Essays

Unlawful Data Processing Prevention and Strict Liability Regime Under EU GDPR

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Abstract

This essay provides an in-depth analysis of the new special regulation on civil liability for unlawful processing of personal data and compensation for pecuniary and non-pecuniary damages – enacted pursuant to Art 82 of the *General Data Protection Regulation* (GDPR) – with respect to the protection of the fundamental personal rights to confidentiality and protection of personal data. An axiological reading – through the prism of the new principle of accountability – of the new GDPR's strict liability regime, and in particular of the rediscovery of the remedy of subjective moral damages and of its sanctionatory nature, is proposed in the light of the GDPR, the Italian Privacy Code, the Civil Code and the most recent case law of the Supreme Court of Cassation (San Martino 2019).

I. Foreword

The *General Regulation for the Protection of Personal Data*, EU Regulation 27 April 2016 no 679, which can be considered, given its transnational vocation, as a global legal benchmark in the area in question, as the General Data Protection Regulation (hereinafter, for the sake of brevity, GDPR), has recently introduced a new uniform regulatory structure for the processing of personal data.[1]

The protection of the individual, the protection of personal data and the regulation of liability for unlawful processing are central legal topics in the socio-economic context of *digital surveillance capitalism*.[2]

Civil liability for unlawful processing of personal data, as is known, has been analysed in jurisprudence both in regard to the historical Law of 31 December 1996 no 675, the first organic Italian regulatory text concerning protection of confidentiality and protection of personal data and, subsequently, in the light of

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[1] Let us refer on this point to the writer's recent monographic study: E. Tosi, 'Responsabilità civile per illecito trattamento dei dati personali e danno non patrimoniale', in G. Alpa ed, *Temi di Diritto Privato e di Diritto Pubblico* (Milano: Giuffrè, 2019); to which we may add the *Privacy Digitale* collection of studies, E. Tosi, *Diritto delle Nuove Tecnologie* (Milano: Giuffrè, 2019).

[2] S. Zuboff, 'Big other: surveillance capitalism and the prospects of an information civilization' 30 *Journal of Information Technology* (2015); and most recently: S. Zuboff, *Il capitalismo della sorveglianza* (Roma: Luiss University Press, 2019). See also *Garante per la Protezione dei dati personali, La società sorvegliata*, proceedings of the conference of 28 January 2016 (Roma, 2016).

Legislative Decree of 30 June 2003 no 196, so-called *Privacy Code*.[3]

The present study intends to record the independent distinctive traits of the European regulations on civil liability for unlawful processing of personal data with regard to the common rules on civil liability for unlawful acts,[4] more precisely to highlight their special and objective nature.

The examination of the subjective and objective profiles of this special

[3] See *ex multis* on the subject of the safeguarding of privacy and protection of personal data: G. Alpa and G. Conte, *La responsabilità d'impresa* (Milano: Giuffrè, 2015); V. Cuffaro and V. Ricciuto, *Il trattamento dei dati personali* (Torino: Giappichelli, 1999); G. Buttarelli, *Banche dati e tutela della riservatezza* (Milano: Giuffrè, 1997); F. Bravo, *Il "diritto" a trattare dati personali nello svolgimento dell'attività economica* (Padova: CEDAM, 2018); V. Franceschelli, 'Sul controllo preventivo del contenuto dei video immessi in rete e i provider. A proposito del caso Google/Vividown' *Rivista di diritto industriale*, 347 (2010); G. Finocchiaro, *Privacy e protezione dei dati personali. Disciplina e strumenti operativi* (Bologna: Zanichelli, 2012); V. Scalisi, *Il diritto alla riservatezza* (Milano: Giuffrè, 2002); C.M Bianca and F.D. Busnelli, *La protezione dei dati personali* (Padova: CEDAM, 2007); R. Panetta, *Libera circolazione e protezione dei dati personali* (Milano: Giuffrè, 2006); V. Cuffaro et al, *Il Codice del Trattamento dei dati personali* (Torino: Giappichelli, 2007); V. Sica, *La libertà fragile. Pubblico e privato al tempo della rete* (Napoli: Edizioni Scientifiche Italiane, 2014); D. Poletti and P. Passaglia, *Nodi virtuali, legami informali. Internet alla ricerca di regole* (Pisa: Pisa University Press, 2017); P. Perlingieri, 'Privacy digitale e protezione dei dati personali tra persona e mercato' *Il Foro Napoletano*, 481 (2018); C. Perlingieri and L. Ruggeri, *Internet e diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015); R. Pardolesi, *Diritto alla riservatezza e circolazione dei dati personali* (Milano: Giuffrè, 2003); G.M. Riccio, 'Diritto all'oblio e responsabilità dei motori di ricerca' *Diritto dell'informatica*, 753 (2014); F. Di Ciommo, 'Quello che il diritto non dice. Internet e oblio' *Danno e Responsabilità*, 1101 (2014); R. Tommasini, 'Riservatezza e Banche dati: il problema del controllo' *Diritto alla riservatezza e libertà di informazione* (Torino: Giappichelli, 1999); S. Tobani, 'Il danno non patrimoniale da trattamento illecito dei dati personali' *Diritto dell' informatica*, 427 (2017); F. Viterbo, *Protezione dei dati personali e autonomia negoziale* (Napoli: Edizioni Scientifiche Italiane, 2008); P. Manes, *Il consenso al trattamento dei dati personali* (Padova: CEDAM, 2001); G. Resta and A. Salerno, 'La responsabilità civile per il trattamento dei dati personali', in G. Alpa and G. Conte eds, *La responsabilità d'impresa* (Milano: Giuffrè, 2015), 684; N. Zorzi Galgano, *Persona e mercato dei dati. Riflessioni sul GDPR* (Padova: CEDAM, 2019), passim.

