of the funded consumer associations. The decisions were heavily criticized in legal literature¹⁵ and they led to no further such lawsuits being filed in the following years. Only when implementing the RAD the German lawmakers revised the case law. Since October 2023, TPF has been expressly declared admissible for skimming-off actions under Sec. 10 Unfair Competition Act.

In the UK in 2023, the Supreme Court decided in the famous *Paccar* case¹⁶ that litigation funding agreements in opt-out proceedings before the Competition Appeal Tribunal (CAT) are equivalent to damages-based agreements (DBA) and therefore banned by Sec. 47C (8) Competition Act. As a result, almost all funding agreements in competition law cases became unenforceable. There was enormous uncertainty in the litigation financing industry and considerable legal uncertainty as to how a funding agreement could still be structured. There was a bill to restore the pre-*Paccar* position of funders in March 2024, but it was dropped in summer 2024 due to the upcoming elections.¹⁷ The new Government indicated that legislative change will not be considered before the Civil Justice Council has completed a report. The report, published 2 June 2025, recommended that the UK Government should reverse the impact of the *Paccar* decision and introduce a ‘light-touch’ statutory framework.¹⁸

The debates about third-party financing have by now become more political in nature. It was no coincidence that the conservative wing of the European Parliament launched this debate at a time when it became clear that the RAD could no longer be prevented and might lead to more representative actions in some Member States. In July 2021, the so-called *Voss-Report* by the Committee on Legal Affairs of the European Parliament suggested to take legal action in order to develop a – very restrictive – legal framework for commercial litigation funding in Europe. It resulted in a resolution of the European Parliament in September 2022 which recommends that the EU Commission adopts a Directive on Responsible private funding of litigation. For more details see below VI.

III. FUNDING OF COLLECTIVE ACTIONS: THE POSITION OF THE RAD

III.1 Safeguards against the misuse of TPF

The legislative history of the RAD reveals some distrust of TPF and of a US style litigation industry, but the final version of the RAD does not ban TPF completely. It is up to the Member States to decide on the admissibility of TPF and its conditions. However, the RAD does impose certain requirements in cases where representative actions are in fact financed with the help of TPF in its Article 10. Article 10 para 1 emphasizes the primacy of the collective interests of consumer and Member States must ensure that conflicts of interests are prevented. Article 10 para 2 prohibits that any decisions of qualified entities, including decisions on settlements, are unduly influenced by funders. Funding providers must not be competitors of the defendant nor dependent on the

¹⁵ A. Stadler, *Sittenwidrigkeit der Prozessfinanzierung eines gemeinnützigen Verbraucherschutzverbandes*, Juristenzeitung (JZ) 203–206 (2019); M. Sattler, No Third Party Funding of Skim-Off Claims, *Zeitschrift für Internationales Wirtschaftsrecht*, 78 (2019); M. Loschelder, *Anmerkung zu BGH: Prozessfinanzierung bei Gewinnabschöpfungsansprüchen unzulässig*, Gewerblicher Rechtsschutz und Urheberrecht in der Praxis (GRUR-Prax), 534 (2018); A. Halfmeier, *Rechtsmissbrauch durch Prozessfinanzierung bei Gewinnabschöpfungsklage*, Wirtschafts- und Bankrecht (WuB), 27 (2019).

¹⁶ R(on the application of PACCAR Inc. and others (Appellants) v. Competition Appeal Tribunal and others, UKSC/2021/0078, Supreme Court, 26 July 2023, (2023) UKSC 28.

¹⁷ For details on the aftermath of PACCAR, <https://www.hoganlovells.com/en/publications/the-aftermath-of-paccar> (last visited 18 February 2026).

¹⁸ The report, *Civil Justice Council, Review of Litigation Funding – Final Report*, is available at <https://www.judiciary.uk/wp-content/uploads/2025/06/CJC-Review-of-Litigation-Funding-Final-Report.pdf> (last visited 18 February 2026).

defendant in order to prevent conflict of interests. Member States shall ensure that courts have the power to enforce compliance with these rules, and for the sake of transparency, qualified entities shall disclose to the court ‘a financial that lists sources of funds used to support the representative action.’

III.2 Funders’ success fee

The RAD does not provide a clear picture of whether the funder’s success fee can be deducted from the consumers. awarded compensation. There are two clear restrictions. According to Article 12 para 1 RAD the loser pays principle shall apply to collective actions and para 2 clearly states that individual consumers must not bear the costs of litigation (as they are not parties to the representative action). In some Member States such as the Netherlands and Austria, qualified entities traditionally do book building in mass harm situations before they file a representative action for various reasons. In Austria, very often an assignment of consumer claims was necessary to aggregate the claims. In the Netherlands, qualified entities are often ad hoc founded foundations (‘stichtings’) which will later compete to be appointed the lead representative in the proceedings. The court’s selection depends, among other things, on how many victims an organization represents in the particular case. For this purpose, but sometimes also for financing, consumers or victims of mass tort may be required to register for a fee. Article 20 para 3 RAD imposes some restrictions on this practice. Qualified entities may ask only for a ‘modest entry fee’, when preparing and litigating the enforcement of consumer claims by a representative action. In Austria, the legislator has fixed the maximum amount at 250 Euros,¹⁹ many other Member States do not have an explicit rule in this respect.

Both regulations can be used in order to argue in favour of a prohibition of success fees at the expense of consumers. On the other side, it becomes clear from Article 10 that the RAD did not intend to impose a complete ban on TPF. Of course, the European legislator was aware that any third-party funding involves success fees. Against this background, it was also clear and inevitable that a success fee would ultimately be borne by consumers whose claims are to be enforced by the representative action. The only way to avoid this result would have been a clear rule on cost shifting. If the success fee to be paid by the claimant’s side were to be regarded as part of the legal costs and passed on to the defendant under the loser-pays principle, consumers would receive the full amount of compensation. This highly controversial solution is not mentioned by the RAD and was apparently not even discussed in most Member States. It was, however, implemented in the Netherlands²⁰. The disadvantages of such a cost shifting are obvious: in addition to compensatory damages, the defendant must pay the contingency fee, the amount of which he has no influence over. Experience with English cost rules has shown that such provisions have proven to drive up costs and have been abolished there.²¹ In 2009, the *Jackson* Report identified the recoverability of Conditional Fee Arrangements as a key driver of rising litigation costs and pointed out the

¹⁹ Sec. 9 para 4 QEG (Act on Qualified Entities): the entry fee must not exceed 20% of the amount claimed by the individual consumer and the maximum amount is 250 Euro.

²⁰ Art. 1018l Abs. 2 Dutch Civil Procedure Code: ‘A judgment under Article 1018i contains an order for costs, whereby the court may, insofar as necessary and in derogation from Book 1, Section 12, § 2, order the unsuccessful party to pay reasonable and proportionate legal costs and other costs incurred by the successful party, except where this would cause injustice.’ This includes the court’s power to a cost shifting with respect to the funder’s success fee, I. Tzankova, *Collective Actions in the Netherlands – a step forward?*, *Zeitschrift für Zivilprozess – International - ZZPInt*, 83 at 95 (2020).

²¹ For details cf. Chr. Hodges in Chr. Hodges/A. Stadler, *Resolving Mass Disputes*, Cheltenham, 2013, Ch. 5, p. 122.

‘excessive profits’ of the legal profession on the one hand and the considerable burden on the defendant on the other.²²

As a result, the RAD cannot be used to argue against consumers ultimately having to pay the success fee. Of course, Member States must ensure that consumers who join such representative actions by opting-in are aware of the cost implications and accept that part of their compensation will be paid to the funder.

IV. TRANSPOSITION OF THE RAD IN GERMANY

IV.1 Restrictions for TPF

In October 2023, the German Consumer Rights Enforcement Act (CREA) came into force. The implementation of the RAD in Germany clearly demonstrates the legislature's attempt to avoid a flood of representative actions in the future and, as far as possible, to limit activities to the large, established consumer associations. The new rules do not ban TPF, but in a last-minute decision during the legislative process a strict cap on success fees was implemented for representative actions. In addition to traditional injunctive relief, consumer associations can now bring redress actions as required by the RAD or — as provided for in German law since 2018 — bring an action for only a declaratory judgment on the requirements of the defendant's liability. The latter type of collective action was retained, even though it had not been successful in the past. The mere declaratory decision by the court on certain elements of the defendant's liability is not particularly helpful for consumers, as they then have to sue the defendant for damages individually in follow-on lawsuits. Consumers who register for the declaratory action benefit from the binding effect of the declaration, but this type of legal enforcement is completely unsuitable for minor damages in particular.

For both types of representative actions²³ Sec. 4 CREA provides the following restrictions on funding in paragraph 2:

A representative action is inadmissible if it is financed by a third-party

1. who is a competitor of the trader sued
2. who is dependant on the trader sued
3. who is promised an economic share of more than 10 percent of the amount to be paid by the trader being sued, or
4. which is expected to influence the conduct of the lawsuit by the qualified entity, including decisions on settlements, to the detriment of consumers.

Whereas the restrictions listed in number 1, 2 and 4 are required by the RAD, the cap on funders' success fees in number 3 is unique in German law. It is remarkable because the average share of funders on the market is 25-35 % and there was no debate in Parliament on the 'if' and 'how' of the cap. In principle, commercial litigation financiers will not be prepared to provide financing under these conditions as the return of the investment will be too low. In addition, funders who are in principle willing to finance a representative action face additional problems. The CREA leaves completely open the question of whether and how consumers can participate in such a

²² R. Jackson, *Final Report*, pp. 109 ff. The success fee can also be classified as damage incurred by the claimant and could then be the subject of a substantive claim for damages. Details as well as the approach as such are disputed, see Lieberknecht, *Die materiell-rechtliche Ersatzfähigkeit von Kosten der Prozessfinanzierung*, Neue Juristische Wochenschrift, 3318 (2022). For Austria this approach has been rejected by K.Kitzenberger/M. Briza, *Praktische Fragen der Prozessfinanzierung im Zivilverfahren*, in: A. Fremuth-Wolf, *Prozessfinanzierung in Österreich*, Vienna, 2025, pp. 219 ff. at 239.

²³ The cap does not apply to skimming-off illegally gained profit actions under Sec. 10 Unfair Competition Act.

financing agreement initiated by a consumer organisation. The only certainty is that they must agree to the deduction of the success fee from their share. The consumer association cannot simply dispose of part of the compensation to which consumers are entitled. Since German consumer associations traditionally do not engage in book building prior to filing a lawsuit and do not 'collect' claims if they do not proceed according to the assignment model, there is usually no contact between the qualified entity and the injured parties. This is particularly true when the group of consumers can only be described in general terms. To make matters more difficult, the German implementation allows consumers to opt-in to a representative redress action up to three weeks after the end of the oral proceedings.²⁴ This means that it is only once the core of the proceedings has been concluded that it is clear who is participating and claiming compensation.

One could consider the registration ('opt-in') for the financed lawsuit as consumer consent to the financing agreement, if transparency is provided,²⁵ but this is largely rejected in legal literature.²⁶ Should a financing agreement be concluded despite these circumstances, it is currently unclear how and when the success fee may be paid to the funder. The CREA does not allow the funder's share to be paid directly from a compensation fund established in case of a successful representative action.²⁷ Only the claims of registered consumers approved by the fund administrator and the costs of the fund administrator himself may be paid from the total amount paid by the defendant. It is unclear whether the problem was overlooked or deliberately left unregulated in order to potentially deter financiers. In a worst-case scenario, the funder would have to collect its share mosaic-like from each individual consumer.²⁸

Of the sixteen representative action lawsuits which have been published in the official claims register²⁹ by the end of January 2026, the majority does not appear to be third-party funded. Consumer associations have decided to use the new instrument for some straightforward cases with no high amounts of compensation involved. Two very prominent actions against *Vodafone* and *Amazon prime* are based on allegedly illegal general contract terms to increase monthly fees. At least the calculation of the individual damages is a simple arithmetic problem and can be easily handled in the context of such a representative action. The amounts of damages claimed are between 30 -70 Euros per consumer. After deducting a success fee for a financier, only amounts would be paid out for which many consumers would not bother to opt in. Even without TPF the registration figures are low under the opt-in system. Although in absolute numbers, the participation rates appear relatively high, with some cases involving more than 100,000 consumers. However, in the *Vodafone* and *Amazon prime* cases this only represents around 1% of those affected. However, a lawsuit filed in November 2025 at the Court of Appeal in Hamburg³⁰ by an Austrian consumer association (VSV) against *Meta* is more promising in this respect and has the support of

²⁴ Sec. 46 para 1 CREA.

²⁵ A. Stadler in H. Musielak/W. Voit, *Commentary on the German Code of Civil Procedure*, Munic (22nd ed. 2025), Introduction VDuG mn. 26; K. Rinck, *Streuschadensbekämpfung in Anwendung der Cy Pres-Doktrin – Ein Vorschlag auf rechtsvergleichender Basis zur Umsetzung der Verbandsklagerichtlinie in das deutsche Recht*, Tübingen 2023, 169.

²⁶ See e.g. F. Maultzsch, *Das neue Verbraucherrecht durchsetzengesetz – VDuG*, *Zeitschrift für Zivilprozess - ZZP* 137, 119 (2024); H. Wais in: D. Skauradszun, *Commentary on CREA (VDuG)*, Munich (1st ed. 2024), Sec. 4 VDuG mn. 18 f; P. Röthemeyer, *Commentary on CREA (VDuG)*, Baden-Baden (1st ed. 2024), Sec. 4 VDuG mn. 17.

²⁷ Sec. 22-38 CREA.

²⁸ For details H. Wais, *Drittfinanzierte Verbandsklagen – wer zahlt?*, *Neue Juristische Wochenschrift (NJW)*, 1441 Rn. 3 (2025).

²⁹ <https://www.verbraucherschutzverein.eu/sammelklage-gegen-meta/>
https://www.bundesjustizamt.de/DE/Themen/Verbraucherrechte/VerbandsklageregisterMusterfeststellungsklagenregister/Verbandsklagenregister/Verbandsklagen/Verbandsklagen_node.html (last visited 18 February 2026).

³⁰ File no. 11 VKl. 1/25, for details see meta-klage.de

a commercial funder. The action is based on the allegedly unlawful use of so-called business tools by *Meta*, which completely monitor the internet behavior of *Facebook* and *Instagram* users. According to media reports, a success fee of 9.5% was promised to *Padronus*.³¹ There are likely several reasons for the funder to agreeing to such a low success fee in this particular case: firstly, the maximum allowed success fee would be 10 % anyhow, secondly, the high damages of €5,000 or €10,000 claimed per user may sum up to an attractive amount for a funder. To date, German courts had only awarded small amounts in damages for immaterial losses in cases of GDPR violations (50-500 Euros). The Federal High Court³² recently ruled that a data leak at Facebook, which resulted in users' mobile phone numbers being freely accessible on the internet, justified compensation for immaterial damages ('pain and suffering') due to the loss of control over one's own data, but only in the amount of approximately 100 euros. The *Meta* case about the use of its 'business tools' is different. The permanent and complete monitoring of Internet activities for *Meta's* own economic benefit and without the consent of users is a serious violation of personal rights and data. Therefore, several first-instance decisions by German courts in individual lawsuits³³ have already awarded compensation between 1.500 and 5.000 Euro. The cases are all pending on appeal, but *VSV* and *Padronus* seem to be optimistic that the court will award 5.000 Euros for each adult *Meta* user and up to 10.000 Euros for the allegedly illegal monitoring of minors. Due to these high amounts, a large number of *Meta* users are expected to participate via opt-in. As a result, the overall amount to be collected by the funder is promising. Secondly, the lawsuit is being brought by an Austrian consumer association, which, in accordance with Austrian traditional practice, requires advance registration of the injured parties who wish to participate. The registration with *VSV* is linked to a declaration of consent regarding the financing of the lawsuit and followed by the official registration in the German claims register.

IV.2 Rules on costs for collective redress actions in Germany

Against the background of very difficult access to TPF, how can qualified entities finance representative actions under the regime of RAD and CREA?

To implement Article 10 RAD, German law reduces the litigation risk for qualified entities by implementing a cap on the amount in dispute in representative actions, which also automatically limits court and attorney fees. These maximum limits, regardless of the actual amount in dispute, are 300.000 Euro for collective redress actions, 250.000 Euro for collective actions for injunctive and declaratory relief, and 410.000 Euro for actions skimming off illegally gained profit (Sec. 10 Unfair Competition Act).³⁴ The downside of this regulation, however, is that the statutory fees for lawyers which depend on the amount in dispute are very low. The plaintiff's lawyer in a redress action is legally entitled to only approximately 8,200 Euro. No lawyer will represent a qualified entity (and thousands of consumers) in complex mass proceedings for such a low amount. Consumer organizations therefore only have a chance of finding a lawyer if they agree to pay a fee that is above the standard legally fixed rate, usually an hourly fee. As mentioned earlier, this is, however, not reimbursed by the defendant, meaning that the qualified entity is left with considerable

³¹ <https://www.meta-klage.de/> and <https://www.padronus.at/meta-klage> (last visited 18 February 2026).

³² Federal Court of Justice, 18 November 2024, VI ZR 10/24, Neue Juristische Wochenschrift (NJW) 298 (2025).

³³ E.g. District Court Leipzig, 4 July 2025, 05 O2351/23, ZD 2025, 580; for a list of judgments in the *Meta* case cf. <https://www.test.de/Datenschutzverstoss-Meta-sieht-fast-jeden-Klick-6234106-0/#id6234111> (last visited 18 February 2026).

³⁴ Sec. 48 German Legal Cost Act (*Gerichtskostengesetz*).

costs even if it wins the case. Each organization will therefore select very carefully and decide which cases can be brought before the courts.

V. OTHER ACTORS IN THE MARKET OF LEGAL SERVICES

V.1 Enforcement of claims by SPVs based on the assignment model

Due to the fact that consumer associations cannot handle all mass harm events in consumer law, not to speak about the enforcement of consumer claims in cartel law or capital market law, many debt collecting companies (claims vehicles or ‘special purpose vehicles’ - SPVs) operating on the assignment model have entered the legal services market in Germany. These are specialized entities, often legal tech companies, whose sole business model is to bundle and to enforce assigned claims in return for a success fee.³⁵ Their target group currently consists of consumers and airline passengers seeking compensation for delayed or canceled flights on one side. In antitrust damages law, however, they are particularly active on behalf of companies of all sizes that do not wish to enforce their claims themselves.³⁶ This is of practical importance for SMEs which do not have their own legal departments and who shy away from the effort of enforcing their own damages claims. In antitrust law hundreds of actions are pending before German courts that have been filed by claims vehicles.

The advantage for the assignors – whether consumers or companies - lies in the fact that legal enforcement is completely free of cost and risk. Litigation costs – often including adverse costs – are paid by a third-party funder under a funding agreement with the SPV. Sec. 4 CREA with its 10% cap on success fees does not apply to these SPVs. Debt collecting companies sue in their own name and outside the rules governing representative actions.

At least in consumer law, this has given rise to a competing model of law enforcement that relieves the burden on consumer associations to some extent but is not free of charge for the assignors and consumers. Even before the RAD was implemented, German consumer associations had already left the enforcement of air passenger compensation entirely to such legal tech companies. The European Regulation³⁷ which protects air passengers from delayed and cancelled flights grants a lump-sum compensation which depends only on the distance of the flight and the delay. This is independent of individual factors and can be calculated using simple software. In most cases the lump-sum amount does not compensate for actual financial losses of air passengers. Therefore, they are apparently willing to pay a success fee to a legal tech company and prefer to have nothing to do with the enforcement of their claim. German district courts are inundated with thousands of

³⁵ For details of the assignment model: Th. Riehm, *Effektive Rechtsdurchsetzung durch finanzierte Abtretungsmodelle*, Neue Juristische Wochenschrift (NJW) 2713 (2024); Th. Heiß, *Massenverfahren und die Zukunft des deutschen Zivilprozesses*, Neue Juristische Wochenschrift (NJW), 1625 (2025); A. Stadler, *Abtretungsmodelle und gewerbliche Prozessfinanzierung bei Masseschäden*, Wirtschaft und Wettbewerb (WuW), 189 (2018); A. Stadler, *Funding of mass claims in Germany - caught between a rock and a hard place?* in Willem van Boom, *Litigation, costs, funding and behaviour - implications for the law*, London, 2016, p. 201 – 221; A. Stadler, *Third party funding of mass litigation in Germany Entrepreneurial Parties – Curse or blessing?*, in L. Cadet/B. Hess/M. Requejo (eds), *Privatizing Dispute Resolution - Trends and Limits*, Baden-Baden, 2019, 209-232.

³⁶ For a detailed analysis cf. H. Hiss, *Bündelung von Kartellschadensersatzansprüchen im Lichte des Rechtsdienstleistungsgesetzes*, Baden-Baden 2023. Recently the Federal Court of Justice imposed restrictions on the assignment model, BGH 12 May 2026 KZR 6/24, GRUR-RS 2026, 10222: in the cartel damages case thousands of claims arising from many jurisdictions were in controversy and the Federal Court of Justices estimated that it would take approx. 38 years to decide the case. The Court concluded that this was an abuse of the assignment model. Today it is not clear what the implications for future claims will be, cf. A. Stadler, *Case note*, Mass Claims Journal Vol. 6/2026, p. 55.

³⁷ Regulation (EG) 261/2004.

such lawsuits because airlines often do not pay voluntarily.³⁸ Consumer organizations have not yet taken up these cases — there are simply too many of them. The business model of debt collecting companies exists parallel to the representative actions system of CREA, and the RAD does not undermine it in any way.

V.2 Challenges of the assignment model

However, the assignment model used by debt collection companies has been subject to many objections and attacks, as has third-party financing. Unsurprisingly, the defendants sued by debt collecting companies, especially in the big antitrust cases, regularly vehemently contest the validity of the assignment to the SPV. The German Legal Services Act provided arguments for this, as it not only requires debt collection companies to register in advance, but also explicitly prohibits conflicts of interests for the debt collector. Violations of the Legal Services Act can render the assignment to the SPV null and void and thus have severe consequences for the assignors. The defendants attacking the assignment model found themselves in a natural alliance with their attorneys, so to speak. The legal profession vehemently opposed the spread of the assignment model from the outset because it felt disadvantaged by the different framework conditions. In particular, the fact that German lawyers are not allowed to charge contingency fees,³⁹ but debt collection agencies are, led to great discontent.

In 2021, the German legislature attempted to create a level playing field for these cases by also allowing attorneys to charge contingency fees for claims up to 2,000 Euro⁴⁰ which is a rather doubtful compromise. It took several landmark decisions by the Federal High Court to clarify the compatibility of the assignment model with applicable law.⁴¹ Recently the Federal Court of Justice imposed restrictions on the assignment model, BGH 12 May 2026 KZR 6/24, GRUR-RS 2026, 10222: in the cartel damages case thousands of claims arising from many jurisdictions were in controversy and the Federal Court of Justices estimated that it would take approx. 38 years to decide the case. The Court concluded that this was an abuse of the assignment model. Today it is not clear what the implications for future claims will be, cf. Astrid Stadler, Case note, Mass Claims Journal Vol. 6/2026, p. 55.

While there is a relatively clear legal framework for debt collection agencies now, litigation financing (as an important component of the assignment model) has not yet been regulated by law — with the exception of Sec. 4 CREA.

VI. PROPOSAL FOR A DIRECTIVE ON RESPONSIBLE PRIVATE FUNDING OF LITIGATION BY THE EUROPEAN PARLIAMENT 2022

It is clear that TPF is an effective lever for strengthening or weakening representative actions. In September 2022, the European Parliament adopted a proposal to the European Commission for a

³⁸ In 2024, 131.000 claims based on air passenger rights were filed before German courts; for more details: <https://www.lto.de/recht/justiz/j/klagewelle-gegen-airlines-berlastet-gerichte> (last visited 18 February 2026).

³⁹ Sec. 4a Lawyers Remuneration Act (*Rechtsanwaltsvergütungsgesetz*), Sec. 49b para 2 Federal Lawyer's Act.

⁴⁰ Law on the Promotion of Consumer-Friendly Offers in the Legal Services Market, 10 August 2021, Federal Law Gazette 2021 part I no 53, p. 3415: the new act imposed stricter regulations for the registration of legal service providers, but also allowed contingency fee arrangements for lawyers for small claims.

⁴¹ Federal Court of Justice, 13 June 2022, Via ZR 418/21, Neue Juristische Wochenschrift (NJW) 2022, 3350 para 50; Federal Court of Justice, 13 July 2021, II ZR 84/20, Neue Juristische Wochenschrift (NJW) 2021, 3046 para 47, 49 et seq, Federal Court of Justice, 5 December 2022, Via ZR 998/22, BeckRS 2022, 37853, para 14.

Directive on TPF.⁴² The proposal is somewhat more moderate than the previous Voss report⁴³ that had taken the initiative, but still very restrictive in its approach and problematic in many respects. In its entirety it could have a deterrent effect on financiers and could significantly affect the availability of TPF in Europe. Some groups may welcome this effect given the reservations about TPF described at the outset. However, the proposal generally recognizes that TPF can facilitate access to justice.⁴⁴ One main point of criticism is the intended overregulation.⁴⁵ This is not the place to discuss the EU Parliament's proposals in detail,⁴⁶ but it should be outlined in broad terms.

A fundamental problem with the proposal is that it is based on the premise, without further justification,⁴⁷ that TPF is problematic, tends to disadvantage consumers, and must therefore be strictly regulated.⁴⁸ The Australian regulation on litigation financing is used as a reference, particularly in the Voss-Report,⁴⁹ but the Australian system has changed repeatedly in recent years depending on the political orientation of the government⁵⁰ and is based on a class action system modeled on the US system, which has different framework conditions than European civil proceedings.⁵¹

The basic idea of the proposal is to establish a uniform regulatory framework across the European Union with a number of safeguards such as an authorization system and supervision of registered funders by public regulators, caps on excessively high awards for funders and transparency requirements regarding the funding agreements.

⁴² European Parliament resolution of 13 September 2022 with recommendation to the Commission on Responsible private funding of litigation 2020/2130(INL), the text is available at https://www.europarl.europa.eu/doceo/document/TA-9-2022-0308_EN.html (last visited 18 February 2026).

⁴³ Report with Recommendation to the Commission on Responsible private funding of litigation, Committee on Legal Affairs, Rapporteur: Axel Voss, 2020/130(INL), the text is available at https://www.europarl.europa.eu/doceo/document/JURI-PR-680934_EN.pdf (last visited 18 February 2026).

⁴⁴ Introduction sub C.

⁴⁵ B. Hess, Europäische Perspektiven der Prozessfinanzierung, in: A. Fremuth-Wolf (ed.), *Prozessfinanzierung in Österreich*, Vienna 2025, pp. 208-211.

⁴⁶ For a more detailed discussion cf. B. Gsell/C. Meller-Hannich/A. Stadler, *Prozessfinanzierung in Deutschland vor dem Hintergrund europäischer Regelungsiniciativen*, Juristenzeitung (JZ), 989-1000 (2023).

⁴⁷ B. Hess, Europäische Perspektiven der Prozessfinanzierung, in: A. Fremuth-Wolf (ed.), *Prozessfinanzierung in Österreich*, Vienna 2025, pp. 207 f.

⁴⁸ B. Gsell/C. Meller-Hannich/A. Stadler, *Prozessfinanzierung in Deutschland vor dem Hintergrund europäischer Regelungsiniciativen*, Juristenzeitung (JZ), 989 at 990 (2023).

⁴⁹ Voss Report p. 3/28 - 4/28, 25/28-26/28.

⁵⁰ As early as 2006, the High Court of Australia approved of the use of TPF in *Campbell Cash & Carry Pty Ltd. v. Fostif Pty Ltd* (2006). In 2017, the Victorian Law Reform Commission published a consultation paper and its report recommended regulation of TPF at the national level, VLRC, *Access to Justice – Litigation Funding and Group Proceedings: Report* (March 2018). Since 2020, litigation funders have been required to hold an Australian Financial Services Licence and to comply with investment scheme regulations. The Corporations Amendment (Litigation Funding) Regulations 2022 revised this regulation and since the end of 2022 litigation funders have been exempted from the managed investment scheme and financial services licensing (<https://www.asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-368mr-asic-amends-relief-for-litigation-funding-arrangements/> - last visited 18 February 2026). There is no cap on funders' success fee despite a draft bill of 2021 of the liberal government which failed to pass the Senate.

In legal literature it is argued that the overall decrease in the number of funded class actions in Australia since 2018 is the result of numerous regulatory changes; for details on the situation in Australia see P. Aldermann, *At a glance: Regulation of litigation funding in Australia*, November 2024 at <https://www.lexology.com/library/detail.aspx?g=e133b4b8-75d6-47e0-a385-d7b8e625f106> (last visited 18 February 2026).

⁵¹ For a comparative overview of the funding situation in Australia, Canada, UK and the EU G. Solas, *Third Party Funding*, Cambridge, 2019, pp. 38-122.

VI.1 Supervision of funders

The proposal starts with the assumption that there is a ‚regulatory vacuum‘ in the field of TPF resulting in a risk of funders to operate non-transparently.⁵² In order to regulate litigation funding activities the European Parliament suggests to establish a system of authorization and supervision of funders by a public regulator in each Member State.⁵³ This includes adequate safeguards such as minimum standards for the avoidance of conflicts of interests, transparency, independence, governance and capital adequacy of funders.⁵⁴ It seems questionable whether such a strict registration and monitoring system, which involves a high level of administrative effort, is really necessary. It is based on the existing model of multi-level state supervision in the banking and insurance sectors. However, in these both sectors a strong supervision is legitimate. Banks and insurance companies are systemically important in the overall economic context. The state must not only protect individuals from the risks arising from the fundamentally long-term and capital-intensive legal relationships with these institutions and enhance consumer trust. It must also prevent the collapse of the banking and insurance system as such. Against this background, strong governance rules and minimum capital requirements are necessary, as is the strong monitoring of their compliance.

Unlike banks and insurance companies, commercial litigation financiers are not systemically important players.⁵⁵ For individuals, of course, funding is often essential for their economically important individual lawsuits. If a plaintiff is abandoned by their financier in the middle of a lawsuit due to lack of capital, insolvency, or the like, this is a problematic situation. However, the state does not generally intervene with a state supervisory system to protect individuals in risky transactions. As a general rule, it is up to each contract partner to carefully select its counterpart. Of course, the rapidly growing market also means that unscrupulous funders may want to get involved. However, it should also be noted that individual consumers rarely enter into contracts directly with litigation funders. TPF is usually sought by business-savvy companies or experienced consumer associations that are in a position to check the funder before concluding a contract. Individual consumers need less protection from litigation funders than from potentially unscrupulous debt collecting companies working with the assignment model and aggressive advertising on the internet. However, this is not the thrust of the European Parliament's proposal.

VI.2 Regulation of funding agreements

The EP's proposal furthermore suggests in Article 7 to impose particular fiduciary duties on funders in the interest of the funded party. These duties go much beyond what is applicable in other contractual relationships. Moreover, funders are prohibited from exercising undue influence on proceedings,⁵⁶ but it is unclear when influence exceeds the permissible level. It seems questionable whether the legitimate interest of the funder in monitoring its investment in a particular case is sufficiently taken into account. The financier can hardly be denied a certain say in a settlement agreement. The interests of funders and funded parties regularly coincide, and the only concern can be to prevent clear abuse in individual cases. On the other hand, a certain amount of influence by the funder can even be helpful and protect the courts and defendants from a plaintiff,

⁵² Introduction sub K.

⁵³ Articles 4 and 5, 8-10 of the Proposal.

⁵⁴ Articles 6, 12-15 of the Proposal.

⁵⁵ B. Gsell/C. Meller-Hannich/A. Stadler, *Prozessfinanzierung in Deutschland vor dem Hintergrund europäischer Regelungsvorschläge*, Juristenzeitung (JZ), 989 at 991 f. (2023).

⁵⁶ Article 14 para 2 of the Proposal.

who bears no cost risk, initiating expensive evidence-gathering and conducting or extending the proceedings in an unobjective manner.⁵⁷ The business sector often fails to mention in the discussion that involving a commercial financier significantly reduces the often-cited risk of abusive lawsuits. No funder will get involved in a case that they consider hopeless after thorough examination.

Art. 14 para 4 of the proposal suggests a general cap on the funder's award of 40 %. At first glance, this may seem a high threshold, but such an abstract cap on success fees is inappropriate and contradicts market economy principles and the contractual freedom of the parties involved.⁵⁸ Funders calculate their fees primarily on the basis of the risk they take in a particular case. If, in exceptional cases, they finance proceedings whose outcome is really uncertain, even a success fee of 50% might be acceptable. The decision should, however, be left to the discretion of the contracting parties within the always applicable limitations of freedom of contract. It may be better for a plaintiff to accept a high success fee than not to bring the case to court at all due to a lack of resources.

The proposal also suggests implementing more or less a general liability of funders for adverse cost orders (Articles 12 lit. c, 14 para 5, 18). According to Article 18 Member States shall ensure that courts can make a cost order against the litigation funder if the claimant party has insufficient resources to meet adverse costs. Even today, funders often already agree to pay for the defendant's legal costs should the defendant win the case. This, too, is a question of contract negotiations between the funder and the funded party. A generally imposed obligation of funders to pay for adverse cost orders shoots over the target. As a result, defendants would receive a much better protection than in other proceedings by having the funder as a debtor with sufficient financial resources. Granting this protection only based on the fact that litigation financing is involved hardly seems justified. Instead, courts should be able to require a security deposit for legal costs from a funder on a case-by-case basis.

Article 15 of the Proposal suggests imposing strict restrictions on the unilateral termination of a funding agreement by the litigation funder. Termination of the contract should basically only be permissible with the consent of the financed party or the court. This goes far beyond existing standards for terminating contracts. In particular, the court's permission is a significant encroachment on freedom of contract, especially since terminations must also be possible outside of pending court proceedings.

Last, but not least Article 16 of the proposal requires a far-reaching disclosure of funding agreements. There is, of course, a legitimate interest of the court and the defendant to know that there is TPF and who the funder is in order to prevent competitors to initiate proceedings against the defendant. The RAD has correctly identified this as a problem, but Article 16 goes beyond that standard. At the request of the court, a complete and unredacted copy of the agreement must be provided and it is not clear from the wording whether disclosure has to be made only to the court or also to the defendant. Any disclosure of the entire financing agreement to the defendant would be highly problematic and must be avoided. Not only does it often contain confidential business information about the funder, but it would also regularly give the defendant strategic advantages if they knew the scope and limits of the financing. Since this would regularly only affect the plaintiff, it would be a clear violation of the principle of equality of arms between the parties in the

⁵⁷ B. Gsell/C. Meller-Hannich/A. Stadler, *Prozessfinanzierung in Deutschland vor dem Hintergrund europäischer Regelungsvorschläge*, Juristenzeitung (JZ), 989 at 995 (2023).

⁵⁸ Article 14 para 4 leaves some room for higher rates in 'exceptional circumstances'.

proceedings. If it is deemed necessary that at least the court be aware of the contract, for example to identify clauses that could exert undue influence on the proceedings, disclosure must be limited to the court. The defendant may be granted access to excerpts at most.⁵⁹ However, the Federal High Court recently decided in favour of a more or less full disclosure of a funding agreement, see Federal High Court, 12 May 2026, KZR 6/24, GRUR-RS 2026, 10222 n. 81-82.

VI.3 Reaction of the EU Commission: Study on Mapping Third-Party Funding in the EU

The EU Commissions reaction to the proposal was hesitant. In order to prepare future legislative actions, the Commission commissioned a study on the situation of TPF in the EU Member States. The study ‘Mapping Third Party Litigation Funding in the European Unions’ by the British Institute of International and Comparative Law in London (BIICL) was published in March 2025.⁶⁰ Its aim was to collect and analyse information on legal regulations and practices of TPF in the EU and selected third countries (such as Switzerland, the UK and the US). It includes national reports and interviews with stakeholders. In many Member States there is no reliable data on the number of funded cases, but the study identified that across Europe the minimum value of a funded claim is between 1-14 million Euro. The funder’s share is between 20-30%. The interviews made an attempt to get a better picture on the positive and negative effects of TPF, but unsurprisingly the results are not clear. Among the positive effects a better access to court for parties that could not fund litigation otherwise was observed by 56% of the respondents, 34% emphasized that the support of funders provides professionalisation and expertise in complex cases, and 28% confirmed a filtering effect as cases with a low chance of success will not be funded. On the other side, 25-26% of the respondents identified conflicts of interests and confirmed that funders take influence on the substantive and procedural decisions of the funded parties, including settlements and appeals. The study does not result in a final recommendation to the Commission, but explains the options and consequences of ‘no regulation’, ‘strong regulation’, or a ‘light-touch regulation’. According to a statement of the Commissioner for Justice, *Michael McGrath*, from December 2025, the Commissions does not see a need for legislative activities at the moment.⁶¹

VII. ELI PRINCIPLES GOVERNING THE THIRD-PARTY FUNDING OF LITIGATION 2024

Finally, another initiative in the field of TPF is worth being mentioned. A working group established by the European Law Institute developed principles for TPF.⁶² The group started with the assumption that there are always mutual benefits for the funder and the funded party and it addressed primarily points of common concern. The soft law approach taken by ELI resulted in 12 key principles on the conduct of funders and funded parties regarding the following issues: facilitating and increasing access to justice, identifying and meeting valid concerns about TPF, levelling the playing field internationally between parties, and providing aid to courts, administrative

⁵⁹ B. Gsell/C. Meller-Hannich/A. Stadler, *Prozessfinanzierung in Deutschland vor dem Hintergrund europäischer Regelungsiniziativen*, Juristenzeitung (JZ), 989 at 997-999 (2023). However, the Federal High Court recently decided in favour of a more or less full disclosure of a funding agreement, see Federal High Court, 12 May 2026, KZR 6/24, GRUR-RS 2026, 10222 n. 81-82.

⁶⁰ The study is available at https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/civil-justice/civil-and-commercial-law/third-party-litigation-funding-tplf_en (last visited 18 February 2026).

⁶¹ <https://www.kennedyslaw.com/en/thought-leadership/article/2025/third-party-litigation-funding-an-ongoing-divergence-in-approach-between-the-eu-and-uk/> (last visited 18 February 2026).

⁶² https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_Governing_the_Third_Party_Funding_of_Litigation.pdf (last visited 18 February 2026).

bodies, legislators and funders.⁶³ Of course, such principles are sometimes vaguely formulated and do not have the regulatory character and density that the European Parliament envisaged for a directive. They are closer to the self-regulation by codes of conduct that are in place for some associations of funders.⁶⁴ The working group itself considers the Principles to offer an alternative to codes of conduct and prescriptive regulation.⁶⁵

VIII. CONCLUSION

The possibilities for commercial funders to support representative actions under the RAD currently vary greatly across the EU.⁶⁶ Case law sometimes reveals a certain restrictive tendency. However, consumer organizations and, above all, ad hoc founded qualified entities are dependent on access to TPF. At present, no significant abuse, which is often attributed to TPF, has come to light. It therefore appears that the safeguards provided for in the RAD are sufficient. Whenever Member States go beyond this and establish stricter rules, they must be aware that this can significantly restrict access to justice in cases of mass damage. A uniform Europe-wide regulation is not necessary at present, and if the Commission were to consider it maybe in the future, the European Parliament's proposals would have to be carefully examined in detail and brought back to a more balanced level.

⁶³ ELI Principles Governing the Third-Party Funding of Litigation, Vienna 2024, p. 11.

⁶⁴ European Litigation Funders Association, Code of Conduct 29 June 2022: <https://elfassociation.eu/about/code-of-conduct> (last visited 18 February 2026); ALF- Association of Litigation Funders of England and Wales, Code of Conduct 2011: <https://associationoflitigationfunders.com/code-of-conduct/> (last visited 18 February 2026).

⁶⁵ ELI Principles Governing the Third-Party Funding of Litigation, Vienna 2024, p. 11.

⁶⁶ For details see the national reports part in the BIICL study.

WHO PAYS FOR CONSUMER JUSTICE?

THIRD-PARTY LITIGATION FUNDING AND COLLECTIVE REDRESS

*Cristina Poncibo**

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Abstract. This paper examines the evolving role of third-party litigation funding in facilitating consumer collective redress, with a particular focus on the European Union. Collective redress has emerged as a critical tool for addressing diffuse and low-value harms, especially in digital and data-driven markets, yet their practical effectiveness is often limited by high costs, procedural complexity, and risk exposure. TPLF can mitigate these barriers by redistributing financial risk and enabling qualified entities to pursue claims against deep-pocketed defendants. Drawing on comparative case law, the paper highlights how courts have recognised the public policy value of litigation funding in promoting access to justice, behaviour modification, and the deterrence of corporate misconduct. At the same time, the paper addresses regulatory challenges, such as funder influence, conflicts of interest, and remuneration limits, including lessons from U.S. states that have imposed statutory caps on funders' returns. In the EU context, the study argues for a proportionate, evidence-based approach that balances consumer protection with the need to maintain viable funding markets, emphasising transparency, fairness, judicial oversight, and case-specific assessment rather than rigid price controls. The paper concludes that TPLF is not merely a private financing tool, but a structural component of effective collective redress, essential for bridging the gap between substantive consumer rights and their practical enforcement.

Keywords: Third-Party Litigation Funding – Consumer Collective Redress – Directive 2020/1828 – Access to Justice – Regulatory Fairness

I. INTRODUCTION

Despite its formal recognition as a key instrument of private enforcement, consumer collective redress in the European Union remains structurally under-enforced. While the Directive 2020/1828¹ has expanded the procedural availability of collective mechanisms, their practical use has so far been limited.² High litigation costs, procedural complexity, evidentiary burdens, and the risk of adverse cost orders continue to deter qualified entities from bringing actions, particularly in cases involving complex digital or data-driven harms. As a result, a significant gap persists between the normative ambition of collective redress and its empirical impact, weakening its capacity to function as an effective complement to public enforcement.

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¹ Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409, 4.12.2020, 1–27, ELI: <http://data.europa.eu/eli/dir/2020/1828/oj>

² C. I. Nagy, The Long-Awaited Directive on Representative Actions: Still Waiting for Godot, in *Revista Ítalo-Española de Derecho Procesal*, 127-138 (2020).

Third-Party Litigation Funding (TPLF) is an instrument that can contribute in resolving the problem of costs – and risks – of disputes, which in fact entail a barrier to access justice. It has emerged in common law jurisdictions (precisely, Australia, and the UK) and is now also gaining pace in the EU continental ones, within the civil law traditions.³ At this stage, the provisions contained in the Directive 2020/1828 address the main issues in regulating TPLF in the context of consumer collective or representative claims. It should be noted that, in implementing the mentioned Directive, the Member States have actually lost the opportunity to extend the safeguards provided for consumer collective redress to individual cases.

TPLF is a business entailing the provision of capital and other resources to parties to a dispute, by an entity that is neither a lawyer nor an insurer of that party. It is generally provided in exchange for a share of the recovery, only in case of success, sometimes even entailing the transfer of the claim to a controlled entity and prosecuting the dispute against the original defendant. In this respect, it is worth noting that the assignment of claims is often discussed alongside TPLF because both mechanisms serve a similar functional purpose: overcoming financial and organisational barriers to litigation by reallocating litigation risk. In both cases, the original right holder does not bear the full economic burden of pursuing the claim, thereby facilitating access to justice and enabling collective or mass claims that would otherwise remain unenforced. However, despite this functional proximity, assignment of claims is conceptually and legally distinct from TPLF. In an assignment model, the substantive claim itself is transferred, in whole or in part, from the original claimant to another entity, which then becomes the formal rights holder and litigates in its own name and at its own risk. The assignee's entitlement to the proceeds of litigation derives from ownership of the claim rather than from a contractual right to remuneration contingent on the outcome of the proceedings. As a result, the litigation is no longer conducted “on behalf of” the original claimant, but rather by a new claimant whose standing is grounded in private law rules on the transfer of rights. By contrast, TPLF does not involve any transfer of the claim. The claimant retains ownership and procedural standing, while a third-party funder merely finances the litigation in exchange for a share of the proceeds in the event of success. The funder's interest is contractual and derivative, not proprietary. This distinction is crucial, as it affects issues of procedural legitimacy, control over the litigation, disclosure obligations, and potential conflicts of interest. The difference also has important regulatory implications. Assignment of claims is typically governed by contract law and rules on assignability, which vary significantly across jurisdictions and may restrict the transfer of certain types of consumer claims. TPLF, by contrast, raises specific concerns related to litigation finance, such as funder influence, transparency, and alignment of incentives, which have prompted targeted regulatory responses domestically and by the EU. In the context of consumer collective redress, assignment models have sometimes been used as a *functional substitute* for underdeveloped collective action mechanisms. Nonetheless, treating assignment of claims as equivalent to TPLF risks obscuring their distinct legal nature and governance challenges. While both mechanisms may contribute to addressing under-enforcement, they do so through fundamentally different reallocations of rights, risks, and control.⁴

³ A. Cordina, E. Storskrubb, The Future Regulation of Third-Party Funding in Europe, Conference Report, in *Erasmus University Rotterdam*, 1-8 (2023).

⁴ L. Hornkohl, Turning Harm into Claims - How Recent ECJ Case Law Shapes the Interplay of Claim Assignment, Funding, and Victim Compensation in Mass B2B Competition Law Litigation on Digital Markets, Research Paper, 2-13 (2025), <http://dx.doi.org/10.2139/ssrn.5629632> (last visited March, 10, 2026).

II. THE STATE OF THE ART

In litigation funding agreements, the funders commit to covering civil litigation costs and, in most of the times, assume the risk of adverse cost awards. In exchange, they seek reimbursement of litigation expenses and compensation dependent on the dispute's financial outcome. The compensation for funders is contingent upon the results of the litigation and the settlement of debts by the opposing party, which adds complexity to these arrangements. More specifically, in the current understanding of TPLF, the size of the funder's remuneration depends in principle on the following three factors: likelihood of success; presumable length of the civil proceedings; value of the claim. Moreover, funders are generally more interested in funding high value claims, given that the remuneration clearly depends on the claimant's recovery by winning the litigation.⁵

According to this model, a funder is more likely to agree to fund condemnation claims, rather than claims for the ascertainment of a legal right or fact, which will ultimately end with the enactment of a purely declaratory judgement. In fact, if the funded party obtains a condemnatory judgement, the counterparty will pay the sum ordered by the court, and the funder will be able to retain the agreed percentage.⁶

The funder is more likely to agree to fund a claim against a financially solvent defendant offering good prospects of recovering any sum that is awarded in the final judgement. The solvency of the counterparty, however, is a dynamic factor and may vary from the moment of the funding decision to the end of the dispute when the funder is expected to recover. Hence the third-party funder's investment decision suffers from an external and apparently uncontrollable risk: the counterparty's solvency risk.

For the funded party, which is usually a claimant that does not meet the criteria to be granted legal aid, TPLF is an opportunity to improve its access to justice in high value disputes and to challenge defendants greatly superior to it in terms of economic power.⁷ For the party being funded, TPLF serves as a valuable device with which to shift the risk of any adverse judgment outcome, with the funder assuming full responsibility and effectively becoming the "primary risk holder".⁸

TPLF also differs from contingency and conditional fee agreements insofar as it is the funder, and not the claimant's lawyer, who is entitled to obtain a reimbursement and a remuneration fee.⁹ However, contingency/conditional fee agreements and TPLF agreements seem to share a common feature whereby the 'investor' providing resources - be it a lawyer or a litigation funder - agrees

⁵ E. D'Alessandro & C. Poncibò, *State of play of the EU private litigation funding landscape and the current EU rules applicable to private litigation funding*, Research Paper for the European Parliament Research Service (EPRS), Strasbourg, 2021, pp. 15 ss. The Research Paper has been published as Annex to J. Saulnier, K. Müller, I. Koronthalyova, *Responsible Private Funding of Litigation*, European Added Value Unit, PE 662.612, Strasbourg, 2021, pp. 45-118, [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU\(2021\)662612_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU(2021)662612_EN.pdf) (last visited March, 10, 2026).

⁶ D'Alessandro & Poncibò, 2021, p. 45 ss.

⁷ TPLF clearly differs from B.T.E. insurance, because there is no payment of a premium and maximum coverage for the funder, litigation crowdfunding, because funders are professional investors making an investment in the claim, whereas crowdfunders are usually individuals having no investment expertise and committing a small sum (often through a crowdfunding platform) to cover a small part of the costs and risks of a dispute; sale of claim, because the claimant's claim is not purchased by the funder. TPLF also differs from the assignment of claims for collection only, because the funder is not a claimant whose goal is that of collecting the claim.

⁸ For example, the German TPLF model contracts usually provide for the assignment of the claim to the funder ("assignee") as security. The assignment as security should be kept confidential and cannot be revealed in court. The claim is retransferred to the assignor once the funder has no further interest or reason to require a security.

⁹ D'Alessandro & Poncibò, 2021, p. 45 ss.

with a party to the case (generally the claimant) to be paid a percentage or fraction of the recovery if that party is successful.

In 2021, the European Parliament had concluded a Study and commissioned a Research Paper covering TPLF (also ‘EP Study’).¹⁰ It analysed the economic and legal issues of TPLF in the EU, and specifically focused on the risks posed by unregulated TPLF. The study investigated the origin of the TPLF industry in Europe, which can be traced back to 1967 in the UK, where it has been ruled by the courts. At present, the European market consists of several European funders and non-European funders able to operate in many EU Member States, as well as start-up companies that operate only at national level. The study also attempted to define TPLF in both litigation and arbitration where the funder agrees to fund litigation by bearing the costs of the civil proceedings, and to contractually assume the risk of adverse cost awards¹¹ in return for reimbursement of the litigation costs and for remuneration. The funder’s investment is not necessarily recouped or repaid and the funder’s remuneration depends on if (and when) the funded party wins the litigation.

Scholars have noted that funders usually seek a ratio of between 1 to 10 in terms of the amount of money needed to finance the dispute and the value of the financed claim.¹² A funder is more likely to agree to fund condemnation claims, rather than claims for the mere ascertainment of a legal right which will ultimately end with the enactment of a purely declaratory judgment. In fact, if the funded party obtains a condemnatory judgment, the counterparty will pay the sum ordered by the court, and the funder will be able to retain the agreed percentage. A funder is more likely to agree to fund a claim against a solvent defendant offering good prospects of recovering any sum awarded in the final judgment. For the funded party – usually a claimant who does not meet the criteria to be granted legal aid – TPLF is an opportunity to improve its access to justice in high value disputes and to challenge defendants greatly superior to it in terms of economic power. For the funded party, TPLF is also useful for transferring the risk of any unfavourable outcome of the judgment, which is covered in full by the funder.

