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

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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 inibitoria 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. Carpagnano, *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 slightheadedness 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 autoreponsabilità 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.