[4] On the subject of civil liability and compensation for damage in general see *ex multis* (no exhaustivity asserted): G. Alpa and G. Conte, *La responsabilità d'impresa* (Milano: Giuffrè, 2015); G. Alpa, *La responsabilità del produttore* (Milano: Giuffrè, 2019); G. Alpa and M. Bessone, *La responsabilità del produttore* (Milano: Giuffrè, 1999); G. Alpa and M. Bessone, *La responsabilità. Rischio d'impresa - assicurazione - analisi economica del diritto* (Milano: Giuffrè, 1980), II, 1; G. Alpa and M. Bessone, 'I fatti illeciti', in P. Rescigno ed, *Trattato Diritto Privato* (Torino: UTET, 1982), XIV, 295 et seq; C.M. Bianca, *Diritto Civile*, *La Responsabilità* (Milano: Giuffrè, 2011), 575; F.D. Busnelli, 'Illecito civile' *Enciclopedia giuridica*, (Roma: Treccani, 1989), XV, 1; F.D. Busnelli, 'Itinerari europei nella "terra di nessuno tra contratto e fatto illecito": la responsabilità da informazioni inesatte' *Contratto e impresa*, 539 (1991); M. Franzoni, 'L'illecito' *Trattato della Responsabilità civile* (Milano: Giuffrè, 2010), 941; C. Salvi, La *responsabilità civile* (Milano: Giuffrè, 1998), 110; E. Quadri, 'Considerazioni sugli orientamenti della giurisprudenza in tema di danno alla persona dopo l'intervento delle Sezioni Unite' *Il Foro Napoletano* (2012), 501; S. Rodotà, *Il problema della responsabilità civile* (Milano: Giuffrè, 1964), 89; D. Poletti, 'La dualità del sistema risarcitorio e l'unicità della categoria dei danni non patrimoniali' *Responsabilità civile e previdenziale*, 75 (2009); P. Perlingieri, 'La responsabilità civile tra indennizzo e risarcimento' *Rassegna di diritto civile*, 1066 (2004); P. Trimarchi, *Rischio e responsabilità oggettiva* (Milano: Giuffrè, 1961), 11; P. Trimarchi, *La responsabilità civile: atti illeciti, rischio, danno* (Milano: Giuffrè, 2017), 405.

liability regime clearly reveals the GDPR's role of safeguarding personal dignity and privacy through the protection of personal data in the society of digital surveillance capitalism.

In this respect the compensation of material and non-material – ie pecuniary and non-pecuniary – damages shall be eased and increased in order to balance overpower of data controllers and digital disruptive technologies versus the fundamental rights of the weaker party – the data subject – to personal dignity, privacy and personal data protection.[5]

Acknowledgement of these fundamental rights, even in the global digital society of surveillance capitalism, is to be no more underestimated: the fragility of the individual *versus* the Big Tech is astonishing and needs to be counterbalanced non only through sanctions but also through full compensation of damages and beyond.