The EP Study also clarified that TPLF differs from contingency fee agreements because it is the funder, and not the claimant’s lawyer, who is entitled to obtain a reimbursement and a remuneration fee. Moreover, contingency fee agreements and TPLF agreements seem to share a common feature whereby the ‘investor’ providing funds, be it a lawyer or a litigation funder, agrees with a party of the case (generally the claimant) to be paid a fixed percentage of the recovery if that party is successful.

Since publication of the Study, the EP has passed a Resolution requesting the EU Commission to promulgate a new directive regulating third-party funding. In particular, the EU Parliament has added a draft directive to its resolution (the “Proposal for Directive”) which indicates the type of regulations that can be anticipated in EU Member States in the medium term.¹² As drafted, the Proposal for a Directive would apply a one-size-fits-all approach applicable to the TPLF of all litigation and arbitration proceedings in the EU.¹³ However, this proposal has been either

¹⁰ D’Alessandro & Poncibò, 2021, p. 50 ss.

¹¹ D’Alessandro & Poncibò, 2021, p. 555 ss.

¹² D’Alessandro & Poncibò, 2021, p. 60 ss.

¹³ EU Parliament, Resolution of 13 September 2022 with Recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL)), https://www.europarl.europa.eu/doceo/document/TA-9-2022-0308_EN.pdf

abandoned or put on hold for the time being, prompting considerable debate and discussion within the EU institutions and legal scholars.¹⁴

It is also worth noting that, in March 2025, the European Commission ('EC') has published a new Study ('EC Study') to analyse the landscape of TPLF across the member states of the EU by grounding on an empirical and comparative methodologies.¹⁵ In the EU, TPLF is actually practiced in some EU member states, such as: Austria, Belgium, France, Germany, Italy, Spain and The Netherlands.¹⁶ The ongoing comparative research seems to confirm that this practice is taking place in the absence of a specific national legislative framework, with the exception of Ireland.¹⁷ TPLF is permitted and regulated in Slovenia by Article 59, in accordance with the principles set out in the Commission Recommendation of 11 June 2013 pursuant to the legislation on collective redress,¹⁸ "Law of Collective Actions".¹⁹

The comparative analysis also indicates a general lack of data and case-law about TPLF in the EU Member States.²⁰ In fact, the provisions of the litigation funding agreements are generally protected by confidentiality clauses and, thus, they are not disclosed to third parties, nor to domestic courts.²¹ Today, such practice remains a much-debated topic in EU Private Law.²² The reason why this instrument has attracted so much attention from - and stirred controversy among stakeholders - is that, on the one hand, it can facilitate access to justice and promote the enforcement of EU Law,²³ while on the other hand, it may raise risks of abuses and undermine the well-functioning of EU judicial systems. For this reason, the debate on whether it should be regulated, and eventually how, is animated.²⁴ In fact, to date, while TPLF has certainly facilitated the filing of some claims in the EU (primarily concerning commercial and financial law, or competition law), there is a very limited factual evidence that abuses happen on a large scale, although the fact that this business remains undisclosed (i.e. litigation agreement are often confidential) prevents the making of accurate assessments by academic and policy-makers.²⁵

¹⁴ The proposed limitation on TPLF recovery shares to a maximum of 40% of awarded damages (absent "exceptional circumstances") represented a significant regulatory intervention in litigation funding arrangements. This limitation has proven controversial primarily because it conflicts with the principle of party autonomy in contract law.

¹⁵ British Institute of International and Comparative Law, *Mapping Third Party Litigation Funding in the European Union*, in collaboration with Civic Consulting, the Asser Institute and Risk & Policy Analysts (RPA), 2025, <https://www.biicl.org/projects/mapping-third-party-litigation-funding-in-the-european-union> (last visited March, 10, 2026).

¹⁶ British Institute of International and Comparative Law, *Mapping Third Party Litigation Funding in the European Union*, 2025, p. 76 ss. About Country Reports.

¹⁷ In Ireland, TPLF is prohibited by the Supreme Court of Ireland in *Persona Digital Telephony Ltd vs. Minister for Public Enterprise*, Ireland, [2017] IESC 27 at 54 (iv).

¹⁸ J. Sladič, A New Model of Civil Litigation in Slovenia: Is the Slovenian Judiciary Prepared for the Challenges Presented by the New Law on Collective Actions? In A. Uzelac, C. Hendrik, R. van Rhee (eds.), *Transformation of Civil Justice. Unity and Diversity* Paesi Bassi, 2018, pp.213-277.

¹⁹ J. Sladič, 2018, pp. 213 ss. See the Art. 59 of Slovenian Law of Collective Action, 2019.

²⁰ Precisely, there are no statistics or case law available yet that report on the use of TPLF.

²¹ British Institute of International and Comparative Law, EC Study, 2025.

²² T. Trapp, Z. Hlady, H. Abildgaard, O. Mokko, Third-Party Legal Standing under European Union Law: A Comparative Review of Selected EU Law and National Implications', in *Amsterdam Law School Research Paper* 1-54 (2024).

²³ M. E. Méndez Pinedo, Access to justice as hope in the dark in search for a new concept in European Law, in *Int. J. of Humanities and Social Sciences*, 11 (2001).

²⁴ D'Alessandro & Poncibò, 2021, p. 81.

²⁵ A. Cordina, Is It All That Fishy? A Critical Review of the Concerns Surrounding Third Party Litigation Funding in Europe, in *Erasmus Law Review*, 270-280 (2021). M. Dumitrunica, Third-party litigation funding between business opportunity and facilitating access to justice, in *European Journal of Law and Public Administration*, 104-111 (2022).

III. TPLF AND COLLECTIVE REDRESS

Among the key issues surrounding TPLF and consumer collective redress mechanisms are several interrelated considerations.

TPLF arrangements can create potential conflicts between the funder, the representative plaintiffs, and the legal counsel. For example, a funder's primary goal is often financial return, which may not always align perfectly with the optimal legal strategy for claimants. Ensuring transparency and proper governance mechanisms is therefore crucial to mitigate risks that the funder's interests might override the collective interests of the plaintiffs.

With regard to conflicts of interest, Directive 2020/1828, in line with the 2013 Recommendation on collective redress,²⁶ provides that the representative entities' (which manages the claim) decisions must not be unduly influenced by funders *in a manner that would be detrimental to the collective interests of the consumers concerned* (Article 10, paragraph 2.a). Moreover, the Directive excludes the possibility of bringing a representative action *against a defendant that is a competitor of the funding provider or against a defendant on which the funding provider is dependent* (paragraph 2.b). Paragraph 3 of the same article 10 empowers Courts and administrative Authorities to overview the compliance with the previously described provisions. The Directive does not regulate the aspect regarding disclosure of the funding agreement (if to the Court only or also to the counterparty). In this sense may prove helpful rule 237 of the ELI/Unidroit Model European Rules of Civil Procedure, which requires that such details may be disclosed to the Court and *in so far as appropriate, to the parties*.²⁷ These provisions, since no specific rules are present in the Italian system, could be applied as interpretative and addressing principles.²⁸

Secondly, how a litigation funder is compensated is another central concern. Funders typically receive a percentage of any damages recovered or settlement achieved. The structure of this remuneration can influence litigation strategies, potentially creating incentives to settle prematurely or to pursue claims primarily with high financial upside rather than those with the strongest legal merit. Regulatory frameworks and contractual safeguards are necessary to balance the funder's economic interests with the fair representation of claimants.

Having regard to contingency fees, the European hostility vis-à-vis this tool seems rooted. Indeed, point 30 of the 2013 Recommendation explicitly prohibited contingency fees, except in case they are properly regulated by a national legislation which considers the right to full compensation of the claimants. Similarly, the European Parliament's Legislative resolution of 26 March 2019, a preparatory work in the path to Directive 2020/1828, at the proposed article 15a, explicitly prohibited the introduction of a contingency fee mechanism.²⁹ However, the final version of the Directive, which is silent on this point, seems to have implicitly expunged such a prohibition, thus allowing member States to introduce contingency remuneration. A national example of

²⁶ Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ L 201, 26 July 2013, 60-65.

²⁷ ELI/Unidroit Model European Rules of Civil Procedure, 2020, <https://www.unidroit.org/instruments/civil-procedure/eli-unidroit-rules> (last visited March, 10, 2026).

²⁸ European Parliament, Legislative resolution of 26 March 2019 on the proposal for a directive on representative actions for the protection of the collective interests of consumers, 2018/0089 (COD), https://www.europarl.europa.eu/doceo/document/TA-8-2019-0222_EN.html?redirect (last visited March, 10, 2026).

²⁹ European Parliament, Legislative resolution of 26 March 2019.

contingency fees' regulation is represented by the Slovenian *ZKollT*, which provides that the plaintiff's lawyer can arrange a contingency fee agreement not exceeding 15% of the sum recovered by means of the action. However, this percentage can be increased up to 30%, should the lawyer accept to bear all the expenses in case of defeat (article 61).³⁰ Such an innovative mechanism can be defined as a *sui generis attorney third party litigation funding*.³¹ However, an alternative and viable method for regulating the issue – given the still cold European approach towards contingency fees – may be represented by the mentioned 2019 Italian reform, which, despite not introducing a proper contingency fee system, has adopted a sort of rewarding remuneration for lawyers (article 840-*novies* of the Code of Civil Procedure).³²

Furthermore, in collective redress, the design of the participation mechanism can significantly affect both the efficiency of the process and the fairness of outcomes. Opt-in mechanisms require claimants to actively join the action, which can limit exposure to funder-driven litigation but may reduce overall participation. Opt-out mechanisms automatically include all eligible claimants unless they expressly decline, potentially increasing recoveries and efficiency but also raising ethical concerns regarding consent and the extent of the funder's influence. Deciding which mechanism is more appropriate depends on legal traditions, the nature of the claims, and the balance between access to justice and protection of individual rights.

The central issue while dealing with TPLF and collective redress is represented by which adhesion mechanism is more tailor-made for TPLF. First of all, it is worth mentioning that after years of European hostility against the opt-out adhesion mechanism, Directive 2020/1828 does not impose an adhesion mechanism, thus leaving the door open for opt-out. However, in order to better understand how to find the better solution in the TPLF context, a comparative approach is needed. As a starting point, an opt-in mechanism has the positive aspect of granting a better management of the case by the funder (people who opt-in also signs the funding agreement). However, it might reduce access to justice, which is one of the main aims of both collective redress and TPLF. This issue can be better addressed by the opt-out scheme, which, however, may incentivize the so-called free-riding, *i.e.*, the action is joined also by people who have not signed the TPLF agreement, but who takes the benefits stemming from the action sustained by the funder. Having reference to Italy, it must be evaluated in practice the solution introduced by the 2019 reform of a postponed opt-in, similar to what was previously introduced in France with the creation of the *action de groupe*.³³ This model can mix the advantage of granting a decision which can potentially reach all the affected parties, thus by keeping control by the funder during the subsequent adhesion phase. Anyhow, it does not reduce the possibility of *free-riding*.

³⁰ A. Piletta Massaro, The New Directive on an EU-Wide Representative Action and Third-Party Litigation Funding on opportunity for consumers, Research Paper, 97-115, 2021, 10.5937/RKSP2101095P (last visited March, 10, 2026).

³¹ U.S. Chamber Institute for Legal Reform, *Uncharted Waters, An Analysis of Third Party Litigation Funding in European Collective Redress*, October 2019, 73, available at <https://instituteforlegalreform.com/research/uncharted-waters-analysis-of-tplf-in-european-collective-redress/> (last visited March, 10, 2026).

³² A. Piletta Massaro, The Italian class action reform: a redesigned tool beyond consumer law, in *ERPL* 841-864 (2020). C. Poncibò, A. Piletta Massaro, The Italian Government adopts a collective action reform which aims at redesigning proceedings beyond consumer law, in *Concurrences*, 95748 (2020).

³³ Dalloz, L'action de groupe entre dans une nouvelle ère : la réforme tant attendue est promulguée, 1 2026, <https://www.dalloz-actualite.fr/flash/l-action-de-groupe-entre-dans-une-nouvelle-ere-reforme-tant-attendue-est-promulguee-partie-1> (last visited March, 10, 2026).

IV. RE-THINKING TPLF IN CONSUMER COLLECTIVE REDRESS

In this context, it becomes imperative to develop a more coherent and principled regulatory framework for TPLF in consumer collective redress, one that recognises the transformative potential of litigation-tech synergies but also addresses their inherent tensions.³⁴ Such a framework should aim to preserve accessibility and innovation while embedding safeguards for transparency, fairness, and consumer autonomy. It should also foster accountability across the value chain, from the design of legal algorithms to the governance of funding arrangements. Only by doing so can the EU ensure that the promise of legal tech and litigation funding does not come at the expense of the rule of law or the legitimacy of its justice systems.

The article argues that a critical distinction must be drawn between funding arrangements involving sophisticated commercial entities and those involving individual consumers, groups of consumers and their associations.³⁵

The fundamental premise for differential treatment rests on the inherent vulnerability gap between consumers and commercial entities.³⁶ Professional economic operators typically possess legal expertise, negotiating experience, and the resources to assess complex funding agreements. They enter such arrangements as informed participants capable of evaluating risks and negotiating favorable terms. Consumers, by contrast, often lack specialized knowledge of litigation finance, face significant information asymmetries, and may be experiencing financial distress that compromises their bargaining position.

This vulnerability creates conditions where funders may exploit their superior position to secure disproportionate shares of litigation proceeds. The consumer or the group of consumers, facing the choice between abandoning a legitimate claim or accepting potentially onerous funding terms, may acquiesce to arrangements that ultimately leave them with minimal recovery despite bearing the emotional and temporal burdens of litigation.

Additionally, we argue that the Unfair Terms Directive may offer a suitable legal basis for consumers, as its core principles can be readily applied to evaluate the fairness of the contractual terms of litigation funding arrangements between funders, consumers and their groups.³⁷ Terms reserving exceptionally large portions of litigation proceeds for funders could be scrutinised by public agencies and courts in the EU under the significant imbalance test, especially when they substantially diminish the effective remedy available to consumers.³⁸

³⁴ These are Arkansas, Indiana, Nevada, Tennessee and West Virginia, Illinois, which have passed laws capping the percentages that funders may charge if the party being financed is a consumer. In this regard, see R. Avraham, L.A. Baker, A. J. Sebok, *The MDL Revolution and Consumer Legal Funding*, U of Texas Law, Law and Econ Research Paper No. 601, (2021), pp. 152-153, <https://ssrn.com/abstract=3858826>. The authors point out that in Tennessee, the introduction of the price cap induced one of the largest funders in the country to leave the market in that state. The authors take a contrarian approach to 'excessive' regulatory initiatives, illustrating how many of them are based more on 'fears' than on solid scientific evidence.

³⁵ C. de Meeûs, Investing in Responsible Litigation: Third-Party Funding for Public Interest Litigation, in *Neth Int Law Rev* 1 (2024), <https://doi.org/10.1007/s40802-024-00268-2>

³⁶ N. Helberger, H-W. Micklitz, H-W. & P. Rott, *The regulatory gap: Consumer protection in the digital economy*, BEUC (The European Consumer Organisation), 2024, https://www.beuc.eu/sites/default/files/publications/beuc-x-2021-116_the_regulatory_gap-consumer_protection_in_the_digital_economy.pdf (last visited March, 10, 2026).

³⁷ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, p. 29-34, ELI: <http://data.europa.eu/eli/dir/1993/13/oj>

³⁸ F. Esposito & M. Grochowski, The consumer benchmark, vulnerability, and contract terms transparency: A plea for reconsideration, in *ERCL* 1-31 (2022).

In practice, we argue that the courts and/or consumer protection agencies in the Member States should exercise heightened scrutiny when approving funding percentages in consumer cases, while the standard for approval should incorporate both procedural and substantive fairness considerations. Procedurally, courts would examine whether the consumer received adequate disclosures about the funding arrangement, including clear explanations of how the funder's share would be calculated under various recovery scenarios. Substantively, courts would assess whether the funder's potential recovery remains proportionate to the risk assumed and services provided. This would not categorically prohibit higher-percentage arrangements in all consumer cases, but would subject them to meaningful fairness assessment. Courts would consider factors such as the risk assumed by the funder, the complexity of the case, the anticipated duration of proceedings, and comparable market rates when determining whether a particular arrangement unfairly disadvantages the consumer.

V. COMPARATIVE PERSPECTIVES

In order to strengthen the analysis, the argument should also be developed through a comparative perspective on consumer collective redress and third-party litigation funding.

V.1 US Approaches to TPLF

While TPLF is generally permissible in the US, its regulation varies by state. Courts have consistently treated litigation funding as legally acceptable, provided it does not constitute champerty or maintenance.

The recognition of this vulnerability gap is not without precedent. Even in jurisdictions that traditionally favor contractual freedom, such as the United States, several state legislatures have implemented targeted consumer protections for litigation funding.³⁹ Several U.S. states, including Arkansas, Indiana, Nevada, Tennessee, West Virginia, and Illinois, have adopted legislative measures capping the percentage that third-party funders may charge when the funded party is a consumer. These interventions are typically justified on consumer protection grounds, reflecting concerns about exploitative pricing and the risk of funders extracting disproportionate returns from vulnerable claimants.

However, empirical and economic analyses cast doubt on the effectiveness of such price-cap regimes. As highlighted by Avraham, Baker, and Sebok, the introduction of a statutory cap in Tennessee led one of the largest consumer litigation funders to exit the state market altogether. Rather than correcting market failures, the cap appears to have reduced the availability of funding, thereby potentially exacerbating under-enforcement by limiting consumers' practical ability to pursue claims. This outcome illustrates a classic regulatory trade-off: measures designed to protect consumers ex-ante may, in practice, deprive them of meaningful access to justice ex post.⁴⁰

More broadly, the authors adopt a deliberately contrarian stance towards what they describe as "excessive" regulatory initiatives in the litigation funding space.⁴¹ They argue that many such

³⁹ R. Avraham, L.A. Baker, A. J. Sebok, *The MDL Revolution and Consumer Legal Funding*, U of Texas Law, Law and Econ Research Paper No. 601, 152-153 (2021), <https://ssrn.com/abstract=3858826>. They points out that in Tennessee, the introduction of the price cap induced one of the largest funders in the country to leave the market in that state. The authors take a contrarian approach to 'excessive' regulatory initiatives, illustrating how many of them are based more on 'fears' than on solid scientific evidence.

⁴⁰ R. Avraham, L.A. Baker, A. J. Sebok, 2021, p. 151 ss.

⁴¹ R. Avraham, L.A. Baker, A. J. Sebok, 2021, p. 151 ss.

interventions are driven less by robust empirical evidence than by normative anxieties surrounding the commodification of litigation, moral hazard, or perceived threats to judicial integrity.⁴² In doing so, the article challenges the assumption that price regulation is a necessary or proportionate response to litigation funding, suggesting instead that disclosure obligations, judicial oversight, and competition may offer more calibrated means of addressing potential abuses.

V.2 Australia

The Australian market for litigation funding is highly developed, and TPLF is widely recognised as a legitimate and essential component of access to justice.⁴³

In *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*, the High Court of Australia delivered a landmark judgment on the legality and governance of third-party litigation funding (TPLF)⁴⁴, firmly establishing its permissibility within the Australian legal system. The case concerned funding arrangements supporting representative proceedings brought by tobacco retailers against wholesalers, with the litigation funder playing an active role in organising and financing the claims. Rejecting the argument that the funding arrangements were inherently *champertous* or contrary to public policy, the High Court held that the provision of litigation funding, even where the funder stands to receive a share of the proceeds, does not in itself constitute an abuse of process. The Court emphasised that traditional doctrines of maintenance and champerty should not operate as categorical barriers to funding arrangements in modern litigation, particularly in the absence of demonstrable prejudice to the administration of justice.

At the same time, the Court adopted a measured and pragmatic approach. While affirming the legality of TPLF in principle, it declined to endorse a blanket acceptance of all funding arrangements. Instead, the judgment left open the possibility for judicial intervention where the funder's involvement might compromise procedural fairness or where the terms of the funding agreement, particularly the funder's share of any recovery, could be considered unreasonable. This preserved a supervisory role for courts without imposing ex-ante prohibitions on funding.

The significance of *Fostif* extends beyond its immediate facts. The decision laid the foundation for Australia's development into one of the most mature and sophisticated litigation funding markets globally. Subsequent case law has built on *Fostif* by refining standards for disclosure, managing conflicts of interest, and scrutinising funding commissions. Indeed, *Fostif* is particularly instructive because it demonstrates a judicial willingness to normalise TPLF as a legitimate feature of civil justice, while simultaneously recognising the need for case-specific oversight. The case is also notable for its applicability to claims brought by business entities, illustrating that concerns about access to justice and litigation asymmetries are not confined to individual consumers. In this respect, the decision has informed later debates on the role of litigation funding in collective redress mechanisms that extend beyond traditional consumer protection paradigms.

Following the 2006 *Fostif* decision by the High Court of Australia, the Australian judiciary faced a new set of challenges, particularly regarding how to organize and manage the participation of group

⁴² British Institute of International and Comparative Law, *Mapping Third Party Litigation Funding in the European Union*, 2025, p. 598.

⁴³ D'Alessandro & Poncibò, 2021, p. 25.

⁴⁴ *Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd* (2006) 229 CLR 386. This landmark High Court case confirmed the legality of third-party funding in Australia. It underscored that funding arrangements should not necessarily be viewed as *champertous* (unlawfully speculative) but left the door open for courts to assess the reasonableness of the funder's share. This ruling has been influential in later cases that have examined the specifics of funding agreements, especially when the funded party is a business entity rather than individual consumers.

members in such actions. One key concern was ensuring fairness and efficiency in adhesion mechanisms, that is, how claimants become part of a class action.

To address these issues, the courts explored the use of a “closed class system”, which was first introduced in the 2007 *Multiplex* decision by the Full Federal Court of Australia.⁴⁵ Under this system, the class of claimants is fixed at an early stage of the proceedings, meaning that only those who are identified and opt in at that point can participate in the action. This approach contrasts with an open or opt-out system, where potential claimants can be added later or are automatically included unless they expressly opt out.

The closed class system was designed to balance efficiency, fairness, and procedural manageability. By clearly defining the group of claimants early on, the court aimed to reduce uncertainties about funding arrangements, legal costs, and the allocation of any recovery. It also helped to mitigate potential conflicts of interest between funders, lawyers, and plaintiffs, since the composition of the class, and therefore the funder’s potential return, was known from the outset.

In essence, after endorsing TPLF, the Australian judiciary was working to create a structured framework for collective actions that could accommodate the new role of litigation funders while protecting the rights and interests of the claimants. The closed class system represented an early judicial attempt to regulate participation in funded collective litigation, setting a precedent for the careful integration of TPLF in class action law.

According to this approach, only adherents who signed the relevant TPLF agreement might have the right to join the action. Anyhow, it appears evident as this mechanism eminently transformed the opt-out Australian class action system into an opt-in one. As a consequence, an alternative solution was introduced with the so-called common fund orders. In brief, this system allows the Court to issue an order which authorizes the funder’s payment from the total sum awarded by the Court, irrespectively of the fact that class members entered into the relevant funding agreement.⁴⁶

V.3 Canada

Canada has emerged as one of the most advanced jurisdictions for TPLF in the context of class actions. The combination of judicial oversight and growing market sophistication has enabled Canadian courts to actively engage with litigation funding while safeguarding the interests of class members.

In *Lileyman v Bumble Bee Foods LLC*, the Ontario Superior Court of Justice addressed the legitimacy and public policy value of third-party litigation funding (TPLF) in the context of class proceedings.⁴⁷ The case concerned a proposed class action against a well-resourced corporate defendant, where the plaintiffs relied on external funding to pursue complex and costly litigation. Applying the litigation funding provisions of the Ontario Class Proceedings Act, the Court approved a funding arrangement under which a third-party funder agreed to cover disbursements

⁴⁵ Federal Court of Australia, Full Court, 21 December 2007, *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd*, (2007) 164 FCR 275.

⁴⁶ D’Alessandro & Poncibò, 2021, p. 30 ss.

⁴⁷ *Lileyman v Bumble Bee Foods LLC*, 2021 ONSC 4968. The Ontario Superior Court of Justice applied the litigation funding provisions of the Class Proceedings Act and confirmed the public policy benefit of litigation funding in situations where individual plaintiffs may have difficulty obtaining damages from a deep-pocketed corporate defendant. The litigation funder provided funding to the class for expenses and provided an indemnity for any adverse cost award. The Court recognised that funding by a third party can play a large role in ensuring that defendants are held accountable for their alleged wrongful actions. Justice Perrel observed that: “Third-party litigation funding is acceptable as promoting the important objectives of class proceedings, including promoting access to justice and behaviour modification and may be justified in class proceedings as a matter of necessity.”

and provide an indemnity against any adverse costs award. This aspect was particularly significant given the Canadian “loser pays” cost regime, which can otherwise deter collective actions by exposing representative plaintiffs to substantial financial risk.⁴⁸

In this case, it has been expressly recognised the public policy benefits of litigation funding in class actions, emphasising its role in overcoming structural barriers to access to justice. The Court held that third-party funding can be instrumental in enabling plaintiffs—who might otherwise lack the resources or risk tolerance—to seek redress against deep-pocketed corporate defendants. In this sense, TPLF was framed not merely as a private financing arrangement, but as a mechanism that supports the broader objectives of class proceedings. In other words, TPLF is acceptable as promoting the important objectives of class proceedings, including promoting access to justice and behaviour modification and may be justified in class proceedings *as a matter of necessity*.⁴⁹

This passage situates TPLF squarely within the normative foundations of collective redress, linking it to both access to justice and behaviour modification, the latter reflecting the deterrent and regulatory function of private enforcement. The Court’s reasoning thus aligns litigation funding with the public interest dimension of class actions, rather than treating it as an exceptional or suspect practice.

The decision in *Lileyman* is also significant in comparative perspective. It exemplifies a judicial approach that acknowledges litigation funding as a structural response to enforcement asymmetries, particularly where collective claims target powerful corporate actors and entail high litigation costs. At the same time, by subjecting funding arrangements to judicial scrutiny and approval, the Court reaffirmed the need for safeguards to protect class members’ interests and maintain procedural integrity.

Both courts in these jurisdictions often evaluate the specifics of each case, including the nature of the litigation and the characteristics of the funded party, to ensure that the funder’s share is appropriate. Generally, a larger share of the proceeds is more acceptable in cases where the funded party is a professional entity or a corporate actor, particularly in complex, high-risk litigation, for example, bankruptcy cases.

VI. THE ELI PRINCIPLES

Rather than importing price-cap models inspired by consumer credit regulation, a more proportionate EU approach could prioritise transparency and fairness⁵⁰ of funding agreements and judicial oversight.

In the realm of TPLF, where external financiers support litigation in exchange for a share of the proceeds, transparency and fairness are paramount. This is particularly relevant in consumer collective redress. The European Law Institute (‘ELI’) has recognised this imperative and has embarked in 2022-2024 on a comprehensive project aimed at elucidating key considerations surrounding TPLF arrangements.⁵¹ The multifaceted aspects of the ELI’s endeavour include: the

⁴⁸ British Institute of International and Comparative Law, *Mapping Third Party Litigation Funding in the European Union*, 2025, p. 572.

⁴⁹ British Institute of International and Comparative Law, *Mapping Third Party Litigation Funding in the European Union*, 2025, p. 572.

⁵⁰ E. Mišćenić, & P. Tereszkiewicz, Towards a new Digital Fairness Act, in *Journal of European Consumer and Market Law*, 229-233 (2024).

⁵¹ ELI Third Party Funding of Litigation Project & Working Group (2022-2024): <https://www.europeanlawinstitute.eu/projects-publications/current-projects/current-projects/eli-third-party-funding-of-litigation/>

spanning disclosure requirements, capital adequacy assessment, case control and conflict of interest, and fee regulation, with a focus on their implications for promoting fairness and bolstering confidence in the European legal landscape.⁵²

Central to the ELI's initiative is the exploration of *disclosure requirements* concerning TPLF agreements and assuring the transparency of this practice.⁵³ The Institute grapples with the delicate balance between safeguarding the confidentiality of funding arrangements and the imperative of transparency, particularly for courts and administrative bodies. By delving into when and to whom information regarding TPLF should be disclosed, the ELI seeks to foster an environment in which stakeholders are adequately informed while respecting the commercial sensitivities inherent in such agreements.

Furthermore, the ELI's project scrutinizes the critical issue of capital adequacy assessment. By examining the responsibility and practice for evaluating the financial robustness of TPLF funders and the disclosure of this information to prospective litigants, ELI aims at ensuring the stability of the litigation landscape. This diligence in assessing funders' financial standing serves to safeguard the interests of all parties involved, mitigating risks and bolstering confidence in the integrity of TPLF arrangements.⁵⁴

Addressing concerns surrounding case control and conflict of interest is another pivotal purpose of the ELI's Principles: clarity on these matters is indispensable for upholding the rights of litigants and maintaining trust in the judicial system.⁵⁵

Moreover, the ELI's Principles analyses the issue of fee regulation within the TPLF framework. By considering mechanisms such as caps or other regulatory measures, the ELI attempts to curb excessive fees that could compromise the fairness of the litigation process. Such oversight is instrumental in fostering equitable outcomes and bolstering confidence in the efficacy of TPLF as a financing tool.⁵⁶

Tellingly, also rule 238, paragraph 2, of the ELI/Unidroit Model European Rules of Civil Procedure states that in case of successful proceeding, *the total amount of compensation received by the qualified claimant shall form a common fund*. Moreover, paragraph 3 of the same rule 238 specifies that the representative entity's costs and expenses *must be paid from the common fund before any distribution of compensation to group members*. At this purpose, considering the relevant funder's fee included into the *costs and expenses* referred to in rule 238, paragraph 3, seems reasonable.⁵⁷

VII. CONCLUSIONS

Consumer collective redress and TPLF occupy an increasingly central position in contemporary systems of private enforcement of consumer rights in the EU. In regulatory environments characterised by diffuse harm, complex factual patterns, and asymmetric resources, particularly in digital and data-driven markets, collective litigation has become indispensable to the effective protection of consumer rights. Yet, as this article has argued, the mere availability of collective

⁵² X. Kramer, The ELI-Unidroit Model European Rules of Civil Procedure: Key Features and Prospects of Costs and Funding of Collective Redress, in S. Amrani-Mekki & T. Clay (eds), *Mélanges en l'honneur du Professeur Loïc Cadiet*, Lexis Nexis (2023), pp. 823-835, <http://dx.doi.org/10.2139/ssrn.4710983>

⁵³ European Law Institute (ELI), *Principles Governing the Third-Party Funding of Litigation*, 2024, <http://dx.doi.org/10.2139/ssrn.5058246> (last visited March, 10, 2026).

⁵⁴ European Law Institute (ELI), *Principles Governing the Third-Party Funding of Litigation*, 2024, p.10 ss.

⁵⁵ X. Kramer, 2023, p. 825 ss.

⁵⁶ X. Kramer, 2023, p. 830 ss.

⁵⁷ D'Alessandro & Poncibò, 2021, p. 84.

redress mechanisms does not guarantee their practical effectiveness. Persistent barriers relating to cost, risk, and organisational capacity continue to produce structural under-enforcement.

In this context, TPLF emerges as a powerful enabling mechanism. By redistributing financial risk and providing access to capital, funding arrangements can render collective actions economically viable and allow qualified entities or consumer organisations to pursue claims that would otherwise remain dormant. Properly designed, TPLF can therefore enhance access to justice, strengthen compliance incentives, and contribute to the broader enforcement architecture of EU consumer law.⁵⁸

At the same time, the growing role of litigation funding raises legitimate concerns. Issues of funder influence, conflicts of interest, transparency, and alignment between private profit and public enforcement objectives cannot be ignored, particularly in cases where claimants act in the collective interest of consumers rather than for individual gain. These concerns underscore the need for a nuanced regulatory approach that neither demonises TPLF nor treats it as a neutral technical solution.

The relationship between TPLF and collective redress thus reflects a broader tension within EU enforcement policy: the attempt to reconcile market-based instruments with public interest objectives. Rather than viewing litigation funding as an anomaly or a threat, EU lawmakers and courts should recognise it as a structural response to enforcement gaps, while ensuring robust safeguards to assure disclosure, transparency, and fairness especially in consumer collective redress. Ultimately, the effectiveness and legitimacy of consumer collective redress will depend not only on procedural design, but also on the governance of the economic infrastructures that sustain litigation. Addressing under-enforcement in consumer law therefore requires moving beyond formal rights and remedies to confront the financial realities of enforcement.

⁵⁸ M. Namysłowska, The Silent Death of EU Consumer Law and Its Resilient Revival: Reinventing Consumer Protection Against Unfair Digital Commercial Practices, in *J Consum Policy* 317-336 (2025).

MASS DAMAGES AND COLLECTIVE LITIGATION IN ITALY

Giorgio Afferni

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This article examines the recent development of mass damages litigation and collective redress mechanisms in Italy. It explains why the old opt-in class action (Article 140-bis of the Consumer Code) largely failed, owing to its high notice costs and lack of adequate financing mechanisms, and assesses whether the new class action (Article 840-bis et seq. of the Code of Civil Procedure) is capable of overcoming these shortcomings, notwithstanding its still limited success fees. The article then turns to the growing role of claims-purchase vehicles as an alternative means of aggregating and financing mass litigation. Particular attention is devoted to the requirement of homogeneity of rights, a procedural (rather than substantive) threshold that determines the admissibility and manageability of collective actions, and to how this requirement operates differently in cartel damages claims and in fraud-on-the-market claims against issuers, auditors and gatekeepers, as opposed to individual actions against investment firms for breach of information duties. The compensability of non-pecuniary damages in collective proceedings is also considered. The article concludes that the growth of collective litigation should be welcomed, as it enhances deterrence without disproportionately increasing the costs of justice administration, and it discusses whether Italy should move further towards an opt-out model of class action.

Keywords: class actions – collective redress; assignment of claims – homogeneity of rights – fraud on the financial markets

I. INTRODUCTION

In recent years, there has been a significant development in collective litigation in Italy, other EU Member States and the United Kingdom. This development has been made possible by the increasingly important role played in collective litigation by investment funds specialising in litigation financing. Areas affected by this phenomenon include private enforcement of competition law, consumer protection (e.g. the *Dieseldgate* case), but also environmental law and financial market law. The development of collective litigation is leading to the emergence of a new industry, consisting of law firms specialising in this kind of litigation, economists' firms specialising in damages estimation, service providers specialising in the mass collection of claims (so-called book-builders), and litigation funders. It remains to be seen how this phenomenon will be received and handled by the Italian courts (but also by the courts of the EU and the United Kingdom), whether with a defensive approach or a proactive approach aimed at finding the most efficient way to manage this new strand of complex litigation. What is certain is that the “genie is out of the bottle”. Hindering collective litigation will not stop the proliferation of lawsuits but could instead divert the flow towards less efficient forms of dispute resolution. In this work, I will briefly illustrate the reasons for the failure of the old class action, the lack of appeal of the new one and the superiority – at least at the present moment in history – of other mechanisms for aggregating disputes, such as, in particular, the purchase of claims. I will then discuss the impact of collective litigation on the development of substantive law categories, with particular reference to the need for claims to be sufficiently similar to each other (the so-called requirement of homogeneity of

rights) and how this requirement forces proponents to adapt their allegations and evidence to collective litigation, which requires a different approach from that of individual litigation. I will then focus on some practical cases, with particular reference to infringements of competition law, fraud on financial markets and compensation for non-pecuniary damage. I will conclude with a positive assessment of the development of collective litigation in Italy, which should be seen as an opportunity to bring order to the disorder of serial litigation, and not as a threat to the administration of justice.

II. THE OLD CLASS ACTION

The old class action could only be brought in the interests of consumers (Article 140-bis of the Consumer Code)¹. Furthermore, it could only be brought for certain infringements: breach of contract, product liability, service provider liability, unfair commercial practices, and infringements of competition law. It was a so-called *early opt-in* action, in the sense that consumers interested in joining had to do so immediately after the action was admitted. Bringing an old class action was expensive and risky. In addition to paying the costs of a lawyer and any technical consultant, the claimant had to bear high legal notice costs. In fact, the court typically ordered the publication of the order admitting the action in one or more national newspapers. This form of legal notice was expensive, often exceeding €100,000. Furthermore, if the action was declared inadmissible or rejected as unfounded on its merits, the claimant was obliged not only to pay the legal costs incurred by the other party, but also to give notice of the order of inadmissibility or the judgment of rejection in the manner already described. On the other hand, the old class action did not contain any specific provisions on the financing of the action. Therefore, it was unclear how the claimant could be compensated for the costs and risks incurred in bringing the action, also in the interests of all other consumers who were victims of the same infringement. In particular, it was impossible for the claimant to demand a contribution from the consumers interested to join the action or a share of any amount awarded by the court. In fact, the consumers concerned had the right to join the action directly in court, thus bypassing the claimant and free-riding on its investment. In this context, the only entity that has managed to build a sustainable economic model for the promotion of old class actions is Altroconsumo, perhaps the only Italian consumer association to be financed mainly by membership fees, having over 300,000 members. In particular, Altroconsumo used (and still uses) the promotion of class actions as a tool to encourage consumers to become members of the association (the so-called *call to action*). If even a small portion of those who sign up to the action become members of Altroconsumo, the association recovers all the costs necessary to promote the action and may even make a surplus to be used in other initiatives. However, in this way, the association has a financial incentive to promote the action, but no similar incentive to win the case. The only incentive to win is reputational, but this is often not enough to guarantee the availability of the resources needed to fight with the necessary vigour. This problem is well illustrated by the

¹ On the old class action, see C. Consolo and B. Zuffi, *L'azione di classe ex art. 140-bis cod. cons.*, Padua, 2012; E. Ferrante, *L'azione di classe nel diritto italiano*, Padua, 2012; T. Febbrajo, *L'azione di classe a tutela dei consumatori*, Naples, 2012; R. Caponi, *Azione di classe: il punto, la linea e la discontinuità*, in *Foro it.*, 149 (V, 2012); Id., *Il nuovo volto della class action*, in *Foro it.*, 383 (V, 2009); A. Giussani, *Il nuovo art. 140 bis c. cons.*, in *Riv. dir. proc.*, 595 (2010); P. Fiorio, *L'azione di classe nel nuovo art. 140 bis e gli obiettivi di deterrenza e di accesso alla giustizia dei consumatori*, in Demarchi P.G. (ed.), *I diritti del consumatore e la nuova class action*, Bologna, 2010, p. 487; I. Pagni, *L'azione di classe del nuovo art. 140 bis: le situazioni soggettive tutelate, l'introduzione del giudizio e l'ammissibilità della domanda*, in *Riv. dir. civ.*, 349 (2010); S. Menchini and A. Motto, *L'azione di classe dell'art. 140 bis c. cons.*, in *Nuove leggi civ. comm.*, 1414 (2010); C. Consolo, *Come cambia, rivelando ormai a tutti e in pieno il suo volto, l'art. 140-bis e la class action consumeristica*, in *Corriere giur.*, 1297 (2009). I would also like to refer to G. Afferni, *Opt-in Class Actions in Italy: Why are they Failing?*, in *Journal of European Tort Law*, 82 ff. (2016); Id., *Recenti sviluppi nell'azione di classe*, in *Contratto e impresa*, 1275 ff. (2013).

two class actions brought by Altroconsumo for infringements of competition law: *Altroconsumo and Casa del consumatore v. Moby et al.* and *Altroconsumo v. Volkswagen Bank et al.* In both cases, Altroconsumo had brought a class action after the Italian Competition Authority (ICA) had found a restrictive agreement, respectively, on the market for maritime passenger transport on routes between central and northern Italy and Sardinia and on the market for the purchase of motor vehicles through financing. In both cases, the ICA's decision was overturned on procedural grounds by the Lazio Regional Administrative Court with a decision confirmed by the Council of State: in *Altroconsumo and Casa del consumatore v. Moby et al.*, the Lazio Regional Administrative Court had ruled that the fact that the accused companies had participated in a joint venture was not admissible as evidence for the purposes of establishing the infringement, since this circumstance had not been contested at the start of the investigation; in *Altroconsumo v. Volkswagen Bank et al.*, it was contested that the ICA had waited too long after Mercedes Bank's self-reporting before initiating the investigation to ascertain the infringement, thereby incurring a forfeiture. In both cases, the class action brought by Altroconsumo could have continued, transforming from a follow-on action to a stand-alone action, taking advantage of the information acquired by participating in the ICA investigation. However, in both cases, the Association preferred to abandon the action, mainly because, as the action had been suspended pending administrative appeals against the ICA's decision, several years had passed since the infringement and consumers had lost interest in the case. Therefore, the costs of continuing the action, and mainly those of giving legal notice of any admission, were no longer justified. It is therefore clear that, if one wishes to provide the person proposing a class action with an adequate economic incentive, it is not enough to rely on their altruistic spirit (the myth of the Good Samaritan, which is sometimes invoked), but it is necessary to provide them with a financial incentive, for example by allowing them to obtain a share of the amount that may be paid by the court if the claim for compensation is upheld. In this way, the proponent is incentivised not only to bring the action, but also to pursue it with the vigour necessary to maximise not only the number of participants, but also the chances of success of the legal action.

III. THE NEW CLASS ACTION

The new class action represents an improvement over the old class action in several respects². First of all, its scope of application has been generalised. The action can be brought not only in the interest of consumers, but of anyone (including businesses or public bodies) who has suffered damage because of an infringement common to a sufficiently large number of individuals. Furthermore, the action can be brought not only for certain specific infringements, but for any infringement. Therefore, the new rules are now found in the Code of Civil Procedure (Art. 840-bis et seq. of the Italian Code of Civil Procedure). Secondly, the new class action is a *late opt-in* action, in the sense that those interested in benefiting from the legal action can join either immediately after the action has been admitted (as was already the case with the old class action), or immediately after the action has been decided with the acceptance of the claim. Therefore, the number of participants will certainly be higher than with the old class action. Thirdly, the new rules have eliminated the requirement of having performed the legal notice as ordered by the court as a

² On the new class action, see V. Barsotti, F. De Dominicis, G. Pailli, V. Varano (eds.), *Azione di classe: la riforma italiana e le prospettive europee*, Turin, 2020; C. Consolo, *L'azione di classe, trifasica, infine inserita nel c.p.c.*, in Riv. dir. proc., 714 (2020); Id., *La terza edizione della azione di classe è legge ed entra nel c.p.c.: uno sguardo d'insieme ad una amplissima disciplina*, in Corriere giur., 737 (2019); A. Carratta (ed.), *La class action riformata*, in Giur. it., 2297 (2019); A. Giussani, *La riforma dell'azione di classe*, in Rivista dir. proc., 1572 (2019). I would also like to refer to G. Afferni, *La nuova azione di classe antitrust*, in Mercato Concorrenza e Regole, 437 (2021).

condition for the action to proceed. Therefore, the claimant no longer has the burden of publishing the admission order in one or more national newspapers, which was not only very expensive but also completely useless for the purpose of increasing the number of participants (after all, how many ordinary citizens read legal notices published on newspapers?). Finally, and most importantly, the new class action provides for rules on the financing of the action. In particular, if the claim is upheld, the judge must pay the claimant's solicitor a success fee calculated on the basis of the sum of the amounts paid to the claimant and all other victims of the same infringement who have joined or will join the action. However, this success fee is too low. It varies between 0.5% and 9% of the total amount paid, depending on the number of participants: the greater the number of participants, the lower the percentage of the solicitor's success fee. In this regard, it should be noted that this success fee must remunerate not only the work of the solicitor, but also that of the technical consultant. Furthermore, it must compensate for the assumption of the risk of losing the case (which will typically be insured with an After-The-Event policy) and guarantee an adequate profit margin for any third-party funder of the litigation. Therefore, it is foreseeable that the new class action will only be used for infringements with the following characteristics: (i) relatively high individual damages, so that the size of the pie is sufficiently large; (ii) relatively low number of victims, so that the size of the slice for the claimant's solicitor is sufficiently large; and (iii) relatively low litigation costs, so that the risk assumed by the claimant's solicitor and any other funders of the action is sufficiently low. However, these are exactly the cases where a class action is less needed. The same limitations of the new class action are also found in the representative action introduced in implementation of the Representative Action Directive for the benefit of consumers (Article 140-ter of the Italian Consumer Code)³. Indeed, in this case, the limitations are even more severe, since consumer actions are typically characterised by a large number of participants and low individual damages.

IV. THE PURCHASE OF CLAIMS

The fact that the new class action is relatively unattractive should not lead us to conclude that collective litigation is not destined to grow in Italy. In fact, in addition to class actions, there are other means of aggregating claims for compensation of damages. In particular, the mechanism of purchasing claims is gaining ground also in Italy⁴. While in opt-in class actions, the victims of the infringement join a collective action brought by a member of the class or by a representative body, in the assignment of claims model, the victims of the infringement assign their claims to a special purpose vehicle (SPV), which acts on its own behalf to enforce in a single lawsuit all the claims purchased. On closer inspection, the purchase of claims is both a means of aggregating claims and a means of financing the litigation. In fact, typically, the vehicle created for the purchase of compensation claims bears the costs and risks of the litigation in exchange for a share of the proceeds. More precisely, the SPV can immediately pay off the assignor (so-called cash out), or it can have the claim assigned to it with the commitment to return part of the compensation obtained

³ G. De Cristofaro, *Azioni "rappresentative" e tutela degli interessi collettivi dei consumatori. La "lunga marcia" che ha condotto all'approvazione della Dir. 2020/1828/UE e i profili problematici del suo recepimento nel diritto italiano*, in Nuove leggi civ. comm., 1010 (2022).

⁴ On the purchase of compensation claims, see G. Afferni, *Bundling of claims by way of assignment in Italy*, in Mass Claims, 30 (2022); Id., *La cessione del credito risarcitorio per violazione del diritto antitrust*, in Diritto del commercio internazionale, 909 (2017). For its use in Germany see C. Krüger and A. Weitbrecht, *Bundling of Claims by way of Assignment in Germany*, in Mass claims, 107 (2021). T. Schreiber and M. Seegers, *Collective or Class Actions and Claims Aggregation in the EU: the Claimant's Perspective*, in N. Heaton and B. Holt (eds.), *Global Competition Review Private Litigation Guide*, 2021 (3^o ed.), p. 41. On assignment of claims and principle of effectiveness of EU competition law see most recently ECJ, 28 January 2025, case C-253/23, *ASG 2*.

(e.g. 70%) to the assignor if the legal action is successful⁵. In the first case, the purchase of the claim constitutes a form of financial investment, while in the second case, the purchase of the claim constitutes a form of non-recourse financing, i.e. without any obligation to repay. The assignment of claims is prohibited or subject to restrictions in some jurisdictions, while it is perfectly valid and effective under Italian law⁶. In Italy, the question has arisen as to whether the purchase of claims on a professional basis constitutes a financial activity reserved for intermediaries authorised by the Bank of Italy or other national competent authorities. In the context of the extensive litigation generated by the purchase of claims for flight delays by specialised companies, the Italian Court of Cassation has repeatedly stated that, when no payment is made at the time of the transfer of the claim, no financing activity is involved, with the consequence that no authorisation is required⁷. Therefore, under these conditions, the purchase of claims on a professional basis for the purpose of promoting a collective action is not only permitted but also free.

V. THE REQUIREMENT OF HOMOGENEITY OF RIGHTS

A class action is admissible only when the rights asserted are homogeneous, *i.e.* sufficiently similar (Article 840-bis, paragraph 1, of the Italian Code of Civil Procedure)⁸. The category of homogeneous rights is not a category of substantive law, but a category of procedural law (homogeneous rights do not exist!). The requirement of homogeneity of rights is satisfied when the claimant is able to prove, by means of evidence common to all members of the class, all the conditions for establishing liability and awarding compensation⁹. In particular, the claimant must be able to prove by common means the infringement, the causal link and the damage. Correspondingly, the defendant must be able to prove, by means of evidence common to all members of the class, all the facts on which their defences are based. In other words, in order for the requirement of homogeneity of rights to be met, it is necessary for the court to ascertain (also by its own motion) at the admissibility stage of the action that it will be able to decide on all the claims for compensation of all the members of the class in the subsequent stage on the merits through a single trial activity. Otherwise, if it were necessary to conduct individual trials for each member of the class, the action would not be practicable. Obviously, the requirement of homogeneity of rights must not be applied rigidly, but must be applied flexibly, based on the circumstances of the specific case and in light of its function. For example, when the number of victims who could join is sufficiently small, the judge may require a lower degree of homogeneity

⁵ In some Member States, where the assignment of claims is permitted, the assignment takes place on a fiduciary basis and the vehicle retains a portion of the dispute for itself as compensation for the service rendered (this is the case in Germany, for example). In Italy, on the other hand, in view of the prohibition on asserting another person's right in one's own name outside the cases provided for by law (Article 81 of the Italian Code of Civil Procedure), it is considered preferable to assign the claim by way of sale, where the retrocession of the share of the dispute represents the payment of the price, deferred and conditional upon the successful outcome of the dispute.

⁶ Among the many, see Court of Cassation, 10 January 2012, no. 52, in *Giudice di pace*, 209 (2012); Court of Cassation, 13 May 2009, no. 11095; Court of Cassation, 5 November 2004, no. 21192; Court of Cassation, 21 April 1986, no. 2812.

⁷ Court of Cassation, 21 March 2024, no. 7635; Court of Cassation, 20 February 2024, no. 4427. See also the order of inadmissibility pursuant to Article 363-bis of the Italian Code of Civil Procedure issued by the First President of the Court of Cassation on 17 May 2024, No. 13749, which refers to the aforementioned Court of Cassation ruling No. 4427/2024.

⁸ M. Libertini, *L'azione di classe e le pratiche commerciali scorrette*, in *Diritto industriale*, 150 f. (I, 2011); G. Conte, *I "diritti individuali omogenei" nella disciplina dell'azione di classe*, in *Riv. dir. civ.*, 609 ff. (2011).

⁹ See Court of Cassation, 31 May 2019, no. 14886, *Altroconsumo et al. v. Trenord*. See the comments by A. Giussani, *Diritti omogenei e omogeneizzati nell'azione di classe*, in *Riv. dir. proc.*, 359 (2020); G. Ponzanelli, *Il danno non patrimoniale dei pendolari all'esame della Corte di cassazione*, in *Nuova giur. civ. comm.*, 1002 (2019); C. Scognamiglio, *La Cassazione delinea presupposti e limiti di risarcibilità del danno non patrimoniale contrattuale nell'azione di classe*, in *Nuova giur. civ. comm.*, 993 (2019).

if he or she considers that he or she is still able to resolve the entire case with a practicable trial activity. In any case, the positions of each participant should never be required to be identical, as the possibility of a joint trial, including through the use of presumptions and equitable assessments, is sufficient. Finally, where there are significant differences between different groups of victims, the creation of sub-classes must be allowed – where useful for the efficient and orderly management of the case – in order to divide the participants into sub-groups, each of which meets the requirement of homogeneity.

