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

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COMPARATIVE LAW REVIEW VOL. 17/3 – 2026

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

5

VERONICA MONTANI, LAURA BUGATTI & PETER ROTT (EDS.)

Harmonizing and Enhancing the Enforcement of Consumer Law: A Comparative Analysis of Italy and Germany

9

CRISTINA AMATO

A Critical Assessment of Contemporary EU Collective Redress

14

LAURA BUGATTI, ANN-KRISTIN MAYRHOFER, CAROLINE MELLER-HANNICH

Comparative Analysis of Collective Redress in Italy and Germany. Framework Conditions and Legal Decisions in the Implementation of the European Representative Action

63

MALTE JOCHEM

Disclosure of Evidence in Representative Actions under German Law

81

ANDREA PILETTA MASSARO

Disclosure of Evidence in Collective Actions: The Italian Model in a Comparative Perspective

96

VERONICA MONTANI

Collective Redress and Structural Tensions: Focusing on (Non-Material) Damages

137

ASTRID STADLER

Financing of Collective Redress Proceedings – A Major Challenge for Qualified Entities

154

CRISTINA PONCIBÒ

Who Pays for Consumer Justice? Third-Party Litigation Funding and Collective Redres

169

GIORGIO AFFERNI

Mass Damages and Collective Litigation in Italy

181

MARINA FEDERICO

Harmonizing and Enhancing the Enforcement of Digital Rights. The Integrated Role of Consumer Law and Data Protection Law

192

LUIGI CRISTIANO

From Failure to Redesign: The European ODR System and the Next Generation of Digital Consumer Redress

211

MARIA CECILIA PAGLIETTI & PETER ROTT

Public and Hybrid Enforcement of Financial Services Consumer Law in Italy and Germany

226

ANGELO BONAITI

Public Enforcement of Consumer Protection in Italy: The Competence Saga among Independent Authorities

251

AXEL HALFMEIER

Research Perspectives on Collective Litigation and Society

MASS DAMAGES AND COLLECTIVE LITIGATION IN ITALY

Giorgio Afferni

TABLE OF CONTENTS:

I. INTRODUCTION - II. THE OLD CLASS ACTION - III. THE NEW CLASS ACTION - IV. THE PURCHASE OF CLAIMS - V. THE REQUIREMENT OF HOMOGENEITY OF RIGHTS - VI. HOMOGENEITY OF RIGHTS AND DAMAGES CAUSED BY A CARTEL - VII. HOMOGENEITY OF RIGHTS AND FRAUD ON THE FINANCIAL MARKETS - VIII. FALSE INFORMATION AND PRESUMPTION OF CAUSATION - IX. COMPENSATION FOR NON-PECUNIARY DAMAGES IN COLLECTIVE LITIGATION - X. THE IMPACT OF THE DEVELOPMENT OF COLLECTIVE LITIGATION ON THE FLOW OF LITIGATION - XI. CONCLUSIONS

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 *Dieselfgate* 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.