Through the endorsement of *in re ipsa* damage doctrine, enhancement of personal data protection, dignity and fundamental rights can be easier achieved.

An interpretative reading is conducted, with a constitutionally oriented axiological approach, through the prism of the new *principle of accountability* placed by the GDPR at the foundation of the overall rationale of prevention and corporate risk management in relation to the processing of personal data.[6]

A constitutionally oriented axiological method of interpretation leads the jurist through the path of deeper attention to highest ordinamental values and in particular to the fundamental rights of person set forth by the Italian Constitution and the EU Charter of fundamental rights.[7]

It requires a broader functional analysis of the legal rules enshrined in the constitutionally integrated framework of legal sources, both Italian and European.

The GDPR's rules, indeed, do not only protect data: they protect at last personal dignity. The unlawful processing of personal data at its highest level infringes the personal dignity of the human being, including privacy and data protection related fundamental rights.

In this respect the fundamental principles set out by Art 2 of Italian Constitution, under which the Republic recognizes and guarantees the inviolable rights of the person – first of all personal dignity but also privacy in its broader meaning– together with the general solidarity principle.

[5] See Arts 7 and 8 of the Charter of Fundamental Rights of the European Union; see also Art 16(1) of the Treaty on the Functioning of the European Union (2012 OJ C 326) and Art 39 of the Treaty on the European Union (2012 OJ C 326). See H. Kranenborg, 'Article 8 – Protection of Personal Data' in S. Peers et al eds, *The EU Charter of Fundamental Rights – A Commentary* (Londra: Hart Publishing, 2014) 223; H. Hijmans, *The European Union as Guardian of Internet Privacy: The Story of Art 16 TFEU* (Berlino: Springer Verlag GmbH: 2016).

[6] The accountability principle is expression of general precaution principle. See on this latter: F. De Leonardis, *Il principio di precauzione nell'amministrazione del rischio* (Milano: Giuffrè, 2005); U. Izzo, *La precauzione nella responsabilità civile* (Padova: CEDAM, 2007), 642.

[7] P. Perlingieri, *Il Diritto Civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti* (Napoli: Edizioni Scientifiche Italiane, 2020).

Furthermore, at the European level these fundamental rights are typically declined by the legislator: see in this respect Arts 7 *Respect for private and family life* and 8 *Protection of personal data* of the EU Charter of fundamental rights, under which privacy and data protection are expressly mentioned and become specific fundamental rights of the person under the general legal umbrella of the broader principle of personal dignity.

Through privacy and data protection risk prevention, enforcement and strict liability regime, GDPR ensures easier access to judicial remedy by the data subject: through strengthening the restoration remedy of pecuniary and not pecuniary damages the European legislator finally protects personal dignity, which is fundamental right both under the Constitution and the EU Charter.

The aforesaid *principle of accountability*, which will be addressed more thoroughly below, accompanies and strengthens personal fundamental rights protection – which benefit of constitutional rank – through the traditional general principles of *lawfulness*, *proportionality*, *fairness* and *transparency*.

The only regulatory framework for civil liability in the area of unlawful processing of personal data is, at present, represented exclusively by Art 82 of the GDPR, which, in paragraph 1, reads as follows:[8]

> 'Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered'.

It seems that civil liability for the unlawful processing of personal data, according to the preferable and predominant doctrinal orientation, must be framed in terms of non-contractual liability:[9] indeed a *special liability regime*, for reasons that we shall see, further beyond the common framework of Aquilian rules delineated in Art 2043 of the Italian Civil Code.

[8] The new Privacy Code, amended (for harmonisation) by Legislative Decree no 101 of 2018, registered the repeal of the well-known Art 15 which governed, in the pre-existing internal regulation, the system of civil liability regarding unlawful processing of personal data.