Although the requirement of homogeneity of rights is expressly required only for the admissibility of class actions, it must be held that it should also exist for other means of aggregating a multitude of claims in a single trial, and in particular also in cases where a collective action is brought through the mechanism of assignment of claims. In fact, even in this case, the judge must be able to resolve all the claims submitted to his judgement through a single trial common to all claims for compensation or, in any case, through proceedings that are not excessively burdensome or lengthy. However, while in the case of a class action, the lack of this requirement implies that the action is not admissible, in the case of a collective action brought through the purchase of claims, the lack of this requirement implies that the judge may separate the claims into several separate cases (Article 104, paragraph 2, of the Italian Code of Civil Procedure).

VI. HOMOGENEITY OF RIGHTS AND DAMAGES CAUSED BY A CARTEL

The requirement of homogeneity of rights is typically satisfied in cases where collective action is brought on behalf of the victims of a cartel¹⁰. Indeed, in such cases, if the class has been correctly defined (*e.g.*, all direct purchasers of a certain good that was the object of a restrictive agreement), the evidence of the infringement is common to all members of the class. In follow-on actions, it will be sufficient to allege and produce the final decision of the competition authority (European Commission or ICA). Furthermore, in the case of cartels, causation is presumed (Article 17, paragraph 2, Directive 2014/104/UE). Therefore, proof of causation may also be provided by means of common evidence. It will be up to the defendant to prove that, for some particular reason, the effects of the cartel were not the same for all members of the class. This could be the case, for example, if the cartel concerned specific tenders (*bid rigging*), each of which requires a separate assessment. Finally, proof of damage may also be provided by common means. Obviously, the amount of damages for which each member of the group is entitled to compensation will depend on the quantity of product purchased and the price paid. Therefore, the damages for which each member of the class can claim compensation is not identical. However, in cases of this type, it is typically possible to identify a common formula for estimating the damage suffered by each member of the class, for example, a percentage of the price paid (known as *overcharge*). Moreover, the fact that there is a certain degree of heterogeneity between the goods purchased by the members of the class (*e.g.*, goods with partly different characteristics) or between the members of the class themselves (*e.g.*, members with different market power and therefore able to obtain different discounts) does not in itself affect the existence of the homogeneity requirement. For example, it is generally acknowledged that, even if each member of the class has purchased partially different products or obtained different discounts, the impact of the cartel on prices is common to all

¹⁰ See A. Montanari, *Il danno antitrust*, Padua, 2020; V. Meli and E. Camilleri, *La nuova disciplina del risarcimento dei danni per violazione della normativa antitrust*, in *Nuove leggi civ. comm.*, 119 (2018); G. Villa, *La direttiva europea sul risarcimento del danno antitrust: riflessioni in vista dell'attuazione*, in *Corr. giur.*, 301 (2015); L. Castelli, *Disciplina antitrust e illecito civile*, Milan, 2012. I would also like to refer to G. Afferni, *La nuova azione di classe antitrust*, cit., p. 446 ff.; Id., *Azione di classe e danno antitrust*, cit., p. 506 ff.

members of the class, since it has led to an inflation of the base price level, which influences the price of the various sub-products and on the basis of which individual discounts are negotiated (the so-called *tide effect*).

VII. HOMOGENEITY OF RIGHTS AND FRAUD ON THE FINANCIAL MARKETS

The requirement of homogeneity of rights is more problematic in cases of fraud on financial markets. In this regard, a distinction must be made between individual actions that can be brought against the distributors of the financial instrument (*brokers and dealers*) and collective actions that can be brought against the issuer, the auditor or the intermediaries responsible for the placement (*gatekeepers*). In individual actions of the first type, the victim typically alleges a breach of the rules of conduct in the provision of investment services, such as the unsuitability of the recommended transaction (Article 25 MiFID II) or the failure to provide information on the characteristics and risks of that specific type of financial instrument (Article 48 MiFID II Delegated Regulation). Furthermore, in this case, the victim typically alleges that if the intermediary had acted correctly (and therefore had not recommended an unsuitable transaction, or had correctly informed him or her about the characteristics and risks of that specific type of financial instrument), he or she would not have purchased the instrument in question. Therefore, in these cases, the victim typically alleges a defect in consent that played a decisive role in his or her decision to enter into the transaction (so-called *transaction causation*)¹¹. In class actions of the second type, on the other hand, the victim typically alleges fraud on the financial market (so-called *Fraud-On-The-Market*), claiming that – had the true state of affairs been publicly known – he or she would have paid a lower price for the instrument. Therefore, in these cases, the victim typically alleges a defect in consent that was merely incidental (so-called *loss causation*)¹². The reason for this difference in allegations lies precisely in the individual or collective nature of the action. In fact, when an individual action is brought, it is possible to allege a decisive defect in consent, the assessment of which requires a personalised evaluation of the victim's investor profile. On the other hand, when a collective action is brought, it is necessary to allege an incidental defect, the assessment of which does not require a personalised assessment of each victim's profile, but can be carried out by means of evidence common to all members of the class. In other words, if a class action is brought in the interest of a very large number of investors, alleging a decisive defect in consent due to the unsuitability of the investment in relation to their profile, the action should be declared inadmissible due to the lack of the requirement of homogeneity of rights. In fact, establishing the causal link (as mentioned above, a defect in consent that has been decisive for his or her decision to enter into the transaction) would

¹¹ On this type of litigation, see F. Annunziata, *MiFID II as a Template. Towards a General Charter for the Protection of Investors and Consumers of Financial Products and Services in EU Financial Law*, in R. D'Ambrosio and S. Montemaggi (eds), *Quaderni di ricerca giuridica di Banca d'Italia n. 90/2020, Private and public enforcement of EU investor protection regulation*, 21 (2020); F. Della Negra, *MiFID II and Private Law. Enforcing EU Conduct of Business Rules*, London, 2019; A. Perrone, *Servizi di investimento e tutela dell'investitore*, in *Banca borsa tit. cred.*, 1 (2019); G. Guizzi, *Un anno di ACF tra risultati raggiunti e qualche incognita*, in *Corriere giur.*, 5 (2018); L. Enriques and M. Gargantini, *The Expanding Boundaries of MiFID's Duty to Act in the Client's Best Interest: the Italian Case*, in *The Italian Law Journal*, (2017); D. Imbruglia, *La regola di adeguatezza e il contratto*, Milan, 2017. I would also like to refer to G. Afferni, *Remedies available to retail clients of investment firms in the light of the decisions of the Italian Financial Ombudsman (ACF)*, in M. Heidemann (ed.) *The Transformation of Private Law – Principles of Contract and Tort as European and International Law: A Liber Amicorum for Mads Andenas*, Berlin, 883 (2024); and in *Quaderni di ricerca giuridica di Banca d'Italia n. 90/2020*, cit., p. 97 ff.

¹² On this type of litigation, see P.-H. Conac and M. Gelter, *Global securities litigation and enforcement*, Cambridge, 2019; P. Giudici, *La responsabilità civile nel diritto dei mercati finanziari*, Milan, 2008; S. Bruno, *La (nuova?) responsabilità da prospetto*, in *Banca borsa tit. cred.*, 785 (2008). I would also like to refer to G. Afferni, *Responsabilità da prospetto: natura, danno risarcibile e nesso di causalità*, in *Danno e responsabilità*, 621 (2011); Id., *Recent developments on Prespectus Liability in Italian Law*, in *European Banking and Financial Law Journal*, 470 (2011).

require a personalised assessment of the profile of each member of the class, which would not be possible or practicable. On the other hand, if the proponent of the class action alleges that, in the absence of fraud, the market price of the financial instrument would have been lower, and therefore that each member of the class who purchased the instrument during the period affected by the fraud would have paid a lower price, the determination of causation does not require an individual assessment of the profile of each member of the class, but can be made by means of common evidence. Indeed, if the financial instrument is listed on a regulated market, it is generally presumed that the false information had an effect on its market price (the so-called *Fraud-On-The-Market-Theory*)¹³.

As can be seen, the decision to bring a class action rather than an individual action requires a change in the allegations made in court, abandoning those that require individual investigation in favour of those for which a common investigation is sufficient. However, limiting one's allegations to those common to all other members of the class may entail a partial sacrifice of one's claim for compensation. In fact, common allegations constitute a sort of lowest common denominator among all class members. Therefore, the victim of the infringement must carefully assess the advisability of bringing or joining a class action rather than bringing an individual action.

VIII. FALSE INFORMATION AND PRESUMPTION OF CAUSATION

The comparison between collective litigation and individual litigation and its impact on the allegation and proof of causation allows us to make some considerations on the recent case law of the Court of Cassation on proof of causation in the event of a breach of the rules of information by an intermediary who has provided an investment service. As mentioned, intermediaries providing services in relation to the purchase of a financial instrument are required to inform investors of the characteristics and risks of that specific type of financial instrument. There is debate as to which party bears the burden of proving causation in the event of a breach of this information obligation, *i.e.* whether it is the client's responsibility to prove that, had he or she known the true state of affairs, he or she would not have purchased the financial instrument in question, or whether it is the intermediary's responsibility to prove that, even if the client had known the true state of affairs, he or she would still have purchased the instrument in question and therefore suffered the damage for which he or she is seeking compensation. Part of the case law of the Court of Cassation states that the client only has the burden of alleging the causal link, but that it is the intermediary's burden to prove its absence, *i.e.* that even if duly informed, the client would still have carried out the disputed transaction¹⁴. Essentially, this case law extends to cases involving the breach of the duty to provide information in the provision of investment services, the presumption of causation established for cases of cartels or fraud on the financial markets. However, the two situations are completely different, since in the case of a cartel or fraud on the financial markets, the victim typically alleges defect in consent that was merely incidental, *i.e.* that without the cartel or fraud, he or she would have paid less for the purchase of the asset or financial instrument in question, whereas in the case of a breach of the duty of information in the provision of an investment service, the victim typically alleges a defect in consent that was decisive, *i.e.* that if he or she had known the true state of affairs, he or she would not have purchased the financial instrument. In the first two cases, it is possible to presume that the cartel or fraud had an impact on the price, whereas in the third case, in my opinion, it cannot always be presumed that, if properly informed, the victim would

¹³ Court of Cassation, 11 June 2010, no. 14056.

¹⁴ See, for example, Court of Cassation, Section I, 28 February 2018, no. 4727; Court of Cassation, Section I, 16 February 2018, no. 3914.

not have purchased the financial instrument in question. In the latter case, reference must be made to the principle of proximity of evidence¹⁵. Who, between the client and the intermediary, is in the best position to know what the client would have done if he or she had been properly informed? Which of the two parties knows the client's profile better: the client itself or the intermediary? In the case of a professional client or a sufficiently sophisticated retail client, it seems clear that the client knows or should know itself better than his or her intermediary. For example, the client in question may have multiple bank accounts and therefore have access to much more information about its operations than the intermediary, who only has visibility of the securities deposit account opened with it. On the other hand, in the case of a retail client with little expertise and experience in financial transactions, it can be assumed that the intermediary is in the best position to reconstruct its profile and past transactions. Therefore, in this case, it can be considered that it is the intermediary's burden to demonstrate that, in light of the client's profile and past transactions, even if correctly informed, the client would still have carried out the disputed transaction. As can be seen, when the client alleges a defect in consent that has had a decisive effect on its decision to enter into the transaction, identifying the party on whom the burden of proof of causation lies requires a case-by-case assessment and cannot be done by applying a simple presumption based on a rule of thumb.

IX. COMPENSATION FOR NON-PECUNIARY DAMAGES IN COLLECTIVE LITIGATION

The requirement of homogeneity of rights also has an impact on the possibility of claiming compensation for non-pecuniary damages in a collective action¹⁶. In Italian law, except in cases of criminal offences, non-pecuniary damages can only be compensated when there has been a serious infringement of a constitutional right. Furthermore, non-pecuniary damages must be estimated following a personalised assessment¹⁷. Therefore, it could be argued that compensation for non-pecuniary damages is incompatible with collective proceedings, since this type of proceedings typically concerns infringements that have caused minor individual damages and, in any case, does not allow for an individual assessment of the damages. However, also in this case, it is not correct to mechanically transpose rules established with reference to individual proceedings to collective proceedings (or vice versa)¹⁸. Rather, also in this case, it seems preferable to argue on the basis of the function of these rules and verify whether rules other than those generally applied to individual actions should be applicable to collective actions. The requirement of seriousness of injury for compensation for non-pecuniary damage serves to hinder serial actions of a trivial nature, where a multitude of victims bring a multitude of individual cases of little value. In such cases, the individual interest of each victim in obtaining compensation for minor non-pecuniary damages is not sufficiently high to justify the social costs of the proceedings (*de minimis non curat praetor*). Instead, the requirement for personalisation of non-pecuniary damages was introduced to prevent excessive standardisation of serious non-pecuniary damages, such as damage to health resulting in disability above a certain degree. It is therefore clear that the requirement of seriousness of the injury and

¹⁵ See P. Trimarchi, *La responsabilità civile: atti illeciti, rischio, danno*, Milano (3^o ed.), 2021, p. 685 ff.; G. Villa, *Onere della prova, inadempimento e criteri di razionalità economica*, in Riv. dir. civ., 707 (II, 2002).

¹⁶ C. Scognamiglio, *La Cassazione delinea presupposti e limiti di risarcibilità del danno non patrimoniale contrattuale nell'azione di classe*, in Nuova giur. civ. comm., 993 (2019). I would also like to refer to G. Afferni, *Recenti sviluppi nell'azione di classe*, cit., p. 1287 ff.

¹⁷ For both principles, see also Court of Cassation, United Sections, 11 November 2008, no. 26972, in Giust. civ., 930 (2009), with extensive commentary by M. Rossetti.

¹⁸ C. Scognamiglio, *Il risarcimento del danno e la sua prova nell'azione di classe (a proposito del c.d. Dieselgate)*, in Nuova giur. civ. comm., 169 (2024); Id., *Risarcimento del danno, restituzioni e rimedi nell'azione di classe*, in Resp. civ. prev., 509 ff. (2011); G. Villa, *Il danno risarcibile nell'azione collettiva*, in Danno e resp., 15 f. (2009).

the obligation to personalise the damages, which serve a useful function in individual proceedings, cannot be applied in collective proceedings or, in any case, can only be applied in a mitigated form¹⁹. In fact, class actions, but more generally collective litigation, have the very function of allowing access to justice even for small claims or for claims for which it would not be worthwhile to bring an individual action. Therefore, in collective litigation there should be no or very little space for the requirement that the injury is serious. In addition, as mentioned, in order for this type of action to be admissible or workable, it is necessary that the rights are homogeneous, *i.e.*, that the claims for compensation are sufficiently similar to each other to be decided on the outcome of a single trial activity common to all members of the class. This also applies to claims for compensation for non-pecuniary damage. Therefore, in collective litigation there should be no or very little space for personalisation of damages, which is not or hardly compatible with the requirement of homogeneity of rights.

X. THE IMPACT OF THE DEVELOPMENT OF COLLECTIVE LITIGATION ON THE FLOW OF LITIGATION

The establishment of collective litigation in Italy will have an impact not only on the way in which homogeneous individual rights are asserted in court, but also on the flow of litigation. In my opinion, in the coming years we will see a division of labour between individual and collective litigation. In addition, there will be a decrease in serial litigation. Individual litigation will remain essential when the victim of a massive infringement has suffered significant damages that require a personalised assessment, such as damage to health. On the other hand, collective litigation will gain ground for infringements that have caused common damages to a multitude of individuals, such as fraud on the financial market or infringements of competition law. There should no longer be room for serial litigation, *i.e.* litigation that, while not requiring an individual trial for each claimant, is nevertheless brought individually through a multitude of identical cases. An example of this was the serial litigation generated by the crisis at Veneto Banca, Banca Popolare di Vicenza and Banca Popolare di Bari. The clients of these three Italian banks had been unfairly pressured by the cooperative banks of which they were clients to underwrite or purchase ever-increasing quantities of shares in the same banks (so-called *self-placement*). Once the true state of affairs was discovered (*i.e.*, that the shares, which were not listed on the stock exchange, had a value much lower than their official value, with the consequence that they could not be resold at any price), clients brought a very large number of individual legal actions against the issuing banks before ordinary courts or the Italian Financial Ombudsman (ACF). The claims were always the same and largely disregarded the profile of each client (so-called massive infringements). Therefore, the work carried out by ordinary courts or ACF was mostly repetitive. In these cases, it would have been much more practical and efficient to bring class or collective actions against the auditing firms or other entities that should have prevented the placement of these financial instruments, which were clearly harmful to retail investors.

XI. CONCLUSIONS

In conclusion, one may wonder whether the development of collective litigation in Italy should be viewed favourably or unfavourably. In my opinion, it should be viewed favourably, as it increases the level of deterrence without excessively increasing the costs of administering justice. Furthermore, hindering collective litigation will not have the effect of reducing the overall level of litigation, but will only have the effect of encouraging serial litigation, which is much more

¹⁹ In favour of such a relaxation, see Libertini, *L'azione di classe e le pratiche commerciali scorrette*, cit., p. 160.

inefficient in terms of the costs of administering the system. Finally, the development of collective litigation in Italy will not necessarily lead to the kind of abuse of litigation that can be observed in the USA. In fact, the excesses of the American system are not so much due to the availability of opt-out class actions as to the combination of all those characteristics that make the American system so exceptional: punitive damages, jury trials, potentially unlimited pre-trial discovery, joint and several liability without right to contribution, and finally the so-called American rule, whereby the losing party is not liable for legal costs. Indeed, one might wonder whether it would not be preferable to bring this process of developing collective litigation to its conclusion by introducing opt-out class actions in Italy, as has already been done in the Netherlands (WAMCA) and Portugal (Law No. 83/95), and in the United Kingdom for infringements of competition law (Article 47B Competition Act 1998). In this regard, it is enough to consider what will happen the next time the European Commission or the ICA finds an infringement of competition law: for this same infringement, a class action will be brought (or maybe two: one in the interest of direct purchasers and one in the interest of indirect purchasers), a multitude of individual actions by larger purchasers who have suffered sufficiently high individual damages, one or more joint actions, one or more collective actions through the purchase of claims by a wide variety of entities: securitisation companies, alternative investment funds (*e.g.* SICAFs), Italian limited liability companies, foreign companies (*e.g.* GmbHs). One may wonder whether it would not be preferable, not only for the victims but also for the defendants, and above all for a more efficient and orderly administration of justice, if it were possible to bring a single opt-out class action that would allow all claims for compensation arising from the same infringement to be resolved in a single judgment.

HARMONIZING AND ENHANCING THE ENFORCEMENT OF DIGITAL RIGHTS. THE INTEGRATED ROLE OF CONSUMER LAW AND DATA PROTECTION LAW

Marina Federico

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This article explores how the boundaries between consumer law and data protection law have increasingly become blurred in the digital economy, and considers how these bodies of law can be integrated in order to strengthen the protection of users' rights, starting from the concept of “redress vulnerability”. The essay begins from a European law perspective, then focuses on the intersections between consumer law and data protection law in the Italian and German legal systems. It analyzes some recent judicial rulings, highlighting the need to use consumer law tools to enforce data protection rights, and vice versa. The article frames data privacy as a consumer right and discusses the advantages of collective redress for the protection of consumers' digital rights, as well as the main challenges that aggregate litigation is likely to face in this field in the coming years.

Keywords: Consumer law – data protection – collective redress – enforcement – redress vulnerability

I. THE “REDDRESS VULNERABILITY” OF DIGITAL CONSUMERS

The term “redress vulnerability” refers to consumers’ “difficulty in seeking remedies for wrongs suffered”¹. This expression appears in a study devoted to “vulnerable consumers” conducted by the European Parliamentary Research Service (EPRS). It describes the complications which consumers may encounter when asserting their rights and interests before an administrative or judicial body. However, the EPRS does not dwell extensively on this concept, and focuses on other “layers”, types, and dimensions of consumer vulnerability instead². Similarly, the growing body of literature on “digital vulnerability” seldom devotes sustained attention to the law of remedies³.

One way to mitigate, or at least reduce, the redress vulnerability of consumers in online markets is through the use of collective redress mechanisms. Collective actions are judicial remedies which allow a plurality of individuals to bundle their claims and bring them jointly before a court, asking for an injunctive or compensatory relief, when these claims share a sufficient degree of

¹ N. Sajn, *Vulnerable consumers*, EPRS Briefing, 3 (2021).

² For a layered approach to vulnerability, see F. Luna, *Elucidating the Concept of Vulnerability: Layers Not Labels*, in *International Journal of Feminist Approaches to Bioethics*, 121 ff. (2009).

³ On digital vulnerability, among many, see M. Grochowski, *Digital Vulnerability in a Post-Consumer Society. Subverting Paradigms?*, in Max Planck Institute for Comparative and International Private Law Research Paper Series, 215 (2024); C. Crea - A. De Franceschi (eds.), *The New Shapes of Digital Vulnerability in European Private Law*, Varese (2024); G. Malgieri, *Vulnerability and data protection law* Oxford (2023); N. Helberger - M. Sax - J. Strycharz - H.W. Micklitz, *Choice Architectures in the Digital Economy: Towards a New Understanding of Digital Vulnerability*, in *Journ. of Consum. Policy*, 175 ff. (2022); C. Riefa, *Protecting Vulnerable Consumers in the Digital Single Market*, in *Eur. Bus. Law Rev.*, 1 ff. (2022). In general, on the concept of vulnerability, M. A. Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, in *Yale Journ. of Law and Feminism*, 1 ff. (2009); for a group-based approach to vulnerability, L. Peroni - A. Timmer, *Vulnerable groups: the promise of an emerging concept in European Human Rights Convention Law*, in *I•CON*, 1056 ff. (2013).

“homogeneity”. In essence, they ought to present common “issues” of law or fact, or at least originate from a common title⁴.

This work explores collective redress as a way to strengthen the enforcement of consumer rights in the digital environment⁵. Particular attention is devoted to the data protection rights of consumers, which appear to be well suited to being presented in a collective proceeding. In the *big data* economic model, violations of data protection law often occur on a large scale, given the massive volume of personal data collected by companies. Collective proceedings can enhance the effectiveness of the rights and obligations provided for in data protection law, granting data subjects effective relief when their rights are infringed, and reducing their “redress vulnerability”. To this end, this article examines the intersections between data protection law and consumer law in the collective private enforcement of digital rights. Data protection and consumer law might in fact be used in an integrated way. Individuals frequently hold a “double” legal qualification: they are data subjects, according to Regulation EU/2016/679 (the General Data Protection Regulation, GDPR), and consumers. When users consent to the processing of their personal data in exchange for services or products, they provide a “double consent”: one to the processing of their data, in accordance with the GDPR, and the other to the contractual terms unilaterally drafted by the service provider⁶.

The intersections between consumer and data protection law are multifaceted. An unlawful processing of personal data may simultaneously constitute an unfair practice, or terms and conditions of a service may include abusive clauses that also impair the exercise of data protection rights. The same conduct may violate the GDPR and other consumer law rules, such as Directive EU/2011/83 (the “consumer rights” directive), as well as Directive 2005/29/EC on unfair commercial practices, or Directive 93/13/EC, on unfair contractual terms⁷.

In the spirit of this gathering, this analysis focuses on Italy and Germany. The two legal systems both adopt a “dignitary” and “personalistic” conception of data protection, and have developed similar rules with respect to the compensation of non-pecuniary losses. Moreover, data protection law and consumer law are extensively harmonized at the EU level, thus a common approach is needed for ensuring their effectiveness⁸.

⁴ On collective redress in Europe, in general, see, among many, M. E. Bartkus – M. Tulibacka – I. Varga – S. Voet (eds.), *Collective Litigation in Europe: Law and Practice*, Huntington, NY, 2025; C. I. Nagy, *Collective actions in Europe. A Comparative, Economic and Transsystemic Analysis*, Berlin (2022); D. Fairgrieve, *Collective redress in Europe: Moving forward or treading water?*, in *International and Comparative Law Quarterly*, 465 ff. (2020); S. Voet, *European Collective Redress and Compensation*, in *Effet de l'action collective. The Class Action Effect*, 125 ff. Montréal (2018); R. Caponi, *Azioni collettive: interessi protetti e modelli processuali di tutela*, in *Riv. dir. proc.*, 1210 ff. (2008); R. Donzelli, *La tutela giurisdizionale degli interessi collettivi*, Napoli (2008); R. Mulheron, *The Class Action in Common Law Legal Systems. A Comparative Perspective*, Oxford (2004).

⁵ On the application of collective redress for protecting fundamental rights in the digital age, G. Versaci, “*TikTok ban*” confermato dalla Supreme Court: le condotte contestate alla piattaforma cinese sotto le lenti del diritto europeo, in *Foro it.*, 306 ff. (2025); M. Federico, *Protezione dei dati personali e tutela collettiva. Itinerari di comparazione tra Europa e Stati Uniti*, 159 ff. Torino (2024); A. Palmieri – F. Altamura (eds.), *Class actions e meccanismi di tutela collettiva. Le prospettive di sviluppo e le sfide della dimensione digitale* Torino (2023).

⁶ C. Camardi, *Prime osservazioni sulla Direttiva UE/2019/770 sui contratti per la fornitura di contenuti e servizi digitali. Operazioni di consumo e circolazione dei dati personali*, in *Giustizia civile*, 499 ff. (2019); G. Resta, *I dati personali oggetto del contratto. Riflessioni sul coordinamento tra la Direttiva 2019/770 e il Regolamento 2016/679*, in *Ann. del contratto* 127 ff. (2018). See also, on this matter, F. Caggia, *Cessione di dati personali per accedere al servizio digitale gratuito: il modello del “consenso rafforzato”*, in V. D’Auria (ed.), *I problemi dell’informazione nel diritto civile, oggi. Studi in onore di Vincenzo Cuffaro*, 417 ff. Roma (2022).

⁷ See, on the relationship between consumer and data law, among many, recently, C. Angiolini, *Le intersezioni tra disciplina in materia di dati personali e diritto dei consumatori*, in C. Angiolini – A. Iuliani (eds.), *Manuale sulla protezione e circolazione dei dati personali*, Firenze 97 ff. (2025).

⁸ On the issue of ensuring the effectiveness of private law remedies in this field, see G. De Gregorio – S. Demkova, *The Constitutional Right to an Effective Remedy in the Digital Age*, in *Eur. Yearbook of Constitutional Law* 223 ff. (2023).

The article begins from a European law perspective, then narrows its scope, analyzing the intersections of consumer and data protection law in the Italian and German legal systems, with a focus on the law of remedies. The aim is to find a way to effectively tackle the above-mentioned “redress vulnerability” of consumers, and collective judicial remedies are claimed to be a tool to achieve this objective.

The paper starts with the analysis of concrete cases attesting the functioning of public and private enforcement at the EU level, looking at some recent rulings of the Court of Justice, and at the judicial interpreting the GDPR and Directive EU/2020/1828, on representative actions for the collective interests of consumers (hereinafter: RAD). These cases highlight the necessity and the possibility of using consumer law for enforcing data protection law, and vice versa.

This paper embraces a comparative law methodology, comparing the legal systems of Italy and Germany, with respect to the role of collective disputes in data protection and consumer law⁹. Both statutory law and case law are analyzed. The essay employs an integrated approach combining substantive and procedural law, while the topic also lies at the intersections of public and private law. On the one hand, the aim of this research is theoretical. It argues that data protection is not only an individual right, but also a collective and diffuse interest, and it maintains the difficulty in drawing boundaries between these categories, and between fundamental rights and consumer rights, in our digitized and globalized society. On the other hand, the aim of the research is also practical. It argues that consumer law tools may enhance the fundamental right to data protection, and that collective actions are not only suitable, but useful, to bring these interests to court in terms of access to justice and the protection of fundamental rights¹⁰.

The essay is structured as follows. Following this brief introduction, the second paragraph provides an overview of the European legal framework, advocating for a more holistic conception of consumer privacy. Then, the third paragraph focuses on why collective redress may be an effective tool to tackle consumer redress vulnerability and explores the collective dimension of consumer privacy. Afterward, the fourth paragraph examines the Italian and German systems of collective redress. The fifth paragraph shifts the analysis to some judicial cases where collective proceedings have been brought in the data protection field, in both Germany and Italy. Eventually, a conclusion is drawn, advocating for further integration of consumer law and data protection law, and pointing to the main challenges that collective judicial actions for enforcing consumer privacy are likely to face in the coming years.

II. CONSUMER LAW, COMPETITION LAW AND DATA PROTECTION LAW: A TRIANGLE

For a while, the European Union stressed that data protection law and consumer law should be kept separate¹¹. Formally, this was linked to a conception of personal data as attributes of

⁹ In general, on the role of comparative law in the digital age, G. Smorto, *Il ruolo della comparazione giuridica nella contesa per la sovranità digitale*, in DPCE online 339 ff. (2023).

¹⁰ On the access to justice movement and the role of collective redress in it, B. G. Garth – M. Cappelletti, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, in Buffalo Law Review, 181 ff. (1978).

¹¹ A critique to this perspective is offered by G. Smorto – A. Quarta, *Diritto privato dei mercati digitali*, 155-157 Firenze (1st ed. 2020). See also S. Pagliantini, *GDPR e consumerizzazione dei dati personali*, in Giurisprudenza italiana, 2212 ff. (2023); F. Zuiderveen Borgesius – N. Helberger – A. Reyna, *The perfect match? A closer look at the relationship between EU consumer law and data protection law*, in Common Market Law Review, 1427 – 1466 (2017); O. Lynskey – F. Costa Cabral, *Family ties: the intersection between data protection and competition in EU law*, in Common Market Law Review, 11-50 (2017).

personality rather than tradable commodities. Integrating data protection and consumer law more closely would have implied acknowledging the property-like nature of personal data¹².

However, beyond statements and declarations, separating data protection and consumer law also served to distribute competences between the different supervisory authorities. Consumer authorities would enforce consumer law, while data protection authorities would enforce data protection law rules.

This assumption was finally and remarkably challenged by the German *Bundeskartellamt* (*BKartA*), in the well-known case *Facebook Inc. et al v. Verbraucherzentrale Bundesverband e.V.*¹³. Facebook was accused of abusing its dominant position in the social media market, thereby distorting competition. The Federal Cartel Office argued that Facebook had unduly secured its dominant position by collecting the personal data of millions of users without their valid consent, in breach of the GDPR, and created barriers for others trying to access the market.

Facebook appealed the decision of the *BKartA* to the Higher Regional Court of Düsseldorf. The question of whether a national competition or consumer law authority is entitled to declare a violation of data protection law was referred to the Court of Justice. Specifically, the German court asked whether this complied with the GDPR, which assigns the task of enforcing data protection law to data protection supervisory authorities.

In case C-252/21, the CJEU took a clear stand in favor of enhanced cooperation between different authorities, and integration between data, competition and consumer law. It stated that in investigating the compliance with data protection law it may be “*a vital clue to assess the compatibility of a certain conduct with the interests of the market or to assess the consequences of a certain practice for consumers*”. It then hoped for sincere cooperation among national authorities.

The European Commission in its investigation into Apple and Metaplatforms for breaches of Regulation EU/2022/1925, the Digital Markets Act (hereinafter: DMA), eventually stated that Metaplatforms’s controversial “pay or okay” model violated the DMA, infringing antitrust and data protection law rules, and therefore imposed heavy sanctions on the platform¹⁴.

Italian jurisdictions have likewise supported the application of consumer law rules in cases involving the right to data protection. In 2018, the Italian Competition and Market Authority (Autorità Garante della Concorrenza e del Mercato, AGCM) sanctioned Metaplatforms for its misleading commercial practices. The Authority affirmed that Metaplatforms was deceiving consumers declaring that its main social media service, Facebook, was provided for free. The Authority declared that users’ personal data served as counter performance for the platform’s service. Facebook filed an appeal against the Authority’s decision before the regional administrative court (TAR Lazio), then before the Council of State. Both courts upheld the decision of the AGCM, confirming its competence and the applicability of consumer law, specifically of the

¹² See the European Data Protection Board Opinion on Directive 770/2019, available at: https://www.edps.europa.eu/sites/default/files/publication/17-03-14_opinion_digital_content_en.pdf. The EDPS has vouched against the possibility of formally qualifying personal data as counter performance, affirming that: “There might well be a market for personal data, just like there is, tragically, a market for live human organs, but that does not mean that we can or should give that market the blessing of legislation. One cannot monetise and subject a fundamental right to a simple commercial transaction, even if it is the individual concerned by the data who is a party to the transaction”.

¹³ See C. Osti – R. Pardolesi, *L’antitrust ai tempi di Facebook*, in *Mercato Concorrenza Regole* 195 ff. (2019).

¹⁴ See European Commission, press release, “The European Commission finds Apple and Meta in breach of the Digital Markets Act”, available at: https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_25_1085/IP_25_1085_EN.pdf. On the integration between competition and data law, I. Graef – B. van der Sloot, *Collective Data Harms at the Crossroads of Data Protection and Competition Law: Moving Beyond Individual Empowerment*, in *European Business Law Review*, 513 ff. (2022).

prohibition of unfair commercial practices, admitting that data subjects can rely on consumer law rules in addition to the GDPR¹⁵.

The same approach is desirable for private enforcement. In Germany, data protection has been included among the rights that can be enforced through collective injunctions since 2001. Under Section 2 of the *Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen* (*Unterlassungsklagengesetz*, hereinafter: UKlaG, the “law on injunctions against infringements of consumer law and others”) qualified entities may seek collective injunctions to enforce consumer law. This includes “the rules defining the lawfulness of the collection of personal data of a consumer by an undertaking, the processing or use of personal data which have been collected by a business in relation to a consumer, where the data are collected, processed or used for purposes of advertising, market and opinion research, use by an information agency, a personality and usage profile establishment, of any other data business or for similar commercial purposes” (Section 2, UKlaG).

Integrating consumer, data protection, and competition law not only strengthens substantive protection for digital users, but also saves judicial and administrative resources¹⁶, enhances legal certainty, secures consistency and coherence of decisions. Thus, the CJEU affirmed that consumer law tools can be used to enforce data protection law interests also as far as private enforcement is concerned.

Specifically, the CJEU vouched for the integration between data and consumer law in private enforcement in case C-319/20, *Metaplatforms v. the German Federal Union of Consumer Organizations and Associations*. This case also originated in Germany, when the German Federal Union of Consumer Organizations and Associations brought a collective injunction against Meta pursuant to Section 2 of the UKlaG. The Higher Regional Court of Berlin asked the Court of Justice about the compatibility with Article 80 GDPR of a law allowing a consumer organization to raise a collective claim for securing privacy rights, namely the UKlaG. Article 80 GDPR enables the representation of the data subjects by an entity upholding their rights on their behalf. The case offered the Court the chance to rule on the possibility of using consumer collective redress for enhancing data protection rights¹⁷.

Although the RAD was not yet in force¹⁸, the CJEU expressly referred to it. The RAD lists the GDPR among those European legal acts whose violation, pursuant to Annex I, may ground a representative action for “the collective interests of consumers” (Annex I, n. 56; Article 2, RAD). Annex I of the RAD also enumerates other legal acts which are closely linked to the GDPR, such as the Digital Services Act, the AI Act, Directives EU/770/2019 and 771/2019. The Court

¹⁵ TAR Lazio nn. 260-261/2021, Cons. di Stato n. 2631/2021; among many, see V. Ricciuto, *Lo scambio dei dati con i contenuti e i servizi digitali: una nuova modalità di contrarre?* in EJPLT 20-33 (2023) and F. Bravo, *La “compravendita” di dati personali?*, in Diritto di internet, 531-540 (2022).

¹⁶ See J. G. Backhaus – A. Cassone – G. B. Ramello, *The law and economics of class actions in Europe: Lessons from America*, Cheltenham (2012); A. Bitetto, *European vs. American Class Action: Discrepancy in Law and Economics Perspective!*, in Comparative Law Rev., 195 ff. (2023).

¹⁷ See on this case, M. Federico, *European Collective Redress and Data Protection. Challenges and Opportunities*, in Medialaws 86 ff. (2023); K. Wörle – O. J. Gstrein, *Collective Data Protection Litigation*, in Eur. Journ. of Comp. Law and Gov., 293 ff. (2024). The very same case gave rise to another preliminary ruling proceeding, one year later, case C-757/22, *Metaplatforms v. the German Federal Union of Consumer Organisations and Associations (Metaplatforms II)*, 11 July 2024. Moreover, the Court of Rotterdam has recently raised a request for preliminary ruling to the CJEU (C/2025/5934) asking whether Article 80 GDPR legitimises collective actions for damages.

¹⁸ On the RAD and its implementation, P. Rott – A. Halfmeier – W. Vandenbussche – L. Bugatti – J. Mucha, *Comparative legal study on procedural rules and their impact on collective redress actions in Europe*, Study commissioned by BEUC, 2025; A. Biard, *Collective redress in the EU: a rainbow behind the clouds?*, in ERA Forum, 197 ff. Berlin (2018); G. Scarchillo, *Class action: dalla comparazione giuridica alla formazione del giurista: un caleidoscopio per nuove prospettive* Torino (2nd ed. 2024).

explicitly recognized the RAD as a potentially important instrument for enforcing data protection law, and increasing its effectiveness.

III. THE CASE FOR COLLECTIVE REDRESS

The RAD represents the latest step in the development of a European “procedural consumer law”, to borrow the terminology of Maria Cecilia Paglietti and Vincenzo Zeno-zencovich¹⁹.

Representative actions may be brought when the same commercial practice violates both consumer and data protection rights. As the Court of Justice noted, “*the infringement of a rule relating to the protection of personal data may at the same time give rise to an infringement of rules on consumer protection or unfair commercial practices*”²⁰.

Representative actions, however, are not the only collective enforcement mechanism available for data protection law. Article 80 GDPR provides a distinct legal basis for starting collective proceedings in the interest of data subjects, irrespective of their nature as consumers and market actors.

Article 80 leaves the choice up to the laws of Member States on whether to allow bodies, organizations and associations to lodge a complaint with a supervisory authority, or to ask for a judicial remedy, with or without a data subject’s mandate, when the rights of the data subjects have been infringed²¹.

This provides data subjects with a “double shield”: the one of consumer law, and the other of data protection law.

Collective proceedings present significant advantages in terms of access to justice, enabling individuals to bundle their claims. Pecuniary and non-pecuniary losses may be small on an individual scale, but acquire great relevance when considered collectively, bringing to light the societal dimension of privacy harms, and performing a deterrent effect against unlawful conducts²². As to the suitability of data protection rights for collective proceedings, the answer appears affirmative. Data protection is, indeed, an individual and fundamental right, but it does also have a serial and collective dimension.

In each relationship and contractual agreement between platforms and their users, the right to control the flow of one’s personal data belongs to each individual. Yet, in many contexts - for instance, when profiling techniques “group together” a plurality of individuals for marketing purposes, or targeted advertising, and discriminate against them, or profile them inaccurately - data protection takes on the features of a collective interest. This collective interest can be traced to a certain group, the members of which hold an interest in the processing of their data happening in a “fair, lawful, and transparent” manner, as prescribed by the GDPR. Such an interest can then be represented by a qualified entity, which may assert it in court.

This situation is similar to other subjective juridical situations in consumer law, such as the interest in fair competition, or in proper market functioning, which have the dual nature of an individual *and* collective interest.

¹⁹ M. C. Paglietti – V. Zeno-zencovich, *Diritto processuale dei consumatori* Roma (2011).

²⁰ CJEU, *Metaplatforms*, I, cit.

²¹ On the interpretation of Article 80 GDPR, see F. Episcopo – A. Van Duin – A. Jonkers, *Towards Collective Redress for Data Protection Harms Under the GDPR*, in *Mass Claims Journal*, 67 ff. (2025); E. Palmerini, *Il problema dei (nuovi) danni negli illeciti algoritmici*, in *Resp. civ. prev.*, especially 430 f. (2025); G. Versaci, *Trattamenti illeciti dei dati personali e tutele collettive dei consumatori*, in F. Altamura, A. Palmieri (eds.), cit., 95 ff.; M. Federico, *European Collective Redress*, cit.

²² See I. Cofone, *The Privacy Fallacy: Harm and Power in the Information Economy* (2023); D. Citron – D. J. Solove, *Privacy harms*, in *Boston University Law Review* 818 (2022); A. Palmieri – M. Federico, *Collective privacy litigation and the law of torts. A comparative perspective*, in *Siena-Tirana Comparative Law Day. Legal Issues in the Digital Age, Proceedings Book*, 7 ff. Tirana (2025).

In the field of data protection, we also witness a societal interest in a data driven economy where the fundamental rights of the individuals are safeguarded and respected, and their personal data processed fairly. “Group data protection” is the term that can effectively encompass this multi-layered and stratified dimension of data privacy²³.

IV. THE IMPLEMENTATION OF THE REPRESENTATIVE ACTION IN ITALY AND GERMANY

For collective actions to flourish, it is vital to overcome the longstanding skepticism and reluctance that civil law systems, such as those of Italy and Germany, and other European Countries, have traditionally shown toward aggregate litigation mechanisms²⁴.

It remains to be seen how collective proceedings will evolve in this field across different European states. Both consumer and data law are extensively harmonized by European law. However, Member States enjoy a wide margin of discretion in civil procedure law, due to the principles of subsidiarity and procedural autonomy²⁵.

a) Currently, in the Italian legal system there are two main pathways for starting a collective proceeding in private law matters. The first is the so-called “Italian class action”, laid down in articles 840 *bis* ff. of the Italian civil procedure code (c.p.c.)²⁶. The second is article 140 *ter* ff. of the Italian consumer code, implementing the European Directive on representative actions for the collective interests of consumers²⁷.

It should be taken into due consideration that these two procedural law mechanisms are “mutually exclusive”. According to Article 140 *ter*, comma II, of the consumer code, when a qualified entity intends to start a collective claim on behalf of a plurality of consumers, it must use the representative action. Therefore, the representative action is more likely to be used than the Italian class action, which is not a bad outcome in and of itself, as representative actions offer procedural advantages over Italian class actions. One of these is the possibility to seek both injunctive and redress measures within the same proceeding, which is not an option under the Italian class action regime.

²³ M. Federico, *Protezione dei dati personali*, cit., 159 ff. This expression is driven from the notion of group privacy, famously elaborated by scholars such as L. Taylor – L. Floridi – B. van der Sloot (eds), *Group privacy: new challenges of data technologies* (2017). On the “group” dimension of privacy, see also A. Mantelero, *Personal data for decisional purposes in the age of analytics: from an individual to a collective dimension of data protection*, in Comp. Law & Sec. Rev., 238 ff. (2016).

²⁴ A. Stadler, *Are class actions finally (re)conquering Europe?*, in Juridical international, 15 ff. (2021). Extensively, A. Uzelac – S. Voet, *Class actions in Europe: holy grail or a wrong trail?* Berlin (2021).

²⁵ See in general F. Gascón Inchausti – B. Hess (eds.), *The Future of the European Law of Civil Procedure. Coordination or Harmonisation?*, Cambridge (2020).

²⁶ On the Italian class action, see, among many, U. Ruffolo (ed.), *Class action ed azione collettiva inibitoria. Commento sistematico alla legge 12 aprile 2019 n. 31*, (Milano) 2021; P. Pardolesi – R. Pardolesi, *La (azione di) classe non è acqua*, in Foro it., 325 ff. (2019); A. Giussani, *La riforma dell'azione di classe*, in Riv. dir. proc. 1572 ff. (2019); P.G. Monateri, *La riforma italiana della class action tra norme speciali processuali e ricostruzione della tutela civilistica*, in Danno e resp., 312 ff. (2019); R. Pardolesi, *La classe in azione. Finalmente*, in Danno e resp., 301 ff. (2019); G. Ponzanelli, *La nuova class action. Commento a legge 12 aprile 2019 n. 31*, in Danno e resp., 306 ff. (2019); C. Consolo, *La terza edizione dell'azione di classe è legge ed entra nel c.p.c. Uno sguardo d'insieme ad un'ampissima disciplina*, in Corriere giuridico, 737 ff. (2019). On the previous regime, among many, E. Ferrante, *La via italiana alla "class action" fra interesse di classe e regole ostruzionistiche per le adesioni*, in Giur. it., 66 ff. (2017).

²⁷ On the Italian representative action, E. Camilleri, *L'azione rappresentativa e il raccordo imperfetto con il diritto privato regolatorio. Le decisioni delle authorities tra libero apprezzamento e presunzioni giurisprudenziali: spunti dall'arrêt Repsol*, in NLCC, 437 ff. (2024); G. De Cristofaro, *Le “azioni rappresentative” di cui agli artt. 140-ter ss. c.cons.: ambito di applicazione, legittimazione ad agire e rapporti con la disciplina generale delle azioni di classe di cui agli artt. 840-bis ss. c.p.c.*, in NLCC, 1 ff. (2024). On the relationship between the Italian class action and the Italian representative action, B. Randazzo – A. Henke – S. Voet (eds.), *L'azione di classe italiana nel quadro europeo: profili sostanziali e processuali*, Torino (2025).

An individual may also initiate an action on behalf of a plurality of data subjects, using the Italian class action. Both Articles 840 *bis* and 840 *sexiesdecies* c.p.c. allow an individual to act as a class representative in injunctive and compensatory proceedings. Nevertheless, it seems unlikely that a single person would bear the burden of a collective action on behalf of a large group, given the Italian litigation culture, and the lack of economic resources and incentives.

However, it can be argued that an entity meeting the requirements of Article 80 GDPR can bring forward an action on behalf of a plurality of users when their rights as *data subjects* – not as consumers – are infringed²⁸. For instance, this may occur in cases of data breaches.

b) As far as Germany is concerned, the implementation of the RAD has consolidated and unified the mechanisms of existing group actions²⁹. The KapMug and the UKlaG have been adapted to EU law, and the Verbraucherrechtgedurchsetzungsgesetz (VDuG), the law transposing the Directive, has introduced a new collective compensatory action: the Abhifelklage³⁰. Thanks to this new instrument consumers can finally seek damages in a collective proceeding³¹.

In Germany, collective injunctions have historically been employed in the field of data protection. The famous European cases *Fashion ID* and *Metaplatforms* both originated from two German collective actions where a consumer organization asked for injunctive measures against the unlawful processing of personal data³².

Moreover, the law implementing the Directive allows a plurality of small companies to join a representative action, which seems to be particularly interesting. In fact, some associations may challenge digital platforms with the aim to simultaneously protect the rights of the data subjects and promote the rights of small companies. For instance, this model could work extremely well with the right to data portability (Article 20, GDPR). This right not only promotes users' informational self-determination, but also favors fair competition in the market. This model may be especially useful in light of the Data Governance Act (Regulation EU/2022/868), which introduces the new role of “*data intermediation service providers*”. If they fulfill the requirements laid down in the VDuG, data intermediaries or data cooperatives could potentially act as class representatives of groups of users in collective proceedings³³.

V. THE COMING TO LIFE OF COLLECTIVE PROCEEDINGS IN THE FIELD OF DATA PROTECTION

Collective actions in the field of data protection law are on the rise, in Germany and Italy.

²⁸ It is noteworthy that Article 80, GDPR, has been implemented in Italy by a modification of Article 10 of the legislative decree n. 150/2011. The law lists the requirements that entities shall have to represent a data subject in court, but it does not consider the collective dimension of Article 80 GDPR.

²⁹ On the previous regime A. Halfmeier, *Collective Litigation in German Civil Procedure*, in The Cambridge Handbook of Class Actions. An International Survey, B. T. Fitzpatrick – R. S. Thomas (eds.), 233-245 Cambridge (2021).

³⁰ *Verbraucherrechtgedurchsetzungsgesetz vom 8. Oktober 2023* (BGBl. 2023 I Nr. 272). See P. Rott, *The new German representative action - a mixed bag*, in *Revue européenne de droit de la consommation*, 255 ff. (2024); L. Hernkohl, *Collective Actions for Competition Law Violations and DMA Infringements Following the Transposition of the Representative Actions Directive (Germany)*, in *Journal of European Competition Law and Practice*, 311 ff. (2024); D. Markworth, *Implementation of the Representative Actions Directive (RAD) in Germany – Does the “VDuG” lack bite?*, in *Observatoire des actions de groupe et autres actions collectives*, 1 ff. (2023).

³¹ The previous model of the Musterfeststellungsklage allowed consumer associations to bring forward an action to obtain a declaratory judgement deliberating on the harmfulness of a certain conduct, but then it was up to consumers to sue, individually, the defendant, in order to recover damages (A. Stadler, *Are Class Actions?*, cit., 15-16).

³² On the ongoing proceeding for obtaining collective redress for unlawful personal data processing in front of the Hamburg court, see A. Palmieri – M. Federico, *Collective privacy litigation*, cit., 9 ff.

³³ On data intermediaries and the collective dimension of data protection G. Resta, *Pubblico, privato, collettivo nel sistema europeo di governo dei dati*, in *Governance of/ through Big Data, Vol. II*, 614 ff Roma (2023); F. Bravo (ed.), *EU Data Cooperatives. L'ingresso delle cooperative di dati nell'ordinamento europeo*, Torino (2024).

Recently, SOMI, a Dutch-registered representative entity, initiated a transborder collective proceeding in Germany against TikTok. SOMI is seeking both injunctive and compensatory relief on behalf of the represented subjects. It claims that TikTok manipulated users - especially minors – by unduly collecting their data for targeted advertising, failing to adopt adequate security measures, and neglecting to report data breaches. The same entity has also sued the platform X, for failure to report data breaches and unlawful processing of users' sensitive data³⁴.

Furthermore, another consumer organization has recently launched a collective action against Google asking for damages for unlawful processing of individuals' data, before the Hamburg court³⁵.

Meanwhile, in Italy, a collective proceeding was recently started against Google by the association Algoritmo. The association brought a collective injunction using the scheme of Article 840 *sexies-decies* c.p.c. to enforce the represented parties' right to be forgotten. Specifically, the association has asked for measures to secure Google's compliance with the GDPR when handling delisting requests submitted by users. The entity has also requested an order requiring Google to establish a system for the rapid management of users' complaints, and to avoid the re-publishing of harmful, defamatory or false content under different domain names³⁶.