[9] See in doctrine, *ex multis*, in terms of non-contractual liability: G. Resta and A. Salerno, *La responsabilità civile per il trattamento dei dati personali* n 3 above, 653; E. Lucchini Guastalla, 'Il nuovo regolamento europeo sul trattamento dei dati personali: i principi ispiratori' *Contratto e impresa*, 106 (2018); E. Navarretta, 'Commento *Sub* Art 9', in C.M. Bianca and F.D. Busnelli eds, *Tutela della "*privacy*". Commentario alla L. 31 dicembre 1996, n. 675* (Milano: Giuffrè, 2011), 323; and most recently, M.L. Gambini, *Principio di responsabilità e tutela aquiliana dei dati personali* (Napoli: Edizioni Scientifiche Italiane, 2018); *contra*, in terms of *contractual liability for breach:* F.D. Busnelli, 'Itinerari europei nella "terra di nessuno tra contratto e fatto illecito": la responsabilità da informazioni inesatte' *Contratto e impresa*, 539 (1991); *social contact liability*: C. Castronovo, 'Situazioni soggettive e tutela nella legge sul trattamento delle informazioni personali' *Europa e diritto privato*, I, 677 (1998). Finally, see the novel position that attempts to overcome the opposition contractual/extra-contractual liability by evoking the dual nature of this special liability: thus A. Bravo, 'Riflessioni critiche sulla natura della responsabilità da trattamento illecito dei dati personali', in N. Zorzi Galgano ed, *Persona e mercato dei dati* (Milano: Giuffrè, 2019), 383.

The problem of qualification, however, is bound to lose significance in the context of *European private law*:[10] the purpose of the EU regulation in question is precisely that of harmonising the regime of liability for unlawful acts in such a strategic sector, attenuating the peculiarities and legal traditions of the Member States' respective systems.[11] In this perspective, the EU Court of Justice's case law will therefore be fundamental.[12]

It is thus a question of a new special subsystem of civil liability directly regulated by European private law: seen in this perspective, the overcoming of the common requirement of *injustice of the injury* and the re-emergence of the subjective non-pecuniary moral damage, the compensability thereof and the rediscovery of the original function deserve particular attention.[13]

Since regulatory reference material is lacking, it is necessary to clarify – after having preliminarily highlighted its special nature, the subjective and objective profiles of the liability regime foreseen under the GDPR – the following central

[10] See on this point N. Lipari, *Le categorie del diritto civile* (Milano: Giuffrè, 2013), 194, who warns that while overcoming, in European private law, the traditional distinctions proper to individual States in European private law, still: 'The outlook of EU sources does not automatically lead to a necessary uniformity of national regulations (...) but the trend line is henceforth clearly drawn'. On the complex, almost paradoxical dynamics of relations between individual States' laws and European law in terms of *droit pluriel*, the system's porosity and post-modern law: G. Alpa, *Diritto Privato Europeo* (Milano: Giuffrè, 2016), 8.

[11] F.D. Busnelli, 'Itinerari europei nella "terra di nessuno tra contratto e fatto illecito: la responsabilità da informazioni inesatte' *Contratto e Impresa*, 539 (1991); C. Castronovo, *Responsabilità civile* (Milano: Giuffrè, 2018), 41; A. Di Majo, 'Fatto illecito e danno risarcibile nella prospettiva del diritto europeo' *Europa e Diritto Privato*, I, 19 (2006).

[12] Ex multis EUCJ Joined Cases C-293/12 and C594/12 Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others; Case C-362/14 Maximillian Schrems v Data Protection Comr.; Case C-131/12 Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González; Case C-311/18, Maximillian Schrems v Data Protection Comr.

[13] On the subject of *non-pecuniary damage* in general and of *moral damage*, see *ex multis* (no exhaustivity asserted): M. Astone, 'Danni non patrimoniali, Art. 2059 c.c.', in F.D. Busnelli ed, *Commentario Codice Civile* (Milano: Giuffrè, 2012); G. Bonilini, *Il danno non patrimoniale* (Milano: Giuffrè, 1983), 299; M. Franzoni, 'Il danno' *Trattato della Responsabilità civile* (Milano: Giuffrè, 2010); E. Navarretta, *Il danno non patrimoniale. Principi, regole e tabelle per la liquidazione* (Milano: Giuffrè, 2010); E. Navarretta and 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: Giuffrè, 2010), 98; G. Ponzanelli, *Il "nuovo" danno non patrimoniale* (Padova: CEDAM, 2004); G. Ponzanelli, *Il risarcimento integrale senza il danno esistenziale* (Padova: CEDAM, 2007); F. Quarta, *Risarcimento e sanzione nell'illecito civile* (Napoli: Edizioni Scientifiche Italiane, 2013); A. Ravazzoni, *La riparazione del danno non patrimoniale* (Milano: Giuffrè, 1962); R. Scognamiglio, *Responsabilità civile e danno* (Torino: Giappichelli, 2010); C. Scognamiglio, 'Il sistema del danno non patrimoniale dopo le decisioni delle Sezioni Unite' *Responsabilità civile e previdenziale*, 261 and 266 (2009); D. Messinetti, 'I nuovi danni. Modernità, complessità della prassi e pluralismo della nozione giuridica di danno' *Rivista critica di diritto privato*, 552 (2006); D. Messinetti, 'Danno giuridico' *Enciclopedia del diritto, Aggiornamento* (Milano: Giuffrè, 1997), III, 469; V. Scalisi, 'Danno alla persona e ingiustizia' *Rivista di diritto civile*, 152 (2007); V. Scalisi, 'Illecito civile e responsabilità: fondamento e senso di una distinzione' *Rivista di diritto civile*, 657 (2009).

theoretical and practical legal issues:

(i) compensation of damages deriving from unlawful processing, more precisely from mere *unlawful conduct*, as damage *in re ipsa*; (ii) broadening of the scope of damages by unlawful data processing that can be compensated: criticism of the case law's double filter of gravity and seriousness of the injury; (iii) reinterpretation of the bipolarity of pecuniary and non-pecuniary damages with consequent enhancement, and rediscovery, of the original deterrent-sanctioning function of the *subjective moral damage* under Art 2059 Civil Code; (iv) strengthened data subject's protection of the fundamental rights – the weaker party of the asymmetric relation established with the data controller – of personal data and privacy through broad and easier access to liability remedy and damages – both pecuniary and non-pecuniary – restoration even beyond full restoration in order to obtain a deterrent effect for prevent further infringements.

II. Special Nature of the Civil Liability for Unlawful Data Processing Under GDPR

Seen in the perspective of unitary safeguarding of personal rights, as is known, the processing of personal data has been recognised as having amulti-offensive potential, which may infringe many fundamental personal rights and interests deserving protection: rights to privacy, personal identity, protection of personal data, image, and the right to be forgotten.[14]

The GDPR, in order to achieve such a broad safeguarding function, presents a special model of liability for unlawful processing of personal data which – in the face of the significant business risk involved in the massive processing of personal data – strengthens the protection of the data subject from unlawful processing by following the path drawn by the previous domestic regulations set out in Art 15 of the old Privacy Code.

The need to rewrite the previous legal frame of data protection infringement

[14] G. Alpa, 'Privacy', in G. Alpa ed, *I precedenti, La formazione giurisprudenziale del diritto civile* (Torino: UTET, 2000), I, 259, and most recently G. Alpa, 'L'identità digitale e la tutela della persona. Spunti di riflessione' *Contratto e impresa*, 723 (2017); G. Alpa and G. Resta, 'Le persone fisiche e i diritti della personalità', in R. Sacco ed, *Trattato di diritto civile* (Torino: UTET, 2006); G. Finocchiaro, *Il diritto all'anonimato* (Padova: CEDAM, 2008); G. Finocchiaro, 'Identità personale (diritto alla)' *Digesto delle discipline privatistiche*, *Aggiornamento* (2010), 721; C.M. Bianca and F.D. Busnelli, *La protezione dei dati personali* (Padova: CEDAM, 2007); C. Mignone, *Identità della persona e potere di disposizione* (Napoli: Edizioni Scientifiche Italiane, 2014); P. Rescigno, 'Personalità (diritti della)' *Enciclopedia giu*ridica (Roma: Treccani, 1991), XXIV; S. Rodotà, *Elaboratori elettronici e controllo sociale* (Bologna: il Mulino, 1973); S. Rodotà, 'Persona, riservatezza, identità. Prime note sistematiche sulla protezione dei dati' *Rivista critica di diritto privato*, 583 (1997); V. Zeno Zencovich, 'I diritti della personalità', in N. Lipari and P. Rescigno eds, *Trattato di diritto civ*ile, *Le fonti e i soggetti* (Milano: Giuffrè, 2009), 495; A. Zoppini, 'I diritti della personalità delle persone giuridiche (e dei gruppi organizzati)' *Studi in onore di P. Schlesinger* (Milano: Giuffrè, 2004), I.

liability rules comes from far.[15]

The Directive 95/46 did not fully harmonize national privacy laws, and even within Europe, countries adopted different rules to attract Big Tech industry with signals of weak enforcement and competitive tax regimes.

Furthermore, Directive 95/46 did not contain any provision on data processor liability, with the exception of a duty of non-action under Art 16.[16]

Therefore, and quite significantly, under the previous regime, processors were regarded as duty-less subjects, in substance protected by data controllers' umbrella.