Another collective action has been announced by the consumer association Altroconsumo against the company Infocert following a data breach that occurred at the beginning of 2025. The association issued a "cease-and-desist" letter to ask Infocert to provide information on the measures put in place to restore security after the data breach, and to recognize a lump sum compensation of 400 euros to every user affected by it.³⁷

A collective action for damages was also initiated in the famous case Cambridge Analytica, pursuant to the former (now repealed) Article 140 *bis* of the consumer code. However, this latter case was settled before reaching a judicial decision³⁸.

VI. FUTURE PATHWAYS AND MAIN CHALLENGES

Collective litigation in the field of data protection law is still at a very early stage, not only in Italy and Germany, but overall across Europe, and there are several challenges and questions that must be addressed in the coming years for it to become truly effective.

The first challenge pertains to cross-border actions. The RAD enables transborder actions, but the Brussels I *bis* Regulation has yet to be updated to reflect the specificities of collective litigation. In one of the *Schrems* cases, the Court of Justice explicitly stated that the consumer-jurisdiction rule does not apply to aggregate proceedings and called for a reform of the Brussels I *bis* Regulation, to make it fit for the digital age and mass claims³⁹.

³⁴ About this collective action see <https://www.medialaws.eu/tiktok-and-x-faces-class-action-suit-for-violations-of-dsa-gdpr-and-ai-act/>.

³⁵ Some information about the judgment is available at the following link: <https://www.sammelklagen.de/verfahren/facebook>.

³⁶ Information about the proceeding can be found here: <https://www.classactiongoogle.com/>.

³⁷ Information about the proceeding can be found here: <https://www.altroconsumo.it/azioni-collettive/dati-infocert>.

³⁸ See the joint statement by Facebook and Euroconsumers available at: https://assets.ctfassets.net/iapmw8ie3ije/1sxhDq70DZNeZgPR3jsXjz/35bf318dca775644f2b725d118774939/Joint_press_release_with_Facebook.pdf.

³⁹ CJEU, Case C-498/16, 25 January 2018, *Maximilian Schrems v. Facebook Ireland Limited*. Recently, see CJEU, Case C-34/24, *Stichting Right to Consumer Justice, Stichting App Stores Claims v. Apple*, 2 December 2025, where jurisdiction for a collective, transborder claim was set in the place where the harm occurred, namely where the users targeted by an anticompetitive practice were established.

Furthermore, the outcome of these collective proceedings still remains to be seen. Will they culminate in settlements? In judicial decisions? What are the implications of allowing settlements in a sensitive field like data protection law?

A further point of complexity regards the compensation of non-material damages. This topic has been the subject of extensive scholarly debate. Privacy harms are often non-material harms, hard to prove, and difficult to quantify⁴⁰.

In Italy and Germany, non-material harm ought to overcome a certain “threshold” in order to be compensated⁴¹. Nevertheless, in the light of the recent judgment of the CJEU in case *Österreichische Post AG v. UI*, this orientation must now be reconsidered in relation to non-material privacy harms⁴². In fact, the Court held that setting a threshold for awarding damages for unlawful processing of personal data is incompatible with EU law. Non-material privacy losses should always be compensated, however small.

This development discloses interesting opportunities for collective redress. In fact, when small individual claims for non-pecuniary damages under the GDPR are aggregated, they reveal their “social dimension”. Collective proceedings expose the massive dimension of privacy harms, and their impact on a democratic digital public sphere.

For aggregate litigation to be effective, public and private enforcement should be properly aligned. While Directive EU/2014/104 coordinates judicial and administrative enforcement in the field of competition law, explicit rules are lacking in other areas of the law⁴³.

Doubts may arise when a collective proceeding for the unlawful processing of personal data is brought before a judicial authority, while the very same practice is being assessed by a judge of a different State, or by a supervisory authority. What happens if administrative and judicial authorities assess the practice differently? What if a consumer authority ascertains the unfairness of a certain practice, but the judge reaches a different outcome? What is the binding force of the authority’s decision in an ongoing judicial proceeding? Italian courts are currently assessing and considering these issues, but a clearer legislative framework appears necessary.

Even though there are still many challenges to be overcome, the time has come for the collective private enforcement of data protection law to be tried and tested. To ensure its effectiveness, integration between consumer law and data protection law is essential.

Collective litigation can be a flexible and effective means to safeguard users’ digital rights in the context of a regulatory framework that is increasingly struggling to keep pace with technological developments. Notwithstanding the challenges, difficulties and inevitable risks, collective claims can contribute to the process of adapting our legal systems to the rapid transformations of our present economic and social reality.

⁴⁰ See I. Cofone, *The Privacy Fallacy*, cit.; K. Wörle – O. J. Gstrein, *Collective Data Protection*, cit., 289 ff.; J. Cohen, *Law for the platform economy*, in UC Davis Law Rev., 177 ff. (2017).

⁴¹ For an overview of civil liability rules in both legal systems, see G. Alpa, *Responsabilità civile (profili di diritto comparato)*, in I tematici VII, Responsabilità civile, dir. by C. Scognamiglio, 746 ff. (2024).

⁴² CJEU, Case C- 300/21, *UI v. Österreichische Post AG*, 4 May 2023, commented on *Il Foro Italiano*, 268 ff., 2023 by A. Palmieri – R. Pardolesi, *Mai futile il danno non patrimoniale da violazione della privacy (purché lo si provi!)*; S. Pagliantini, *Un altro palcoscenico della «guerra» tra le corti: il danno (immateriale) bagatellare dell’art. 82 Gdpr*; M. Federico, *«La tempesta perfetta»: ultime dalla Corte di Lussemburgo su danno (non patrimoniale) da illecito trattamento dei dati personali e possibili risvolti in tema di tutela collettiva*, see also U. Salanitro, *Illecito trattamento dei dati personali e risarcimento del danno nel prisma della Corte di Giustizia*, Riv. dir. civ., 429 ff. (2023); C. Scognamiglio, *Danno e risarcimento nel sistema del Rgdpr: un primo nucleo di disciplina eurounitaria della responsabilità civile?*, Nuova giur. civ. comm., 1151 ff. (2023); C. Camardi, *Illecito trattamento dei dati e danno non patrimoniale. Verso una dogmatica europea*, Nuova giur. civ. comm., 1137 ff. (2023).

⁴³ E. Camilleri, *L’azione rappresentativa*, cit., 437 ff. On the need to coordinate public and (collective) private enforcement in privacy litigation, K. Wörle – O. J. Gstrein, *Collective Data Protection*, cit., 304 ff.

FROM FAILURE TO REDESIGN: THE EUROPEAN ODR SYSTEM AND THE NEXT GENERATION OF DIGITAL CONSUMER REDRESS

Luigi Cristiano

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*The discontinuation of the European Union's Online Dispute Resolution (ODR) platform, formalized by Regulation (EU) 2024/3228, marks the end of a governance model premised on a centralized technological gateway dependent upon voluntary trader cooperation. Despite attracting millions of annual visitors, the platform suffered from a structural traffic-to-referral gap, where only 2% of complaints received the trader consent necessary to proceed to an ADR entity. Comparative analysis reveals that the EU model functioned primarily as a referral gateway to ADR bodies. In the UNCITRAL typology, this corresponds to "stage 2" (facilitated mediation). By contrast, more successful systems – such as Brazil's *consumidor.gov.br* – rely on "stage 1" direct negotiation, combined with reputational discipline and public transparency mechanisms; furthermore, different models demonstrate the necessity of binding authority and enforceable outcomes. The transition to Directive (EU) 2025/2647 shifts the EU strategy toward a guided pathway infrastructure and introduces structured response obligations to mitigate trader inertia. Ultimately, the demise of the platform confirms that digital redress cannot succeed through technology alone; it requires a regulatory design that creates meaningful participation incentives and aligns institutional oversight with access-to-justice standards.*

Keywords: Online Dispute Resolution – Alternative Dispute Resolution – EU Consumer Law – Access to Justice – Platform Governance – Digital Market

I. INTRODUCTION

The European Union's Online Dispute Resolution platform (EU ODR) was conceived as a flagship instrument of digital justice for consumer disputes arising from e-commerce.¹ Launched in 2016, it promised a multilingual, low-cost and accessible pathway for resolving low-value claims – especially cross-border claims – towards certified ADR entities, rather than resolving disputes directly.² Yet, less than a decade later, the Union legislator has formally discontinued the platform,

¹ Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes.

² See: L. Caplin, *Online Cross-Border Consumer Dispute Resolution: an assessment of its potential and analysis of the ECODIR Project*, London, 2004 (1st ed.): "The ECODIR pilot project has shown that a real need exists for a low-cost mechanism for the resolution of low-value cross-border disputes."; F. Galves, *Virtual Justice as Reality: Making the Resolution of E-Commerce Disputes More Convenient, Legitimate, Efficient, and Secure*, in *Journal of Law, Technology & Policy*, 1-4 (2009): "the rule of law must transcend old realities in order to face the challenges of adjudicating low-cost online transactions between buyers and sellers from different states, and even countries."; M. E. Hiscock, *Cross-Border Online Consumer Dispute Resolution*, in *Contemporary Asia Arbitration Journal*, 4-1 (2011): "This is a global problem – large numbers of disputes with a low value. The average value is between US\$100 – US\$150. Because of the nature of consumer disputes, and also because of the structure of the international legal infrastructure, it is not possible to have a simple cosmetic change in the machinery for the resolution of international commercial disputes to include cross-border online dispute resolution of consumer transactions."

repealing Regulation (EU) No 524/2013 via Regulation (EU) 2024/3228, marking the shift away from a centralized technological gateway, in a legislative move that is as symbolically relevant as it is legally consequential.³ The formal act of repeal is not merely the end of a website: it signals the limits of a particular governance model for digital consumer redress – one premised on an EU-level technological gateway embedded within, and dependent upon, fragmented national ADR infrastructures and the voluntary cooperation of traders. The discontinuation schedule itself is revealing: Regulation (EU) 2024/3228 distinguishes between the cessation of new complaint submissions (20 March 2025) and the repeal of Regulation (EU) No 524/2013 (20 July 2025), thereby framing the end of EU ODR as a managed shutdown rather than an immediate termination.⁴

The underlying policy justification is stated with unusual candour in the recitals of the repealing Regulation: the platform attracted millions of visitors annually, yet only a minimal fraction of interactions translated into procedures before ADR entities and, ultimately, into redress outcomes.⁵ This structural mismatch – between high demand and negligible throughput – constitutes the core analytical puzzle of this paper: why did a sophisticated match-making interface fail to generate actual cross-border complaints into ADR procedures capable of delivering effective consumer redress?⁶ From this angle, the label “ODR” was arguably misleading from the outset: the platform was designed chiefly to route and coordinate complaints, not to decide disputes in its own right.

At stake is a broader question of institutional design: whether the Union can credibly pursue a model of digital consumer justice that relies on voluntarism and indirect incentives, rather than on mandatory participation rules or binding authority. This question must be made explicit from the outset, because the EU ODR platform was structurally reliant on national ADR systems operating under a minimum-harmonisation directive; it therefore raises a prior institutional dilemma: to what extent can an EU-level digital gateway be effective when it must build on highly heterogeneous national – and often sector-specific – regulatory landscapes? The comparative contrast with domestic platforms operating within harmonised national frameworks suggests that the EU’s problem is not merely technological, but constitutional and regulatory: absent deeper convergence (potentially through fuller harmonisation of the ADR Directive’s key access and participation variables), a digital interface may amplify expectations while remaining unable to guarantee outcomes across borders. The architecture of Regulation (EU) No 524/2013 – which created information obligations without imposing a general duty on traders to participate in ADR –

³ Regulation (EU) 2024/3228, recital (5): “The evidence strongly suggests that, given that no more than 200 cases are transferred per year to an ADR entity, further maintenance of the ODR platform does not correspond to the principles of efficiency and effectiveness as provided for in Regulation (EU, Euratom) 2024/2509 of the European Parliament and of the Council.”

⁴ Regulation (EU) 2024/3228, art. 2.

⁵ Regulation (EU) 2024/3228, recitals (3)–(4).

⁶ G. F. Colombo, *What We Talk About When We Talk About Consumer ODR: The EU ODR Regulation and its Preliminary Lessons*, in *International Journal of Procedural Law*, 2 (2021), p. 266: “The Report, which is probably slightly overly optimistic, is laudatory from a qualitative point of view, but less so from a quantitative one. This is clearly seen in the contrast between the number of accesses to the platform (“Since its launch, the platform has attracted more than 8.5 million visitors and 120 000 consumer-to-business disputes”) and the number of disputes effectively handled through the platform itself: 2% of the total.”

foreshadowed this tension.⁷ Early scholarship warned that such a model risked disappointing consumers: a hyperlink can create expectations of redress, but the platform cannot assist a consumer if the trader declines to engage.⁸

Compliance with Article 14 information obligations was also reportedly weak, with a large share of traders failing to display the required link and many of those who displayed it placing it in locations unlikely to be noticed by consumers;⁹ at the same time, trader engagement with complaints was extremely low.¹⁰ The platform, in this sense, appears to have suffered from a combination of (i) legal under-inclusiveness (limited binding participation), (ii) practical under-compliance (limited visibility of the tool), and (iii) institutional dependency (variable quality and capacity of national ADR bodies and contact points).¹¹

II. THE EU CONSUMER ADR/ODR ARCHITECTURE (2013 – 2025)

The EU Online Dispute Resolution (ODR) platform was not conceived as an isolated technological artefact. Rather, it constituted the operational gateway of a two-instrument legislative strategy adopted in 2013, aimed at enhancing consumer confidence in the internal market through accessible redress mechanisms. The regulatory move responded to a structural diagnosis: cross-border consumer disputes, especially those arising from e-commerce, were frequently left unresolved because the expected costs (time, language barriers, legal uncertainty) outweighed the individual value of the claim, thereby discouraging rational enforcement and, ultimately, depressing trust in the digital single market. This diagnosis is already explicit in the early recitals of Regulation (EU) No 524/2013, which connect consumer protection, the functioning of the internal market, and the need for effective redress as a precondition for market participation, especially in cross-border settings. The same recitals frame the small-value and cross-border character of disputes as an institutional design constraint: where litigation is structurally irrational, regulatory policy tends to seek alternative channels that reduce transaction costs while maintaining adequate guarantees of fairness.¹² The ODR initiative was, in this sense, a market-making project, but one articulated through the language of consumer rights and procedural accessibility.¹³

⁷ S. Voet, S. Caruso, A. D'Agostino, S. Dethier, *Recommendations from academic research regarding future needs of the EU framework of the consumer Alternative Dispute Resolution (ADR)*, pp. 93-100 available at https://commission.europa.eu/system/files/2022-08/adr_report_final.pdf (last visited Jan. 07, 2026).

⁸ "Surveys undertaken in the Netherlands and Belgium show that most consumers indeed do not reach the ODR sites via traders, but by self-searching on the Internet." E. van Gelder, *The EU Approach to Consumer ODR*, in *International Journal of Online Dispute Resolution* (2019), p. 224, referring to A. Biard, K. Hanemaaijer, E. van Gelder, *Ervaringen en verwachtingen van consumenten over de Consumentenombudsdienst -Onderzoek naar onvolledige dossiers / Expériences et attentes des consommateurs vis-à-vis du Service de Médiation pour le Consommateur- enquête sur les dossiers incomplets*, available at <https://www.law.kuleuven.be/pub/nl/bestanden/nl-onderzoek-juli-2019-final.pdf> (last visited Jan. 07, 2026).

⁹ M. Poblet, G. Ross, *ODR in Europe*, in D. Rainey, E. Katsh, M. S. Abdel Wahab (eds.), *Online Dispute Resolution: Theory and Practice*, Den Haag, 2021 (2nd ed.).

¹⁰ See statistics: European Commission, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes*, COM(2019) 425 final, p. 16.

¹¹ E. van Gelder, *The EU Approach to Consumer ODR*, in *International Journal of Online Dispute Resolution* (2019), pp. 220-222.

¹² P. Cortés, *Developing Online Dispute Resolution for Consumers in The EU: A Proposal for the Regulation of Accredited Providers*, in *International Journal of Law and Information Technology*, 19-1 (2010), pp. 1-5.

¹³ Regulation (EU) No 524/2013, recitals (9)-(10).

The binding package also marked an evolution from earlier, non-binding EU efforts to stimulate out-of-court consumer redress: the pre-2013 framework – mainly composed of Commission recommendations and policy documents – failed to generate uniform effects in Member States because of its voluntary character and its inability to ensure consistent sectoral and territorial coverage of ADR bodies.¹⁴ The EU legislator identified three main deficits in the pre-2013 framework: uneven availability of ADR schemes across Member States, inconsistent quality standards, and low consumer awareness. The 2013 package was explicitly designed to address these shortcomings. In that sense, the ODR platform should be understood as the digital interface of a deeper institutional choice: rather than building a single European consumer tribunal, the EU opted for a networked model, in which a central platform would route disputes toward a plurality of nationally certified ADR entities, coordinated through EU-level visibility and minimum procedural standards.¹⁵

Regulation (EU) No 524/2013 articulates its purpose in a characteristically EU manner: it links consumer protection to the internal market and treats trust as a functional variable of market integration. The recitals insist that a “high level of consumer protection” is necessary to ensure confidence in the internal market and to encourage cross-border activity, including online commerce. They identify the specific friction points of online transactions – distance, linguistic obstacles, and the asymmetry of bargaining power – and present ODR as a mechanism capable of neutralising those frictions through accessibility and procedural simplification.

At the same time, the EU’s approach cannot be reduced to a purely economic conception of trust. The legal discourse surrounding the platform, including the conceptual and legal framework provided by the Regulation, explicitly situates consumer ODR within a fundamental-rights matrix: access to justice, enshrined in Article 6 ECHR and Article 47 of the Charter of Fundamental Rights of the European Union, is invoked as a normative anchor for ensuring that consumers – particularly in low-value cross-border disputes – can effectively enforce their rights.¹⁶ This dual anchoring (market-integration logic and rights-based discourse) is important for any diagnosis of failure. If the platform is read solely as a policy experiment to increase consumer trust, low usage might be interpreted as mere inefficiency; if, however, the platform is also read as a component of access-to-justice infrastructure, low conversion from complaints to outcomes raises rule-of-law concerns: the system may generate expectations of enforceability without delivering actual remedies, thereby producing not only inefficiency but also frustration and legitimacy loss.

A further design choice that structurally shaped the platform’s trajectory was the narrowing of scope: Regulation (EU) No 524/2013 limits its application to disputes arising from online sales or service contracts, thereby excluding disputes rooted in offline contractual relations, even when cross-border. The rationale, according to the recitals, was to target the e-commerce sector as the primary site of cross-border growth and, simultaneously, of consumer vulnerability.¹⁷ This choice had a consequential institutional implication: the EU did not intend the ODR platform to become a general online civil justice portal; instead, it was built as a specialised consumer redress entry-

¹⁴ J. Hörnle, *Cross-Border Internet Dispute Resolution*, Cambridge, 2009 (1st ed.).

¹⁵ Regulation (EU) No 524/2013, recitals (10)–(18).

¹⁶ Regulation (EU) No 524/2013, recitals (1)–(4).

¹⁷ M. J. Schmidt-Kessen, R. Nogueira, M. Cantero Gamito, *Success or Failure? Effectiveness of Consumer ODR Platforms in Brazil and in the EU*, in *Journal of Consumer Policy*, 43 (2020), pp. 668–669.

point, tied to contractual obligations arising from distance and digital contracting practices. The Regulation also defines its negative scope: it does not apply to disputes between traders, and it does not apply to “consumer complaint-handling systems operated by the trader,” which underscores the conceptual distinction between private customer-service mechanisms and independent ADR procedures.¹⁸

Even within that limited domain, the Regulation introduces additional exclusions. In particular, it clarifies that it does not apply to disputes arising from online contracts in the health and education sectors, and that it does not cover disputes where the trader is not established in the Union.¹⁹ These boundaries highlight an implicit EU strategy: to focus regulatory resources on sectors where the EU could plausibly ensure systemic coordination through the internal market competence, and where the ADR supply (nationally certified bodies) could realistically exist across Member States. Yet, as comparative analysis later shows, jurisdictions that have built high-uptake ODR systems often succeed precisely by integrating consumer complaint-handling, negotiation, and escalation pathways within a single environment, rather than drawing sharp lines between trader-operated systems and certified ADR. The EU’s conceptual boundary thus already foreshadows a structural challenge: the platform’s value proposition depends on consumer migration away from private complaint-handling channels and toward an EU-level gateway, without the EU gateway itself offering decisive procedural leverage over traders.

In functional terms, the platform provides: (i) the electronic complaint form; (ii) information regarding ADR entities; (iii) an electronic case management tool; (iv) translation of information; (v) feedback mechanisms; and (vi) public-facing information on the functioning of ODR and consumer rights.²⁰ It also contains a register of certified ADR entities, as established in accordance with the ADR Directive, and it is explicitly required to operate free of charge. This is, therefore, a classic gateway model: a centralised intake and routing infrastructure coupled with decentralised dispute resolution procedures.

The platform’s workflow, as legally structured, is crucial for understanding both its promise and its vulnerability. The Regulation provides that the complainant submits the complaint through an electronic form, and the complaint must include information enabling identification of the competent ADR entity;²¹ once a complaint is submitted, the platform notifies the respondent party; the decisive step follows: the parties must, through the platform, agree on the ADR entity that will handle the dispute.

The Regulation establishes a default procedural stopping point if agreement fails: if the parties do not agree on an ADR entity within 30 calendar days from the submission of the complaint, or if the complaint cannot be transmitted because no competent ADR entity exists (or the identified entity refuses competence), the platform informs the complainant that the complaint cannot be processed further.²² In other words, the platform is structurally dependent on a party-consent mechanism at the most critical point of the workflow. This design choice may be interpreted as a

¹⁸ E. van Gelder, *The EU Approach to Consumer ODR*, in *International Journal of Online Dispute Resolution* (2019), pp-221-222.

¹⁹ Regulation (EU) No 524/2013, art. 4(e)-(f); Directive 2013/11/EU, art. 2(2)(b), (h).

²⁰ Regulation (EU) No 524/2013, recital (18); art. 9.

²¹ Regulation (EU) No 524/2013, art. 8(1).

²² Regulation (EU) No 524/2013, art. 9(6)-(7).

compromise between consumer protection and trader autonomy; yet, from an institutional perspective, it creates a consent requirement capable of neutralising the platform's effectiveness. The importance of this bottleneck becomes clearer when placed against the Directive's aspiration to create effective, quick, and low-cost procedures. In the architecture imagined by EU policymakers, the ADR entity would then resolve the dispute within the Directive's envisaged timeframe (the ninety-day horizon), delivering a speedy outcome where litigation would be irrational.²³ Yet the procedural chain is only as strong as its weakest link: if the trader refuses to cooperate, or simply remains passive, the consumer's experience becomes one of bureaucratic intake without remedy. The platform can therefore generate a paradoxical effect: by making dispute initiation easy, it may multiply consumer expectations, while the consent bottleneck dissipates those expectations into non-processing.

III. PRACTICAL CHALLENGES AND REASONS FOR FAILURE

The trajectory of the EU ODR platform, viewed through a synthetic yet source-based reconstruction, reveals its demise as a structural – rather than merely operational – failure. The most immediate empirical marker is the traffic-to-resolution gap: notwithstanding the legal obligation for online traders and marketplaces to display a readily accessible link to the EU ODR platform, awareness efforts produced between two and three million visitors per year, yet only a minority of those visitors filed a complaint and, crucially, only about 2% of submitted complaints received a positive reply from traders that would allow transmission to an ADR entity, with the overall output amounting to roughly 200 cases per year across the Union.²⁴ This disproportion between a high-demand front-end and an almost negligible back-end throughput is legally significant because it reveals a mismatch between the platform's regulatory ambition – enhancing consumer trust in cross-border e-commerce through accessible redress – and the design choice to rely on voluntary trader cooperation within a fragmented and uneven ADR landscape across Member States, an institutional ecology that the platform neither governed nor could effectively compel. The subsequent political and legislative conclusion aligns with this diagnosis: in the 2022 call for evidence on adapting out-of-court dispute resolution to digital markets, the Commission reported that only 5% of responding consumers had used the platform and that the prevailing view was that it either required substantial reform or should be discontinued as not cost-effective, a premise later crystallised in the repeal.²⁵ At the doctrinal core lies a specific juridical architecture: the platform did not resolve disputes in its own right, but functioned mainly as a referral gateway enabling consumers to request that traders agree to use an ADR entity listed on the platform; accordingly, effectiveness depended less on the consumer's willingness to complain (which was demonstrably present) than on the trader's willingness to engage and on the parties' capacity to converge on a competent ADR body.²⁶ The Regulation establishes a procedural architecture whereby, if the parties do not agree on an ADR entity within 30 calendar days from the submission

²³ Directive 2013/11/EU, art. 8(e).

²⁴ Regulation (EU) 2024/3228, recitals (3)-(4).

²⁵ Regulation (EU) 2024/3228, recital (5).

²⁶ Regulation (EU) 2024/3228, recital (2).

of the complaint,²⁷ or if the complaint cannot be transmitted because no competent ADR entity exists or the identified entity refuses competence,²⁸ the platform informs the complainant that the complaint cannot be processed further. This consent-dependent design creates what may be termed a “consent bottleneck”, in which rational non-cooperation by traders – when legally low-cost and reputationally neutral – became systemic attrition rather than an exception, a dynamic explicitly captured in the trader engagement patterns. The fragility of this model had been anticipated in the literature: authors warned that information duties could generate an illusion of access, because traders not committed to ADR were neither required to identify a concrete ADR entity nor required to disclose non-adherence, so consumers could be directed to an ODR gateway structurally unable to deliver redress where the trader refused participation.²⁹ Empirical accounts reinforce that this structural impediment was not hypothetical: where parties failed to agree on an ADR entity, complaints were automatically closed after thirty days, with Commission data cited in the literature suggesting that a very large share of complaints ended in closure on that ground.³⁰ The platform’s regulatory strategy – relying on information obligations rather than mandatory participation – suffered analogous weaknesses in practice: although the ODR framework mandated a clear and accessible link, the statistics report widespread non-display and, when displayed, frequent concealment within legal pages such as terms and conditions, neutralising the behavioural function of pre-dispute information duties. Empirical analysis complements this picture by suggesting that consumers often reached the ODR platform through their own online searches rather than through traders’ disclosures, thus exposing, in classic consumer-law fashion, how formally elegant information obligations may fail under conditions of weak enforcement and minimal downside for non-compliance.³¹

The platform’s difficulties were further amplified by its dependence on divergent national infrastructures: conceived as an EU gateway resting on Member State ADR ecosystems, it necessarily inherited wide variations in the availability, quality, and sectoral coverage of ADR bodies, and it relied on national contact points whose performance was uneven, thereby failing to deliver a uniform European experience of redress and instead channeling users into heterogeneous national systems. This structural heterogeneity also intersects with legitimacy concerns: without mechanisms for the publication of outcomes and systematic quality controls, the ODR architecture risks fragmenting into a domain of dispersed micro-justice; such a lack of transparency limits the platform’s ability to foster the consistent development of EU consumer law or to generate trust in voluntary enforcement channels. A final nuance concerns user practice: the platform’s direct talk function was often used as a communication tool between consumer and trader, while only a marginal proportion of users proceeded to an ADR body, suggesting that formal transmission to

²⁷ Regulation (EU) No 524/2013, art. 9(8).

²⁸ Regulation (EU) No 524/2013, art. 9(6)-(7).

²⁹ M. B. M. Loos, *Enforcing European consumer rights at the detriment of European consumer law*, in *European Review of Private Law*, 24-1, (2016), pp. 61-79.

³⁰ M. J. Schmidt-Kessen, R. Nogueira, M. Cantero Gamito, *Success or Failure? Effectiveness of Consumer ODR Platforms in Brazil and in the EU*, in *Journal of Consumer Policy*, 43 (2020), p. 670.

³¹ E. van Gelder, *The EU Approach to Consumer ODR*, in *International Journal of Online Dispute Resolution* (2019), pp. 223-224.

ADR may have been an imperfect proxy for user-perceived resolution.³² Nevertheless, this interpretive rescue remains circumscribed: a communication tool without incentives risks becoming a digital dead-end, and where settlement occurs off-platform the Union lacks reliable visibility into the fairness, transparency, and effectiveness of outcomes, which undermines the claim that the platform secured meaningful access to justice as a regulatory deliverable; the EU's decision to discontinue the platform while pursuing a different digital interactive tool focused on guidance and signposting is consistent with that reassessment.³³ Ultimately, the repeal is not merely a policy recalibration but a formal legal admission: Regulation (EU) 2024/3228 explicitly frames discontinuation in terms of public-law principles of efficiency and effectiveness, fixes a concrete closure timetable and data-management duties, and thereby confirms that a soft model – information duties combined with a voluntary referral gateway – could not justify the administrative and technological costs of maintenance; the repeal thus compels a renewed comparative inquiry into what forms of incentive alignment, market integration, or calibrated compulsion are necessary for ODR to function at scale in consumer disputes characterised by low claim values and high enforcement costs.³⁴

IV. COMPARATIVE LESSONS FOR THE RE-DESIGN OF EU DIGITAL CONSUMER REDRESS

The discontinuation of the EU ODR Platform on 20 July 2025, after a period in which new complaints were no longer accepted (after 20 March 2025), does not merely mark the end of an institutional artefact: it clarifies, by negative evidence, that the effectiveness of digital redress depends less on the existence of a sophisticated portal than on the legal, economic, and institutional forces that make participation rational for traders and credible for consumers.³⁵ The EU experiment treated ODR primarily as an access point – a multilingual single entry interface – while leaving the core of dispute settlement to a fragmented constellation of national ADR bodies and voluntary trader behaviour. Comparative experience suggests that such a model is structurally weak whenever the platform is not embedded in a broader ecosystem that produces settlement incentives and absorbs enforcement costs.

A first comparative cluster consists of private, marketplace-embedded schemes. The classic example is the rise of eBay/SquareTrade dispute resolution, which illustrates that ODR can succeed when it is tightly integrated into the life-cycle of the underlying transaction, and when compliance is driven by reputational and economic mechanisms rather than by a formal legal duty to cooperate.³⁶ Early models of private ODR were able to combine the promise of informality with

³² S. Voet, S. Caruso, A. D'Agostino, S. Dethier, *Recommendations from academic research regarding future needs of the EU framework of the consumer Alternative Dispute Resolution (ADR)*, available at https://commission.europa.eu/system/files/2022-08/adr_report_final.pdf (last visited Jan. 07, 2026).

³³ Directive (EU) 2025/2647, art. 20.

³⁴ M. J. Schmidt-Kessen, R. Nogueira, M. Cantero Gamito, *Success or Failure? Effectiveness of Consumer ODR Platforms in Brazil and in the EU*, in *Journal of Consumer Policy*, 43 (2020), pp. 679-682.

³⁵ M. J. Schmidt-Kessen, R. Nogueira, M. Cantero Gamito, *Success or Failure? Effectiveness of Consumer ODR Platforms in Brazil and in the EU*, in *Journal of Consumer Policy*, 43 (2020), pp. 659-660.

³⁶ On the eBay/SquareTrade model as paradigm of marketplace-embedded ODR, see P. Cortés, *Online Dispute Resolution for Consumers in the European Union*, London, 2010 (1st ed.), p. 67; on the broader European context of online mediation development, see G. László Szöke, *The Possibility of Online Mediation under the Hungarian Mediation Act in Comparison with a Number of International, Including European, Documents on Mediation*, in *Information and Communications Technology Law*, 15-2 (2006).

the hard levers of platform governance (feedback systems, payment flows, and continuing access to the marketplace). The crucial comparative point is not that private ordering is normatively superior, but that a platform which can internalise the costs of non-compliance – by penalising the uncooperative party within the marketplace – does not need to rely on exogenous enforcement.³⁷ The EU ODR Platform, by contrast, never acquired an equivalent capacity: it could notify traders and host a directory, but it could not make engagement the most convenient option.

A second comparative cluster is represented by public negotiation platforms that make cooperation attractive through transparency and reputational discipline. Brazil's *consumidor.gov.br* is routinely invoked as a counter-example precisely because it demonstrates that a public platform can produce high settlement rates without transforming every consumer dispute into a judicialised procedure. The scheme's effectiveness is explained, in large part, by the architecture of direct communication between consumers and participating companies, coupled with publicly visible performance indicators. The platform is described as an online service "allow[ing] consumers and businesses to engage in direct communication", where the business is expected to respond within a short time window and performance is measured in terms of resolution rate, response time, and satisfaction.³⁸ These figures, drawn from data collected between 2016 and 2018, have been subsequently confirmed by more recent platform statistics, with resolution rates remaining consistently above 80%.³⁹ The resulting dynamics are quasi-regulatory: traders voluntarily participate, but the publication of rankings turns participation into a reputational investment and non-performance into a market disadvantage. These comparisons must, however, be handled with care: both Brazil's *consumidor.gov.br* and Canada's Civil Resolution Tribunal operate within a single national jurisdiction with comparatively coherent procedural baselines and enforcement expectations, whereas EU ODR was necessarily layered over diverging Member State ADR designs, sectoral coverage and language regimes. The comparative value is therefore heuristic – identifying incentive levers and user-interface choices – rather than a claim of institutional equivalence.

The comparison matters for EU policy because it highlights a structural asymmetry between merely informational obligations and incentive-producing transparency. Under the ODR Regulation, the EU emphasised the duty to display a link to the platform; empirical non-compliance and the invisibility of the link undermined the expected awareness channel. Yet even perfect compliance with a hyperlink duty would not have solved the deeper problem: if traders can ignore complaints without tangible consequences, the platform becomes, for consumers, a bureaucratic detour rather than a pathway to redress.⁴⁰ Brazil's model instead treats transparency not as an ancillary value but as a functional mechanism for inducing cooperation. In doctrinal terms, it translates the diffuse duty of good faith in consumer relations into measurable public signals, thereby reducing information asymmetry and disciplining opportunistic behaviour.⁴¹

³⁷ P. Cortés, *Online Dispute Resolution for Consumers in the European Union*, London, 2010 (1st ed.), p. 67.

³⁸ M. J. Schmidt-Kessen, R. Nogueira, M. Cantero Gamito, *Success or Failure? Effectiveness of Consumer ODR Platforms in Brazil and in the EU*, in *Journal of Consumer Policy*, 43 (2020), pp. 664-667.

³⁹ For current statistics, see <https://www.consumidor.gov.br/pages/indicador/geral/abrir> (last visited Jan. 03, 2026).

⁴⁰ E. van Gelder, *The EU Approach to Consumer ODR*, in *International Journal of Online Dispute Resolution* (2019), pp. 223-224.

⁴¹ M. J. Schmidt-Kessen, R. Nogueira, M. Cantero Gamito, *Success or Failure? Effectiveness of Consumer ODR Platforms in Brazil and in the EU*, in *Journal of Consumer Policy*, 43 (2020), pp. 667-668.

A third comparative cluster points towards a different solution: not reputational discipline, but public authority. Canada's Civil Resolution Tribunal (CRT) illustrates the logic of "ODR with teeth": a digital forum is effective when it is part of the public justice system, equipped with binding decision-making power and enforceability. The CRT is presented as an administrative tribunal within British Columbia's justice system, whose resolution process is designed to be primarily online and to culminate, where settlement fails, in an enforceable decision. Its structure includes negotiation and facilitated settlement phases before adjudication, reflecting a layered model in which the system first attempts consensual outcomes but does not remain hostage to refusal or inertia. Moreover, tribunal decisions are described as enforceable "as a court order", with limited avenues of review – features that transform digital access into effective legal protection.⁴²

The CRT experience offers particularly instructive data for EU policymakers. The tribunal's design philosophy centres on avoiding adjudication. According to published statistics, only 15% of disputes have been resolved through formal adjudication; the remaining 85% were resolved by consent, default, or withdrawal.⁴³ This ratio stands in stark contrast to traditional courts, where a very high percentage of matters may be abandoned due to cost and delay rather than reaching consensual resolution.⁴⁴ The CRT achieves these outcomes through a layered architecture: prospective claimants must first complete a sophisticated online "Solution Explorer" that triages disputes, collects information, and prompts consideration of alternative resolution methods; only thereafter does the proceeding enter a facilitation phase – essentially online mediation – with adjudication reserved as a last resort.⁴⁵

Crucially, the CRT's trajectory illustrates the governance evolution that may be necessary for ODR to function at scale. Originally designed as a voluntary tribunal, the CRT was transformed into a mandatory forum following stakeholder feedback: condominium property representatives argued that a voluntary scheme would allow one party to veto the other's access to an efficient digital forum, effectively forcing claimants back to the Supreme Court of British Columbia.⁴⁶ This transition – from opt-in voluntarism to exclusive jurisdiction – represents a structural solution to the participation deficit analysed above. The CRT now exercises exclusive or quasi-exclusive jurisdiction for strata disputes and small claims up to CAD \$5,000, with plans to expand this threshold progressively.⁴⁷

⁴² P. Daly et al, *A Comparative Analysis of Online Dispute Resolution For The International Legal Aid Group*, available at http://www.internationallegalaiddgroup.org/images/miscdocs/CPBP_Report_-_FINAL.pdf (last visited Jan. 05, 2026), pp. 78-82.

⁴³ P. Daly et al., *A Comparative Analysis of Online Dispute Resolution For The International Legal Aid Group*, p. 83, available at http://www.internationallegalaiddgroup.org/images/miscdocs/CPBP_Report_-_FINAL.pdf (last visited Jan. 05, 2026); see also S. Salter, D. Thompson, *Public-Centred Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal*, in McGill Journal of Dispute Resolution, 3, p. 117 (2016-2017).

⁴⁴ In British Columbia, only 3% of civil cases are disposed of at trial: BC Justice Review Task Force, *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (November 2006), p. 2.

⁴⁵ Civil Resolution Tribunal Act, SBC 2012, c 25, as amended; see S. Salter, *Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal*, in Windsor Yearbook of Access to Justice, 34 (2017).

⁴⁶ British Columbia, Hansard, 39th Parl, 4th Sess, 8 May 2012 at 11686 (Hon S Bond): "For many matters, the choice to use the tribunal or the Provincial Court will be up to the parties in the dispute. [...] This is a voluntary tribunal." The shift to mandatory jurisdiction followed the Civil Resolution Tribunal Amendment Act, 2015, SBC 2015, c 16.

⁴⁷ S. Salter (2017), cit., p. 122: the monetary jurisdiction for small claims was subsequently increased to \$5,000 and is expected to reach \$25,000.

User satisfaction data further validates the model. The CRT conducts voluntary participant surveys, with cumulative results indicating that 75% of respondents would recommend the tribunal to others, 77% agreed that the system prepared them adequately for dispute resolution, and 71% found the online interface easy to use.⁴⁸ While these figures should be interpreted cautiously – representing self-selecting respondents – they nonetheless demonstrate that a public ODR system can achieve reasonable acceptance when supported by enforceable authority and integrated guidance mechanisms.

Sectoral ombudsman schemes offer a complementary variant of authority through regulation: the UK Financial Ombudsman Service (FOS) is not a generic consumer ODR platform; however, it illustrates how mandatory trader participation and binding outcomes can be achieved through sector-specific regulation rather than through a universal platform. The UK financial regulatory framework requires firms to handle complaints fairly and recognises the ombudsman mechanism as a final stage of redress; where the ombudsman decides in favour of the consumer and the consumer accepts the outcome, the firm must comply, up to specified monetary limits that have been progressively increased over time.⁴⁹ This design again resolves the EU's fundamental weakness: it eliminates the silent trader problem by converting cooperation into a regulatory obligation, and it gives consumers a credible end-point beyond information and negotiation.

Comparatively, these models show that digitalisation is not a substitute for governance. Whereas the EU placed technology at the centre while leaving governance dispersed, successful public models tend to do the opposite: they place governance at the centre and use technology as an enabling infrastructure. The policy implication is not that the EU should judicialise consumer disputes, but that any EU-level digital redress strategy must either embed incentives (market governance), embed transparency (reputational discipline), or embed authority (binding outcomes). Without at least one of these anchors, ODR remains a portal rather than a remedy.

V. THE DIRECTIVE (EU) 2025/2647 AND THE NEW ODR SYSTEM

The EU's response to the collapse of its first-generation platform is not a retreat from digital redress, but a conceptual shift. At the level of public communication, the Commission frames the discontinuation as a transition rather than an abandonment: consumers are redirected towards a broader ecosystem of redress options, including the new mechanisms developed under the Digital Services Act for specific platform-related disputes.⁵⁰ At the legislative level, the key move is the adoption of Directive (EU) 2025/2647, adopted on 16 December 2025 and published in the Official Journal on 30 December 2025, which must be transposed by Member States by 20 March 2028 and applied from 20 September 2028. This amending directive reflects an explicit acknowledgement that the prior model – central platform plus voluntarism – requires re-engineering.

⁴⁸ Participant Satisfaction Survey – April to December 2018 (Civil Resolution Tribunal, 15 January 2019), available at <https://civilresolutionbc.ca/participant-satisfaction-survey-april-december-2018/> (last visited Jan. 05, 2026).

⁴⁹ Financial Ombudsman Service, *Annual Reports and Accounts for the year ended 31 March 2025*, available at <https://www.financial-ombudsman.org.uk/files/324642/Financial-Ombudsman-Service-Annual-Report-and-Accounts-2024-25.pdf> (last visited Jan. 09, 2026); Financial Conduct Authority, *DISP 3.6 (Handbook)*, available at <https://handbook.fca.org.uk/handbook/disp3/disp3s6?timeline=true> (last visited Jan. 02, 2026).

⁵⁰ M. Dąbrowski, *The Revision of Directive 2013/11/EU on ADR for Consumer Disputes: Strengthening or Only Reorganizing ADR Rights for Consumers?*, in *Review of European and Comparative Law*, 60-1 (2024), pp. 171-174.

Two elements are especially relevant for a re-design of EU digital redress.

First, the amended framework introduces a structured response obligation on traders. The amended Article 5 of Directive 2013/11/EU, as introduced by Directive (EU) 2025/2647, establishes a structured timeline: traders must reply within a maximum of 20 working days to any question addressed by an ADR entity regarding their participation in a proposed ADR proceeding; this period may be extended to 30 working days in the case of complex disputes or exceptional circumstances such as periods of increased activity or external crises.⁵¹ The significance of this provision lies not in its coercive force – traders remain free to decline participation – but in its informational function: consumers will receive a clear answer within a defined timeframe rather than encountering the opacity that characterised the previous system. If a trader fails to respond, the ADR entity may treat such silence as a refusal and close the case accordingly, thereby providing closure to the consumer rather than indefinite procedural limbo.⁵² This is not full mandatory participation, but it introduces a legally significant innovation: silence becomes legally qualified as refusal, rather than functioning as a *de facto* veto through inertia.

The directive also specifies a concrete implementation calendar that structures the transition period. The digital interactive tool mandated by the amended Article 20 of Directive 2013/11/EU must be operational no later than 20 April 2026.⁵³ This tool is conceived as a user-friendly, multilingual interface that guides consumers through the identification of appropriate redress options, provides direct links to ADR entity complaint forms, and includes a free machine-translation function available to ADR entities and contact points dealing with cross-border disputes.⁵⁴ Member States must transpose the directive by 20 March 2028 and apply its provisions from 20 September 2028.

The temporal gap between the availability of the new digital tool (April 2026) and the full application of the amended ADR framework (September 2028) creates an intermediate period during which the guidance infrastructure will operate without the supporting regulatory obligations on traders. This sequencing reflects a pragmatic recognition that consumer awareness and institutional capacity must be developed before the substantive reforms take effect. The Commission is also tasked with creating a network of ADR contact points and Member States must notify the Commission of their designated contact points by 20 March 2028, ensuring that the informational infrastructure is in place when the new obligations become applicable.

In the EU ODR Platform, silence was practically indistinguishable from a technical failure, leaving consumers without clarity and without a next step. The new duty to reply, although limited, is

⁵¹ Directive (EU) 2025/2647, art. 1, point (4)(d), adding paragraph 9 to article 5 of Directive 2013/11/EU. The Committee on Internal Market and Consumer Protection had proposed reducing this period to 15 working days, with optional extension to 20 days only for complex disputes: see European Parliament, Amendments to Proposal for a Directive 2013/11/EU, A-9-2024-0060-AM-001-057.

⁵² The legal effect of non-response as qualified refusal represents a departure from the previous system where silence had no procedural consequence: see M. Dąbrowski, *The Revision of Directive 2013/11/EU on ADR for Consumer Disputes: Strengthening or Only Reorganizing ADR Rights for Consumers?*, in *Review of European and Comparative Law*, 60-1 (2024), pp. 181-182.

⁵³ Directive (EU) 2025/2647, art. 1(10)(c), adding paragraph 8 to article 20 of Directive 2013/11/EU.

⁵⁴ *Ibidem*. The tool must include links to ADR entities listed pursuant to Article 20(4) of Directive 2013/11/EU and to ADR contact points notified under Article 24(4).

therefore best understood as a minimal anti-inertia rule designed to make voluntary ADR operationally meaningful.

Second, the guided pathway infrastructure described above represents a conceptual shift from the prior model. It resembles the CRT's logic, though without necessarily creating an EU-level adjudicative body. It also offers a partial answer to the EU ODR Platform's failure to match high user traffic with effective outcomes: guidance, if designed well, can reduce the friction of choosing the correct ADR scheme, mitigate linguistic barriers, and reframe consumer redress as a set of navigable routes rather than as a single portal.

As the Union turns to a post-platform model, the successor digital tool should be designed not as a merely informational portal, but as a governance interface capable of aligning incentives and managing expectations. It should, first, communicate in a legally accurate manner that its function is triage and signposting – rather than online adjudication – so as to avoid the expectation gap that undermined EU ODR. Second, it should embed a structured, technology-enabled negotiation space between consumer and trader, supported by time-bound response duties and by the “silence-as-refusal” logic, so that the entry stage of the procedure does not collapse into inertia. Third, the tool should be interoperable with the Union’s wider enforcement and redress ecosystem: where individual complaints reveal systemic infringements, they should be capable of being flagged, in an appropriate and privacy-compliant manner, for competent authorities and for collective redress actors, in a context where parallel tools – such as EC-REACT for representative actions – are already developing. Finally, the tool should publish aggregate, privacy-respecting performance metrics by sector and trader category, enabling reputational incentives to complement legal design, while keeping the user journey coherent across a proliferating landscape of EU and national consumer-protection platforms.⁵⁵

VI. OPEN QUESTIONS

Before drawing final conclusions, it is appropriate to acknowledge the limitations of this analysis and identify questions that remain open for future research.

First, the relationship between public ADR infrastructure and private platform-based dispute resolution (PODR) warrants further investigation. While this paper has noted the success of marketplace-embedded schemes such as eBay's Resolution Center, a systematic analysis of the regulatory implications of PODR dominance – including questions of procedural fairness, algorithmic accountability, and platform neutrality – exceeds the scope of the present study. The available data suggests that in 2020, 12% of consumers who experienced a problem with a trader used these private platforms, compared with only 5% who resorted to ADR procedures.⁵⁶ The eBay Resolution Center alone reportedly handles over 60 million disputes annually – a figure that

⁵⁵ Council of the European Union, Council calls for the closure of the ODR platform and its replacement with a better tool, 19 November 2024, available at: <https://www.consilium.europa.eu/en/press/press-releases/2024/11/19/council-calls-for-the-closure-of-the-odr-platform-and-its-replacement-with-a-better-tool/> (last visited Feb. 17, 2026); European Commission, Welcome to EC-REACT: the Representative Actions Collaboration Tool, available at: <https://representative-actions-collaboration.ec.europa.eu/> (last visited Feb. 17, 2026); European Commission, Representative Actions Directive – “EC-REACT”, available at: https://commission.europa.eu/law/law-topic/consumer-protection-law/representative-actions-directive_en (last visited Feb. 17, 2026).

⁵⁶ M. Dąbrowski, M. Rokosz, *The Revision of Directive 2013/11/EU on ADR for Consumer Disputes: Strengthening or Only Reorganizing ADR Rights for Consumers?*, in *Review of European and Comparative Law*, 60-1 (2024), p. 174, citing Commission Staff Working Document SWD/2023/337 final.

dwarfs the entire EU ADR caseload.⁵⁷ These private systems are not subject to the quality standards and transparency requirements imposed by Directive 2013/11/EU, raising questions about procedural fairness, algorithmic bias, and the potential for structural favouritism toward traders who are also the platforms' commercial partners. The relationship between public and private ODR – whether complementary, competitive, or substitutive – requires sustained scholarly attention.

Second, the geographical scope of the EU framework remains contested. Directive (EU) 2025/2647 extends ADR coverage to disputes involving traders not established in the Union but offering goods or services to EU-resident consumers.⁵⁸ This expansion addresses a significant gap: e-commerce increasingly involves purchases from non-EU traders, particularly through platforms based in Asia. However, the enforcement mechanisms available against non-EU traders are limited, and the cost implications for ADR entities – which cannot recover fees from traders who refuse to participate – have not been fully assessed.⁵⁹ Whether the new framework will be effective against traders beyond the jurisdictional reach of EU enforcement authorities remains to be seen.

Third, the analysis has not addressed the specific challenges facing vulnerable consumers and those with limited digital skills. While Directive (EU) 2025/2647 requires Member States to ensure that consumers can submit and access documents in non-digital form upon request,⁶⁰ the fundamental premise of the new system remains digital accessibility. From a design and legitimacy perspective, this is not merely a question of access to hardware: empirical work on consumer redress mechanisms suggests that users' expectations, digital literacy and behavioural patterns shape whether they will complete a procedure, trust its neutrality, and persevere beyond the first friction point. Where consumers misunderstand the role of a redress body, or where the interface demands evidentiary and procedural steps that users are not prepared to fulfil, discontinuation and drop-out become structural rather than exceptional; conversely, trader participation is also conditioned by reputational incentives and organisational compliance cultures. A credible EU successor tool should therefore be explicitly user-centred, integrating assistance and expectation management as core functionalities rather than as ancillary communication.⁶¹

Finally, the balance between procedural efficiency and substantive fairness remains a perennial concern. The CRT model demonstrates that mandatory participation and enforceable outcomes

⁵⁷ C. Rule, *Designing a Global Online Dispute Resolution System: Lessons Learned from eBay*, in University of St. Thomas Law Journal, 13 (2017), p. 354; see also A. J. Schmitz, C. Rule, *The New Handshake: Online Dispute Resolution and the Future of Consumer Protection*, Washington, 2017, p. 33.

⁵⁸ Proposal to amend Article 5(1) of Directive 2013/11/EU, as reflected in Commission Staff Working Document, part 2/2, p. 36. See M. Dąbrowski (2024), cit., p. 180.