By introducing Art 82 GDPR, the EU legislator tries to solve – or at least to reduce – the debate over (i) the nature of liability; (iii) the burden of proof imposed on data subjects, and (iii) the extension of recoverable damages.[17]

This article only apparently seems to replicate what was already provided under Art 23 of the previous Directive 95/46.

Indeed, the main innovation of Art 82 of GDPR, in comparison with Art 23 of repealed Directive 95/46, relates not only to the imposition of cumulative liability as such between data controller and data processor) and imposition of an increasing number of obligations directly upon controllers and processors, but also to the fact that the GDPR set up a favourable burden of proof regime for the weaker part, namely the data subject.

The strict liability model of EU data protection law is consistent with the *Principles of European Tort Law* (PETL),[18] provided one takes into account the 'general' liability of controllers and the 'proportional' liability of processors. In many ways, the changes introduced by the GDPR constitute a special codification of general tort law principles.[19]

[15] See on the liability regime debate: B. Van Alsenoy, 'Liability under EU Data Protection Law: From Directive 95/46 to the General Data Protection Regulation' *JPITEC*, 277 (2016), and latest B. Van Alsenoy, *Data Protection Law in the EU: Roles, Responsibilities and Liability (Cambridge; Intersentia: 2019).*

[16] Art 16 of Directive 95/46, which specifies that the processor may not process personal data '*except on the instructions of the controller*', which is a requirement directly applicable to processors.

[17] G.M. Riccio, 'Certification mechanism and liability rules under the GDPR. When the harmonization becomes unification', in De Franceschi and A. Schulze eds, *Digital Revolution - New Challenges for Law* (München: Beck, 2019), 140; E. O'Dell, 'Compensation for Breach of the General Data Protection Regulation' *Dublin University Law Journal (ns)*, 97-164; D. Leczykiewicz, 'Compensatory Remedies in EU Law: The Relationship Between EU Law and National Law', in P. Giliker ed, *Research Handbook on EU Tort Law* (Cheltenham: Edward Elgar, 2017).

[18] The PETL were presented at a public conference on 19 and 20 May 2005, in Vienna. The print version of the Principles including a commentary thereto were published by Springer and are now distributed by Verlag Österreich. It should be noted that, as an academic piece, the PETL do not enjoy legal authority as such. Nevertheless, the PETL offer an interesting frame of reference when assessing any regulation of liability at European level, as they reflect what leading scholars have distilled as 'common principles' for European tort law liability. For additional information see http://www.egtl.org.

[19] The cumulative liability regime of Art 82(4) of the GDPR reflects the Principles of European Tort Law (PETL) regarding multiple tortfeasors. According to Art 9:101 of the PETL, liability is solidary 'where the whole or a distinct part of the damage suffered by the victim is attributable to two or more persons'. The same provision also stipulates that where persons are

Art 82 GDPR, to ensure maximum protection for the individual concerned by data processing, refers to conduct of the data controller that may be contrary to any provision of the regulation itself and of delegated acts, including internal regulations.

It cannot be overlooked that the framing the remedy of compensation pursuant to Art 82 GDPR within the more general context of the Aquilian liability pursuant to Art 2043 of Civil Code, minimising the special character thereof, benefits from the approval of the most recent case law regarding unlawful processing of personal data, which links compensation to the importance of the harm done to the data subject, thus adhering to the general parameters of *unlawfulness of the conduct and injustice of the damage* traditionally required by the Courts.[20]

Violation of the procedural rules prescribed for the protection of the personal right to the safeguarding of data would, therefore, on the basis of such orientation, be a necessary – but not sufficient – condition to activate the obligation of compensation.

However, the traditional general prerequisite of injustice of the damage must be overcome:[21] the violation of the right to protection of personal data does not seem to require – unlike in the common regime – proof by the injured party of

subject to solidary liability, the victim may claim full compensation from any one or more of them, provided that the victim may not recover more than the full amount of the damage suffered by him. See I. Gilead et al, 'General Report – Causal uncertainty and Proportional Liability: Analytical and Comparative Report', in I. Gilead et al eds, *Proportional Liability: Analytical and Comparative Perspectives, Tort and Insurance* Law (Berlino: De Gruyter, 2013), 1 et seq. The term is used to signal that each party's liability exposure is limited to their proportional share in causing the damages. In case of joint and several liability, each party can be held liable by data subjects for the full amount. See also H. Koziol and R. Schulze eds, *Tort Law of the European Community* (Berlino: Springer, 2008) 27-28; C. van Dam, *European Tort Law* (Oxford: Oxford University Press, 2013) 359-360.