⁵⁹ The Commission estimates that the cost of resolving one dispute could be EUR 300, and handling potential new 200,000 disputes could amount to EUR 60 million per year: Commission Staff Working Document accompanying the Proposal for a Directive amending Directive 2013/11/EU.

⁶⁰ Proposal to amend Article 5(2)(b) of Directive 2013/11/EU, requiring Member States to ensure that consumers with limited digital skills can submit and access documents in non-digital form upon request.

⁶¹ A. Biard, S. Voet, K. Hanemaaijer, E. van Gelder, *Ervaringen en verwachtingen van consumenten over de Consumentenombudsdienst / Service de Médiation pour le Consommateur. Onderzoek naar onvolledige dossiers*, Brussels, 2019, available at: <https://euciviljustice.eu/sites/default/files/nl-onderzoek-juli-2019-final.pdf> (last visited Feb. 17, 2026), pp. 9-15; Cambridge Pro Bono Project, *A Comparative Analysis of Online Dispute Resolution*, Cambridge, 2019 (Executive Summary and Conclusions); S. Voet, S. Caruso, A. D'Agostino, S. Dethier, *Recommendations from academic research regarding future needs of the EU framework of the consumer Alternative Dispute Resolution (ADR)*, Brussels, 2022, available at: https://euciviljustice.eu/sites/default/files/files/2022-08/adr_report_final.pdf (last visited Feb. 17, 2026).

can generate high throughput, but critics have questioned whether the streamlined procedures adequately protect parties' rights to be heard and whether the absence of traditional legal representation disadvantages less sophisticated disputants.⁶² Similar questions will arise as the EU system evolves: if the new guided pathway successfully increases case volume, will ADR entities maintain procedural quality under increased workload? The trade-off between accessibility and due process safeguards remains a design challenge that no jurisdiction has fully resolved.

VII. FINAL REMARKS

Regulation (EU) No 524/2013 was, in its original architecture, an internal market instrument: it sought to support cross-border e-commerce by giving consumers access to simple, efficient, fast and low-cost dispute resolution pathways, precisely where judicial enforcement was structurally unattractive because of low value, linguistic distance, and the costs of cross-border litigation.⁶³ The legal policy wager was therefore clear: if the Union could reduce transactional friction at the enforcement stage, it could increase trust in online cross-border trade and, indirectly, strengthen the digital dimension of the internal market.

The later decision to repeal that framework functions as an explicit regulatory admission that the platform did not meet the standards of efficiency and effectiveness expected from a Union-level governance tool. The repeal instrument explicitly acknowledges the traffic-to-resolution gap documented above, confirming that the platform's informational success did not translate into dispute resolution outcomes. It also records the results of the Commission's 2022 call for evidence: only a small portion of consumer respondents had used the platform, and most respondents supported substantial reform or discontinuation on cost-effectiveness grounds.⁶⁴

This diagnosis is legally consequential because it clarifies the nature of the platform's failure. The EU ODR initiative did not collapse merely because of a deficit of technological adoption, nor because consumers were unwilling to seek digital pathways. Rather, its demise reflects the classic governance problem of platformisation without leverage: a sophisticated interface cannot compensate for weak incentives, under-enforced duties, and the absence of credible participation mechanisms for the economic actor whose cooperation is indispensable – namely the trader.⁶⁵ The formal termination schedule further crystallises this shift from experimentation to abandonment: new complaint submissions ceased on 20 March 2025, and the repeal took effect on 20 July 2025. The most illuminating contrast is offered by publicly supported systems designed around direct engagement rather than a gateway-to-ADR model: drawing on the UNCITRAL typology of ODR

⁶² See the discussion of CRT limitations in P. Daly et al., *A Comparative Analysis of Online Dispute Resolution For The International Legal Aid Group*, pp. 83-84, available at http://www.internationallegalaidgroup.org/images/miscdocs/CPBP_Report_-_FINAL.pdf (last visited Jan. 05, 2026), noting inter alia: "Since the CRT is a tribunal rather than a court, the institutional and personal aspects of judicial independence are attenuated"; and observing that in small claims decisions, "any party who is dissatisfied with the decision can file a notice to have it vacated without supplying any grounds."

⁶³ M. Kumar N, J. Banerjee, *The Role of Cross Border ODR in Standardizing E-Commerce Dispute Resolution Globally*, in *International Journal of Human Rights Law Review*, 4-3 (2025); C. Berlian, M.A. Santoso, R. Yuniarti, M.F. Hadi, *Consumer Dispute Resolution in Cross-Border Online Transactions Through Alternative Dispute Resolution from the Perspective of International Law*, in *Tirtayasa Journal of International Law*, 4-1 (2025).

⁶⁴ Regulation (EU) 2024/3228, recital (5).

⁶⁵ European Commission, *Report from the commission to the European parliament and the council on the functioning of the European Online Dispute Resolution platform established under Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes*, COM(2017) 744 final, 13.12.2017.

procedures (which distinguishes between stage-1 technology-enabled negotiation, stage-2 facilitated mediation, and binding stages like arbitration), it is possible to classify Brazil's *consumidor.gov.br* as a stage-1 system. Conversely, the EU ODR platform is characterised as stage 2, being structured to route cases toward ADR entities rather than to concentrate on the negotiated resolution phase itself.⁶⁶

The empirical asymmetry is stark and has direct implications for legal design. In the EU setting, approximately 85% of complaints were automatically closed after the lapse of a period without trader engagement; exit surveys suggested that many disputes were resolved bilaterally outside the platform, while only a small minority proceeded to the ADR stage that constituted the platform's formal objective.⁶⁷ Conversely, the Brazilian system is characterised by very high trader responsiveness, with replies in almost all cases and within a short time horizon – an element that is not simply a user experience feature but a structural governance lever.⁶⁸

The comparative lesson, for present purposes, is not that the EU should mechanically import a foreign model. The EU environment is multi-jurisdictional, multilingual, and institutionally fragmented in ways that make any single-platform solution intrinsically more complex. However, the comparison does show that, in low-value B2C disputes, the core bottleneck is frequently not the adjudication capacity but the responsiveness capacity: absent a credible duty to reply (or a reputational/public accountability mechanism), the procedural funnel collapses at its entrance. In that sense, the EU platform failed not because it tried to be European, but because it tried to be European through a design that presupposed voluntary cooperation in a context where the rational strategy for many traders was non-engagement.

A second implication of the EU ODR experience concerns the constitutional dimension of consumer redress. The legal framework was never merely an instrument of market integration: it was also framed – at least at the level of policy narratives – as part of a broader commitment to access to justice, linked to Article 47 of the Charter of Fundamental Rights and to Article 6 ECHR. This does not mean that ODR must fully replicate judicial guarantees; however, it does mean that digital redress must be assessed not only through utilitarian metrics (traffic, throughput, cost per case) but also through the lens of effective rights-enforcement for weaker parties.

Here, the literature on internet governance provides a further cautionary note. Broader analysis of the ODR landscape connects this field to the “fragmentation of the internet” debate, stressing that because ODR tools often belong to the private world, they risk imposing conditions (including in subtle or surreptitious ways) that shape access to online services. This dynamic can indirectly influence recourse to public justice, potentially to the detriment of weaker subjects.⁶⁹ Read together

⁶⁶ M. J. Schmidt-Kessen, R. Nogueira, M. Cantero Gamito, *Success or Failure? Effectiveness of Consumer ODR Platforms in Brazil and in the EU*, in *Journal of Consumer Policy*, 43 (2020), pp. 667-668.

⁶⁷ G. F. Colombo, *What We Talk About When We Talk About Consumer ODR: The EU ODR Regulation and its Preliminary Lessons*, in *International Journal of Procedural Law*, 2 (2021), p. 265; S. Voet, S. Caruso, A. D'Agostino, S. Dethier, *Recommendations from academic research regarding future needs of the EU framework of the consumer Alternative Dispute Resolution (ADR)*, available at https://commission.europa.eu/system/files/2022-08/adr_report_final.pdf (last visited Jan. 07, 2026).

⁶⁸ M. J. Schmidt-Kessen, R. Nogueira, M. Cantero Gamito, *Success or Failure? Effectiveness of Consumer ODR Platforms in Brazil and in the EU*, in *Journal of Consumer Policy*, 43 (2020).

⁶⁹ I. Sigismondi, *Piattaforme di risoluzione alternativa delle controversie online tra frammentazione di Internet e istanze di giustizia*, in *Rivista Italiana di Informatica e Diritto*, 2 (2023).

with the EU ODR failure, this suggests a dual vulnerability: not only can a public platform fail because it lacks incentives, but even successful private platforms may raise normative concerns if they become de facto gatekeepers of redress without adequate public oversight and without preserving meaningful pathways to public adjudication.

Accordingly, the next generation of EU digital redress must avoid two symmetrical errors: the first-generation error of voluntarism without leverage; and the opposite error of privatised efficiency without rights-based safeguards. The legitimate ambition is to build a redress ecosystem that both increases settlement rates and preserves the normative conditions of accessibility, transparency, and accountability that are implicit in the Union's fundamental rights discourse.⁷⁰

The discontinuation of the EU ODR platform should therefore be understood neither as the end of ODR in Europe nor as the repudiation of digital justice as such. Indeed, the Commission has announced a replacement plan: a new digital interactive tool meant to guide consumers to effective redress options, coupled with the revision of the consumer ADR framework. This is coherent with the broader comparative insight that a single point of entry can be valuable only if it is embedded within enforceable obligations and interoperable institutional infrastructures.

At the same time, the technological horizon – particularly the use of AI-assisted triage, automated negotiation support, and the potential contribution of tamper-resistant records⁷¹ – adds a new layer of regulatory complexity. The technological innovation in dispute resolution also triggers concerns about data protection, fairness, accountability, and the need for human oversight and appeal mechanisms, including in light of GDPR compliance and the emerging AI governance framework at EU level. The regulatory complexity introduced by AI-assisted dispute resolution mechanisms warrants particular attention in light of the EU AI Act framework. Recent scholarship has proposed a risk-based categorisation of AI-driven ADR/ODR systems (AI-DR) that maps directly onto the architecture of Regulation (EU) 2024/1689.⁷² Under this framework, AI systems intended to assist ADR bodies in researching and interpreting facts and law, and in applying law to specific facts, qualify as high-risk where the outcomes of such proceedings produce legal effects for the parties – a classification explicitly acknowledged in Recital 61 and Annex III, point 8(a) of the AI Act.

This categorisation carries significant implications for the next generation of EU digital redress tools. The new interactive digital tool mandated by Directive (EU) 2025/2647 may incorporate AI functionalities ranging from informational chatbots (minimal risk) to systems that analyse claims and assist in triage or workflow automation (limited risk). However, should future iterations integrate AI systems capable of producing case-specific assessments or predictive outcomes with legal effects, they would fall within the high-risk category, triggering mandatory requirements including conformity assessments, fundamental rights impact assessments, and human oversight obligations.

The distinction articulated in the literature between AI systems that generate automated outputs to assist human experts and fully autonomous systems that render binding decisions without human

⁷⁰ O. Kesten, S. Özyurt, *Strategy-proof Multi-Issue Mediation: An Application to Online Dispute Resolution*, in Management Science, 71-1 (2025).

⁷¹ P. Ortolani, *A research agenda for online dispute resolution for DLT finance*, in J. Lee, A. Darbellay (eds.), *A Research Agenda for Financial Law and Regulation*, Cheltenham, 2025 (1st Ed.).

⁷² A. E. Vilalta Nicuesa, M. Gili Saldaña, *AI-driven alternative and online dispute resolution in the European Union: An analysis of the legal framework and a proposed categorization*, in Computer Law & Security Review, 57 (2025), proposing five categories: zero-risk AI-DR, minimal-risk AI-DR, limited-risk AI-DR, high-risk AI-DR, and unacceptable-risk AI-DR.

oversight is particularly salient.⁷³ The latter category – characterised as presenting unacceptable risk – would be incompatible with the foundational principles of access to justice, including human dignity, accountability, and the right to an effective remedy. Recital 61 of the AI Act underscores that “the use of AI tools can support the decision-making power of judges or judicial independence, but should not replace it: the final decision-making must remain a human-driven activity.” This principle applies equally to alternative dispute resolution bodies when their outcomes carry legal effects.

The redesign of the EU’s infrastructure necessitates that AI integration preserves human oversight at the decisional stage. Furthermore, transparency regarding AI’s influence is essential to satisfy the accountability requirements of the AI Act.

The post-platform horizon demands more than technological sophistication; it requires a careful calibration between efficiency and procedural fairness. Consequently, this shift should be framed not merely as a technical redesign, but as a governance challenge where architectural legal obligations and institutional oversight are strictly aligned. In the comparative perspective, ODR succeeds where legal design creates participation incentives, collects meaningful performance data, and safeguards fairness; it fails where it is reduced to a procedural corridor without enforceable commitments.

The real lesson of the EU case is therefore institutional: when law turns to platforms as governance tools, it must ensure that normative ambition is matched by enforceable design.

⁷³ A. E. Vilalta Nicuesa, M. Gili Saldaña, *AI-driven alternative and online dispute resolution in the European Union: An analysis of the legal framework and a proposed categorization*, in *Computer Law & Security Review*, 57 (2025), Section 5.5, noting that Recital 61 of the AI Act, while not codified in Article 5, signals the incompatibility of fully autonomous adjudication with rule-of-law values.

PUBLIC AND HYBRID ENFORCEMENT OF FINANCIAL SERVICES CONSUMER LAW IN ITALY AND GERMANY

Maria Cecilia Paglietti & Peter Rott¹

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This article wishes to introduce readers to the rather different ways in which Italy and Germany have organised the enforcement of consumer law in the area of financial services. It starts by providing some EU law background on both substantive consumer law related to financial services and the enforcement system (I). The article then discusses the roles of Italian and German financial services regulators: Banca d'Italia with the Arbitro bancario e finanziario (Banking and Financial Ombud; ABF), National Commission for Companies and the Stock Exchange (Consob) with the Arbitro per le Controversie Finanziarie (Securities and Financial Ombud; ACF), the Institute for the Supervision of Insurance (IVASS) with the Insurance Ombud (Arbitro Assicurativo; AAS), and the Bundesanstalt für Finanzdienstleistungsaufsicht (Federal Financial Supervisory Authority; BaFin), the instruments they have available for the protection of consumers and their overall importance in the national enforcement landscape of financial services consumer law (II. and III.) before concluding with a summary and perspectives for the future of public enforcement of financial services consumer law (IV.).

Keywords: consumer financial services – public enforcement – alternative dispute resolution – Arbitro bancario e finanziario – BaFin

I. EU BACKGROUND OF PUBLIC ENFORCEMENT OF CONSUMER LAW

EU law is dominating prudential supervision law as well as substantive consumer law in the area of financial services. For example, in banking law, the EU has a long tradition of regulating credit law, currently with the third Consumer Credit Directive (EU) 2023/2225 and the Mortgage Credit Directive 2014/17/EU, and other financial services, with the Payment Services Directive (EU) 2015/2366, the Payment Account Directive 2014/94/EU and the Distance Marketing of Consumer Financial Services Directive 2002/65/EC, among others. In addition to that, general consumer law of the Unfair Contract Terms Directive 93/13/EEC and the Unfair Commercial Practices Directive 2005/29/EC plays an important role in the banking sector.

This strong influence on substantive law is in stark contrast to its enforcement. In the multi-level system of the EU, consumer law is enforced by the Member States. Thereby, as a starting point, Member States enjoy procedural autonomy, which means that they are free to decide on the suitable enforcement mechanisms. Nevertheless, the EU has set limits to that autonomy through the

¹ This Article is the result of joint research. Sections I, II and IV have been written by Peter Rott; sections III and V by Maria Cecilia Paglietti.

principle of effectiveness,² and it has in the meantime adopted minimum standards on enforcement mechanisms in many areas, most recently with the Representative Actions Directive (EU) 2020/1828.³ The latter covers, in its Annex, not only the above-mentioned legislation in the banking area but also EU legislation in the areas of capital market law and insurance law.

The financial sector, together with other areas of particular importance, such as energy and telecommunication, is special in that the EU has obliged Member States to set up regulatory bodies that must be independent and have sufficient powers and discretion. Their main task is the enforcement of public law provisions, for example in the case of banks, relating to capital requirements of banks and the stability of the financial market. Some of the regulators are also explicitly tasked with the protection of consumers but rather in an indirect manner. For example, the electricity regulators have the duty to help to ensure, together with other relevant authorities, that the consumer protection measures are effective and enforced.⁴ Article 16 of the Air Passengers Rights Regulation (EU) No. 261/2004⁵ requires Member States to designate a body responsible for the enforcement of this Regulation as regards flights from airports situated on its territory and flights from a third country to such airports. Where appropriate, this body shall take the measures necessary to ensure that the rights of passengers are respected. The Court of Justice has decided that this provision does not mean that the regulator has to protect the interests of individual consumers.⁶

The only exception is, in principle, the Consumer Protection Cooperation (CPC) Regulation (EU) 2017/2394 dealing with the cross-border cooperation between national authorities responsible for the enforcement of consumer protection laws. This Regulation, as its predecessor, CPC Regulation (EC) No 2006/2004,⁷ requires Member States to designate consumer protection authorities with certain minimum enforcement powers, and it was actually the reason why Germany had to establish a consumer protection authority in the first place, the *Bundesamt für Justiz* (although with only powers for that Regulation).

Overall, however, Member States are free to design their own mix of public and private law enforcement of consumer law, including in the financial sector.

II. ITALY

II.1 Banking, Financial and Insurance Ombud in Italy

In the aftermath of the 2008 financial crisis, to preserve financial stability and increase confidence in the financial system by ensuring adequate implementation of the rules and sufficient protection for the customers, the Italian legislator introduced ADR mechanisms embedded in the supervisory

² ECJ, case 33/76 REWE, ECLI:EU:C:1976:188, and case 45/76 Comet, ECLI:EU:C:1976:191. For detailed discussion see P. Rott, *Effektivität des Verbraucherrechtsschutzes: Rahmenfestlegungen des Gemeinschaftsrechts* (2006), <http://download.ble.de/04HS033.pdf>. See also N. Reich, *Legal Protection of Individual and Collective Consumer Interests*, in N. Reich, H.-W. Micklitz, P. Rott and K. Tonner (eds.), *European Consumer Law*, 2nd ed. Cambridge (UK), 2014, pp. 344 ff.

³ On which see L. Bugatti, C. Meller-Hannich and A.-K. Mayrhofer, *Comparative analysis of collective redress in Italy and Germany. Framework conditions and legal decisions in the implementation of the European Representative Action Directive*, in this issue.

⁴ See Art. 59(1)(r) of the Electricity Market Directive (EU) 2019/944.

⁵ OJ 2004 L 46/1.

⁶ CJEU, joined cases C-145/15 and C-146/15 *Ruijsenaars and Dees-Erf*, ECLI:EU:C:2016:187.

⁷ OJ 2004, L 364/1, as amended.

authorities.⁸ These Ombuds⁹ are out-of-court alternative dispute resolution schemes which fall under the scope of the ADR Directive 2013/11/EC,¹⁰ and thus must possess certain quality requirements and guarantees, such as legality, liberty, speed and impartiality.

There are three financial Ombuds operating in Italy: the Banking and Financial Ombud (*Arbitro bancario e finanziario*, hereinafter: ABF), based at the Bank of Italy, established in 2009;¹¹ the Securities and Financial Ombud (*Arbitro per le Controversie Finanziarie*, hereinafter ACF), based at the National Commission for Companies and the Stock Exchange (Consob) established in 2017,¹² and recently, a new one has been introduced for the insurance market: the Insurance Ombud (*Arbitro Assicurativo*, hereinafter: AAS), based at the Institute for the Supervision of Insurance.¹³

In case of a dispute with an intermediary, clients may file a complaint with the ABF if it concerns banking and financial services, e.g. current accounts, credit or debit cards, personal loans or mortgages and reports to the Central Credit Register; with the ACF if it concerns investment services and activities, e.g. securities trading or placement, investment advice and asset management, and with the AAC if it concerns a range of insurance products. These Ombuds have some features in common, namely a) design and nature; b) functions and competence.

As for design and nature, ABF, ACF and AAS share basically the same model. The dispute system design is very important for the success of these ADR schemes.¹⁴

If one wanted to find a word that features the Italian Ombud model, it would be eclecticism: the system's procedures are deliberately created by drawing upon and mixing elements from various dispute resolution models, rather than adhering to a single, existing cultural reference.

They don't have a judicial nature. They are ADR adjudicative type bodies designed on a mix of adversarial and inquisitorial model; they decide who is right and who is wrong, taking into account only the documents submitted by the parties via the Ombuds' online portals. They provide consumers with expert advice, offering a user-friendly dispute resolution process. They are all based at the supervisory authorities (in relation to which they are autonomous and impartial: see *infra*), which also provide them assistance and support in their work, in particular through the technical secretariats, composed of regulatory authorities' employees. Ombud members are appointed, respectively, by the Bank of Italy, Consob and IVASS; the composition of the panels ensures that

⁸ This is a common trend in Europe: I. Benhor, *Alternative Dispute Resolution for the Consumer in the European Union*, in Christopher Hodges et al (eds.), *Consumer ADR in Europe*, Oxford, 2012, p. 1; M. Hertogh and R. Kirkham (eds.), *Research Handbook on the Ombudsman*, Cheltenham, 2018; N. Creutzfeldt-Banda, *Ombudsmen and ADR: a Comparative Study of Informal Justice in Europe*, London, 2018.

⁹ A note on terminology: we use the term Ombud as singular, Ombuds as plural, also for women working at this post. We use these terms for clarity. Although we are aware of the gender neutrality of the word Ombudman, due to its Scandinavian roots (as the 'man' suffix itself is gender neutral in the Swedish Language), we prefer to use the term Ombud because it allows us to avoid objections regarding its gender and overcome the problem of its plural form, which in Swedish is ombudsmän, but translated in modern English as Ombuds, thus endorsing the masculine ending.

¹⁰ Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution of consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [2013] OJ L 165/63.

¹¹ Credit Committee (CICR) Resolution 275/2008 as amended; Bank of Italy provisions issued on 18 June 2009 as amended; and Legislative Decree 130/2015. On ABF see G. L. Carriero, *Giustizia senza giurisdizione: l'arbitro bancario finanziario*, in Riv. trim. dir. e proc. civ., 2014, 161; E. Lucchini Guastalla, *Arbitro bancario finanziario*, in Enc. Dir., Annali, VIII, Milano, 2014, pp. 35 ff.; D. Dalfino, *L'Abf e i principi del processo civile: contestazione, "contumacia", onere della prova*, in Il Processo 2019, pp. 27 ff.

¹² Legislative Decree 130/2015 (implementing Directive 2013/11/EU), which has been in force since 9 January 2017. See G. Afferni, *Remedies available to retail clients of investment firms in the light of the decisions of the Italian Financial Ombudsman (ACF)*, in *Private and public enforcement of EU investor protection regulation*, Quaderni di ricerca giuridica della Banca d'Italia, Roma, 2019, p. 97 ff.; A. Dolmetta and U. Malvagna, *Sul nuovo ADR Consob*, in Banca, borsa, tit. cred., 2016, pp. 251 ff.

¹³ Min. Decree n. 215/2024.

¹⁴ P. Cortés, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution*, Cambridge (UK) 2017, pp. 247 ff.

the interests of all parties involved are represented. ABF is the biggest and most established Ombud, whose decision-making body has been divided into seven territorial panels (Bari, Bologna, Milan, Naples, Palermo, Rome and Turin, whereby the *forum actoris* rule applies).¹⁵ The other two Ombuds consist of just one body, composed of five members.

Participation in the system is mandatory: this means that any regulated business providing the service covered by the scheme (e.g., banks, insurers, utility companies) is legally required to be a member of, and submit to the jurisdiction of, the relevant Ombud scheme.

Before referring a dispute to the Ombud, the customer must lodge a complaint with the bank, financial intermediary or insurance. Since the Ombuds are meant to resolve disputes which could not be settled directly with the company, procedures require that the company is given the chance to resolve the dispute before the ADR body hears a complaint.

The Ombud services are almost free of charge: Claimants only pay 20 euros, which are refunded if the decision is made in their favour (even if only in part). Only the defending party is charged for the procedure, and only if the complaint is successful.

None of them require any legal or other professional assistance, but, if wanted, customers may also avail themselves of a representative power of attorney).¹⁶

All Ombuds have detailed regulations on their functioning and on the procedure for filing a complaint in order to ensure procedural safeguards, and the average duration of the proceedings is below 180 days. The speed of the proceedings is a crucial element, and the procedural provisions have been updated over the years in order to guarantee timely decisions.¹⁷

They do not deprive intermediaries and customers of the right to go to courts: the protection and dispute resolution of the Ombuds do not limit the protection and dispute resolution of the judiciary.

Their decisions are not binding: the sanction in cases of a compliance failure is that the notice of non-compliance is published on the supervisory authorities' websites for five years. Thus, a black list of non-complying intermediaries is available.

As to the relations with the judiciary, Ombuds and courts coexist. Ombuds add something extra to the protection of individuals and complement the work of the courts by promoting compliance in individual cases and acting as effective guidance for the future. It is important that co-existence does not lead to duplication or collision, thus their relationship is conceived in terms of mutual interaction. For instance, they make cross-references to each other's judgments or decisions and engage in coordination between the formal outcomes of deliberative and decision-making processes.

At the level of fundamental choices, five structural elements should be highlighted: compulsory participation in the system; the right to act is reserved to the customer alone (not exclusively to consumers, but extended to also cover collective entities and/or natural persons, the professional or private scope of the contract being irrelevant)¹⁸; the lack of any obligation of legal assistance¹⁹; the principle of the burden of proof applies; only the defending party is charged for the process, and only if the complaint is upheld.

¹⁵ As consistency in decisions, uniformity of approaches and stability of decisions are key elements in providing effectiveness of protection, a coordinating Panel has been introduced, which decides on the complaints concerning issues of particular significance or that have given or could give rise to inconsistent decisions by the seven territorial Panels.

¹⁶ Respecting the provisions of Art 8, letter c, Alternative Dispute Resolution for Consumer Disputes Directive.

¹⁷ For instance, the ABF process was updated in February 2025.

¹⁸ Art 5, para 1, of the CICR Resolution (n 8), whose aim is to reserve an alternative remedy for settling economic disputes in banking and credit matters and payments to the customer alone.

¹⁹ Respecting the provisions of Art 8, letter c, Alternative Dispute Resolution for Consumer Disputes Directive.

II.2 Specificities

As for the Ombuds' nature, two main issues have been raised since their establishment: their relationship with the regulator and their private/public nature.

One could doubt the Ombuds' independence and impartiality given their close structural connection with the regulatory authority. The question of whether the structural and regulatory proximity to the regulator could undermine the impartiality and independence of Ombuds was answered in the negative by the European Court of Human Rights in its ruling on the UK Financial Ombudsman Services (FOS), which is based at the Financial Conduct Authority (FCA).²⁰ The applicant had complained that the Ombud lacked independence and impartiality "in light of the close link between the FOS and the FSA, with the latter having a supervisory role over the former" (§ 18). One of the grounds of the complaint was the alleged violation of the right to a fair and public hearing ... by an independent and impartial tribunal of Article 6 of the European Convention of Human Rights. The Court stated that the statutory relationship between the regulator and the Ombud was not "such as to compromise or raise doubts regarding the latter's independence and impartiality when deciding individual complaints".

Also, their public or private nature has been discussed at length. Italian Ombuds are bodies placed in a public law framework stemming from the public law imprimatur of the regulatory authorities where they are based, from which they receive support and by whom they are appointed. This is underlined by the mandatory adhesion to the system and by the fact that they exercise decision-making powers provided for them by law. They have, however, private law features as well in that compliance with their decisions is based on consent and private autonomy. Currently, the consensus seems to be that they are private institutions,²¹ which combine elements of hard law (the services providers' obligation to participate to the system) and soft law (no obligation to comply with the Ombuds' decisions) and makes them one unique in the Italian system, impossible to assign to one of the traditional categories. Overall, the Ombuds are private institutions placed in a public law framework with a hybrid nature that combines elements of hard public law and soft law²².

Despite their similarities, certain differences exist among these bodies, and the procedure may vary between the sectors. For instance, the ABF process has been recently improved by the regulator introducing a mediation stage that encourages settlement over adjudication, designing a mixed model where the more costly and acrimonious adjudicative scheme coexists with an amicable resolution of disputes by agreement. These are tiered procedures, where the adjudicative stage takes place where mediation techniques have not succeeded in reaching settlements.²³ The same design has been chosen for the AAC, but not for ACF.

Another significant difference is that, while ABF and ACF decide exclusively according to the law, AAC decides according to the law and, in some typical cases, to equity, considering what is fair and just).

As for the value of the disputes the Ombuds can resolve, they are assigned to solve "small and medium-sized" disputes, with maximum values ranging from 200,000 euros for the ABF to 500,000 euros for the ACF and up to 300,000 euros for the AAC (300,000 euros for life assurance policies

²⁰ European Court of Human Rights: *Heather Moor & Edgcomb Ltd v United Kingdom* App no. 1550/09 (ECtHR 26 June 2012).

²¹ Art. 128-bis Consolidated Banking Law; Art 1, para 1, lett. b) of the CICR Resolution (n 8).

²² S. Lucattini, *Modelli di giustizia per i mercati*, Torino, 2013.

²³ P. Cortés (n 14), 247 ff.

that provide for payment of the benefit solely in the event of death, 150,000 euros for other life assurance policies, 25,000 euros for non-life insurance (e.g., home, health, travel), and 2,500 euros when the claimant is the injured party).

II.3 (Non) Enforceability of Decisions and Mandatory Participation in the System

As previously mentioned, the Ombuds' decisions are not binding and enforceable, but the effectiveness of protection is ensured through a reputational sanction (e.g., naming and shaming non-compliant firms on a regulator's website). These mechanisms appear to be very effective in incentivising compliance -without using judicial authority- due to the fact that the banking and financial market are based on trust and reliability of the operators. The Ombud's decision, therefore, although not legally binding, is binding at the social level.

Mandatory participation ensures that every consumer who has a complaint about a regulated service has a free, independent, and accessible route to redress. Because all firms are mandatory participants, the Ombud can identify and report systemic issues affecting multiple firms to the relevant regulator. This allows the regulator to step in and make changes that benefit the market as a whole, making the scheme a vital part of the overall regulatory framework.

II.4 (Hybrid) Regulatory Purposes

First of all, Ombuds are not conceived as tools of consumer protection, as legal entities are allowed to submit a complaint as well. Still, they provide a response to the need to afford protection and restore balance to asymmetrical positions, also on the procedural level, by removing barriers on the effectiveness of protection and limiting the time and costs of the procedure.

At the same time, due to the convergence between public enforcement and private remedies, the private disputes become instrumental to the public regulation of the market. This implies a significant fallout in terms of the stability of decisions.

Given the lack of the principle of *stare decisis* in the Italian legal system, the uniformity of approach would appear, in the context of banking and financial Ombuds, to be functional 1) to the reliance of operators; 2) to legal certainty; 3) to the deflation of internal disputes; 4) to the measurement of regulatory compliance, through the collection and publication of aggregated data on individual disputes in order to obtain a global overview of the violations and market performance; 5) to the consolidation of regulation; and 6) prospectively, to the study of the review of the regulatory framework.

It is in the guarantee of a significant degree of uniformity that the principle of regulation through the Ombuds decisions may be completed, and the ultimate objective of an effective customer protection may be achieved.

II.5 Ombud in Action

In 2023, 15,816 complaints were received by the ABF, and complainants were awarded €17.3 million in 2023;²⁴ during 2024, the ACF received 961 complaints, bringing the total number of complaints submitted by savers in the first eight years of operation (2017-2024) to 11,735.

The Ombud plays a vital role in addressing the failure of existing written law to keep pace with new market practices or technological developments—through its function of "regulation through litigation".

One of the main contributions of the Ombud, and in particular of the ABF, is that it has been called upon to decide on issues not yet brought to the attention of the ordinary courts, due to its ability to define and enforce standards of conduct where the formal law is silent, vague, or outdated,

²⁴ Data from The Banking and Financial Ombud Annual Report - Abridged Version -2023.

interpreting general principles. ABF consistently rules on new, complex, or unforeseen disputes (particularly, loans secured by a pledge of one-fifth of salary, which alone represent more than half of all cases). By applying general legal principles (like fairness or good faith) to specific, modern scenarios (e.g., new digital products or complex investment schemes), their decisions effectively integrate and clarify the function of supervision and regulation.

One example.

In relation to payment systems, Art. 97(1)(c) of the Payment Services Directive 2366/2015 (PSD2) has introduced the obligation for a payment service provider (PSP) to perform a strong customer authentication check for every electronic payment transaction unless it qualifies for an exemption. Strong customer authentication is a regulatory requirement aiming to increase the security of electronic payments and reduce fraud. It adds an extra layer of security by using a combination of at least two elements: something the user knows (like a password), something he/she possesses (like a phone), and something he/she is (like a fingerprint). This security system had already been required at a sub-primary legislative level and one that is also incorporated by means of the general clauses and references to the ECB Recommendations and EBA Guidelines.²⁵

Strong customer authentication has in practice been found to be mandatory far before the rule came into force on 14 September 2019, in those legal systems with specific ADR systems devoted to solve bank disputes (like the United Kingdom and Italy) which applied, at the same time, national general clauses, national rules on private relationships and EBA Guidelines. In terms of the regulation of damages deriving from hazardous activities (art. 2050 Italian Civil Code) and the general duty of fairness (expressed in art. 1176 Italian Civil Code), as early as 2010 the ABF even stated that the authentication must be based on the use of two or more elements falling under the categories of knowledge, possession and inherence.²⁶ The British FOS (Financial Ombudsman Service, based at the Financial Conduct Authority), by comparison, decided not to uphold the complaint of a payment services client given the presence of SCA in the bank's security system.²⁷ In these legal systems, the initiation and consolidation of the double/multi factor authentication was far quicker than in those countries, like France, which do not have a proper Ombud scheme for handling consumer complaints and strong customer authentication represented a huge change also in evaluating and allocating responsibilities.²⁸

II.6 Conclusions

Italian Ombuds are private entities designed to be instrument of regulation of the contract with conforming effects, so they are instrumental to public regulation (regulation through litigation).

To fully achieve a regulatory effect, the decision must be perceived as stable.

From this perspective, in highly regulated markets – such as the banking market – ADR systems constitute a necessary infrastructure element in an *ordo-liberal* configuration of law and society.²⁹

While not formally regulators in the strict sense, these Ombud exercise *de facto* regulatory powers

²⁵ European Central Bank, Recommendations for The Security of Internet Payments, December 2013, § 7; European Banking Authority, Final guidelines on the security of internet payments, EBA/GL/2014/12_Rev1, 19 December 2014.

²⁶ ABF, Panel Milan, Dec. n. 1506/2010; Coordinating Panel, Dec. n. 3498/12.

²⁷ FOS, Ref: DRN7720365.

²⁸ J. Lasserre Capdeville, *Où en sommes-nous de l'entrée en vigueur des dispositions nouvelles relatives à l'authentification forte?*, in *Semaine Juridique* ed. Entreprise et Affaires, 2020, pp. 567 ff.

²⁹ P. Sirena, *The European System of Banking Law. A Tribute to Stefan Grundmann*, in 34 *European Business Law Review*, 2023, pp. 1017 ff.

in the retail financial services realm, as their rules and determinations direct the behaviour of firms.³⁰

III. GERMANY

III.1 Civil law enforcement and its gaps

With regard to consumer law, Germany has a tradition of private law enforcement. Individual enforcement is reasonably accessible as court fees and lawyers' fees are lower in some other Member States, and nearly 50% of consumers have legal insurance, although it should be mentioned that insurance companies tend to exclude certain areas from protection when mass-scale procedures occur. Thus, they normally do not cover capital market law claims anymore after the IPO of Deutsche Telekom triggered mass litigation of around 17,000 investors.³¹

Collective enforcement has always been performed by consumer organisations, whereby the consumer centres of the *Länder* and their umbrella organisation, *Verbraucherzentrale Bundesverband e.V.* (vzbv), are partly funded by the state. Still, gaps in consumer protection remained, even after the implementation of the Representative Actions Directive. Firstly, many individual still cannot afford litigation, and even less pay for a lawyer, in particular when it comes to consumers with credit issues. Consumer organisations cannot fully close that gap for various reasons. First, they do not have the personal and financial resources for the huge number of lawsuits they would have to initiate. Second, the German implementation of the Representative Actions Directive includes certain obstacles to effective enforcement activities. It only allows third-party funders a share of a maximum of 10%, which makes third-party funding virtually impossible in practice, and judgment only have *inter partes* effects so that a multitude of litigation proceedings would be necessary to fight the same type of breach. For example, all saving banks (*Sparkassen*) have miscalculated interest in certain long-term saving products,³² and a good number of them has been convicted to correct their calculations by now but others still refuse to do so and will need to be sued as well.

Of course, ADR bodies are also available in Germany, due to the requirements of the ADR Directive, and in the area of financial services, we find, for example, the Ombud of the Private Banks (*Ombudsmann der privaten Banken*) and the Insurance Ombud (currently *Versicherungsombudsfrau*). These are, however, not Ombuds in the Scandinavian or Italian sense but regular ADR bodies that simply chose the name *Ombudsmann*. In practice, they are still of some significance as they handle numerous cases for consumers. In 2024, the Ombud of the Private Banks received 10,062 applications³³ while the Insurance Ombud received 15,659 valid applications.³⁴ ADR procedures have gained popularity in Germany not only due to the chance of a free of charge and speedy decision but also because they suspend the prescription of a claim under § 204 para. 1 no. 4 *Bürgerliches Gesetzbuch* (Civil Code, BGB). Thus, ADR bodies are often flooded with claims at the end of the year when those claims are about to be prescribed. Otherwise, ADR bodies have one important disadvantage as they normally do not deal with controversial issues of law that have not been clarified yet by the courts.³⁵

³⁰ Institute of Economic Affairs, *Who Regulates the Regulators? The Financial Ombud Service* (31 March 2021). Available at SSRN: <https://ssrn.com/abstract=3850606> or <http://dx.doi.org/10.2139/ssrn.3850606>.

³¹ See A. Halfmeier, P. Rott and E. Feess, *Kollektiver Rechtsschutz im Kapitalmarktrecht – Evaluation des Kapitalanleger-Musterverfahrensgesetzes*, Frankfurt, 2010, pp. 41 f.

³² See *infra*, IV. 3.

³³ See https://bankenombudsmann.de/media/files/T%C3%A4tigkeitsbericht_2024_0PHrNEE.pdf, sub 4.1.

³⁴ See Ombudsfrau für Versicherungen, *Jahresbericht 2024*, https://www.versicherungsombudsmann.de/wp-content/uploads/Jahresbericht_2024.pdf, 107.

³⁵ See Bankenombudsmann, *Tätigkeitsbericht 2024*, sub 3.

Overall, the gap in private enforcement mainly results from insufficient resources of consumer organisations and from the lack of broader effects of civil law litigation. Public enforcement could play a role in filling that gap.

III.2 The competences of BaFin

BaFin, established in 2002 in a merger of three previous sectoral supervisory authorities for banking, insurance and securities, had for a long time only the competence to act in the public interest, as opposed to the interest of consumers. Its powers in the banking area were and are regulated in the *Kreditwesengesetz* (Banking Act; KWG) that was, again, seen as a set of rules serving only the public interest, whereas consumers could not claim damages for violations of the KWG.³⁶ Only in 2015, BaFin has been explicitly conferred the task of the protection of the collective interest of consumers, following an agreement in the coalition agreement between the conservative parties (CDU and CSU) and the social democrats (SPD) of 2013.³⁷ New § 4 para. 1a *Finanzdienstleistungsaufsichtsgesetz* (Act Establishing the Federal Financial Supervisory Authority; FinDAG) was meant to emphasise the relevance of the aim of collective consumer protection and integrate it in the supervisory activity of BaFin.³⁸ It reads:

”Within its area of competence, the Authority is also obliged to the protection of the collective interests of consumers. Notwithstanding other competences under other laws, the Authority can (...) make all orders that are suitable and necessary to prevent or abolish consumer relevant bad states of affairs if the action is in the general interest of consumer protection. A bad state of affairs in this sense is a significant, continued or repeated breach of consumer protection laws that in its type or extent can violate or impairs the interests not only of individual consumers. (...)”

In detail, almost every aspect of this provision is contested. One commentator had even doubted that this provision is a competence norm rather than a mere political statement.³⁹ This view was, however, untenable,⁴⁰ and courts have, in the few cases that reached them, accepted § 4 para. 1a FinDAG as a proper competence norm,⁴¹ next to the more specific ones in special legislation such as the KWG. This is, however, where general agreement ends. Views on the situations in which the BaFin can take action and what kind of action they can take differ greatly. In the background, there is fundamental disagreement to what extent BaFin, as a public authority, should be allowed to deal with civil law conflicts.

³⁶ See the old case law on the obligation to assess the customer’s creditworthiness that was seen as a public law obligation serving financial stability but not protecting the customer: BGH, 16 March 1989 - III ZR 37/88, in *Neue Juristische Wochenschrift* (NJW), 1989, p. 1665; OLG Köln, 23 June 1999 – 13 W 32/99, in *Zeitschrift für Wirtschaftsrecht* (ZIP), 1999, p. 1794; OLG Stuttgart, 21 March 2001 - 9 U 204/00, in *WM*, 2003, p. 343. Even after implementation of the Consumer Credit Directive 2008/48/EC, the German legislator maintained that view; see P. Rott, E. Terry and C. Twigg-Flesner, *Kreditwürdigkeitsprüfung: Verbraucherschutzverbinderung durch Zuweisung zum Öffentlichen Recht?*, in *VuR*, 2011, pp. 163 ff. This was only changed after the clarifying decision of the Court of Justice in *LCL Le Crédit Lyonnais*: CJEU, 27 March 2014, Case C-565/12 *LCL Le Crédit Lyonnais SA v Fesib Kalban*, ECLI:EU:C:2014:190.

³⁷ CDU, CSU and SPD, *Deutschlands Zukunft gestalten*, <https://www.bundestag.de/resource/blob/194886/koalitionsvertrag.pdf>.

³⁸ See the explanation of the government, Bundestags-Drucksache (Printed Matters of the German Parliament; BT-Drs.) 18/3994, p. 29.

³⁹ See R. Laars, *Finanzdienstleistungsaufsichtsgesetz*, 4th ed., Baden-Baden, 2017, § 4 para. 4 (changed in the 5th ed.).

⁴⁰ See also F. Hufeld, „*Verbraucher und Recht*“, in *VuR*, 2015, pp. 401 ff.; D. Schäfers in D. Kaulbach, G. Bähr and P. Pohlmann (eds.), *Versicherungsaufsichtsgesetz*, 6th ed., Baden-Baden, 2019, § 4 FinDAG para. 6.

⁴¹ See VG Frankfurt, 24 June 2021- 7 K 2237/20.F, in *VuR*, 2021, p. 430; VG Frankfurt, 23 October 2024 – 7 K 548/22.F, in *Zeitschrift für Bank- und Kapitalmarktrecht* (BKR), 2024, p. 1068.

III.2a) Scope of application

Obviously, BaFin can only act within its general field of competence, which is financial services. Not all aspects of financial services have been allocated with BaFin though. For example, the general trading offices (*Gewerbeaufsichtsämter*) are entrusted with the supervision of financial intermediaries and with price control, including control of the correct calculation of the annual percentage rate in consumer credit law.

III.2b) Enforcement of civil law?

The main issue behind the discussions around BaFin's competences is the divide, in German law, between public law and private law. Consumer protection, as mentioned in § 4 para. 1a FinDaG, is obviously a cross-cutting topic, and in financial services law, much of it is private law. It is clear from the explanations of the government at the time that § 4 para. 1a FinDaG was meant to cover, the situation where a financial service provider disregards a decision of the *Bundesgerichtshof* (Federal Supreme Court; BGH) concerning a civil law norm regarding the protection of consumers.⁴²

Nevertheless, banks, with the support of parts of academia, have consistently claimed that the enforcement of civil law by a public authority was unconstitutional due to a breach of the principle of division of powers.⁴³ They refer to a statement of the Federal Constitutional Court (*Bundesverfassungsgericht*; BVerfG) of 1996, according to which decisions should be made by the power that is best suited,⁴⁴ and claim that in matters of civil consumer protection law, these are the civil courts. Of course, it is hard to defend that BaFin, as the German regulator that is preoccupied with nothing but financial services and that represents Germany in relevant EU institutions, such as the European Banking Authority, lacks competence in financial services law. Moreover, while it is true that appeals against decisions of BaFin go to the administrative courts, they are always the same courts that can, therefore, gain expertise in this area; although one could have thought of giving the competence to hear appeals against BaFin decisions on breaches of civil law to the civil courts instead (see also *infra*, 4.). Anyway, the Administrative Court (*Verwaltungsgericht*; VG) Frankfurt flatly rejected the unconstitutionality argument without further discussion.⁴⁵

What is correct though is that the legislator envisaged the primacy of civil law enforcement and saw the competences of BaFin in this area as supplementary.⁴⁶ As mentioned above, the legislator had in mind that the BGH already clarified the law and banks (or other companies) still engage in the incriminated breach. The main example would be standard terms that have already been declared unfair in relation to one bank but that other banks continue to use.⁴⁷ At the same time, BaFin is explicitly not limited to this situation but can also take action if this is necessary for the protection of consumers, in particular where no decision of the BGH is foreseeable in the near future. The latter criterion has led to controversial discussion. Clearly, a BGH decision is foreseeable if the case is already pending before the BGH. Moreover, academics argued that it is

⁴² BT-Drucks. 18/3994, p. 36.

⁴³ P. Buck-Heeb, *Missstandsaufsicht durch die BaFin nach § 4 Abs. 1 a FinDaG*, in BKR, 2021, pp. 141 ff., p. 143. Vgl. auch C. Herresthal, *Keine Informationspflicht des Klauselverwenders bei ergänzender Vertragsauslegung laufender Verträge*, in BKR 2021, pp. 131 ff., p. 140; H. Edelmann, T. Schultheiß and T. Hölldampf, *Grenzen der Eingriffsbefugnisse der BaFin gegenüber Kreditinstituten nach § 4 Abs. 1a FinDaG*, in Betriebs-Berater (BB), 2021, pp. 835, p. 843.

⁴⁴ BVerfG, 17 July 1996 – 2 BvF 2/93, NJW, 1997, p. 383.

⁴⁵ VG Frankfurt, in BKR, 2024, 1068.

⁴⁶ See also D. Poelzig, *Durchsetzung von Verbraucherrechten durch Zivilgerichte und die BaFin*, in BKR, 2021, pp. 589 ff., p. 592; L. Klöhn and J. Adam, *Grenzen des Verbraucherschutzes durch die BaFin – eine Untersuchung zu § 4 Abs. 1a FinDaG*, in WM, 2022, pp. 1149 ff., p. 1152.

⁴⁷ There is a slight complication when the standard terms are not entirely identical, see Buck-Heeb, BKR, 2021, pp. 141 ff., p. 146. In the context of representative actions in the form of injunctions, an injunctive order also covers terms that are essentially alike; a concept that should also be applied in the context of § 4 para. 1a FinDaG.

sufficient if the case has reached the level of the higher regional courts so that an appeal against their decision would reach the BGH;⁴⁸ an argument that VG Frankfurt showed sympathy for.⁴⁹ This view is hard to defend as it is entirely uncertain whether the defendant would file an appeal in the first place. In addition to that, much time could pass during which consumers would suffer harm from the continued breach. Even more alien is the argument that BaFin action is not necessary when a case is pending at first instance,⁵⁰ as the legislator clearly looked at foreseeability of a BGH decision in the near future.

III.3 Measures in BaFin's portfolio

A further point of controversy is the measures that are available to BaFin. § 4 para. 1a FinDAG simply refers to 'all measures that are suitable and necessary to prevent or abolish consumer relevant bad states of affairs (...)'. Clearly, the provision foresees preventive and repressive measures.⁵¹

Classical instruments of public authorities are of course injunctive orders and fines. One could, however, also think of more advanced measures, such as an order to inform consumers of a breach, as now foreseen for courts in Article 13(3) Representative Actions Directive, the right to accept undertakings and make them binding, or even reimbursement orders that have proven spectacularly successful in the United Kingdom.⁵² These instruments are clearly suitable, and they could also be seen as necessary for the protection of consumers as experience tells that banks do not normally inform their customers of a breach or even pay out of their own motion.⁵³ In that regard, it should be noted that an injunctive order by BaFin does not suspend the prescription of claims of consumers that are affected by the breach in question. Thus, it would be essential for these consumers to learn of the breach.

Needless to say that banks are heavily opposed to these latter instruments but also academic authors reject them, arguing that § 4 para. 1a FinDAG was too vaguely formulated to allow exotic advanced instruments.⁵⁴

III.4 BaFin in action – the saving accounts case

The problems of BaFin with enforcing consumer law can be nicely illustrated with the saving accounts case that is currently pending in the court system. In the 1990s, German saving banks offered saving contracts with variable interest rates that were to rise continuously over (e.g.) 15 or even 25 years. Consumer organisations alleged that the interest calculation terms were unfair as they left too much discretion to the saving banks, and that saving banks systematically miscalculated interests to the disadvantage of consumers. Despite first decision at the level of instance courts, saving banks (that had all used more or less identical standard terms) routinely rejected consumers' claims or offered unfavourable settlements. In June 2021, BaFin that had been criticised in the press of not doing anything to remedy the situation finally addressed that mass phenomenon with a general order (*Allgemeinverfügung*) to all banks to inform all consumers concerned about the

⁴⁸ See Buck-Heeb, in BKR, 2021, pp. 141 ff., p. 147; Poelzig, in BKR, 2021, pp. 589 ff., p. 592; Klöhn and Adam, in WM, 2022, pp. 1149 ff., p. 1152.

⁴⁹ VG Frankfurt, in VuR, 2021, p. 430.

⁵⁰ Against Buck-Heeb, in BKR, 2021, pp. 141 ff., p. 147; H. Edelmann, *Anmerkung*, in BKR, 2021, pp. 587 ff., p. 588.

⁵¹ See Buck-Heeb, in BKR, 2021, pp. 141 ff., p. 147.

⁵² See C. Hodges, *Mass Collective Redress: Consumer ADR and Regulatory Techniques*, in European Review of Private Law, 2015, pp. 829 ff., p. 847 ff.; P. Rott, *Behördliche Rechtsdurchsetzung in Großbritannien, den Niederlanden und der USA*, in Schulte-Nölke (ed.), *Neue Wege zur Durchsetzung des Verbraucherrecht*, Dordrecht, 2017, pp. 31, 47 ff.

⁵³ For discussion, see Rott, in WM, 2019, pp. 1189 ff., p. 1191.

⁵⁴ See Buck-Heeb, in BKR, 2021, pp. 141 ff., p. 145.

unfairness of the standard term and promise them appropriate compensation in accordance with the yet to be expected concretisation by the BGH.⁵⁵ More than 1,000 banks appealed to BaFin against that order, which BaFin rejected in January 2022, upon which all banks filed lawsuits.

In October 2021, the BGH held the standard term used by Stadt- und Kreissparkasse Leipzig to be unfair,⁵⁶ thereby confirming earlier decisions of 2010 on similar standard terms.⁵⁷ By way of complementary interpretation of the contract (*ergänzende Vertragsauslegung*), banks must use the reference interest rate for long-term saving contracts. Only in July 2024, the BGH concretised the applicable calculation method further,⁵⁸ whereupon BaFin amended the general order in October 2024.

The VG Frankfurt handed down its decision on 23 October 2024,⁵⁹ only taking into account, for procedural reasons, the original decision of BaFin of June 2021. Probably impressed by a bombardment with legal statements from the side of the banking industry (and affiliated lawyers and academics), the court, first of all, did not find a ‘bad state of affairs’, arguing that banks had not been under a duty to inform consumers. Moreover, the court questioned whether requirement of complementary interpretation of the contract (as triggered by the unfairness of the standard terms on variable interest) was meant to protect consumers, arguing, among others, that this BGH case law might disregard case law by the European Court of Justice. Thereby, the court ignored that the bad state of affairs already consisted in the use of unfair terms and the following miscalculation of damages.

The court then argued that at the time of the general order (June 2021) and the rejection of the appeal (January 2022), no relevant BGH case law had been available. According to VG Frankfurt, earlier decision of 2010 on variable interest in saving contracts had been on different types of saving contracts and therefore not relevant for § 4 para. 1a FinDAG, whereas the decision of the BGH of October 2021 (that confirmed the application of the 2010 rules) only dated from October 2021 and was still not sufficiently clear. The BGH decision of July 2024 did not count as it came after the BaFin’s decision on the banks’ appeals in January 2022. Interestingly, the BGH itself stated, in its decision of July 2024, in relation to prescription that the legal situation had been clear since 2010.⁶⁰ The case is now pending on appeal.

III.5 Lessons

One obstacle to the enforcement activities of BaFin is legal uncertainty. With vague formulation of both the preconditions of enforcement and the available instruments, enforcement measures are open to attacks of banks and academia. Thus, the legislator should clarify the relationship between enforcement by BaFin and civil litigation. In particular, rather than enforcement by BaFin being ‘necessary’, BaFin should have discretion as to what cases they want to take up while taking account of the primacy of civil litigation. Courts could then only stop BaFin in clear cases of unnecessary action,⁶¹ which are highly unlikely to occur. The legislator should also codify the

⁵⁵ BaFin, *Allgemeinverfügung bezüglich Zinsanpassungsklauseln in Prämiensparverträgen*, https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Aufsichtsrecht/Verfuegung/vf_210621_allgvfg_Zinsanpassungsklauseln_Praemiensparvertraege.html.

⁵⁶ BGH, 6 October 2021 – XI ZR 234/20, in NJW, 2022, p. 311.

⁵⁷ BGH, 13 April 2010 – XI ZR 197/09, in VuR, 2010, p. 267.

⁵⁸ BGH, 9 July 2024 – XI ZR 44/23, in NJW, 2024, p. 2751.

⁵⁹ VG Frankfurt, in BKR, 2024, p. 1068.

⁶⁰ BGH, 9 July 2024 – XI ZR 44/23, in NJW, 2024, pp. 2751 ff., p. 2756.

⁶¹ See also R. Podszun, C. Busch and F. Henning-Bodewig, *Die Durchsetzung des Verbraucherrechts: Das BKartA als UWG-Behörde?*, in *Gewerblicher Rechtsschutz und Urheberrecht (GRUR)*, 2018, pp. 1004 ff., p. 1010, discussing possible competences of the Federal Cartel Authority in collective consumer protection in unfair commercial practices law.

available instruments, and it should do so in a ‘modern’ way that includes consumer information orders, the right to accept undertakings and make them binding, and reimbursement orders. Actually, these instruments have been made available to the Federal Cartel Authority (*Bundeskartellamt*).⁶²

Acceptance of public enforcement of consumer law could be increased if decisions could be appealed in the civil courts rather than the administrative courts.⁶³ This would reduce the risk of diverging decisions on the merit, and it would alleviate the discomfort of civil lawyers with public law enforcement. Admittedly, the first decisions of VG Frankfurt also seem to show that their lack of experience with BaFin lawsuits exposes them to false or exaggerated arguments of the banking industry.⁶⁴ The few cases that have reached the administrative courts until now have all been stopped for procedural grounds or lack of competence rather than on the merits, and it seems that the VG Frankfurt tries to avoid engaging with substantive consumer law as such.

In fact, changing the legal recourse towards the civil courts would not be without precedence. In the specific case of access to basic bank accounts, this is exactly what the law provides for,⁶⁵ and the aim is exactly to avoid diverging decisions between administrative courts and civil courts.⁶⁶

Finally, to increase the practical effects of BaFin’s activities, injunctive orders by BaFin should suspend the prescription of individual claims of consumers in the same way that is foreseen for injunction procedures by consumer organisations, in accordance with Art. 16 Representative Actions Directive, and that German law provides for in competition law.⁶⁷

IV INSIGHTS

In the broader context of the transformation of (public and private) enforcement, it appears that the banking, financial (and insurance) markets need their own system of dispute resolution, to foster market integrity, financial stability and consumer protection —a necessity also driven by the EU regulatory framework.

Despite this common need, Italy and Germany have chosen profoundly different solutions. The fundamental difference lies in the choice between a semi-formal Alternative Dispute Resolution (ADR) model (Italy) and a model based primarily on civil law and supplementary public oversight (Germany).

Italy opted for a hybrid, external to state courts form of consumer protection enforcer, designed considering the underlying regulatory character of the banking, financial and insurance legal framework. The model embraced is that of Ombuds, closely integrated with the supervisory authorities (Banca d’Italia, Consob, IVASS). The Italian Ombuds are a success story as they benefit of great flexibility, offering faster, simpler and informal procedures: accessing the Ombuds is basically free, does not require complex procedural formalities, nor mandatory legal representation. The simplified procedures lead to a much faster resolution than court proceedings, often completed within 180 days, as requested by the ADR Directive 2013/11/EC. Beyond solving the dispute between the parties, they also have a regulatory function by establishing updated and predictable standards of conduct for the industry (regulation through litigation). They are complementary to, and do not replace or supersede, the judiciary. Thus, Italy appears to have created an effective,

⁶² See § 32 paras 2 and 2a and § 32b *Gesetz gegen Wettbewerbsbeschränkungen* (Competition Act; GWB).

⁶³ See also Buck-Heeb, in BKR, 2021, pp. 141 ff., p. 148.

⁶⁴ One commentator even accused the VG Frankfurt of not having understood that unfair contract terms law was not consumer law as it also protects businesses in Germany; see M. Hippeli, *Anmerkung*, in BKR, 2024, p. 1071.

⁶⁵ See § 50 para. 1 *Zahlungskontengesetz* (Payment Accounts Act, ZKG).

⁶⁶ See BT-Drucks. 18/7204, p. 96.

⁶⁷ See § 33h para. 6 GWB.

highly utilized and widely recognized consumer dispute resolution system in the banking, financial and insurance markets, handling tens of thousands of complaints annually.

On the contrary, the German model of public law enforcement is a public authority exercising public powers. Although the Federal Financial Supervisory Authority (BaFin) was explicitly conferred the task of protecting the collective interests of consumers in 2015, in practice, its enforcement action is often compromised due to systemic and legal ambiguities. Efficacy is curtailed by the legal uncertainty arising from the vague statutory formulation of both the preconditions required for regulatory intervention and the instruments available to the authority. Furthermore, BaFin's intervention is typically limited by the primacy of civil law, meaning it can primarily act in cases where the relevant legal norm has already been unequivocally established by the Federal Supreme Court (BGH) and market operators subsequently persist in the breach; which leads to serious delays.

In summary, Germany's effort to integrate collective consumer protection into the mandate of a pre-existing public law regulator clashes fundamentally with the nation's rigid separation between public and private law, resulting in a hindered, less proactive, and often ineffective enforcement mechanism.

PUBLIC ENFORCEMENT OF CONSUMER PROTECTION IN ITALY: THE COMPETENCE SAGA AMONG INDEPENDENT AUTHORITIES

Angelo Bonaiti

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This paper analyses public enforcement of consumer protection in Italy through the conceptual framework of Italian public law and the practical problem of overlapping administrative competences. It first explains why consumer protection was traditionally marginal in administrative thinking, and it clarifies the role of supra-individual positions—collective interests and diffuse interests. It then shows how liberalisation of public services and the rise of regulated markets fostered new enforcement architectures, including the so-called “public class action” aimed at restoring efficiency rather than awarding damages. Against this background, the paper reconstructs the “competence saga” among independent authorities, focusing on the antitrust authority’s general power to repress unfair commercial practices and its interaction with sectoral authorities and data protection authority. It argues that legislative and judicial attempts to resolve conflicts have produced residual uncertainty and uneven sectoral outcomes. Finally, the paper shows how the digital regulatory package intensifies competence overlapping, making cooperation useful in practice yet insufficient to eliminate legal conflicts and potentially calling for structural rethinking of institutional design.

Keywords: public enforcement – consumer protection – competence saga – public authorities – digital markets – digital services

I. CONSUMER PROTECTION AND PUBLIC LAW

The Italian Antitrust Authority (*Autorità Garante della Concorrenza e del Mercato*, “AGCM”) holds a pivotal role in public enforcement of consumer protection. It is well known that, since 2007, the Authority has been given the power to suppress and sanction “unfair commercial practices” perpetrated by “traders” in every market¹. Furthermore, AGCM indirectly safeguards consumers by enforcing competition rules, repressing agreements that may restrict competition or abuses of dominant position², thereby guaranteeing that the free market offers the best products at the fairest price.

¹ Implementing Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005, Article 1 of Legislative Decree 2 August 2007, No. 146, amended Articles 18-27 of Italian Consumer Code (Legislative Decree 6 September 2005, No. 206) defining unfair commercial practices, and administrative and judicial remedies against them. AGCM has been entrusted with the general competence provided for in the Directive.

² CJEU, 25 February 2025, C-233/23, *Alphabet and Others*: «it is, in particular, the need for undertakings in a dominant position to continue to have an incentive to invest in developing high-quality products or services, in the interest of consumers, which, as the Advocate General stated, in essence, in point 30 of her Opinion, justifies applying the conditions referred to in paragraph 39 of the present judgment where an undertaking in a dominant position has developed infrastructure for the needs of its own business and owns that infrastructure» (§ 43). Conduct carried out by the undertaking in a dominant position (according to Article 102 TFEU) «which restricts competition on the merits [...] is thereby capable of causing harm to consumers» (§ 51), so the same undertaking «may demonstrate, to that end, either that its conduct is objectively necessary, or that the exclusionary effect produced may be counterbalanced or even outweighed by advantages in terms of efficiency which also benefit the consumers» (§ 71); see also ruling of Italian Council of State, 7 January 2026, No. 102: «the welfare of consumers, both intermediate and final, is the ultimate objective that justifies the intervention of competition law to suppress the abusive exploitation of a dominant position in the internal market or in a substantial part thereof» (§ 10.4.2).

In the consumer protection field, private enforcement may also benefit from public enforcement³. The infringement assessment carried out by AGCM – and confirmed in the administrative judicial proceedings – is still not binding on the parties in civil proceedings brought for compensation for damages (as is the case in competition law⁴). However, civil courts confer a “privileged probative value” to any decision taken by AGCM; accordingly, the professional operator shall provide evidence to rebut the “legal presumption” against it, and civil courts shall specifically refute the Authority’s conclusion on the relevant facts⁵.

Undoubtedly, most scholars have focused on the functions performed by AGCM against unfair commercial practices⁶; also in foreign legal systems, public enforcement of consumer protection has been mainly examined in relation to public measures against unfair commercial practices, or

³ Whether public or private enforcement is preferable is a matter of debate and, apparently, one without a clear-cut answer; however, this issue will not be addressed in this paper. Experience shows that the two tools are increasingly being used in a complementary manner: see F. Cafaggi, H-W. Micklitz (eds.), *New Frontiers of Consumer Protection: The Interplay Between Private and Public Enforcement*, Den Haag, 2009; F. Weber, M.G. Faure, *The Interplay between Public and Private Enforcement in European Private Law: Law and Economics Perspective*, in *European Review of Private Law*, 525 ff. (IV, 2015), regarding criminal law enforcement as well. For a discussion of the topic in Europe and the United States, see: C.E. Jones, *Litigate or Regulate? The Elusiveness of an Effective Consumer Protection Regime*, in *Canadian Business Law Journal*, 360 ff. (III, 2013); J. Kalajdzic, *Public Goals by Private Means, & Public Actors Protecting Private Interests: A Response to Professor Jones*, *ivi*, 371 ff. See also K.P. Purnhagen, A. Molitorisová, *Public and Private Enforcement in European Union Food Law*, in *European Journal of Risk Regulation*, 464 ff. (XIII, 2022), who examined the most effective type of enforcement in the specific field.

⁴ D. Dalfino, *Autorità amministrative indipendenti e tutela dei diritti*, 85 ff. (2022); L. Miccoli, *Tra public and private enforcement: il valore probatorio dei provvedimenti dell’AGCM alla luce della nuova direttiva 104/14 e del d.lgs. 3/2017*, in *juscivile*, 348 ff. (2017, IV).

⁵ See rulings of the Italian Court of Cassation, I, 31 August 2021, No. 23655, followed by lower courts: Pistoia Tribunal, I, 15 September 2023, No. 688 (which confers on the administrative decision an “high probative value”); Bergamo Tribunal, IV, 18 January 2024, No. 136, and 29 January 2024, No. 207; Court of Appeal of Bologna, III, 19 June 2024, No. 1324. However, according to Italian Civil Code, a presumption is qualified as “legal”, and it moves the burden of proof on the respondent, when a statutory provision clearly establishes it; to the contrary, a judge may infer a “mere” presumption from a fact, but the burden of proof remains on the claimant. In the cited cases, judges deduced such presumption from the legal system on consumer protection, lacking a specific law provision, and qualified it as “legal” to strengthen its probative value. However, the administrative decision is technically only a “fact” for civil courts, and it gives rise only to a mere presumption.

⁶ See, A. Chiarella, *“Isomorfismo” o superindividualità degli interessi e protezione del consumatore: riflessioni su taluni aspetti di rilevanza dogmatica circa la legittimazione ad agire, ex art. 21-bis, l. n. 287/1990, dell’Autorità Garante della Concorrenza e del Mercato nella recente giurisprudenza del Consiglio di Stato*, in *federalismi.it*, 54 ff. (III, 2024); C. Ruggiero, *Tra asimmetrie informative e pratiche commerciali scorrette: quali tutele per il consumatore?*, in *Rivista della Corte dei Conti*, 61 ff. (II, 2024); G. Pailli, C. Poncibò, *The transformation of Consumer Law Enforcement: an Italian perspective*, in C.A. d’Alessandro, C. Marchese (eds.), *Ius dicere in a globalized world*, II, Roma, 2018, 656 ff.; E. Battelli, *Il principio di unitarietà nella tutela amministrativa dei rapporti di consumo*, in C. Giustolisi (ed.), *La direttiva consumer rights: impianto sistematico della direttiva di armonizzazione massima*, Roma, 2017, 121 ff.; G. De Cristofaro, *Pratiche commerciali scorrette*, in *Enciclopedia del Diritto*, V, 1079 ff. (2012). See also the case law review of M. Filice, *La giurisprudenza in materia di “antitrust” e di tutela del consumatore*, in *Giornale di diritto amministrativo*, 525 ff. (IV, 2019). In relation to the average real or expected knowledge of the consumer, see also C. Bona, N. Bonini, *Tutela del consumatore e nuovi paradigmi scientifici (scienze cognitive e neuroscienze varcano la soglia di Palazzo Spada)*, in *Foro it.*, 542-546 (XI, 2022); S. Thobani, *Pratiche commerciali scorrette e sistemi di conoscenza alternativi al pensiero scientifico: tra protezione del consumatore e tutela del pluralismo*, in *Rivista critica del diritto privato*, 113 ff. (I-II, 2023).

unfair contract clauses, alongside private law remedies⁷. However, the competences attributed to the Authority do not exhaust public enforcement of consumer protection, which extends beyond the repression of unfair commercial practices and the powers conferred upon that Authority.

Before examining the various existing forms of public enforcement, it is necessary to define, albeit on a preliminary basis, the notion of consumer in public law. Indeed, every analysis of the instrument (i.e., public enforcement) requires prior clarification of the object of its activity (i.e., the consumer).

Traditionally, Italian public law did not recognise the consumer as a subject vested with rights to be protected against certain offences.

It is rather telling that the consumer is not expressly mentioned in the Italian Constitution⁸. Principle of solidarity enshrined in Article 2 grounds good faith and correctness duties within contractual and non-contractual relations, and the entire first part of the Charter is dedicated to the protection of the rights of individuals and groups from any abuse perpetrated by the authorities or third parties. On the other hand, while safeguarding economic initiative from interference by the State, the Constitution requires that private and public enterprises contribute to “social utility”⁹. However, the idea of direct public protection of individuals as consumers of goods or services, provided by traders or suppliers, was quite unknown to the Constitution; indeed, public enforcement of consumer protection grew beneath the constitutional provisions.

At the administrative law level, the existence of consumer protection competences was at odds with a fundamental premise: the administration may act only where it pursues a public interest, by exercising an authoritative (unilateral) power. According to the principle of legality, public authority

⁷ See M.B.M. Loos, *The Modernization of European Consumer Law (Continued): More Meat on the Bone After All*, in *European Review of Private Law*, 412 (II, 2020); R. Podszun, C. Busch, F. Henning-Bodewig, *Consumer Law in Germany: a Shift to Public Enforcement?*, in *Journal of European Consumer and Market Law*, 72 ff. (II, 2019), highlighting that, before consumer-protection competences were conferred on the existing market and competition authority, the enforcement was exclusively private, in Germany, and should be boosted with “supplementary powers”; S. Ammerlaan, D. Janssen, *The Dutch Consumer Authority: an introduction*, in W. Van Boom, M.B.M. Loos (eds.), *Collective enforcement of Consumer Law: securing compliance in Europe through private group action and public authority intervention*, Groningen, 2007, 107 ff.; R. Steennot, *Public and Private Enforcement in the Field of Unfair Contract Terms*, in *European Review of Private Law*, 589 ff. (IV, 2015), who describes the Belgian approach to public-enforcement mechanism against unfair contract terms, which provides for the issuance of warnings, followed by penal sanctions in case of infringement, or the proposal of a “transaction”, which implies the payment of a certain amount not higher than the penal sanction (§ 6); J. Mucha, *Public Enforcement of Consumer Law in Poland: Mission Impossible?*, in *Krytyka Prawa*, 29 ff. (II, 2021), focuses on public enforcement conducted by the “Polish President of the Office of Competition and Consumer Protection”, which is an administrative authority responsible for implementing the consumer safeguard policies drawn according to EU law provisions; the Author addresses the issue of “legal impossibilism”, defined as «*the situation when material justice is not brought due to the lack of the principles of procedural justice*», concluding that such phenomenon does not exist in the field of administrative proceedings carried out by consumer protection authority, as procedural mechanisms enable the authority to act in favour of consumers.

⁸ E. Bonelli, *Il valore costituzionale della tutela del consumatore: spunti ricostruttivi (tra Italia ed Unione europea)*, in *giustamm.it*, 30 ff. (2021). While the most recent constitutions of other countries, including Spain and Portugal, contain principles relating to consumer protection (both public and private), older constitutions—the German and French constitutions, as well as the Italian one—do not devote specific provisions to this aspect; even in its most recent revisions (dating back to 2001), when the principle of competition protection was expressly affirmed, consumer protection has not been included in the Constitution. Nevertheless, in the Italian legal system, it is possible to infer from the principles of solidarity (Article 2) and freedom of association (Article 18) the recognition of the value of groups representing several people, also aimed at safeguarding the positions of individuals; these provisions formed the basis for recognising the procedural and legal standing of such groups, as will be seen. With the process of integration of the European Community, later the European Union, the principle of consumer protection has entered national legal systems.

⁹ Article 41 of the Italian Constitution requires that private enterprises shall not interfere with people’s health, environment, safety, freedom, and human dignity; the law shall also guarantee that the economic activity shall be directed and coordinated towards social and environmental purposes. However, such provision does not imply specific protection of the natural person as a consumer, namely a market client.

is entitled to protect general interests defined by law, whether the interest of a specific administration or that of the community which the entity is required to guarantee. If that dimension of general interest were lacking, the administration could not act at all, remaining indifferent to the specific situation of the individual. In other words, public powers are not traditionally conferred for the protection of purely private positions, which are framed as “legitimate interests”, since the authority must in any event ascertain whether the adoption of a punitive measure against the trader serves the public interest¹⁰.

This objection has since been overcome, given that the authority’s intervention to curb practices harmful to consumers safeguards the public interest in market fairness, and in certain cases general interest coincides with consumers’ interests.

From the opposite perspective, a citizen or a natural person may always be seen as a consumer vis-à-vis the public administration, since individuals benefit from activities performed by public or private bodies providing functions or public services—especially where they supply individual services of a social or welfare nature, yet with an economic content. Public law provides remedies in favour of the consumer so intended, as public decisions may be challenged before administrative courts, with the possibility—only from the end of the 1990s—of obtaining compensatory relief for the infringement of relevant interests. However, this notion of consumer tells little on the subject matter regarding what the administration should do to safeguard consumers against third-party professionals: the consumer is the individual that should be protected by, not from, the authority’s initiative.

II. COLLECTIVE INTERESTS AND DIFFUSE INTERESTS AS “GENERAL” INTERESTS

To understand more precisely the notion of consumer in public law, it is necessary to clarify the meaning of two further subjective, “supra-individual” or “trans-individual” positions long discussed: “collective interests” and “diffuse interests”. One may think that public enforcement of consumer protection involves such positions as well; however, they fall within a field that differs from the protection of individual consumers.

It is well established that such interests relate to assets or values commonly described as “ownerless” (*adespoti*), namely, not vested in any individual. At the same time, they do not identify with “public interest”, as public entities do not hold them.

Accordingly, legal standing has been conferred in respect of those interests to ensure that the bodies entrusted with their protection are entitled to bring proceedings against offences. The evolution of such representation differs considerably for collective and diffuse interests.

Pursuant to Italian public law and historically speaking, collective interests only pertain to a legal person (association, committee) representing a “category” and, by embodying it, holding that interest¹¹. Typical examples are groups of workers, professionals or undertakings gathered in bodies, associations or trade unions representing the interests of those categories. Such entities are recognised a role by various legal provisions, which impose their involvement in different public

¹⁰ The individual does not have a “subjective right” (*diritto soggettivo*) in the intervention of the authority, which does not have an obligation or a duty to act, or to adopt a specific decision. If the administration exercises—or may exercise—a power, the individual (natural or legal person) holds a “legitimate interest” (*interesse legittimo*), which is legally relevant because it corresponds to the public power regulated by law; it is the interest in the authority doing, or not doing, something in order to confer or preserve a personal good (*bene della vita*). Such notion has been adopted by European Union law, which qualifies the position of consumers or their groups as a «*legitimate interest in combating unfair commercial practices*» (see Article 11(1) of Directive No. 2005/29).

¹¹ C. Cudia, *Gli interessi plurisoggettivi tra diritto e processo amministrativo*, Santarcangelo di Romagna, 2012; G. Manfredi, *Interessi diffusi e collettivi (diritto amministrativo)*, in *Enc. dir. – Ann.*, 515 ff. (2014).

procedures concerning the category, or allow them to assert the category's interests in judicial proceedings¹².

In recent years, consumer organisations, registered or not¹³, have been recognised as holders of collective interests in that specific sense, *i.e.* the interest refers to the category of consumers, and it is not a collection of individual interests. Representative entities shall have the possibility to challenge and request annulment of administrative acts that may harm collective interests¹⁴, even in the absence of a specific law provision attributing such standing¹⁵. A limit remains, as representative associations cannot claim compensation for damages caused to the consumers by public administration: lawsuits promoted by representatives of the collective interest do not directly and immediately concern the individuals and, vice versa, the association cannot enforce individual claims.

This notion of “collective” interests must not be confused with the one set out in the Italian Consumer Code, which refers to «*interests of a number of consumers who have been or could be harmed by a violation*» of certain provisions of the Code itself perpetrated by a trader (Article 140-ter(c)); such individual interests may be enforceable through representative actions¹⁶, or class actions¹⁷, so that the consumer may join the lawsuit and require compensation. The two¹⁸ “collective” situations have common features (such as the standing of the “qualified entity”, or the possibility of requesting the issuance of a judicial order). However, according to Italian public law, collective interests cannot lead to personal benefits, while representative actions (as an instrument of private enforcement) may also lead to redress measures, because the interest remains individual—namely egoistic—and may receive monetary compensation¹⁹. Although injunctive measures aim to protect the collective interests of consumers irrespective of whether any actual loss or damage is suffered

¹² See recent ruling of Court of Cassation, Civil Joint Sections, 23 November 2023, No. 32559, which recognised legal standing to an association representing the managers of sea bathing facilities, because it has its own collective interest (pertaining to the category in addition to legitimate interests of the operators) in contesting an unfavourable ruling of the administrative judge.

¹³ Article 137 of Italian Consumer Code provides that the registration of a consumer association in the national register depends on certain requirements. A registered association may promote “class actions” according to Articles 840-*bis* and ff. of Italian Code of Civil Procedure and “representative actions” according to Articles 140-*ter* and ff. of Italian Consumer Code. However, in past years those associations were not given the legal standing to challenge administrative acts in judicial proceedings before administrative courts.

¹⁴ Council of State, Plenary Assembly, 20 February 2020, No. 6, affirms that the collective interests, to be relevant, shall be exclusively referred to the representative entity; in that sense, it is not necessary to prove that the legitimate interests of consumers are “homogeneous”. See also Council of State, III, 28 May 2021, No. 4116, and Id., IV, 1 October 2024, No. 7869, on the criteria to admit the standing to bring proceedings of representative associations or committees. See, in this regard, S. Casilli, *Legittimazione, accertamento e risarcimento: il punto sulla capacità delle associazioni esponenti*, in *giustiziasieme.it* (2021).

¹⁵ According to a more restrictive opinion, Council of State, VI, 21 July 2016, No. 3303, declined the appeal filed by a consumer association against CONSOB approval of an offer prospectus, considering that any law provision confers the association the right to challenge administrative acts on behalf of consumers: legitimate interests of the individuals do not merge into the collective position. Decision No. 6/2020, cited above, overruled such opinion and affirmed a general, implicit legal standing of representative organisations with certain requirements.

¹⁶ Under Directive No. 2020/1828 and Articles 140-*ter* and ff. of Italian Consumer Code.

¹⁷ According to Articles 840-*bis* and ff. of Italian Code of Civil Procedure. Different and common features of the two private enforcement instruments are discussed in previous papers of the *Journal* special issue.

¹⁸ Article 3 of Directive (EU) No. 2020/1828 defines “collective interests of consumers” as the «*general interest of consumers and, in particular for the purposes of redress measures, the interests of a group of consumers*».

¹⁹ See A. Gambaro, *Interessi diffusi, interessi collettivi e gli incerti confini tra diritto pubblico e diritto privato*, in *Riv. trim. dir. pubb.*, 779 ff. (III, 2019), on the uncertain distinction between Italian private and public law.

by individual consumers²⁰, or independently of the infringement of specific rights of consumers²¹, the initiative carried out by the representative entity corresponds to an individual interest of each consumer.

For the same reasons, the so-called “public class action” (discussed below at § III.1) has different premises and effects from the private one.

If the supra-individual interest cannot be deemed collective, because no specific category may claim it, it remains a “diffuse interest” (*interesse diffuso*)²². In theory, an interest is diffuse because it does not belong to anyone, neither to a specific category or group: no single person or entity is vested with an individual right, despite having the interest in protecting a “greater good” which pertains to everyone²³.

In the absence of an explicit and substantive legislative recognition of such interests, “collective” entities have acquired relevance within the domestic legal order through the judicial conferral of procedural standing, justified by their constitutional grounding in Article 2 (the principle of solidarity) and Article 3(2) (the principle of substantive equality)²⁴. While participation in administrative proceedings is guaranteed by general provisions²⁵, representatives of diffuse interests still do not have general standing in judicial proceedings; they must demonstrate, on a case-by-case

²⁰ See Recital 33 of Directive No. 2020/1828.

²¹ See CJEU, 28 April 2022, C-319/20, *Meta Platforms Ireland*, in a case regarding the breach of GDPR provisions and the standing for representative actions pursuant to Article 80(2) GDPR, recognised that «it is sufficient to claim that the data processing concerned is liable to affect the rights which identified or identifiable natural persons derive from that regulation, without it being necessary to prove actual harm suffered by the data subject, in a given situation, by the infringement of his or her rights» (§ 72). Such reasoning may be applied also to representative actions under Directive No. 2020/1828, which, according to the Court's opinion, do not prevent Member State from providing for specific remedies against data breach. See A. Capellà i Ricart, *Fundamental Rights' Protection in the Digital Environment: Collective Actions Defending Diffuse Interests and Public Interest*, in *Journal of Consumer Policy*, 636 ff. (48, 2025), on cited case and CJEU, 11 July 2024, C-757/22, *Meta Platforms Ireland Ltd*.

²² Diffuse interests are recognised in several legal systems at National and International level, and they have been studied from various scientific perspectives. Among lawyers, see N. Reich (contr. by), *Law and diffuse interests in the European legal order* (III, 1997). The definition of diffuse interest in social and policy studies tends to be more generic than the legal one, as it encompasses every interest shared by multiple individuals or groups; in this regard, see the earliest studies on the lack of diffuse interests representation (namely the inability to organise as institutional groups) by M. Olson, *The Logic of Collective Action*, Harvard, 1965, 165 ff.; according to M. Bailey, *Quiet Influence: The Representation of Diffuse Interests on Trade Policy*, in *Legislative Studies Quarterly*, 45 ff. (I, 2001), diffuse interests (in the specific case, skilled labor), despite not being organised, cause an anticipated reaction of policy makers, thereby making them relevant. More recently, see also S. Dothan, *Elites, Power Struggles, and the Law. How Courts Support Diffuse Interests*, London, 2025, *passim*, on diffuse interest studied through an integrated socio-legal approach.

²³ Domestic literature is abundant and cannot be entirely cited here. Among others, see F.G. Scoca, *La tutela degli interessi collettivi nel processo amministrativo*, in *Le azioni a tutela di interessi collettivi. Atti del convegno di studio: Pavia, 11-12 giugno 1974*, Padova, 1976, 43 ff.; A. Romano, *Il giudice amministrativo di fronte al problema degli interessi c.d. diffusi*, in *Foro. it.*, ff. 8 (I, 1978); V. Denti, *Interessi diffusi*, in *Novissimo digesto italiano. Appendice*, 305 ff. (IV, 1983); R. Federici, *Gli interessi diffusi. Il problema della loro tutela nel diritto amministrativo*, Padova, 1984; G. Berti, *Diritto e Stato. Riflessioni sul cambiamento*, Padova, 1986; M. Nigro, *Le due facce dell'interesse diffuso: ambiguità di una formula e mediazioni della giurisprudenza*, in *Foro it.*, 7 ff. (I, 1987); G. Alpa, *Interessi diffusi*, in *Dig. disc. priv. Sez. civ.*, 609 ff. (IX, 1993); R. Ferrara, *Interessi collettivi e diffusi (ricorso giurisdizionale amministrativo)*, in *Dig. disc. pubb.*, 481 ff. (VIII, 1993); R. Rota, *Gli interessi diffusi nell'azione della pubblica amministrazione*, (1998); S. Cassese, *Gli interessi diffusi e la loro tutela*, in L. Lanfranchi (ed.), *La tutela giurisdizionale degli interessi collettivi e diffusi*, Torino, 2003, 596 ff.; G. Iudica, *Diritti diffusi*, in *Enc. giur.* (III, 2004).

²⁴ G. Recchia, *Considerazioni sulla tutela degli interessi diffusi nella Costituzione*, in A. Gambaro (ed.), *La tutela degli interessi diffusi nel diritto comparato. Con particolare riguardo alla protezione dell'ambiente e dei consumatori*, Milano, 1976, 25 ff., who also refers to the explicit constitutional protection of health and landscape, and to the implicit protection of (right to) home and environment. M. Cresti, *Contributo allo studio della tutela degli interessi diffusi*, Milano, 1992.

²⁵ See Article 9 of Law 7 August 1990, No. 241, which confers procedural standing to associations and committees of diffuse interests that may be damaged by the administrative decision to be adopted.

basis, that they can exercise that exceptional form of protection beyond public interest and legitimate interests²⁶.

Certain diffuse interests gained broader protection. In environmental matters, legislation came to recognise the right of associations or committees to participate in administrative procedures and opened their standing to bring proceedings²⁷.

Although the notion of diffuse interests has gained considerable support among scholars²⁸, such that the existence of a distinct category is no longer seriously in doubt at the theoretical level, the legal mechanisms devised for their protection tend in practice to conflate them with “general interests”. The debate remains open, and recognising standing for entities bearing these interests—distinct from public entities and situated within the non-profit sector—offers certain theoretical possibilities; however, this does not directly pertain to consumer law and its protection, because diffuse interests have a general and super-individual dimension that goes beyond the position of an individual consumer.

Two concrete examples assist in clarifying the point.

In Italy, for years the environment has been protected by a traditional administration, *i.e.* the Ministry for the Environment, which is entrusted with the function of combating pollution, preventing and remedying environmental damage.

Those tasks are now well defined. The Ministry must adopt preventive measures and exercise supervisory and sanctioning functions in environmental matters, which are: (a) proportionate to the level of protection intended to be achieved; (b) non-discriminatory and consistent with analogous measures already adopted; (c) based on an assessment of potential benefits and burdens; and (d) capable of being updated according to scientific data²⁹.

In the event of a threat of environmental damage³⁰, the intervention of the Ministry may be requested to safeguard the environment. In addition to territorial public bodies, individuals or associations promoting environmental protection are entitled to act. They may also bring proceedings before the administrative court to challenge measures adopted, or the Ministry’s inertia in adopting effective precautionary, preventive, or containment measures in respect of environmental damage³¹. However, only the Ministry may adopt such measures.

When environmental damage occurs, public enforcement takes place through the Ministry’s initiative in a twofold sense: (i) it brings an action for damages, also in criminal proceedings. While individual actions may be brought by people directly harmed by the environmental damage, in

²⁶ See cited ruling of Council of State No. 6/2020; *Id.*, IV, 1 October 2024, No. 7869, which sets out the criteria to admit the standing to bring proceedings of representative associations or committees.

²⁷ See Article 18 of Law 8 July 1986, No. 349, which gave legal standing for the intervention in judicial proceedings for the compensation of damages, and for the appeal against administrative acts, to the representative association recognised by the Minister of the Environment according to Article 13.

²⁸ See comparative studies of A. Aragao, *Les intérêts diffus, instruments pour la justice et la démocratie environnementale*, in *Vertigo* (2015), who refer to a subcategory of trans-individual interests beyond the individual interests and the public interest, which—in certain legal systems—may be enforceable through the so-called *action popularis*; see also M.J. Azar-Baud, *L’action de groupe, une valeur ajoutée pour l’environnement ?*, in *Vertigo* (2015), regarding group action in French consumer law.

²⁹ Preventive measures are adopted in accordance with the precautionary principle set out in Article 191 TFEU: «*where there are risks, even potential ones, to human health and the environment, a high level of protection must be ensured*» (Article 301, c. 1, of Italian Environment Code).

³⁰ Environmental damage, pursuant to Article 300, par. 1, of the Environment Code, is defined as «*any significant and measurable deterioration, direct or indirect, of a natural resource or the utility provided by it*» (*e.g.*, natural species and habitats, inland waters, coastal waters, land, soil).

³¹ G. Ceccherini, *Danno all’ambiente e garanzia dell’accesso alla giustizia: una questione aperta*, in *Riv. dir. civ.*, 347 ff. (II, 2021); M.A. Lupoi (ed.), *Emergenze ambientali e tutela giuridica*, Santarcangelo di Romagna, 2017; F. Giglioni, *La legittimazione processuale attiva per la tutela dell’ambiente alla luce del principio di sussidiarietà orizzontale*, in *Dir. proc. amm.*, 414 (I, 2015); A. Miletto, *Tutela inibitoria individuale e danno ambientale*, Napoli, 2006; M. Maugeri, *Violazione delle norme contro l’inquinamento ambientale e tutela inibitoria*, Milano, 1997.

respect of their health or property, class or representative actions seem to be precluded³²; alternatively, (ii) it initiates the procedure for the adoption of an order enjoining those responsible to restore the environment, by way of compensation in kind. In the event of inertia, the Ministry itself proceeds to restore the impaired environmental matrices, charging the costs.

One may say that people interested in the protection of the environment might fall within a broad notion of consumer and, in that sense, diffuse interests might be relevant to the public enforcement of consumer protection; however, supervisory functions in environmental matters are not materially different from protective functions pursued for general interest. Vis-à-vis public power (to be exercised against potential infringements of the public interest), all persons are consumers. Yet, as it has been said above, this would render wholly useless the notion of consumer in the public sphere, which is, instead, narrower.

Climate litigation confirms such opinion. Whilst a private law remedy, it has a broader object, since it targets—at least insofar as can be understood—polluting emissions, and it is brought against private enterprises and, more recently, States and Governments³³. Apart from other problems concerning the establishment of fault, the causal link between event and damage, and the quantification of damage, the difficulty of such litigation lies in the lack of standing of representative associations and individuals to claim compensation for damages caused to environment or climate³⁴.

On the other hand, the interest in the fairness and integrity of the financial market might be another example of diffuse interest of all the investors, who in certain cases are consumers (*i.e.*, retail investors benefiting from investment services).

The law currently empowers the criminal court to condemn the offender to pay a sum in favour of the financial market authority (*Commissione Nazionale per le Società e la Borsa* – “CONSOB”), in cases of insider dealing and market manipulation³⁵. In practice, compensation for damage arising from breach of rules on transparency and proper conduct in the financial market accrues to a public authority (not to any subject representing investor-consumers), which may receive a sum calculated by the court on a substantially equitable basis and entirely irrespective of proof of specific damage to specific investors³⁶.

According to the law, (private) collective actions do not absorb diffuse interest, because the initiative of the representative entity may only “collect” individual rights, not legitimate interests nor public interests. Indeed, registered consumer associations are entitled to protect the collective

³² According to Article 310 of Environment Code, only damaged individuals may intervene into the proceedings.

³³ A. Merone, *Lo Stato quale legittimato passivo della climate change litigation: tra diritti fondamentali e giudizi universali*, in *Il processo*, 579 ff. (II, 2024); R. Tiscini, *Contenzioso climatico e processo civile. Considerazioni a margine di alcune recenti pronunce*, in *judicium.it* (2024).

³⁴ In a very recent national case, where environmental associations and citizens sued the Italian Ministries and public companies for the assessment of the violation of climate change obligations, the Court of Cassation, Civil Joint Sections, 21 July 2025, No. 20381, following the ECtHR decision in *Verein KlimaSeniorinnen Schweiz v. Suisse*, recognised courts’ jurisdiction on the subject matter; however, it did not decide on the legal standing of representative association, to be evaluated in the merits phase of the proceeding. It should be emphasised that the claimants did not actually seek compensation for environmental or climate damage; rather, to avoid a finding that they lacked standing to bring the action, they sought compensation for the alleged violation of human rights, which is distinct from environmental harm. In that sense, climate litigation focuses on the violations committed by States and undertakings, and *personal* damages suffered by people.

³⁵ See Article 187-*undecies* of the Legislative Decree No. 58/1998 (*Testo Unico in materia finanziaria*).

³⁶ See first ruling of Criminal Court of Milan (first instance), 27 March 2006, on a market manipulation. More recently, Italian Criminal Court of Cassation, I, 5 July 2023, No. 45333, regarding the abuse of inside information, has also affirmed that the compensation for damages cannot include a punitive sum, which pertains to the sanction autonomously imposed by the authority.

interests of investors through class actions or representative actions, namely on behalf of the interest of consumers³⁷; however, an equitable compensation for market damages it is solely for the public authority.

In conclusion, for the purposes of public enforcement, diffuse interests largely overlap general interests: they belong neither to the administration nor, *a fortiori*, to individuals, but are protected by public authorities in an institutional and objective capacity. While a collective interest, in the public-law sense, is the interest of a defined category, a diffuse interest concerns a plurality of people, albeit not on an individual basis. In the absence of specific and explicit legislative provisions allowing such positions to be characterised as diffuse interests, their protection is mainly afforded by public bodies, which are institutionally charged with safeguarding general interests on behalf of citizens, in the absence of any personal interest belonging to consumers.

III. PUBLIC ENFORCEMENT OF CONSUMER PROTECTION IN ITALY

In a broad sense, public enforcement would encompass any action undertaken by public authorities (administrative or judicial powers), as organisational components of the Republic, to safeguard the individual consumer. Even the European legislation on unfair commercial practices leaves it up to Member States to decide whether to entrust the enforcement of the rules exclusively to an administrative authority, or involve the judicial authorities as well, following an action taken by the administration³⁸. In other words, public administration and courts ascertain and repress unlawful conducts, which affects multiple people simultaneously and cause single damages of limited amount, whenever a natural person, or a group of people, would not autonomously proceed, lacking the necessary means to prove complex unlawful conduct or the incentive to seek compensation for small claims.

In a strict sense, enforcement is public only if public administration takes the initiative and decides whether to adopt an injunction or a sanction, or to defer the professional operator to a court. Otherwise, the notion of public enforcement would include decisions taken by civil courts to define collective claims: these remain disputes between private parties governed by civil law.

The Italian legal system currently favours administrative route of public enforcement, as the (administrative) judge only intervenes if the decision has already been made (*i.e.* when it is challenged), or decides disputes brought directly by consumers or their associations according to a scheme similar to private enforcement. Consequently, the internal framework delivers a narrower definition of public enforcement of consumer protection. Public enforcement still identifies with the action undertaken by a public administrative authority—whether a traditional governmental authority, or an independent entity charged with protecting a specific good or entrusted with the regulation and supervision of a sector.

It draws a tripartite relationship among consumers, traders and the authority, and may become quadripartite with the intervention of the court. Here, the consumer figures more as a passive beneficiary than as an actor of protection, to the extent that it has no true right in relation to the

³⁷ See Article 32-*bis* of the Consolidated Finance Act.

³⁸ Article 11(1) of Directive No. 2005/29 provides that persons and organisations shall be given the possibility to bring unfair commercial practices before an administrative authority. However, according to par. 2, «Member States shall confer upon the courts or administrative authorities powers enabling them, in cases where they deem such measures to be necessary taking into account all the interests involved and in particular the public interest: (a) to order the cessation of, or to institute appropriate legal proceedings for an order for the cessation of, unfair commercial practices; or (b) if the unfair commercial practice has not yet been carried out but is imminent, to order the prohibition of the practice, or to institute appropriate legal proceedings for an order for the prohibition of the practice, even without proof of actual loss or damage or of intention or negligence on the part of the traders». Similarly, MS shall confer a court or an administrative authority the power to eliminate the effects of unlawful practices.

imposition of a sanction or a specific remedy. The law requires public authorities to exercise enforcement powers against providers of the relevant good or service who act in breach of the rules safeguarding consumers and users. Consumers derive both indirect and direct benefits from public action, since the findings made by the Authority may assist the consumer in protecting himself privately, including jointly with other subjects, before the civil court to obtain compensation for damage, or may grant the consumer a personal compensation.

Such public competences in the field of consumer protection have become relevant because of two factors, one consequent to the other.

III.1 The liberalisation of public services, the relevance of “homogeneous interests”, and the so-called “public class action”

The historical impetus for the development of public enforcement of consumer protection arose from the privatisation of public enterprises and the liberalisation of *large public services* and *local public services* (both constituting “services of general economic interest”).

The process of European integration has contributed greatly to this transition, because liberal economic doctrines promoted a free and competitive market, limiting public economic intervention and state monopolies. Despite several inefficiencies and distortions, at least public companies—at national, regional and local levels—indirectly performed a social function by guaranteeing accessible and universal services to satisfy people’s fundamental and constitutional rights; being not driven exclusively by the logic of profit, they guaranteed fair prices. With the end of the active intermediation by public authorities between market and users, it became necessary to defend the latter from aggressive or unfair conducts perpetrated by professional operators, in the absence of structural safeguards in contractual relationships³⁹. Thus, the “legal order of the market”⁴⁰ implied consumer protection, alongside competition.

While older national constitutions do not mention consumers, their protection has long been the subject of specific provisions in European treaties, which seek to balance market liberalism with the legal protection of market users⁴¹.

Competition-driven European and National policies chose the regulation as the preferred instrument between the law and the administrative act⁴². At a national level, independent sectoral authorities have been appointed as markets regulators and supervisors in the interest of consumers in major liberalised sectors⁴³.

³⁹ G. Alpa, A. Catricalà, *Diritto dei consumatori*, Bologna, 2016; A. Barenghi, *Diritto dei consumatori*, Padova, 2024, 129 ff.

⁴⁰ N. Irti, *L’ordine giuridico del mercato*, Bari, 1998.

⁴¹ See now Articles 4(2)(f), 12, 39, 40, 102, 107, 114, and the entire Title XV (Consumer protection, Articles 169 ff.), of the Treaty on the Functioning of the European Union. Those provisions were already included in the last version of the Treaty establishing the European Community; the very first version of the Treaty (1957) contained some provisions protecting the consumer in the common agricultural policy, and against the abuses of dominant position.

⁴² A. Zito, *Mercati (regolazione dei)*, in *Enc. dir.*, 805 ff. (III, 2010); P. Guarini, *Contributo allo studio della regolazione “indipendente” del mercato – Profili pubblicistici*, Bari, 2003; F.G. Scoca, *Attività amministrativa*, in *Enc. dir.*, 80 ff. (VI, 2002).

⁴³ Law No. 15 November 1995, No. 481/1995 provided the first set of rules on the regulation of competition in liberalised public utility services, quality standards, and a certain tariff system. See, in the Italian literature, D. Iacovone, *I servizi di pubblica utilità tra Stato, mercato, regolatore e consumatore*, 83 ff. (2014); M. Mariani, *La nuova Costituzione economica: le Autorità Amministrative Indipendenti in Italia*, in G. Borrelli (ed.), *Governance*, Napoli, 2004, 91 ff.; CM. Clarich, *Le autorità indipendenti tra regole, discrezionalità e controllo giudiziario*, in *Foro amm – Tar*, 3858 ff. (XIV, 2002); G. Giraudi, M.S. Righettini, *Le autorità amministrative indipendenti. Dalla democrazia della rappresentanza alla democrazia dell’efficienza*, Bari, 2001; M. Passaro, *Le amministrazioni costituzionali come organismi «neutri»*. Tra falsi problemi ed equivoci dottrinari, in S. Panizza (ed.), *Il contributo della giurisprudenza costituzionale alla determinazione della forma di governo italiana*, Torino, 1997, 275 ff.; S. Niccolai, *Poteri garantiti della Costituzione e Autorità indipendenti*, Pisa, 1997, 175 ff.

While in the banking and financial sectors the supervisory authorities have been established a long time ago⁴⁴, Law No. 481/1995 provided a general framework on privatised “public utility services”, and instituted regulatory authorities in the electricity, gas and communications fields. The authority for the regulation of energy, nets and environment (now called «*Autorità di regolazione per energia reti e ambiente*» – “ARERA”) and communications authority («*Autorità per le garanzie nelle comunicazioni*» – “AGCOM”) were established and became operative a few years later. Recently, AGCOM, whose importance in general consumer protection is attested by Consumer Code⁴⁵, has also been appointed as the “Digital Services Coordinator”⁴⁶ under the so-called Digital Services Act (“DSA”), and it should coordinate supervision by other national authorities⁴⁷. An authority for transport regulation («*Autorità di regolazione dei trasporti*» – “ART”) was later established for the supervision of all kinds of transport services and the implementation of a fair tariff mechanism.

Regulatory and supervisory authorities ensure that services are provided correctly and consistently with quality standards set out in service charters, exercising their powers on consumers and users’ protection⁴⁸. A form of enforcement is ensured by the Alternative Dispute Resolution mechanism provided by each specific authority in conformity with the Consumer Code.

Whereas in the past the user of a public service was subject to the administrative power of the entity managing the service, whose choices were in part reviewable, with privatisation and liberalisation of public economic services the relationships have been fully brought back within a contractual regime⁴⁹. This applies both to completely liberalised sectors, in which the authority may only exercise “external” regulatory and supervisory powers⁵⁰, and to “externalized” services, where the administrative authority selects a private operator to carry out the activity according to a

⁴⁴ In the banking sector, the Bank of Italy exercises regulatory and supervisory powers over “sound and prudent management” (*sana e prudente gestione*) of banking institutions, and compliance with transparency rules in relations between the bank and the customer (see Consolidated Law on Banking, adopted with Legislative Decree No. 385 of 1 September 1993). Founded in 1893 as a private institution with monetary functions, it became a public-law institution pursuant to the Banking Reform of 1936; despite being functionally independent from the Government and the market, its capital is shared by credit institutions and foundations. In the financial sector, CONSOB supervises issuers and intermediaries, ensuring transparency of market operations, proper information in the market, and the due provision of investment services, which under capital markets legislation must comply with the principle of “adequacy” of the transaction and the financial instrument to the investor’s subjective conditions (see cited Consolidated Finance Act); it was founded in 1974. In the insurance sector, the first public supervisory authority was created in 1982.

⁴⁵ See Article 27(6) of Italian Consumer Code: «*When the commercial practice has been or is to be disseminated through periodicals or daily newspapers, or by radio, television or other means of telecommunication, the Authority shall, before taking action, seek the opinion of the Communications Regulatory Authority*»; the opinion is mandatory, but not binding.

⁴⁶ See Article 15 of Law Decree 15 September 2023, No. 123, converted, with amendments, into Law 13 November 2023, No. 159. S. Vaccari, *Riflessioni sulla responsabilità dei c.d. hosting providers tra enforcement privatistico e regolazione amministrativa*, in *Munus*, 695 ff. (II, 2024), underlines the impact of such regulation on the hosting providers’ activity and liability.

⁴⁷ With Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services (Digital Services Act), European law introduced rules intended to guarantee a safe, predictable and reliable online environment, in which the fundamental rights of users of digital services are effectively protected and innovation is facilitated, countering the dissemination of illegal content and the risks to society that the spread of disinformation or other unlawful or harmful content may generate.

⁴⁸ See, *inter alia*, Article 2(20)(c) of Law No. 481/1995, in the original version, according to which the Authority «*orders the service provider to cease conduct that infringes users’ rights, imposing, pursuant to paragraph 12, letter g), the obligation to pay compensations*»; more recently, Article 8 of Law Decree 24 January 2012, No. 1, converted, with amendments, into Law 24 March 2012, No. 27, which provides that independent regulatory authorities and other public entities with supervisory competences on public services shall define users’ rights to be guaranteed by service and infrastructure managers.

⁴⁹ M. Ramajoli, *La tutela degli utenti nei servizi pubblici a carattere imprenditoriale*, in *Dir. amm.*, 383 ff. (III-IV, 2000); G. Carapezza Figlia, *I rapporti di utenza dei servizi pubblici tra autonomia negoziale e sussidiarietà orizzontale*, in *Rassegna di diritto civile*, 440 ff. (II, 2017), see authors cited therein at note 2.

⁵⁰ E.g., in the electricity market (except for network distribution) or the telecommunications field, where regulatory authorities do not have managing powers on the service (there is no concession).

“service contract”⁵¹. While in the first case regulatory acts establish mandatory contractual terms and conditions to be observed in single supply contracts, in the second hypothesis service contracts lay down the general conditions for the provision of public services. In any case, the supplier may set out in the service charter certain quality standards to be guaranteed⁵².

The user (of services) is placed alongside the consumer (of products) by Article 2(2) of the Italian Consumer Code: «*Consumers and users are recognized as having the fundamental right: [...] (g) to the provision of public services according to quality and efficiency standards*»⁵³. Where an activity is qualified as a public service, even in an “objective” sense⁵⁴, the user/consumer therefore receives enhanced protection, which must be specified in specific State or regional laws⁵⁵. In that context, public enforcement of consumer protection has emerged in regulating the service, approving model contracts and service charters, and supervising the provision of services according to criteria of universality, continuity and economic efficiency⁵⁶.

With the recognition of consumers’ right to obtain adequate public services, according to the contractual provisions concluded with the operator, public law—limited to activities classifiable as services of general economic interest—has come to recognise the notion of “*homogeneous interests*”, namely a subjective position common to all beneficiaries of the same performance regulated, wholly or in part, by public law. According to public law, such an individual position appears, in all respects, as an interest in receiving a service with minimum quality standards, while in private law those situations are normatively qualified as “*homogeneous individual rights*”⁵⁷. These individual

⁵¹ E.g., in local services, or in railway transport services, where the service contract must be awarded to private undertaking through a tender procedure.

⁵² V. Silla, *La tutela dei consumatori nei servizi pubblici*, in P. Cendon, C. Poncibò (ed.), *Il risarcimento del danno al consumatore*, Milano, 2014, 553 ff.; G. Carapezza Figlia, *I rapporti di utenza dei servizi pubblici tra autonomia negoziale e sussidiarietà orizzontale*, cit., 448 ff.; S. Mirate, *La tutela del cittadino utente consumatore: profili pubblicistici*, in *Responsabilità civile e previdenza*, 41 ff. (I, 2020); S. Torricelli, *Il contratto di servizio nella nuova disciplina dei servizi pubblici locali*, in *Munus*, 303 (II, 2023).

⁵³ S. Mirate, *La tutela del cittadino utente consumatore: profili pubblicistici*, cit., 47 ff., highlights that the two definitions are not equivalent: the user does not consume products, rather it receives all those services that satisfy its fundamental constitutional rights as human person. In this regard, the user holds, at the same time, mere interests and full rights, depending on the specific service.

⁵⁴ Meaning that a service may be qualified as “public” even if it is not carried out by a public entity, but only because it is necessary to satisfy people’s fundamental rights, freedoms or needs. Such a notion emerged after the liberalisation of services already provided by public enterprises, and it remains controversial lacking certain criteria to ascertain whether a service meets those requirements.

⁵⁵ Pursuant to Article 101 of the Consumer Code, which is the only provision regarding public services (translated from the official Italian version):

«1. *The State and the regions, within the scope of their respective competences, guarantee the rights of users of public services through the concrete and correct implementation of the principles and criteria set out in the relevant legislation in force.*

2. *The user relationship must be conducted in compliance with predetermined quality standards that are adequately made public.*

3. *Users shall be guaranteed, through representative forms, participation in the procedures for defining and evaluating the quality standards provided for by law.*

4. *The law establishes the obligation for certain public service providers to adopt, through specific implementation mechanisms diversified according to sector, appropriate service charters.*».

Accordingly, legal provisions protecting consumers also apply to users, when they are compatible with the features of the service provided (e.g., Article 128 of Consumer Code does not classify water, gas and energy supply as “consumer goods”; consequently, rules on product conformity do not apply).

⁵⁶ G. Carapezza Figlia, *I rapporti di utenza dei servizi pubblici tra autonomia negoziale e sussidiarietà orizzontale*, cit., 452.

⁵⁷ Article 840-bis of Italian Code of Civil Procedure, introduced by Law 12 April 2019, No. 31, provides that homogeneous individual interests may also be enforceable through class actions regulated by the following provisions. Such instrument, which can be activated both by individual consumers and representative associations, differs from the “representative actions” regulated by Articles 140-ter and ff. of Consumer Code according to Directive (EU) No. 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers.

positions differ from the diffuse and collective interests outlined above, in that they are vested in identifiable individuals⁵⁸.

As a hybrid form of enforcement, holders of homogeneous interests may file an appeal before the administrative court to establish a breach committed by a subject carrying out an activity of public interest, from which they benefit as users; the claim may be brought even by one consumer or user in the name of the entire category, or by a representative association (as for the private class action)⁵⁹. Known as the “Appeal for the efficiency of public administration and managers of public services” (*Ricorso per l’efficienza delle pubbliche amministrazioni e degli esercenti un pubblico servizio*)⁶⁰, the procedure provides for a formal notice to the authority or service provider, followed by a court application seeking a declaration of the duty to remedy the breach or infringement. It is not possible to advance a claim for damages⁶¹.

If the judicial order remains unfulfilled, it may be enforced in a form of follow-on proceeding between the same parties, before the same judge (*giudizio di ottemperanza*); in that case, the court may decide on the merits of the dispute, appointing, where appropriate, a special commissioner (*commissario ad acta*), namely a judicial officer who substitutes the administration or the defaulting service operator.

Based on its features, such remedy has been defined as a sort of “public class action”. However, from a reconstructive standpoint, this is not a true class action because the claimants obtain no individual benefit, but only (possible and) indirect benefits⁶². One might say that the remedy corresponds to a “minor” public enforcement of consumer protection. In a proper sense, by contrast, public enforcement is the action of a public administration aimed at protecting the position of multiple consumers through the exercise of peremptory and repressive powers. In this sense, public enforcement has incorporated elements of private enforcement (just as, more generally, over the past thirty years public law has incorporated, rightly or wrongly, many private-law concepts), and consumer law has become increasingly a matter of general law.

In any case, the remedy has not proved particularly successful in past years, both because of the limited incentives to bring it and because it is not straightforward to condemn the administration or operator to compensate the user, and, above all, the compulsory execution of the obligation encounters many practical difficulties⁶³.

⁵⁸ Such clear distinction is adopted in other legal systems. For the Brazilian system, see A. Gidi, *Derecho difusos, colectivos e individuales homogéneos*, in A. Gidi, E. Ferrer Mac-Gregor (eds.), *La tutela de los derechos difusos, colectivos e individuales homogéneos*, México, 2004 (2^a ed.) 27 ff., translated from the original Brazilian version of the author’s *Coisa julgada e litispendencia em acoes coletivas*, Saraiva, 1995.

⁵⁹ S. Mirate, *La tutela del cittadino utente consumatore: profili pubblicistici*, in *Responsabilità civile e previdenza*, 56 ff. (I, 2020); E. Caterini, *L’utente dei servizi pubblici e la riforma fallimentare: nuovi scenari*, in *Rassegna di diritto civile*, 80 ff. (I, 2019); F. Mataluni, *Sulla azione per l’efficienza amministrativa introdotta con il D.Lgs. 198/2009 con riferimento ai primi orientamenti giurisprudenziali*, in *Rass. Am. Stato* 239 ff. (II, 2013).

⁶⁰ The action is governed by Legislative Decree 20 December 2009, No. 198 (implementing Article 4 of Law of 4 March 2009, No. 15) and, according to Article 1, is aimed at «restoring the proper performance of a function or the proper provision of a services». Among earlier studies, see G. Fidone, *L’azione per l’efficienza nel processo amministrativo: dal giudizio sull’atto a quello sull’attività*, Torino, 2012; A. Fabri, *Le azioni collettive nei confronti della pubblica amministrazione nella sistematica delle azioni non individuali*, Napoli, 2011; E. Zampetti, *Class action pubblica ed effettività della tutela*, in *Foro amm. TAR*, 4104 (XII, 2011); C.E. Gallo, *La class action nei confronti della pubblica amministrazione*, in *Urb. e app.*, 501 ff. (II, 2010).

⁶¹ See Council of State, III, 20 September 2024, No. 7704, on the standing of representative associations.

⁶² E. Saresini, *La legittimazione attiva nell’azione per l’efficienza delle amministrazioni e dei concessionari di pubblici servizi. Commento a margine della sentenza Cons. St., III, 20 settembre 2024, n. 7704*, in *giustamm.it* (2025).

⁶³ A. Maltoni, G. Fidone, *L’azione per l’efficienza delle amministrazioni e dei concessionari pubblici*, in *federalismi.it*, 135 (XVI, 2024).

III.2 Consumer protection as specific competence of certain public authorities

When European law required specific regulation protecting consumers' rights in any economic sector, public authorities began directly safeguarding consumers against market abuses—acting as a form of market police by countering unlawful conduct by third parties. This occurred in the protection of the consumer in the various markets, by assigning to a single authority the power to repress unfair commercial practices or other abuses against consumers. In Italy, as it has been said, such powers have been conferred to the Antitrust Authority considering the functions already carried out⁶⁴. Recently, AGCM has also been appointed as the competent authority for the execution of the so-called Digital Markets Act (“DMA”)⁶⁵, while AGCOM is the Digital Services Coordinator under DSA.

Article 27 of the Italian Consumer Code confers upon the authority the competence to ascertain whether undertakings comply with their duty of conduct. Endowed with broad investigative powers (such as requests for information, inspections and on-site checks), the Authority may: (i) prohibit the continuation of the activity⁶⁶, (ii) eliminate the effects, also setting a deadline for compliance with the imposed obligations; (iii) require the operator to undertake specific “commitments” (*impegni*) to end the infringement; (iv) alongside the inhibition of the activity, impose a sanction considering the gravity and duration of the infringement, as well as the trader's economic and financial situation. Moreover, in urgent cases, the Authority may, by way of interim measure, order the suspension of the activity pending the final decision.

Commitments are now broadly used by the authority⁶⁷, which can obtain the reparation of the misconduct without being obliged to formally adopt a final decision; such measures often imply the obligation⁶⁸ to remove the negative consequences of the conduct and directly compensate each of the harmed consumers. In that sense, public enforcement enables direct economic redress for harmed consumers⁶⁹.

The same broad powers may be used to ascertain and repress unfair contract terms included in general contractual conditions or forms applied to consumers⁷⁰.

That said, three cautions are necessary.

⁶⁴ Among others, see recently E. Labella, *Pratiche commerciali scorrette e autonomia privata*, Torino, 2018, 93 ff.

⁶⁵ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act). Article 18 of Law 30 December 2023, No. 214, confers on the authority investigative and sanctioning powers to support the Commission's action, which is «the sole authority empowered to enforce this Regulation» (recital 91) against the gatekeepers that offer core platform services to users (or professional users) established or located in the Union.

⁶⁶ In the case of digital or telematic services, pursuant to Regulation No. 2017/2394, the Authority may also order the provider of internet connectivity services or the network operator to remove initiatives or activities aimed at consumers and disseminated through telematic or telecommunications networks which constitute an unfair commercial practice.

⁶⁷ Pursuant to Article 10 of AGCM Regulation on administrative procedures regarding consumer protection and misleading and comparative advertising of 5 November 2024, No. 31356, commitments may be proposed by the trader concerned, and the authority shall accept or reject them if they are inadequate.

⁶⁸ The procedure does not even commence when AGCM exercises the so-called “moral suasion”: according to Article 3(3) of AGCM Regulation (see footnote above), the authority may invite the trader to remove the unlawful aspects of the conduct; in case of acceptance, the pre-investigative phase is closed.

⁶⁹ G. Straetmans, J. Vereecken, *Recent developments in private and public enforcement of EU consumer law: which way forward?*, in C.M. Cascione (ed.), *Public and private in contemporary societies*, Rome, 2024, 465 ff. [already published as *Towards a New Balance Between Private and Public Enforcement in EU Consumer Law*, in *European Review of Private Law*, 41 ff. (I, 2024)], consider that such compensatory function may “bridge the gap” with private enforcement.

⁷⁰ F. Trubiani, *La conformazione del contratto da parte dell'AGCM tra tutela del consumatore e regolazione del mercato*, in *Rivista di diritto dell'impresa*, 143 ff. (I, 2023), observes that the extension of such powers to the repression of unfair contractual provisions strengthened the efficacy of public enforcement.

First, in such cases, the consumer/user has an interest in obtaining the activation of the authority's intervention (following a report), which will adopt an adverse measure against the operator who has engaged in unlawful conduct and, in turn, will hold a legitimate interest against the exercise of sanctioning or injunctive powers). However, the consumer does not have a right vis-à-vis the Authority, but only vis-à-vis private operators (so that, where appropriate, it may avail itself of private enforcement tools); as against the Authority, it has, at most, a legitimate interest in the exercise of the power⁷¹. This affects the consumer's ability to prompt a public repressive action, which the administration may, in its discretion, decide not to initiate⁷².

Second, the public interest maintains a primary position, since the authority targets behaviours that are potentially or actually harmful to the general interest in the correct functioning of the market. Interests of individual consumers are indirectly protected and merge into broader consumer protection across an entire sector⁷³. Accordingly, the authority suppresses practices (or contests contractual clauses) which may harm a considerable number of consumers, so that the interest in repressing such conducts assumes a "general" dimension.

Third, although it is true that European law and national implementing rules have required AGCM to supervise behaviours of market operators, so that they do not harm the consumer, specific rules governing sectors or markets (see above § III.3) still attribute to other independent authorities the protection of the proper functioning of those markets, which *indirectly* safeguards the consumers of those markets. Accordingly, one may identify as many types of consumer as there are regulated markets, in which they receive goods, services, or other performances from professional operators according to a specific regulation⁷⁴: for example, in the banking sector the consumer is normally the "account holder"⁷⁵; in the financial market, the "investor"⁷⁶; in the energy market, the "user"⁷⁷, likewise in the telecommunications market. These are not merely descriptive distinctions devoid of legal relevance, because each sectoral situation gives access to certain forms of protection (one may think of banking and financial arbitration schemes, or other forms of enforcement). Above all, it is precisely from this multiplication of figures and corresponding public protection functions that the principal competence conflicts to be discussed arise.

Fourth, AGCM is not the sole authority with general competence in safeguarding consumer.

⁷¹ Even European Union Law qualifies consumers' position as a "legitimate interest" in the intervention of the public authority.

⁷² See ruling of Council of State, VI, 22 September 2014, No. 4773, referred to public enforcement of competition law, which clarified a general principle applicable to other sectors: the individual does not hold the right to request the intervention of the authority, despite being legitimately interested in it.

⁷³ See Article 11(2) of Directive No. 2005/29, according to which the authority (administrative or judicial) shall consider the public interest before taking any action against unfair commercial practices.

⁷⁴ See G. Pailli, C. Poncibò, *The transformation of Consumer Law Enforcement: an Italian perspective*, cit., 657: «our first observation is that the public enforcement regime appears to be fragmented due to the overlapping authority of many sectorial public authorities (e.g., energy, telecommunications, insurance, banking services, etc.)».

⁷⁵ V. Minervini, *La tutela del consumatore nel settore bancario (con qualche digressione su quello finanziario) tra codice del consumo e disciplina settoriale. À la recherche de un equilibrio perduto*, in *Diritto della banca e del mercato finanziario*, 593 (IV, 2021), underlines that—according to judicial opinion—banking law does not directly or indirectly protect consumers, being rather focused on the correct management of credit institutions; thus, Bank of Italy does not exercise specific competences in consumer protection, beyond supervision over compliance with transparency obligations. See also G. Biferali, *La sanzione per violazione dell'obbligo di valutare il merito creditizio del consumatore*, in *giustiziacivile.com* (VII, 2022), according to which the obligation to evaluate financial capacity of borrower—namely its creditworthiness—safeguards it as consumer.

⁷⁶ F. Bilotta, *Pratiche commerciali scorrette nel settore finanziario e assicurativo e tutela individuale*, in *Riv. dir. Comm.*, 135 ff. (I, 2012), reminds that, according to the administrative judge's opinion, finance law and regulation protect a specific subjective figure, the investor, as distinct from the general notion of the consumer.

⁷⁷ A. Colavecchio, *La tutela del consumatore nei confronti delle pratiche commerciali scorrette: il ruolo dell'AEEGSI*, in C. Giustolisi (ed.), *La direttiva consumer rights: impianto sistematico della direttiva di armonizzazione massima*, cit., 89 ff.

Pursuant to Article 144-*bis* of the Consumer Code, regarding the cooperation among national consumer protection authorities under Regulation No. 2017/2394, the Ministry of Enterprises and Made in Italy is the “competent authority” for the application of consumer safeguard provisions in relation to the guarantees in the sale of consumer goods, consumer credit, electronic commerce, timeshare, long-term holiday products, resale and exchange contracts. It designates the “single liaison office” responsible for coordinating the investigative and enforcement activities of the competent authorities according to Article 5 of Regulation No. 2017/2394⁷⁸, whereas AGCM is designated as the “body responsible” for the adequate and effective enforcement of the provisions of Regulation No. 2018/302⁷⁹, which lays down measures to prevent unjustified geo-blocking and other forms of discrimination based on nationality, place of residence or place of establishment of customers within the internal market; in relation to the latter Regulation, AGCM is the “competent authority” holding the “minimum powers” referred to in Article 9 of Regulation No. 2017/2394 (namely powers of investigation, prohibition and sanction).

Pursuant to Article 137 of the Consumer Code, the Ministry maintains the list of nationally representative consumer and user associations, which are entitled to bring class actions or representative actions. The National Council of Consumers and Users (CNCU) operates within the Ministry, as the representative body of consumer and user associations at national level, with the aim of contributing—through opinions issued to bodies responsible for adopting legislation, or through the adoption of informational and statistical measures—to improving and strengthening the position of the consumer/user in the market.

Above all, general competence on consumer protection may overlap data protection⁸⁰, which is indeed nothing other than a specific field of consumer law⁸¹.

Privacy of personal data must be safeguarded by a specific authority, called Garante per la protezione dei dati personali (“GPDP”)⁸², which safeguards natural persons as regards the processing—rather than the appropriation—of data understood as “information”⁸³.

According to Italian Privacy Code, the data subject benefits from a dual track of alternative protection. If proceedings have been brought before the court, a complaint can no longer be lodged with the Authority; conversely, if a complaint has been lodged, it is no longer possible to bring a

⁷⁸ Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017, on the cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) 2006/2004.

⁷⁹ Regulation (EU) 2018/302 of the European Parliament and the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers’ nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC.

⁸⁰ N. Muccioli, *Contratti telematici e diritto europeo in un recente libro: la tutela del consumatore e il problema della privacy*, in *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, 437 (III, 2017); A. Zambon, *Il consumatore nella prospettiva dei “big data”: alcune considerazioni filosofico-giuridiche*, in *Cyberspazio e Diritto*, 117 ff. (I-II, 2019).

⁸¹ See P. Rott, *Data protection law as consumer law – How consumer organisations can contribute to the enforcement of data protection law*, in *Journal of European Consumer and Market Law*, 113 ff. (III, 2017), who argues that data protection falls within the scope of consumer protection, which may be enforced both publicly and privately, against the State and private traders. See also M. Federico, *Harmonizing and Enhancing the Enforcement of Digital Rights. The Integrated Role of Consumer Law and Data Protection Law*, in this *Special Issue*.

⁸² Data protection authority was established by Law 31 December 1996, No. 675. Today, it supervises compliance with Legislative Decree of 30 June 2003, No. 196, the so-called Privacy Code (*«Codice in materia di protezione dei dati personali»*), which implements Regulation (EU) No. 2016/679 of the European Parliament and of the Council of 27 April 2016, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (“GDPR”).

⁸³ Rather than being property, personal data is defined by Article 4(1)(1) as *«any information relating to an identified or identifiable natural person»*, namely the “data subject”. [...].

further claim before the court between the same parties and with the same subject-matter, unless nine months have elapsed from the lodging of the complaint without the Authority having decided it.

GPDP has been assigned specific tasks in protecting consumers' right to lawful processing of personal data (Article 57 GDPR); to that purpose, the Authority may exercise, pursuant to Article 166 Privacy Code and GDPR, (i) investigative powers (Article 58(1) GDPR), (ii) corrective powers (Article 58(2) GDPR), (iii) authorisation and advisory powers (Article 58(3) GDPR), and (iv) imposition of administrative fines, that must be effective, proportionate and dissuasive (Article 83 GDPR)⁸⁴. Alongside the sanction, the Authority may require the adoption of institutional communication campaigns aimed at promoting awareness of the right to personal data protection, based on projects previously approved by the GPDP and considering the gravity of the violation. Within 30 days, the sanctioned party may comply with the prescriptions and pay half of the sanction⁸⁵.

The privacy authority has basically the same powers as the Antitrust Authority, when it enforces consumer protection laws. Prescriptions imposed by GPDP correspond, as for the effects on the users and the markets, to commitments approved by AGCM.

IV. THE COMPETENCE SAGA AMONG INDEPENDENT AUTHORITIES

As AGCM's general competence may easily overlap with special competences of sectoral authorities in regulated sectors, or with parallel general competence of privacy authority in consumers' data protection, the question promptly arose of identifying the competent authority responsible for repressing unfair conduct by traders.

The issue was debated for a long time, owing to the absence of a rule establishing which authority should repress abusive conduct towards consumers in regulated sectors, because the few relevant provisions remained unclear. Article 3(4) of Directive No. 2005/29 provides that: «*In the case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects*»; Articles 19(3) and 46(2) of Consumer Code transposed such provision with no substantial amendments. This provision directly concerns the relationship between rules, and it indirectly regulates the interplay between competent authorities: it prevents different rules from being applied to the same facts, and that two public entities punish the same conduct under the same circumstances, applying different rules, in violation of the *ne bis in idem* principle⁸⁶.

⁸⁴ Administrative fines shall, depending on the circumstances of each individual case, be imposed in addition to, or instead of, corrective measures referred to in points (a) to (h) and (j) of Article 58(2).

⁸⁵ Concluding a recent proceeding against *OpenAI*, provider of the AI model known as "*ChatGPT*", by decision No. 755 of 2 November 2024 the Authority found a series of GDPR infringements in the period up to 15 February 2024. In particular, the operator: (i) failed to notify the Authority of the data breach suffered in March 2023; (ii) processed users' personal data to train ChatGPT without first identifying an adequate legal basis; (iii) breached the transparency principle and the related information obligations vis-à-vis users; (iv) failed to provide mechanisms for age verification, with the consequent risk of exposing children under 13 to responses unsuitable for their degree of development and self-awareness (a provisional limitation measure on data processing had already been adopted). For the first time, the Authority ordered the implementation of a six-month institutional communication campaign on radio, television, newspapers and the internet, in addition to a EUR 15 million fine in light of the company's collaboration. However, the Civil Court of Rome, by decision of 18 March 2026, n. 4153, upheld OpenAI's opposition and overturned the sanction.

⁸⁶ According to the well-known opinion of ECtHR, 4 March 2014, *Grande Stevens v. Italia*, Article 4 of Protocol 7 does not permit the prosecution or trial a person for a second violation if it is based on the same facts that justified a sanction (or a proceedings) for a first violation; see also, ECtHR, 27 September 2011, *Menarini v. Italia*, according to which the antitrust sanctions provided for in Law No. 287/1990—referred to in Consumer Code—are materially criminal sanctions based on the so-called "Engel criteria".

The uncertainty on the interpretation of Article 3(4) gave rise to a long “saga” concerning the identification of valid criteria for allocating competences between authorities (especially, AGCM and AGCOM), in which the legislator, the administrative courts, the European Commission and the Court of Justice intervened on several occasions⁸⁷: initially, with specific reference to the financial sector, the Council of State rendered an opinion which preferred the criterion of “sectoral speciality”, interpreting Article 3(4) as a rule of distinction between general markets and specific sectors⁸⁸. In that sense, the competence of the sectoral regulatory authority should prevail over AGCM’s general competence, since sector-specific knowledge should make it easier to identify and punish unfair practices that are hidden within the market’s technicalities; thereafter, regarding the electronic communications field, the administrative courts opted for the criterion of “normative speciality” (*specialità per norme*), which—in adherence to Recital 10 of Directive No. 2005/29—places greater emphasis on regulatory aspects than on industry-specific ones. Thus, sectoral regulation prevails, with disapplication of the general rules under the Consumer Code, if general and special provisions differ, considering the “contrast” referred to in Article 3(4) not as an “incompatibility” between norms, rather as to the simple existence of a different regime for specific sectors⁸⁹. In that sense, the “contrast” clause of Article 3(4) of Directive No. 2005/29 has been interpreted according to the less strict wording of Recital 10 of the same Directive.

With specific reference to the electronic communications sector, there was no doubt that the sectoral legislation regulated specific aspects of consumer protection, so AGCOM’s competences should prevail; from a political and institutional standpoint, the conditions were not yet ripe for entrusting a single authority with cross-sectoral powers, to the detriment of the sector-specific competences of the regulatory authorities, which had been established only slightly more than a decade earlier and possessed the expertise relating to the functioning of their respective sectors. Indeed, in 2012, shortly after the affirmation of the “normative speciality” criterion, the legislator reiterated the principle of “sectoral speciality”, excluding AGCM’s competence where specific regulation exists⁹⁰; an infringement procedure was therefore commenced by the Commission for the alleged breach of Directive No. 2005/29, according to which only the radical “incompatibility” between general and specific rules justifies the exclusive competence of the sectoral authority: the mere existence of a specific regulation, or even its difference from the general one shall not justify sectoral authority’s competence⁹¹; to solve the conflict, Paragraph 1-*bis* was added to Article 27 of

⁸⁷ R. Chieppa, *La direttiva Consumer Rights: l’esperienza del mercato e gli orientamenti dei regolatori*, in C. Giustolisi (ed.), *La direttiva consumer rights: impianto sistematico della direttiva di armonizzazione massima*, cit., 77 ff.; S. Perugini, *Il public enforcement e la tutela del consumatore dopo il recepimento della direttiva 2011/83/UE*, *ivi*, 203 ff.; L. Lorenzoni, *Il Riparto di Competenze tra Autorità Indipendenti nella Repressione delle Pratiche Commerciali Scorrette*, in *Italian Antitrust Review*, 83 ff. (I, 2015); V. Mosca, *Il riparto di competenza sulla tutela del consumatore all’esame della Corte di Giustizia*, in *Giorn. dir. amm.*, 519 ff. (IV, 2017); Id., *Verso un equilibrio nel riparto di competenze per la tutela del consumatore*, in *Giornale di diritto amministrativo*, 195 ff. (II, 2019); B. Rabai, *Ancora sul riparto di competenze tra Autorità Antitrust e Autorità di settore in tema di pratiche commerciali scorrette*, in *Riv. Reg. mercati*, 369 (II, 2019).

⁸⁸ See Opinion of the Council of State, I, 3 December 2008, No. 3999, according to which CONSOB has the power to protect investors against infringements of transparency and correctness in providing financial services; see also F. Bilotta, *Pratiche commerciali scorrette nel settore finanziario e assicurativo e tutela individuale*, cit.

⁸⁹ See the rulings of Council of State, Plenary Assembly, 11 May 2012, Nos. 11–16, which gave prominent relevance to Recital 10 of Directive No. 2005/29: «*This Directive accordingly applies only in so far as there are no specific Community law provisions regulating specific aspects of unfair commercial practices, such as information requirements and rules on the way the information is presented to the consumer. It provides protection for consumers where there is no specific sectoral legislation at Community level and prohibits traders from creating a false impression of the nature of products*». Accordingly, it was ruled that the sectoral authority retains competence if there is «*a discrepancy in discipline such as to render the overlapping of the two rules illogical*».

⁹⁰ See Article 23(12-quinquiesdecies) of Law Decree 6 July 2012, No. 95, converted, with amendments, into Law 7 August 2012, No. 135.

⁹¹ See infringement procedure No. 2013/2169 commenced by letter of 18 October 2013.

the Consumer Code⁹², providing that «*Even in regulated sectors, pursuant to Article 19, paragraph 3, the power to intervene in relation to the conduct of professionals that constitutes an unfair commercial practice, without prejudice to compliance with current regulations, lies exclusively with the Competition and Market Authority, which exercises this power on the basis of the powers referred to in this article, after obtaining the opinion of the competent regulatory authority*»⁹³.

The legislator changed course and clearly opted for the general competence of AGCM in all markets or sectors, despite the existence of a specific regulation or a discrepancy between norms: only the blatant conflict referred to in Article 3(4) of Directive No. 2005/29, transposed in Article 19(3) of Consumer Code, may justify the competence of sectoral authorities; although such provision was already clear on the criterion to be applied, case law sought to take other factors into account when identifying the competent authority. Indeed, administrative courts affirmed that “aggressive” commercial practices perpetrated in regulated sectors, being more serious than the mere infringement of regulatory provisions, absorb less serious forms of conduct and must be punished by AGCM⁹⁴.

In this respect, the administrative courts relied on the criteria ordinarily applied by the criminal courts in determining the applicable offence where several provisions are concurrently engaged; notwithstanding the multiple parameters proposed, the system seemed to have reached a certain equilibrium, and AGCM’s general competence prevailed; however, shortly afterwards, the situation became more complicated again. According to the European Commission opinion, the conflict clause of Article 3(4) of Directive No. 2005/29 implies that, where two provisions overlap, the *lex specialis* should prevail and be applied by the competent sectoral authority⁹⁵. Again, the competence of the sectoral authority did not presuppose any radical incompatibility among the legislative provisions on consumer defence; in light of such repeated uncertainty, following a further request for a preliminary ruling made by the Italian Council of State, in 2018⁹⁶ the Court of Justice eventually ruled that “conflict” between general and specific provisions referred to in Article 3(4) of Directive No. 2005/29 shall be understood as a relationship between provisions going beyond mere disparity or simple difference, showing a divergence which cannot be overcome by a unifying formula enabling both situations to exist alongside each other without the need to bring them to an end⁹⁷.

The intervention of the Court of Justice appears to have put an end to the saga. At national level, the subsequent measures imposed by the Antitrust Authority were deemed legitimate, as they

⁹² By Article 1(6)(a) of Legislative Decree of 21 February 2014, No. 21. M. Cappai, *Quando l’erosione dei limiti costituzionali avviene dall’interno: il Caso dell’art. 27, comma 1-bis del codice del consumo e della sua (presunta) natura interpretativa*, in *Riv. AIC* (II, 2018), criticized the qualification of such provision as a norm of “authentic interpretation”, because it entails unlawful retroactive effects.

⁹³ The same provision specifies that «*The regulatory authorities shall remain competent to exercise their powers in cases of regulatory violations that do not constitute unfair commercial practices. The authorities may regulate the application and procedural aspects of their mutual cooperation through memoranda of understanding, within the framework of their respective competences*».

⁹⁴ See ruling of Council of State, Plenary Assembly, 9 February 2016, Nos. 3-4. On the specific point, see M. Cappai, *La repressione delle pratiche commerciali scorrette nei mercati regolati: cosa aspettarsi dalla Corte di giustizia?*, in *Riv. it. dir. pubbl. com.*, 898 (III-IV, 2017).

⁹⁵ See the European Commission staff working document—SWD(2016) 163 final—entitled «*Guidance on the implementation/application of directive 2005/29/EC on unfair commercial practices*» of 25 May 2016, accompanying the Commission’s communication on a comprehensive approach to stimulating cross-border e-Commerce for Europe’s citizens and businesses.

⁹⁶ See ordinances of Council of State, VI, 17 January 2017, Nos. 167 and 168, commented by G.M. Barsi, *Il conflitto di competenze in materia di pratiche commerciali scorrette nei settori regolati approda in Corte di Giustizia*, in *Riv. reg. mer.*, 151 (I, 2017).

⁹⁷ CJEU, Second Chamber, 13 September 2018, Cases C-54/17 and C-55/17, *AGCM v Wind Tre and Vodafone*, which once again concerned the electronic communications sector. The principle has been recently confirmed in CJEU, First Chamber, 30 April 2026, C-301/25, *Lidl Italia*.

related to unfair commercial practices which, according to the judge, were not regulated by sector-specific rules due to “specific aspects” incompatible with the general rules; consequently, they remained within the competence of AGCM according to Article 27 of the Consumer Code⁹⁸. However, based on this provision, a sanction has been ruled unlawful as it was adopted without the mandatory opinion of the GPDP, despite the unfair commercial practice involved processing of personal data⁹⁹.

V. THE PERSISTENT OVERLAPPING OF COMPETENCES IN THE DIGITAL ENVIRONMENT

The criterion based on the incompatibility between provisions of EU origin and the domestic legislative designation of the AGCM’s general competence gives rise to systematic issues, which may, in the future, rekindle conflicts of jurisdiction between the authorities.

First, since any regulated activity carried out vis-à-vis customers constitutes a commercial practice, any conduct that breaches the obligations imposed on the trader and, at the same time, is detrimental—albeit only potentially—to consumers’ rights may be sanctioned by AGCM. The sanctioning functions of the sectoral authorities are accordingly confined to conduct contrary to the rules of professional diligence set out in regulation.

Secondly, AGCM may apply sector-specific rules drafted by different regulatory authorities based on sectoral expertise. Indeed, not only does Article 27(1-*bis*) preserve compliance with the applicable regulatory framework, but, above all, in order to establish that unlawful conduct has occurred, AGCM shall assess compliance with the rules governing traders’ activity, interpreting those rules to ascertain whether duties of professional diligence have been infringed. Obtaining the opinion of the sectoral authority would serve precisely to avoid a misapplication of the regulatory framework, by ensuring a uniform interpretation thereof. However, as already occurred, the non-binding nature of the opinion issued by the sectoral authority may result in the sanctioning of conduct that are compliant with the regulatory framework but are deemed unfair by AGCM¹⁰⁰. Where it penalises conduct that is formally consistent with rules of professional diligence, AGCM may ultimately exercise indirectly normative powers, in that it shapes behavioural obligations beyond the scope of the regulation. In so doing, it undermines the principle of technical competence underpinning the allocation of regulatory functions to specific authorities.

Thirdly, the allocation criterion does not appear, at present, to be applied uniformly. In the telecommunications sector—directly concerned by the “saga” (many of the decisions, as noted, involved a conflict between AGCM and AGCOM)—the distribution of competences appears, at least *prima facie*, to align with the approach laid down by the Court of Justice; the same is true in relations with the GPDP (save as will be stated shortly regarding the emergence of new markets). In the field of energy supply—which at times overlaps with telecommunications (as in the case of

⁹⁸ See ruling of Council of State, VI, 11 November 2019, No. 7699, according to which the so-called “non-requested supply” (*fornitura non richiesta*) of telephony and internet connectivity services constitutes an aggressive commercial practice, and it may be sanctioned by AGCM pursuant to the Consumer Code. See also Council of State, VI, 25 October 2019, No. 7296, and 5 April 2024, No. 3175.

⁹⁹ Council of State, VI, 15 January 2024, No. 497, the so-called *Telepass* case. See on that M. Guerra, *Le prospettive di collaborazione tra Autorità indipendenti nell’era digitale*, in *Riv. it. inform. dir.*, 425 ff. (I, 2025).

¹⁰⁰ V. Minervini, *La tutela del consumatore nel settore bancario*, cit., 594 ff., reminds that, in a certain case regarding the banking sector, while the Bank of Italy considered credit institutions’ conduct compliant with transparency rule in bank-client relations, AGCM punished the absence of clear and complete information. The Author proposes to render the opinion binding (not only merely mandatory), so that AGCM cannot overrule the contrary opinion of the sectoral authority on the conformity of the practice to sectoral regulation.

“teleselling”)—the competence of the sectoral authority is regarded as residual¹⁰¹. In the banking sector, which historically has not witnessed particular activism by the supervisory authority, and in the insurance sector, consumer-protection functions remain firmly in the hands of AGCM¹⁰², which has most recently been entrusted with the task of repressing unfair commercial practices in digital payment systems¹⁰³.

However, the financial sector retains certain peculiarities: the judicial opinion that initiated the aforementioned competence saga seems to be still followed in the specific sector, notwithstanding the recent decisions of the Court of Justice¹⁰⁴. Indeed, according to civil case-law¹⁰⁵, breach of transparency and correctness duties committed by financial operators shall be sanctioned by CONSOB, since, in determining the competent authority, the interest in market integrity is deemed to prevail over consumer protection. The Italian Court of Cassation clarified that such an interpretation of sectoral rules does not conflict with the provisions of the Consumer Code concerning AGCM’s general competence¹⁰⁶. However, the Court did not explain why the general and sectoral provisions are “incompatible” (within the meaning set out by the CJEU), nor did it refer to the ruling of the European judge: in those cases, the appeals challenged the competence of the financial authority in favour of the banking authority and did not concern AGCM’s competences. In any event, the financial sector appears to follow a logic different from that applicable to other sectors, without any apparent explanation being provided. While Article 3(9) of Directive No. 2005/29 undoubtedly constitutes the basis for a different and more restrictive regime, it is not sufficient to conclude that rules on investor protection in the financial market are, by their nature, incompatible with the provisions of the Consumer Code¹⁰⁷.

Fourthly, to resolve potential conflicts of jurisdiction, AGCM has concluded several memoranda of understanding with sectoral authorities for the repression of unfair commercial practices, with

¹⁰¹ See ruling of Council of State, VI, 6 November 2023, No. 9566, regarding electricity and gas supply contracts stipulated without the explicit consent of users, through external agencies or teleselling methods.

¹⁰² See ruling of Regional Administrative Tribunal of Lazio, Rome, I, 1 August 2019, No. 10193, which confirmed AGCM’s competence on consumer credit, based on CJEU’s ruling. See also ruling of the same Tribunal of 5 January 2024, No. 224, which excluded the incompatibility between Consumer Code and banking and insurance laws. With specific reference to the insurance sector, a dated decision of the Tribunal (17 January 2013, No. 535), which recognised the competence of the sectoral authority, has been taken before the saga began and it is based on preceding principles.

¹⁰³ M. Rabitti, *Il riparto di competenze tra autorità amministrative indipendenti nella Direttiva sui sistemi di pagamento*, in M.C. Paglietti, M.I. Vangelisti (eds.), *Innovazione e regole nei pagamenti digitali*, Roma, 2020, 88 ff., analyzes provisions of Legislative Decree 15 December 2017, No. 218, which implemented Directive No. 2015/2366 (Payment Services Directive 2), conferring to AGCM the repression of specific UCP related to digital payments, while Bank of Italy shall supervise banks’ compliance with the Directive.

¹⁰⁴ Since cited opinion No. 3999/2008 (see supra § IV), Council of State ruled that the Consolidated Finance Act is “specific” and “exhaustive” on the protection of retail investors, thus the violation of its rules against consumers pertains to CONSOB, not to AGCM. See A. Zoppini, *Appunti in tema di rapporti tra tutele civilistiche e disciplina della vigilanza bancaria*, in *Banca, borsa, tit. cred.*, 28 ff. (I, 2012); M. Libertini, *La tutela della libertà di scelta del consumatore e i prodotti finanziari*, in M. Grillo (ed.), *Mercati finanziari e protezione del consumatore*, Milano, 2010, 21 ff. By contrast, in the banking sector the competence has always been conferred to AGCM, V. Minervini, *La tutela del consumatore nel settore bancario*, cit., says, defining the approach followed by Bank of Italy as “prudent”.

¹⁰⁵ Until recently, appeals against administrative fines imposed by CONSOB under financial law (or by the Bank of Italy pursuant to banking law) shall be filed before Civil Court of Appeal, whose decisions may be challenged before the Court of Cassation. To the contrary, sanctions imposed by AGCM (or AGCOM, and ARERA) may be contested before administrative courts. However, Legislative Decree No. 128 of 25 June 2026 restored administrative-court jurisdiction over appeals against sanctions imposed by CONSOB and the Bank of Italy for infringements of the TUF.

¹⁰⁶ See ruling of Court of Cassation, II, 18 September 2020, n. 19558, followed by rulings of 30 May 2022, No. 17400, and of 31 May 2022, Nos. 17574 and 17518: pursuant to Articles 5, 21 and 190 of the Consolidated Finance Act, CONSOB supervises the intermediation of financial products and the determination of their fair value, while Bank of Italy supervises the correct management of bank operators.

¹⁰⁷ One may think about greenwashing practices in financial products; see A. Bassi, M. Lamandini, G. Mollo, A. Troisi, F. Vella, *Greenwashing e tutela del consumatore per un’economia sostenibile*, in *Quad. giur. Consob* (33, 2025).

a view to coordinating public (administrative) action in consumer protection¹⁰⁸. The very existence of such protocols, however, demonstrates that the issuance of an opinion by the sectoral authority does not exhaust cooperation between authorities; rather, such cooperation extends to the supervisory phase—including inspections—and to other technical activities that escape legal and judicial scrutiny. In practice, two or more administrations exercise the same function, allocating individual tasks among themselves, while acknowledging that only one of them may decide, namely AGCM.

Finally, the balance of competences between the authorities risks being undermined by the recent evolution of the EU regulatory framework concerning digital markets and data protection¹⁰⁹.

On the one hand, AGCM has been designated as the competent authority for the application of DMA¹¹⁰, but supervision of compliance with specific provisions has been reserved to GPDP¹¹¹. On the other hand, AGCOM is the digital service coordinator under DSA¹¹², and other independent authorities—AGCM and GPDP included—shall cooperate with AGCOM, which holds the pivotal role in the enforcement of DSA¹¹³. *Inter alia*, it supervises compliance with transparency standards, service restrictions imposed by providers, and internal complaint-handling systems—matters that appear, in substance, to constitute consumer and user protection rules against unlawful commercial practices.

Moreover, whereas implementation of the Data Governance Act¹¹⁴ has been entrusted to an existing governmental agency (“AgID”)¹¹⁵, one or more competent authorities for the

¹⁰⁸ Each memorandum is available at www.agcm.it/per-la-P.A-e-gli-esperti/normativa-e-procedure/protocolli-di-intesa (URL accessed on 12th February 2026).

¹⁰⁹ Such approach is analysed, at Italian level, by M. Guerra, *Le prospettive di collaborazione tra Autorità indipendenti nell'era digitale*, cit. From a broader perspective, see G. Straetmans, J. Vereecken, *Towards a New Balance Between Private and Public Enforcement in EU Consumer Law*, in *European Review of Private Law*, cit., 41 ff., who observe that recent European reforms show «a new emphasis on public enforcement especially on the context of digitalization of the markets», re-defining also the existing interplay between private and public enforcement. With specific reference to private enforcement in the digital era, see J. Vereecken, J. Werbrouck, *Goods with Embedded Software: Consumer Protection 2.0 in Times of Digital Content?*, in *Indiana Int'l & Comp. Law Review*, 53 ff. (I, 2019).

¹¹⁰ See above footnote 65. See also A. Licastro, I. Ottaviano, *Il ruolo del public e private enforcement nel Digital Markets Act*, in *Il diritto dell'economia*, 582 (II-III, 2025), who underlines that national competition authorities maintain a mere support role in the cooperation with European Commission, which is the sole entity in charge of the enforcement of DMA (see Article 38(7)).

¹¹¹ See Article 18(8) of Law No. 214/2023, which reserves to GPDP supervisory powers on gatekeepers' obligations under Articles 5(2, 6 and 10), 7(8), 8(1), and 13(5) of DMA.

¹¹² See above footnote 46.

¹¹³ AGCOM imposes administrative fines—effective, proportionate and dissuasive—for breach of Articles 9-28, 30 and 45 of DSA, which impose several obligations upon providers of digital services, and providers of hosting services, protecting consumers in the digital environment.

¹¹⁴ Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act), which lays down: (a) conditions for the re-use, within the Union, of certain categories of data held by public sector bodies; (b) a notification and supervisory framework for the provision of data intermediation services; (c) a framework for voluntary registration of entities which collect and process data made available for altruistic purposes; and (d) a framework for the establishment of a European Data Innovation Board.

¹¹⁵ See Article 2 of Legislative Decree 7 August 2024, No. 144, which designates the Agency for Digital Italy (*Agenzia per l'Italia Digitale* – “AgID”) as the competent authority for data intermediation services (pursuant to Article 13 of Data Governance Act), which carries out the tasks related to the notification procedure for data intermediation services, and the competent authority for the registration of data altruism organisations (pursuant to Article 23 of Data Governance Act).

implementation of the Data Act have yet to be designated¹¹⁶. The latter does not displace the GDPR, since it aims, *inter alia*, to facilitate data sharing and data subjects' access to personal data or product data (the data-protection rules laid down by the GDPR remaining substantially intact). Competent authorities will be required to perform consumer protection functions that will overlap with those performed by GPDP (unless it is itself designated as competent authority), by AGCM (as regards, *e.g.*, misleading information concerning access to product data), by AGCOM (in relation to the use and sharing of data for digital services), and, further, by the authorities competent for the supervision of artificial intelligence systems.

In implementing Artificial Intelligence Act (AI Act)¹¹⁷, Italian legislator appointed two governmental agencies—AgID and National Cybersecurity Agency (*Agenzia per la cybersicurezza nazionale*, “ACN”)—as national competent authorities: AgID acts as the “notifying authority”; ACN acts as the “market surveillance authority” and “single point of contact”¹¹⁸. Independent sectoral authorities in banking, finance and insurance have been appointed as “market surveillance authorities” pursuant to Article 74(6) of AI Act, and therefore hold regulatory and supervisory powers. Similarly, the competences of GPDP and AGCOM (as Digital Services Coordinator) have been preserved, as they are “authorities protecting fundamental rights” under Article 77 of AI Act, notwithstanding that national legislator does not specify how the respective attributions are to be coordinated¹¹⁹.

Accordingly, it is readily apparent that the digital sphere exacerbates the overlapping of competences between authorities. This situation does not only concern the boundaries of AGCM's competence as general consumer protection authority, but also affects the relations between all authorities tasked with safeguarding the rights of natural persons. Consider, for instance, the indispensable role of GPDP in a market that uses data as the fulcrum of its exchanges, and the interferences with supervisory powers of AGCOM¹²⁰.

¹¹⁶ Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act), aimed, *inter alia*, at (i) making personal data and product data available to users, operators, and public bodies, (ii) facilitating switching between data processing services, (iii) developing interoperability standards, and (iv) introducing safeguards against unlawful third-party access to non-personal data (without prejudice to the GDPR). Each Member State should have appointed the competent authorities and, when more than one competent authority is designated, a data coordinator; however, Italy has not proceeded with such designation yet.

¹¹⁷ Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act).

¹¹⁸ See Article 20 of Law 23 September 2025, No. 132.

¹¹⁹ Article 19 provides for the institution of a coordination committee based at the Presidency of Council of Ministers, and it is composed of members of the Government; representatives of national authorities may be invited to committee's meetings. However, such committee is aimed at the implementation of the National strategy on artificial intelligence, rather than coordinating supervisory activities of general and sectoral authorities. On the other hand, Article 24 of Law No. 132/2025 delegated to the Government the adoption of a legislative decree to specify, *inter alia*, competences and powers of national authorities: such legislative decree, which was adopted on 4 August 2026 but has not yet been published, is expected to better define coordination between public bodies with “vertical” and “horizontal” supervisory powers, as M. Rabitti, F. Bassan, *L'applicazione dell'AI Act in Italia e la tutela del consumatore. Il ruolo delle autorità indipendenti*, in *federalismi.it*, 256 ff. (30, 2024), noted regarding the transposition of AI Act with specific reference to coordination between ACN and authorities protecting fundamental rights according to Article 77 of AI Act: the Authors do not doubt that AGCOM and GPDP may be included in the latter.

¹²⁰ M. Rabitti, *Il riparto di competenze tra autorità amministrative indipendenti nella Direttiva sui sistemi di pagamento*, cit., 84, underlines the strict relation between privacy and communications, as data are massively exchanged in the internet through mobile devices. On the other hand, the author reports the overlapping competences between GPDP (general data protection) and the Bank of Italy (supervisor of payment system), that may only be solved through a loyal cooperation.

Reliance on “loyal cooperation” between the authorities, crystallised in various memoranda of understanding that are proliferating in this period, may help in practice; however, at the legal level, it does not eliminate potential conflicts of competence. On the contrary, the existence of shared functions inherently increases the risk that one authority may claim ownership of a given task to the detriment of another. The absence of precise rules governing the allocation of competences reflects the legislator’s difficulty in distributing functions among a plurality of authorities that pursue the same mission and safeguard the same underlying interests, notwithstanding that they are distinct organisations—essentially for historical reasons, or because it is still considered impossible determining which of them is truly more competent.

In conclusion, the proliferation of digital systems and the associated protective functions may prompt a fundamental reconsideration of the institutional allocation of public functions to ensure the unitary—no longer merely “coordinated”—exercise of the public enforcement of consumer protection.

RESEARCH PERSPECTIVES ON COLLECTIVE LITIGATION AND SOCIETY

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I. SUBJECT MATTER AND CURRENT STATE OF RESEARCH - II. POSSIBLE CAUSES FOR SPREAD OF COLLECTIVE LITIGATION - III. IMPACT OF COLLECTIVE LITIGATION - IV. CONCLUSION AND OUTLOOK

This article summarizes the current state of research on collective litigation, focusing on three issues: The cause of the global spread of collective litigation instruments, its impact on society, and its normative evaluation.

Keywords: Collective Litigation – Society – Impact – Economy – Deterrence

I. SUBJECT MATTER AND CURRENT STATE OF RESEARCH

Collective litigation has been studied intensively over the last decades, in particular since the reform of the U.S. class action in 1966.¹ In the following decades, various types of collective litigation phenomena appeared around the world, and one can say that there has been a world-wide spread or even evolution in the direction of more collective litigation instruments.² The U.S. model of class actions has been replicated – albeit with many variations – in important jurisdictions such as Canada,³ Australia⁴ and Israel.⁵ In Europe, there has been a parallel, but somewhat different trend with regard to the increased use of associations actions, for example in Germany⁶ and France⁷ since the 1960s. The Netherlands have evolved as an important forum state for collective actions since

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¹ In 1966, rule 23 FRCP was rewritten and created the U.S. class action in its modern form. On the history of this rule see D. Marcus, *Flawed but Noble: Desegregation Litigation and its Implications for the Modern Class Action*, 63 Florida Law Review 657 (2011); J. Resnik, *From „Cases“ to „Litigation“*, 54 Law & Contemporary Problems 5 (1991); the same author provides a helpful overview on the workings of the U.S. court system in J. Resnik, *Seeing „The Courts“: Managerial Judges, Empty Courtrooms, Chaotic Courthouses, and Judicial Legitimacy from the 1980s to the 2020s*, 43 Review of Litigation 193 (2024). The practice and reach of class actions in the United States may have changed over the last decades, on these developments see R. Klonoff, *The Decline of Class Actions*, 90 Washington University L. Rev. 729 (2013); R. Marcus, *Bending in the Breeze: American Class Actions in the Twenty-First Century*, 65 DePaul L. Rev. 497 (2016); R. Klonoff, *Class Actions Part II: A Respite from the Decline*, 92 N.Y.U. L. Rev. 971 (2017).

² See, on the global spread of collective litigation: D. Hensler, *The Globalization of Class Actions: An Overview*, Annals AAPS 622 (2009) 7; D. Hensler, I. Tzankova & C. Hodges (eds.), *Class Actions in Context: How Culture, Economics and Politics Shape Collective Litigation*, Cheltenham, 2016; D. Hensler, *From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally*, 65 U. Kan. L. Rev. 965 (2017); B. Fitzpatrick & R. Thomas (eds.), *The Cambridge Handbook of Class Actions. An International Survey*, Cambridge, 2021; for Europe see A. Uzelac & S. Voet (eds.), *Class Actions in Europe. Holy Grail or Wrong Trail?* Cham, 2021; M. Bartkus et al. (eds.), *Collective Litigation in Europe: Law and Practice*, Huntington, NY, 2025.

³ See, e.g., J. Kalajdzic, *Class Actions in Canada*, Vancouver, 2018.

⁴ See, e.g., M. Legg & J. Metzger (eds.), *The Australian class action: A 30-year perspective*, Alexandria, NSW, 2023.

⁵ See, e.g., A. Klement & K. Weinshall-Margel, *Cost-Benefit-Analysis of Class Actions: An Israeli Perspective*, Journal of Institutional and Theoretical Economics (JITE) Vol. 172 (2016) 75.

⁶ See, e.g., A. Halfmeier, *50 Jahre Verbraucherbandsklage*, Berlin, 2015.

⁷ See, e.g., M. J. Azar-Baud, *Les actions collectives en droit de la consommation*, Paris, 2013.

the early 2000s,⁸ and the whole European Union has made a big step in the direction of more collective litigation with the adoption of the “Representative Actions Directive” in 2020.⁹ In view of these many developments, and after about sixty years of research, it may be worthwhile to step back a bit and look at what has been achieved and what could be future avenues of inquiry.

1.1. What are we talking about?

With regard to the definition of the subject, it is not always easy to disentangle collective litigation from other relevant topics that have been and still are discussed. Such adjacent topics include “access to justice,”¹⁰ the workings of the civil justice system in a broader sense, including the effects of digitalization on the justice system (such as recent “legal tech” business strategies), and also the discussion about “strategic” or “public interest” litigation.¹¹

What is it then that makes collective litigation special and that explains why it is regarded as a specific field of enquiry? There are two aspects that are typically relevant here: One is the public or social interest in the proceedings, and the second aspect is the collective nature of the proceedings. The first aspect – the “public interest” quality – is rather obvious in associations actions as they are common in Europe, as these institutions typically claim to further some public or collective goal with their litigation activities. This idea is also very prominent in the European Union’s Directive on “representative actions,” the title of which explicitly points to the “collective interests of consumers”. In collective actions brought not by special institutions, but by individuals or even by companies, the “public interest” in the action is less clear, as one could argue that individual claims, even if aggregated in a class action, do not necessarily have much to do with the “public interest”. However, there is typically a justification given for this type of collective litigation that goes beyond a mere support for aggregated individual interests: The U.S. class action and similar instruments are seen as an instrument that is useful to better enforce the law and thus further the “public interest” in this sense.¹² For example, securities class actions hopefully contribute to the enforcement of capital market laws and its goal of socially optimal allocation of capital, antitrust class actions support competition in a market economy, consumer class actions strengthen consumer protection, and so on. This “private enforcement” aspect is an important feature of all studies in collective litigation.¹³

⁸ See I. Tzankova & D. Lunsingh Scheurleer, *The Netherlands*, in: *The Annals of the American Academy of Political and Social Science* Vol. 622, 149 (2009).

⁹ Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers, O. J. EU 2020 L 409/1. With regard to its implementation see, e.g., P. Rott et al., *Comparative Legal Study on Procedural Rules and their Impact on Collective Redress Actions in Europe* (Study for BEUC, March 2025); M. J. Azar-Baud, *Implementation of the Representative Actions Directive across the European Union: State of Play*, 44 *Civil Justice Quarterly* 124 (2025).

¹⁰ Note that the famous Florence Access to Justice project from the late 1970s included studies on collective litigation, but also on improving individual access to justice, for example in the chapters on small claims procedures in M. Cappelletti & J. Weisner, *Access to Justice Vol II.: Promising Institutions*, Book II, Milano, 1978, p. 491 et seq.

¹¹ See, e.g., B. Hess, *Strategic Litigation: A New Phenomenon in Dispute Resolution*, MPI Luxembourg Research Paper Series 2022 (3). However, this author’s description of strategic litigation as a “new” phenomenon is rather doubtful, however, if we look back to civil rights cases in the United States of the 20th century and other cases that have long ago deliberately been brought to influence and change social and political structures.

¹² As illustrated by the book title of D. Hensler, *Class Action Dilemmas. Pursuing Public Goals for Private Gain*, Santa Monica, CA, 2000.

¹³ On the theory and practice of private enforcement see, e.g., B. Fitzpatrick, *The Conservative Case for Class Actions*, Chicago, 2019, p. 29 et seq., R. Posner, *Regulation (Agencies) versus Litigation (Courts). An Analytical Framework*, in: D. Kessler (ed.), *Regulation vs. Litigation*, Chicago, 2010, p. 11-26.

The second important function of collective litigation is, as the name implies, dealing with collectives or groups of people in litigation. Historically, a dispute between or involving groups of people is nothing special, as disputes in society often arise as “us against them” situations. We are social animals, and as such it is natural that we see our problems in context with others that are similarly situated and try to form alliances in disputes. Historical research into the medieval origins of class actions shows that the participation of collectives in litigation is certainly nothing new.¹⁴

What may be new, however, is that the involvement of collectives in litigation is regarded as an aberration or exception that needs special treatment. This may have to do with the invention and spread of the concept of the legal person in modern legal systems. This concept allows the law to treat a collective or group of persons as one fictitious person, so that the collective aspect and the issues associated with it magically disappear from legal doctrine. In the area of civil procedure, this means that a legal person is treated as one “individual” party to the dispute. With this trick of the legal system, all the issues of agency, representation, and governance that arise wherever collectives try to act, are removed from civil procedure law and pushed into other areas such as company law (for private law legal persons) or public law for public communities. This modern development of treating collectives as individuals is not only very efficient, but it also fits into a market-based society that relies on individual citizens’ rights and their protection and implementation. In this sense, it is typically said – and taken for granted today – that civil procedure law exists to enforce “individual” or “subjective” rights.¹⁵ This means that civil procedure law is based on this conception of individual disputes, and therefore aims to frame all disputes as arising between individuals, which becomes possible through the legal person appearing as “one” fictitious party.

To give an example from Germany: After the Volkswagen “Dieselgate” scandal was uncovered in 2015, many thousands of individual Volkswagen customers wanted to sue Volkswagen for damages. This could be seen as a dispute between two groups: The group of several thousands of affected customers on the one side, and on the other side all the people that are associated with – and profit from – the production and distribution of Volkswagen cars, including the Volkswagen owners, the factory workers, the engineers, the managers, the distributors etc. When such a complex dispute reaches the court, the invention of the legal person makes it possible to sue the “Volkswagen Aktiengesellschaft” (stock company), as if it were one single individual. The questions of who is representing Volkswagen AG, how these representatives (the board) are elected and supervised, what their rights and duties are, how and to whom any profits will be distributed – all of these issues are treated in company law and thus kept outside of civil procedure law. On the consumer side, if they wish to act collectively, there is no such prior organization, and no regulation on all of the governance and agency issues just mentioned. Therefore, if thousands of consumers wish to sue collectively, these issues are now being brought into civil procedure law and have to be dealt with inside procedural law, not outside. This, I believe, is the main reason and explanation why “collective” litigation is seen and treated as a specific problem that justifies special academic and practical treatment. It is a left-over in certain cases where the mechanisms of company law or any other law on legal persons are not sufficient to internalize the collectivity problem.

¹⁴ S. Yeazell, *From Medieval Group Litigation to the Modern Class Action*, New Haven, CT, 1987.

¹⁵ On the development of this assumption towards more “collective” instruments see, in a comparative perspective J. Zekoll, *Comparative Civil Procedure*, in: M. Reimann & R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford, 2006, p. 1327, 1358.

Note that in many cases, the legal person is nevertheless used as one answer to the collectivity issue: In the German associations actions, the plaintiff association is a legal person and thus technically only “one” party. In other cases, the plaintiff group may manage to organize itself as a legal person, for example when a large number of cartel victims transfer their claims to a “special purpose vehicle”, a legal person which will then appear as a single plaintiff before the court. Technically, this will not raise any “collective litigation” issues in the law of civil procedure.

However, these attempts to formally individualize a collective dispute are not always fully successful. The defendant may challenge the validity of claim transfers on various grounds, as it often happens in German cartel damage cases, and thus try to destroy the attempted efficiency gains on the plaintiff side.¹⁶ With regard to the German associations actions, a significant doctrinal problem arises where the association aims to enforce somebody else’s (the consumers’) claims, so that complicated rules are necessary to deal with the possible influence of the association action on the individual consumers’ claims.¹⁷

In sum, one could say that the various instruments of collective litigation deal with the limits of the individualization of disputes. For many or most collectives, modern company law, the law of associations and public entities managed to put them under the hood of the legal person and thus reduce their complexity. But there are some left-overs where civil procedure itself has to face the issues of collectivity, and this is the domain that is studied and compared as collective litigation.

1.2. Different research approaches

Legal scholarship on collective actions appears in at least three variations: Doctrinal work, comparative law research, and an interdisciplinary “law and society” approach. The doctrinal work is important for practice and not always easy, as collective litigation instruments are often changed or newly introduced and thus create a continuing demand for interpretation and systematic commentary. Looking beyond national borders, the world-wide development of collective litigation also lends itself to a comparative legal analysis. Significant research has been already done here, and it has centered on different aspects and policy choices in the structuring of collective litigation, such as the trans-substantive approach in contrast to sectoral approaches, the question of standing, the distinction between “opt-out” and “opt-in” regimes, and issues of financing, only to name some of the most important areas of comparative law research.¹⁸

In addition to these doctrinal and comparative aspects, collective litigation has always been regarded as a matter of considerable economic and political relevance. It is not only seen as a matter of legal technicalities, practice and doctrine, but also attracts support and criticism that is based on its socio-political relevance. The introduction or expansion of instruments of collective litigation is supported by some as more “access to justice”,¹⁹ and is criticized by others as leading to an unwarranted commercialization of justice or creating negative impact on businesses or the

¹⁶ On this issue see last year’s judgment by the European Court of Justice that basically requires German courts to accept such “assignment models” in order to effectively enforce the law on cartel damages: ECJ, decision of 28 January 2025, case C-253/23 – *ASG 2 Ausgleichsgesellschaft für die Sägeindustrie Nordrhein-Westfalen GmbH v. Land Nordrhein-Westfalen*.

¹⁷ On the doctrinal discussion on how the German associations’ actions relate to individual claims, see, e.g., F. Maultzsch, *Das neue Verbraucherrecht durch -setzungsgesetz – VDuG*, *Zeitschrift für Zivilprozess (ZZP)* Vol. 137 (2024) 119.

¹⁸ For an overview see B. Fitzpatrick & R. Thomas (eds.), *The Cambridge Handbook of Class Actions. An International Survey*, Cambridge, 2021.

¹⁹ See the title of J. Kalajdzic, *Class Actions in Canada: The Promise and Reality of Access to Justice*, Vancouver, 2018.

economy in general. This focus on desirable or undesirable effects in society could be called a “law and society” approach in the broader sense²⁰ and leads to an interdisciplinary connection of legal research with economics, political science or other social sciences.

It is this “law and society” perspective on collective litigation that is particularly interesting for purposes of this paper. At the same time, it is also the most challenging approach for lawyers, as many of us are not trained in the social sciences or in empirical research. This is especially true for many European lawyers that have studied at universities which teach “the law only” and often disregard its connection to other social sciences. The following overview is therefore written from an amateur perspective, but it may still be useful and may serve as the starting point for more sophisticated interdisciplinary research.

Taking up the “law and society” perspective on collective litigation, one can ask at least three important research questions: First, what is the cause for the expansion of collective litigation regimes over the last decades? Second, what is the “impact,” the social effect of the existence or use of collective litigation instruments? Third, is collective litigation a good thing in the sense that it supports democracy, prosperity and the rule of law? The first two of these questions are largely empirical in nature, while the third question has considerable normative ingredients.²¹

II. POSSIBLE CAUSES FOR SPREAD OF COLLECTIVE LITIGATION

Looking at the first of these three basic questions, it has not been very much addressed. Why is it that the invention of the legal person did not completely solve the issues associated with collective litigation? And why have instruments of collective litigation spread around the world over the last sixty years? On this significant spread of collective litigation, there is no comprehensive empirical data. But when we look at the qualitative and comparative studies, it becomes quite clear that after the 1960s until today, collective litigation instruments have been developed and used in a large number of countries in many parts of the world.²²

On this question of why collective litigation has expanded around the world, one could develop several approaches that could build on political science, economics, or other social sciences. In political science, a specific theory on the political function of litigation in the United States has been proposed.²³ Under this theory, the legislative branch has installed private enforcement rights in order to insulate the enforcement of certain laws from the influence of the executive branch.²⁴ This theory may be specific to the U.S. arrangement of administration and government, and it would need further research to assess whether and to what extent it could be applied in other countries.

²⁰ On this approach to legal scholarship see L. Friedman, *Impact. How Law Affects Behavior*, Cambridge, Mass., 2016.

²¹ Friedman (previous footnote) addresses only the first two questions at p. 1-3. In Germany, the term „Rechtswirkungsforschung“ is often used for research regarding the impact of legal norms, see, e. g., Wrase, *Rechtswirkungsforschung revisited. Stand und Perspektiven der rechtssoziologischen Wirkungsforschung*, WZB (Wissenschaftszentrum Berlin für Sozialforschung) discussion paper P-2018-005 (2018).

²² See the studies cited above at footnote 2.

²³ S. Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the United States*, Princeton, 2010.

²⁴ *Id.* at p. 19-59, see also S. Burbank, S. Farhang & H. Kritzer, *Private Enforcement of Statutory and Administrative Law in the United States (and Other Common Law Countries)*, in: P. Gottwald & B. Hess (eds.), *Procedural Justice*, XIV. IAPL World Congress Heidelberg 2011, Bielefeld, 2014, p. 197, 215; note that this strategy of creating litigation rights to support regulatory goals may be employed on both sides of the political spectrum, see S. Burbank & S. Farhang, *A new (Republican) Litigation State?* 11 U.C. Irvine L. Rev. 657 (2021).

In sociology and progressive political philosophy, there has been a well-established discussion on *Verrechtlichung* (juridification) in the late 20th century.²⁵ This term is sometimes used in a purely descriptive sense, pointing out the fact that in modern society, more and more areas of life come under the regime of legal norms, adding and partly replacing existing social, religious or moral norms. Jürgen Habermas famously described this as one aspect of the “colonization of the life world”²⁶ in the sense that previously informal intersubjective cooperation and discussion is replaced by formal systems such as law or money. From a normative point of view, this development is sometimes described as paradoxically: On the one hand, more rights may mean more emancipation in spheres that used to be dominated by exploitation and unchecked oppression, but on the other hand, to reduce social and political interaction to juridical procedures may also appear to be unsatisfactory.²⁷ This paradox may also apply to collective litigation which can be seen as an emancipatory instrument as it enforces rights but at the same time may frame social and political issues only as issues of claims and monetary compensation, which may not appear as completely adequate to the problems.

Another perspective with regard to the spread of collective litigation may be to look at them as “legal transplants” in the sense that was coined by Alan Watson.²⁸ His work centers around the idea that legal change is probably not caused in a monocausal or linear fashion by social or economic forces, but that the legal system itself has a certain degree of independence. Lawyers thus “transplant” legal solutions found in other legal systems, which may lead to new or even surprising results as these transplants react with the legal environment into which they are transplanted.²⁹ This approach may be very promising in research on the global spread of collective litigation, as a considerable part of this development can be seen as transplanting the U.S. class action into other legal systems. It is noteworthy, however, that the U.S. class action is not the only concept that is “transplanted” globally but that we can also observe other developments. For example, the concept of “diffuse interests” has been developed mainly in Latin America as a theoretical foundation for popular and group actions, and has since been transplanted – in a form of reverse colonization – to Portugal and Spain.³⁰

Finally, one could look for economic reasons or functions fulfilled by collective litigation which could also explain the spread of these instruments. It is noteworthy that many countries which are very successful in economic terms at the same time have fairly elaborate and strong systems of

²⁵ See, e.g., R. Voigt (ed.), *Verrechtlichung. Analysen zu Funktion und Wirkung von Palamentarisierung, Bürokratisierung und Justizialisierung sozialer, politischer und ökonomischer Prozesse*, Königstein, 1980.

²⁶ J. Habermas, *Theorie des kommunikativen Handelns*, Frankfurt am Main, 1981, Vol. II, p. 522: „Kolonialisierung der Lebenswelt“

²⁷ On this paradox see, from a leftist-progressive perspective: D. Loick, *Juridification and politics: From the dilemma of juridification to the paradoxes of rights*, 40 *Philosophy and Social Criticism* 757-778 (2014).

²⁸ A. Watson, *Legal Transplants. An Approach to Comparative Law*, 2nd ed., Athens, GA, 1993.

²⁹ *Id.* at 95 et seq.

³⁰ See A. Gidi, *Class Actions in Brazil – A Model for Civil Law Countries*, 51 *Am. J. Comp. Law* 311, 354 (2003); J. Ovalle Favella, *Popular Actions for the Protection of Collective Interests*, *Mexican Law Review* 2006, no. 5; H. Sousa Antunes, *Portugal*, in: *The Annals of the American Academy of Political and Social Science* Vol. 622, 161, 164 (2009). Note that the concept of “diffuse interests” has been developed in the U.S., probably based on Mancur Olson’s work on collective action, but has been taken up also in Europe; M. Olson, *The Logic of Collective Action. Public Goods and the Theory of Groups*, Cambridge, Mass., 1965; J. F. Handler, *Social Movements and the Legal System. A Theory of Law Reform and Social Change*, New York, 1978; J. Q. Wilson, *The Politics of Regulation*, New York, 1980; N. Reich, *Förderung und Schutz diffuser Interessen durch die Europäischen Gemeinschaften*, Baden-Baden, 1987, p. 19-25. However, neither in Europe nor in the U.S. has this term achieved such great significance for the explanation of collective litigation instruments as it has in Latin America.

collective litigation, such as the United States, Australia, Canada, the Netherlands and some Scandinavian countries.³¹ All of these countries also have very strong and successful economies.³² As we observe this correlation, we do not know whether there is also causality in the sense that more or better availability of collective litigation is good for the economy or not. It could support the economy and society by providing better protection of rights and enforcement of the law. But it could also be the case that collective litigation is just a luxury that can only be afforded by the rich countries in the world – like air conditioning – and that it may even have a detrimental effect on the economy and on society.

In the econometric “legal origins” studies that have been undertaken in the early 2000s, some authors sought to find causal relations with respect to an alleged superiority of the Common Law model with stronger protection of shareholder rights.³³ However, these studies did not explicitly focus on collective litigation and their validity may be questionable.³⁴ On the other hand, one can probably not dispute the basic insight that strong legal institutions and the protection of individual rights have been very supportive for economic growth over the last centuries.³⁵ Further research is needed to determine whether and how this general proposition can be applied more specifically to collective litigation instruments. *Prima facie* and at the current state of research, it appears that there is at least not a noticeable negative effect of collective litigation on the economy, contrary to what is sometimes claimed by lobbying groups.³⁶ Even though the United States, Canada and the Netherlands have very well developed systems of collective litigation, this has obviously not stopped them from becoming and staying some of the richest countries on this planet.

As a preliminary conclusion, one can say that the question of why collective litigation has spread around the world has not received much attention in research. The possible approaches from different social sciences that have been sketched above may be some possible avenues to start research in this direction.

³¹ For a quantitative view on a selection of countries see the PCAR (Pending Class Actions per million capita Rate) in J. Kalajdzic et al., *The (Un)intended Consequences of Legal Transplants: A Comparative Study in Collective Litigation*, 17 *Journal of Tort Law* 149-202 (2025).

³² If we use the (admittedly insufficient, but readily available) measure of GDP per capita in USD, all of the mentioned countries are in the world's leading group (Norway at #7, U.S. at #8, Denmark #9, Netherlands #10, Australia #12, Sweden #14, U.K. #19, Canada #21; IMF data from 2025, available at [https://en.wikipedia.org/wiki/List_of_countries_by_GDP_\(nominal\)_per_capita#](https://en.wikipedia.org/wiki/List_of_countries_by_GDP_(nominal)_per_capita#)

³³ R. LaPorta, F. Lopez-de-Silanes & A. Shleifer, *The Economic Consequences of Legal Origins*, 46 *J. Econ. Lit.* 285 (2008) with further references.

³⁴ See the critique by M. Siems, *Numerical Comparative Law: Do We Need Statistical Evidence in order to Reduce Complexity?* 13 *Cardozo J. Int. Comp. L.* 521 (2005); S. Voigt, *Are International Merchants Stupid? Their Choice of Law Sheds Doubt on the Legal Origin Theory*, 5 *J. Empirical Legal Studies* 1 (2008); J. Armour et al., *Law and Financial Development: What We Are Learning from Time-Series Evidence*, 2009 *BYU L. Rev.* 1435 (2009); H. Spamann, *The “Antidirectors Rights Index” Revisited*, 23 *Rev. Fin. Studies* 467 (2010).

³⁵ D. Acemoglu & J. Robinson, *Why Nations Fail. The Origins of Power, Prosperity, and Poverty*, New York, 2012.

³⁶ Anecdotal evidence: In 2001, when I started my academic work on collective actions, including the U.S. class action, I came across an editorial in the *Wall Street Journal* that I cut out of the paper and saved in my files for a long time; today it is available in the Journal's digital archive: „Lawyers Torch the Economy“, *The Wall Street Journal*, April 6, 2001, p. A14. The editorial describes the impact of asbestos and other million-dollar litigation and how it made some lawyers extremely rich, and companies go into bankruptcy, calling for an end of such litigation. Looking back now after a quarter of a century, the U.S. economy certainly has not been „torched“ by class actions or other litigation: The U.S. gross domestic product has *tripled* since the publication of that article in 2001, with only two major recessions that certainly had nothing to do with class actions (2008-2009: financial crisis, 2020: Covid virus). Would the U.S. economy have fared even better without class actions? We simply do not know, but any possible negative effect seems to be very limited.

III. IMPACT OF COLLECTIVE LITIGATION

The second fundamental question in collective litigation research has received more attention over the last decades: What is the impact of collective litigation instruments and how can we measure and evaluate this impact on society? In this regard, one could distinguish between intended effects and unintended effects. The focus on intended effects tries to determine whether collective litigation instruments really deliver the expected benefits that they are created for: These positive intended effects of collective litigation are typically seen in three aspects: (1.) Better compensation and access to justice for claimholders in mass harm situations, (2.) behavior modification or deterrence in the sense that the existence of collective litigation instruments reduces the probability of illegal behavior by companies and other actors, and (3.) improved judicial efficiency as courts may use economies of scale and bundle mass claims together in one procedure.³⁷

III.1 *Better compensation*

On a theoretical level, it should be rather clear that the introduction of collective litigation instruments should increase compensation in comparison to a system that would rely purely on individual actions. This is because litigation always comes with a cost and cost risk to the plaintiff. The magnitude of these costs and cost risk may vary from jurisdiction to jurisdiction, but there will always be a cost, if only opportunity cost. This means that there are always claims where the expected value of litigating them is negative. If we assume rational behavior by the claimholder, such “negative expected value claims” will not be brought to court in the framework of individual litigation and thus there will be no compensation for such cases.³⁸ In this respect, the bundling of claims through collective litigation tends to reduce the cost for each claimholder, so that it becomes rational to litigate claims that would have a negative expected value in individual litigation.

This theoretical argument is sometimes supported by empirical studies, insofar as data is available. In the United States, where we find a large number of class action settlements, the problem is that there is not much accessible data on these settlements and how they are executed. In particular, the “take-up rate” is difficult to assess; this refers to the problem that even when there is a settlement that promises certain payments to the affected group, only a small part of the group may actually participate and actively claim such benefits.³⁹ Critics of the U.S. class action therefore see little empirical evidence for actual consumer benefits.⁴⁰ On the other hand, the distribution rates may depend on how distribution is organized: An empirical study from the U.S. shows that the benefit

³⁷ This threefold explanation seems to be the general consensus, see the title of the classic paper on U.S. class actions by K. Dam, *Efficiency, Compensation, Deterrence and Conflict of Interest*, 4 J. Legal Studies 47 (1975).

³⁸ L. Bebchuk & A. Klement, *Negative-expected-value suits*, in: Sanchirico (ed.), *Procedural Law and Economics*, Cheltenham, 2012, p. 341–349.

³⁹ See, e. g., N. Pace/W. Rubenstein, *How Transparent are Class Action Outcomes? Empirical Research on the Availability of Class Action Claims Data*, RAND Working Paper WR-599-ICY (July 2008), available at https://www.rand.org/pubs/working_papers/WR599.html.

⁴⁰ Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* (2013), <https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf>; see also the critical empirical study on consumer class actions by J. Johnston, *High Cost, Little Compensation, No Harm to Deter: New Evidence on Class Actions Under Federal Consumer Protection Statutes*, 2017 Columbia Business L. Rev. 1 (2017).

for class members was much higher when they were directly sent some payment instead of having to fill out claims forms.⁴¹ This is only possible when their identities are known beforehand, but the expectation is that with the rise of online transactions, this will more often be the case than in the past.⁴²

In other class action systems outside of the United States, there is at least some small evidence for compensation: In an empirical study of 55 class action cases in the Canadian province of Québec, the majority of the reviewed cases provided significant benefits for consumers.⁴³ In Australia, there is also some indication for compensation through class action settlements, although the lack of data on take-up rates is also an issue there.⁴⁴ A study in Israel found that only in 3.5 % of the class action cases examined, there was direct financial compensation, and in another 12 % there was some form of other remedy of doubtful effect on compensation for the class.⁴⁵

However, when these and other studies show only a limited effect of compensation for claimholders through class action, this phenomenon is probably rooted in the small individual harms that are often the subject of class actions,⁴⁶ and probably also in the principal-agent conflict that arises when the class action attorney can effectively control the litigation and its outcome.⁴⁷ This means that while it is true that the class action enables negative value claims to be brought before the court, the class action instrument at the same time creates significant, but necessary transaction costs – such as lawyers' fees and distribution costs – that typically reduce the actual compensatory effect.⁴⁸

III.2 Behavior modification

This limited effect on compensation does not make collective actions useless, because the main goal of collective litigation is probably not individual compensation, but deterrence and behavior modification. Again, if we start with a theoretical model, these two goals are completely separated: A rational actor on the possible defendant side will engage in illegal action if the expected value of the illegal act is higher than the expected cost that it creates.⁴⁹ If the availability of collective litigation instruments leads to an increase in the cost and probability of sanctions for the actor, it will have the desired effect of reducing the attractiveness of illegal behavior. In this theoretical model, it is irrelevant whether the money that is to be paid by the illegal actor is given to the victims of the

⁴¹ B. Fitzpatrick & R. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions*, 11 N.Y.U. J. Law & Business 767, 778 (2015).

⁴² *Id.* at 787.

⁴³ C. Piché, *Class Action Value*, 19 Theoretical Inquiries in Law 261 (2018).

⁴⁴ V. Morabito, *Empirical Perspectives on Twenty-one Years of Funded Class Actions in Australia* (2023), SSRN: <https://ssrn.com/abstract=4422278>; see also M. Legg, *Access to Justice and Compensation through the Class Action*, in: M. Legg & J. Metzger (eds.), *The Australian Class Action. A 30-Year Perspective*, Alexandria, NSW, 2023, p. 40.

⁴⁵ A. Klement & K. Weinshall-Margel, *Cost-Benefit Analysis of Class Actions: An Israeli Perspective*, Journal of Institutional and Theoretical Economics (JITE) Vol. 172 (2016) 75, 95.

⁴⁶ B. Fitzpatrick, *The Conservative Case for Class Actions*, Chicago, 2019, p. 88.

⁴⁷ On this problem see, e.g., J. Coffee, *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Columbia L. Rev. 370 (2000).

⁴⁸ B. Fitzpatrick, *The Conservative Case for Class Actions*, Chicago, 2019, p. 95.

⁴⁹ This is the classic law and economics model dating back at least to G. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Political Economy 169 (1968); on the application and complications of deterrence theory see the extensive treatments e. g. by A. Popper, *In Defense of Deterrence*, 75 Albany L. Rev. 181 (2011); L. Friedman, *Impact. How Law Affects Behavior*, Cambridge, Mass., 2016, p. 96 et seq.

illegal act, to charity, to the plaintiff lawyers, or thrown into the river. The important incentive is the potential cost imposed on the actor, and not where any payments go to.

This theory about the risk calculus of potential wrongdoers addresses the issue of what is typically described as “general” deterrence in the field of criminology; the goal is to prevent the breach of the law in the first place. This can be distinguished from “specific” deterrence which looks at future behavior of an individual wrongdoer. In this “specific” aspect, collective litigation is often successful, in particular when injunctions are issued that prescribe or prohibit certain future behavior of the defendant. In Germany, associations actions are traditionally focused on such injunctions, and they have achieved significant results; for example when it comes to eliminate certain unfair contract terms in financial services and other markets.⁵⁰ However, these specific results do not necessarily mean that the associations actions necessarily serve as a general deterrent for companies against using other unfair contract terms.

With regard to general deterrence and behavior modification, there is an interesting laboratory experiment that basically confirms the theoretical model described above in a laboratory situation that is modelled similar to class actions: Where individuals could group their claims together against another participant, the behavioral effect on the actor was bigger than when he was faced with retribution only on an individual basis.⁵¹ The authors of this study come to the conclusion that rules allowing for increased or coordinated enforcement of damages can indeed “promote social welfare.”⁵²

However, in this experiment, the harm that the participants could inflict against the wrongdoer was suffered directly by that wrongdoing person. This is not always the case in the real world, where larger corporations are managed by executives that may not even be shareholders of the company. Where management and ownership of a company are separated, the manager making a decision to engage in potentially unlawful conduct will not always personally carry the cost of his decision. While the company may have to pay a large amount as a result of a class action, the manager may still walk away with his pockets full of money. The personal outcome for the manager depends on the willingness and ability of the company to recoup its losses from the management, on the existence and terms of D&O insurance, on reputational effects and many other variables.

In addition to this complexity, the research on “behavioral economics” has shown that the purely rational model of decision-making often is insufficient to explain real people’s conduct. In the class action context, one may wonder, for example, why Volkswagen’s chief executives in Germany decided to organize a sophisticated fraud scheme regarding its Diesel engine emissions particularly in the United States. It was well known to every half-educated observer that U.S. emission laws are strict, that U.S. class action practice is a big threat for companies, that sophisticated U.S. plaintiff law firms are out there to get you if you do something wrong, and that U.S. judges will probably not be very lenient with foreign companies that intentionally break U.S. laws and defraud the U.S. government and U.S. customers.⁵³ In the face of these obvious and enormous risks, why did the

⁵⁰ See A. Halfmeier, *50 Jahre Verbraucherverbandsklage*, Berlin, 2015.

⁵¹ T. Eisenberg & C. Engel, *Assuring Civil Damages Adequately Deter: A Public Good Experiment*, 11 Journal of Empirical Legal Studies 301, 322 (2014), finding that the „higher probability class action“ treatment had significant effect on behavior.

⁵² Id. at p. 331

⁵³ For an account of the Dieselgate emissions scandal and its legal consequences, see B. Gsell & T. Möllers (eds.), *Enforcing Consumer and Capital Markets Law. The Diesel Emissions Scandal*, Cambridge, 2020; D. Hensler et al., *The*

Volkswagen management still go ahead to break the law?

One possible explanation is overconfidence. This has been described in the behavioral economics literature in particular for large companies' CEOs who see themselves as much smarter than the rest of the world.⁵⁴ Martin Winterkorn, who was Volkswagen's CEO at the time when the Diesel emissions fraud was committed, wanted his company to become the world's biggest carmaker – and almost achieved that by selling more cars than Toyota for a short period before the Dieselgate scandal was uncovered. In the garden of his villa, Winterkorn had a pond with expensive Koi fish, and Volkswagen paid 60,000 Euros to install a luxurious heating in this pond so that these exotic fish would have it warm enough in Northern Germany's wintertime. How could this person not be overconfident? Even if the potential damages in U.S. class actions had been tripled or quadrupled, it can be assumed that Winterkorn would have been undeterred, because he completely underestimated the risk of detection. On the other hand, the radically overconfident Mr. Winterkorn may be an extreme outlier: It is argued by some authors that in general, corporations tend to behave more rational than individual actors, since corporate decisions are often made by groups, after considerable reflection, and in pursuit of a clearly defined goal, namely profit in the purely financial sense.⁵⁵

The significant problems relating to the theoretical concept and practical reliability of deterrence have led some authors to be very skeptical of deterrence as an adequate goal of collective litigation.⁵⁶ This skepticism has a valid point in that it is not always easy to find empirical evidence for deterrence.⁵⁷ However, there is empirical evidence for some connection between a company's knowledge about litigation and its corporate behavior.⁵⁸ In recent years, the most thorough literature review on the studies regarding the deterrence effect of collective litigation has been undertaken by Brian Fitzpatrick, and he concludes that "there is in fact empirical evidence" to support the theory of class actions' deterrent effect.⁵⁹ It is clear that deterrence is a complex issue, as it addresses human behavior, but there is still good reason to assume that collective litigation at least has a significant and realistic potential to achieve deterrence and influence human behavior, even if this may fail in some specific situations as in the Volkswagen case described above.

Globalization of Mass Civil Litigation. Lessons From the Volkswagen „Clean Diesel“ Case, RAND research report 2021, available at https://www.rand.org/pubs/research_reports/RRA917-1.html

⁵⁴ See, e. g., U. Malmendier & G. Tate, Behavioral CEOs: *The Role of Managerial Overconfidence*, 29 Journal of Economic Perspectives 37 (2015); D. Kahneman, *Thinking, Fast and Slow*, New York, 2011, p. 258 spoke of the „hubris hypothesis“ in relation to CEO behavior.

⁵⁵ B. Fitzpatrick, *The Conservative Case for Class Actions*, Chicago, 2019, p. 104 with further references from economic research.

⁵⁶ In particular C. Hodges, *Law and Corporate Behaviour*, Oxford, 2015, p. 47–157 with further references. Note, however, that Hodges also criticizes the deterrence model on normative grounds: Hodges does not like an „aggressive, accusatory and adversarial culture, in which individuals assert unlimited personal freedom until condemned“ (which he locates in the U.S. legal culture), but instead prefers „a culture of inter-relational support and cooperation“ and „the EU (European Union) solidarity model“. Unfortunately, the „EU solidarity model“ apparently was not very popular with many other Englishmen, as the U.K. decided to leave the EU for good only one year after the publication of the cited book.

⁵⁷ In Israel, a study on class action effects found only a „potentially low level of deterrence“: A. Klement & K. Weinshall-Margel (supra, footnote 5) at p. 101.

⁵⁸ L. Simard, *A View from Within the Fortune 500: An Empirical Study of Negative Value Class Actions and Deterrence*, 47 Indiana L. Rev. 739 (2014).

⁵⁹ B. Fitzpatrick, *Do Class Actions Deter Wrongdoing?* in: Piché (ed.), *The Class Action Effect – L'effet de l'action collective*, Montréal, 2018, p. 181–203; B. Fitzpatrick, *The Conservative Case for Class Actions*, Chicago, 2019, p. 99–113.

III.3 Judicial Efficiency

With regard to the third main goal of collective litigation, improved efficiency in litigation, a clear paradox must be conceded: Insofar as collective litigation enables „negative expected value“ claims to be brought before the courts, and these claims would otherwise not have been litigated, collective litigation instruments create more court procedures and thus higher costs arising in the legal system of a given society. However, this effect is inherent in the two primary goals described above – better access to justice and more deterrence – and must therefore be accepted to achieve these goals. From a cost-benefit perspective, the assumption here must be that the benefits associated with these two goals outweigh the additional costs that are created by additional litigation.

With regard to „positive expected value claims“, which will be brought to court even in the absence of collective procedures, it is rather clear that their bundling into some form of collective litigation will save costs and increase the efficiency of the judiciary.⁶⁰ The German experience in the Volkswagen “Dieselgate” scandal clearly shows this potential: The claims of the individual car owners were typically in the area of several thousands of Euros, thus large enough to make an individual action rational from the plaintiff perspective – especially because many of the plaintiffs had legal expenses insurance that would cover their adverse cost risk. This situation led to thousands of individual cases that put a significant burden on the German court system. Although the German legislator had introduced a specific type of association action in 2018 to deal with this problem, this „model declaratory action“ was not capable to significantly reduce the caseload of individual actions. It was therefore argued in the German literature that only a true „group action“ which would bundle individual claims could ease the burden on the judicial system.⁶¹ This experience shows that while there certainly is a potential efficiency-enhancing effect in collective litigation, not all specific instruments can really achieve that effect, in particular when they are not attractive enough for potential plaintiffs to be regarded as a true alternative to individual litigation.

III.4 Negative Effect on the Economy?

Aside from these explicit goals, one of the most controversial issues with regard to class actions and other forms of collective litigation is their alleged negative impact on the economy. This argument assumes that class actions put an extra burden on businesses and thus harm economic development by creating a wasteful “litigation industry”.⁶²

As it was already pointed out above, there is no observable negative effect on the economy in those countries that have established strong collective litigation regimes. Even on a purely conceptual level, the derogatory description of a “litigation industry” seems very ideological and does not make much sense. It is obvious that there is a “litigation industry” in the sense that lawyers on both sides, litigation financing companies and other actors earn their living and may make good money from

⁶⁰ For an early empirical U.S. study on this effect, see R. Bernstein, *Judicial Economy and Class Actions*, 7 J. Legal Studies 349 (1978).

⁶¹ C. Meller-Hannich, *Gutachten A zum 72. Deutschen Juristentag in Leipzig 2018*, München 2018, p. A 74.

⁶² In Germany, paradoxically, it was mainly the “Bundesverband der deutschen Industrie” (BDI), the Federation of German Industry, who repeatedly warned of a „litigation industry“ when collective litigation instruments were discussed and introduced in Germany. See, e. g., the BDI’s press release on collective litigation of 29 April 2011, warning of a „litigation industry“ on p. 4, available at https://bdi.eu/media/themenfelder/recht/downloads/20110429_Stellungnahme_Kollektiver-Rechtsschutz.pdf

engaging in litigation, be it collective litigation or not. That fact alone says nothing about whether their activity is socially useful or not. In Germany, there is also a strong car industry, a chemical industry, a weapons industry, a pharmaceutical industry and many other branches of industry. All of these industries are not inherently good or bad for society or for the economy, but have positive and negative effects.

To take the car industry as an example, it clearly provides income and wealth to many thousands of German workers, managers and shareholders, and it provides its customers with great vehicles that they can use for mobility. On the other hand, there are extremely negative effects caused by the car industry: Thousands of people lose their lives or get severely injured in car accidents, the air is polluted, tons of rubber particles from tire abrasion contaminate the soil and water, and the burning of fossil fuels contributes to global warming. Whether we want to support and protect the car industry therefore depends on a weighing of social and economic cost and benefits. The same is true for any other economic activity, including the “litigation industry”: It has costs and benefits which should be weighed and evaluated by society, and regulated if necessary, but it is ridiculous to say that a “litigation industry” is inherently a bad thing.

III.5 Abusive Litigation?

However, the “litigation industry” argument is often meant in a slightly different way, namely to criticize that meritless or “abusive” actions are being brought in collective litigation. This claim is not easy to evaluate empirically, as one would have to go to the merits of each action to determine whether it is in fact meritless and thus could be seen as abusive. Insofar as there is data on this, there are almost no indications for the existence of a significant number of meritless class actions, even in the United States, where this argument traditionally is most prominent.⁶³ In the United States, the “abuse” arguments is often brought not only with respect to class actions, but with respect to lawyer-driven entrepreneurial litigation in general; but even in this respect there is little empirical support for it.⁶⁴

This lack of evidence for “abuse” is consistent with the incentive structure of such actions: In profit-driven situations – such as class actions driven by entrepreneurial lawyers – a rational actor will only invest in the case if it has sufficient merit to warrant such an investment. In this respect, Kritzer describes the contingency fee practice by U.S. plaintiff lawyers as a form of portfolio management.⁶⁵ If the portfolio is large enough, it may make sense for the lawyer to include some high risk cases, the success of which may be less certain on their merits. However, this can hardly be described as “abusive” as such cases present a high risk for the plaintiff lawyer in developing the law or testing new legal arguments. In a portfolio perspective, most cases brought for profit will be of sufficient merit, as the entrepreneurial lawyer needs to support himself and his staff with a steady flow of income

In continental Europe, a large part of collective litigation is put in the hands of non-profit

⁶³ See the detailed literature review by B. Fitzpatrick, *The Conservative Case for Class Actions*, Chicago, 2019, p. 74 et seq.

⁶⁴ See the extensive empirical study on U.S. lawyers’ contingency fee practice by H. Kritzer, *Risks, Reputations, and Rewards*, Stanford, 2004.

⁶⁵ H. Kritzer, *Risks, Reputations, and Rewards*, Stanford, 2004, p. 10 et seq.; see also J. Coffee, *Entrepreneurial Litigation. Its Rise, Fall and Future*, Cambridge, Mass., 2015; for an economic model on the market determination of lawyers’ contingency fees see W. Lynk, *The Courts and the Market: An Economic Analysis of Contingent Fees in Class-Action Litigation*, 19 J. Legal Studies 247 (1990),

associations or “qualified entities” in the European Union’s terminology. This creates different incentive structure, as these associations do not aim for profit, but for ideological and reputational success. At the same time, they typically have only a very limited budget, so that a lost court case will not only harm their reputation, but also endanger their financial situation. These associations will therefore build up considerable expertise in their field and have little incentive to bring meritless claims. In Germany, empirical studies have shown that such associations’ actions have a very high rate of success in litigation – typically higher than individual actions – which can only be explained by very good preparation and considerable merit in substantive law.⁶⁶ Note that the high success rate is not due to the associations picking only “easy” cases where the violation by the defendant would be obvious. On the contrary, both the environmental and the consumer associations have tackled complicated issues and achieved considerable success in clarifying and developing the law even in difficult areas. With regard to the German and Austrian consumer “associations”, it is noteworthy that they are generously funded by the government, so that they are not really NGOs, but rather “Quangos” (quasi-governmental organisations).⁶⁷

III.6 Positive Effects on Society

In total there is no evidence for any negative economic effects caused by the introduction of collective litigation instruments. On the contrary, there is some literature on possible positive externalities caused by collective litigation. These effects may not relate to the economy in the narrower sense, but to society in total. From a viewpoint of institutional economics, a German public law scholar has argued – although with respect to public and administrative law – that collective actions may support public participation and can serve to reduce the principal-agent problems in the relation between the government and the people.⁶⁸

A similar argument has been made with respect to aggregate private law litigation in the United States: Such actions may generate „public goods externalities even beyond the claimants directly affected“,⁶⁹ as they raise issues that are relevant for society at large and create a forum for a rational discourse on the resolution of such issues. This would fit with a positive theory of litigation that looks not only at the costs created by the legal system, but also at its considerable benefits for a free and democratic society: Litigation not only helps to enforce the law, but it may also may serve to uncover previously hidden information and expose relevant facts to the public eye.⁷⁰ Furthermore, if we accept that adjudication is a form of lawmaking – which is obvious in a case law system, but in fact also holds true in a codified system that leaves open wide holes to be filled

⁶⁶ This effect of higher-than-average success is most prominent in environmental law, see A. Schmidt & M. Zschiesche, *Die Klagetätigkeit der Umweltschutzverbände im Zeitraum von 2013 bis 2016. Empirische Untersuchung zu Anzahl und Erfolgsquoten von Verbandsklagen im Umweltrecht*, Berlin, 2018; but also in private law actions by German consumer associations, there are no indications for any abusive practices by these associations, see A. Halfmeier, *50 Jahre Verbraucherverbandsklage*, Berlin 2015.

⁶⁷ For example, the German „VZBV“ (federation of consumer associations) in Berlin receives about 99 % of its budget (about 58 million Euros in 2024) from taxpayers’ money, see VZBV, *Jahresbericht 2024*, Berlin 2025, p. 58. I would like to thank an anonymous reviewer for pointing out the term „Quango“ to me in this context.

⁶⁸ A. van Aaken, *Massenklagen im öffentlichen Recht aus institutionenökonomischer Sicht: Eine Art der direkten Volksrechte*, *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* (KritV) Vol. 86, 44, 74 (2003).

⁶⁹ R. Avraham & W. Hubbard, *Civil Procedure as the Regulation of Externalities: Toward a New Theory of Civil Litigation*, 89 U. Chicago L. Rev. 1, 61 (2022).

⁷⁰ A. Lahav, *In Praise of Litigation*, Oxford/New York, 2017, p. 82.

by the judiciary – then litigation can also be regarded as a form of participation in self-government.⁷¹ Furthermore, litigation puts to the test the theoretical and largely counter-factual principle of equality before the law.⁷² In litigation, David may sue Goliath and try to enforce the little guy's rights against a big corporations. In this respect, collective litigation may at least try to alleviate factual disparities of social and economic power, and may thus support the principle of equality on which the rule of law is built.⁷³ In view of these supportive features that collective litigation may provide for democracy and for the rule of law, the legitimacy of collective litigation may rather be “the role it plays in the larger polity rather than the internal protection it offers participants.”⁷⁴

IV. CONCLUSION AND OUTLOOK

This summary of the research on collective litigation is certainly not exhaustive or complete, but it may still enable us to draw some preliminary conclusions on the three research questions outlined above: What are the causes of the spread of collective litigation? What is the impact of collective litigation in society? And finally, how do we normatively evaluate collective litigation?

The first question about causal forces has hardly been researched at all – maybe with the exception of the historic development of the English group action⁷⁵ – and has not been the primary subject of this paper. There is a lot of work to be done in this respect.

On the second question – the social impact of collective litigation – there has been a lot of research over the last decades, and some of this was described in this paper. Most of this work has been qualitative and comparative in nature,⁷⁶ and further case studies and comparative work will certainly be useful. What may be missing is more quantitative work, but this has been very difficult until today because of the lack of data within jurisdictions, but also across jurisdictions. One necessary step here would be to collect better data within countries, which could be easier today with the advent of electronic registries of collective litigation cases, such as in some Member States of the European Union.⁷⁷ Furthermore, to make this data comparable, a common framework of sorting and coding collective actions would have to be established.⁷⁸

Another important, but not sufficiently explored area of research is the third, more normative question that asks whether collective litigation is good for democracy and society. The existing studies described above seem to point into that direction, but should be continued and built upon,

⁷¹ *Id.*

⁷² *Id.* at p. 112.

⁷³ *Id.* at p. 121, citing Judge Posner in *Carnegie v. Household Int.*, 376 F.3d 656, 661 (7th Cir. 2004): „The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or fanatic sues for \$ 30.“

⁷⁴ A. Lahav, *The Political Justification for Group Litigation*, 81 Fordham L. Rev. 3193 (2013).

⁷⁵ S. Yeazell, *From Medieval Group Litigation to the Modern Class Action*, New Haven, CT, 1987.

⁷⁶ See, e. g., for qualitative work in the form of case studies: D. Hensler, *Class Action Dilemmas. Pursuing Public Goals for Private Gain*, Santa Monica, 2000; D. Hensler, C. Hodges & I. Tzankova (eds.), *Class Actions in Context. How Culture, Economics and Politics Shape Collective Litigation*, Cheltenham, 2016; B. Gsell & T. Möllers (eds.), *Enforcing Consumer and Capital Markets Law. The Diesel Emissions Scandal*, Cambridge, 2020; D. Hensler et al., *The Globalization of Mass Civil Litigation. Lessons From the Volkswagen „Clean Diesel“ Case*, RAND research report 2021, available at https://www.rand.org/pubs/research_reports/RRA917-1.html

⁷⁷ The EU Directive 2020/1828 on Representative Actions allows the creation of electronic databases by the EU Member States (Art. 14 par. 1 of the Directive), and forces the plaintiff qualified entities to publish information on cases on their websites (Art. 13 par. 1 of the Directive).

⁷⁸ For proposals in this direction see D. Hensler, *Can private class actions enforce regulation? Do they? Should they?* in: F. Bignami & D. Zaring (eds.), *Comparative Law and Regulation* (2018) 238, 268.

especially in view of the current crisis of liberal democracy around the world. In this respect, one could ask whether “more litigation” is a (negative) symptom of a society that is incapable of solving problems through administrative and political work and thus needs to resort to litigation. On the other hand, and in stark contrast to such a negative view, “more litigation” could also be a positive development by enabling more public participation, more enforcement of individual rights, more rational deliberation, and thus more trust in the workings of a civilized society that is built on democracy, prosperity, and the rule of law.