[20] Thus Corte di Cassazione 7 October 2015 no 20106, available at at www.cortedicassazione.it, (for the purposes of a finding of liability with award of damages), the mere allegation, the proof of unlawful conduct and the specific injustice of the damage are required; Corte di Cassazione 20 January 2015 no 824, available at at www.cortedicassazione.it, according to which 'the compensation for non-pecuniary damage cannot derive from the mere infringement of the provisions of Decreto Legislativo 30 June 2003 no 196, Arts 11-15 and Art 2050 Code Civil albeit comprising unjustified violation of the fundamental right to the protection of personal data; it is required that such violation have concretely caused an damage which, in going beyond the aforementioned threshold of tolerability, renders its effect significantly appreciable and the remedy constitutionally worthy'; Corte di Cassazione 15 July 2014 no 16133, *Danno e responsabilità*, 339 (2015); Corte di Cassazione 10 May 2001 no 6507, *Responsabilità civile e previdenziale*, 1177 (2001), with a note by P. Ziviz, *I "nuovi danni" secondo la Cassazione.*

[21] Subsequently to the teachings of S. Rodotà and P. Schlesinger, respectively, in relation to damage *non iure* – in the absence of grounds of justification – and *contra ius* – harmful to subjective legal situations – the concept of *injustice* of damage takes into account, as now generally agreed, both qualifications in the dual perspective of attention to the position of both the injured and the injuring party. See on this point respectively: S. Rodotà, *Il problema della responsabilità civile* (Milano: Giuffrè, 1964), 16; P. Schlesinger, 'La "ingiustizia" del danno nell'illecito civile' *Jus*, 342 (1965), For a critique of the unjust damage as damage *non iure*, see C. Castronovo, *La nuova responsabilità civile* (Milano: Giuffrè, 2006), 24, according to whom 'the qualification of *non iure*, meaning unlawfulness of the conduct, cannot be ascribed to the injustice'.

objectively assessable prejudicial consequences.

The violation of a fundamental right of the person – such as that to the confidentiality and protection of personal data – is always to be deemed significant in light of a constitutionally oriented axiological reading: to strengthen its protection, the compensation for damage is *in re ipsa*, since it is an automatic consequence of an illegal conduct, ie not compliant to the GDPR's protective mandatory principles.[22]

On the other hand, Art 82 of the GDPR, in order to strengthen the protection of the injured party – as Art 15 of the Privacy Code previously did – omits reference to the further clause of injustice: the *ipso iure* removal of this aspect from the judicial assessment comes from the express omission of the specific common requirement.[23]

Thus, on the basis of an authoritative jurisprudential orientation, the structure of the liability changes from a common rule into a special rule: the assessment of the injury as an effect of harmful conduct is no longer significant, but more simply the illegal conduct *ex se* is significant.[24]

This marks the shift from the *paradigm of common liability*, which is grounded in the assessment of the damage as a consequence of the harmful conduct as per Art 2043 of Civil Code, to the *paradigm of special liability*, in which the damage is identified *tout court* with the illegal conduct: *ergo*, once the violation of the rule of conduct is proved, the damage is proved, at least in terms of existence of a right to protection.[25] The aspect of the *gravity of the damage*

[22] The prevailing case law on the subject seems to be oriented in this direction: see *ex multis* Tribunale di Potenza 27 January 2010, *Danno e responsabilità*, 131 (2011); Tribunale di Mantova 27 May 2008, www.ilcaso.it; Tribunale di Milano 5 June 2007, *Guida al diritto*, 41, 56 (2007); Corte d'Appello di Milano, 19 June 2007, *Diritto dell'informatica*, 1101 (2007); Tribunale di Latina, 19 giugno 2006, *Il Foro Italiano*, I, 324 (2007); Tribunale di Roma, 12 March 2004, *Danno e responsabilità*, 879 (2005); Tribunale di Milano, 8 August 2003, *Danno e responsabilità*, 303 (2004).

[23] In the repealed Art 15 of the Privacy Code, as in the pre-existing Art 18 of Law 31 December 1996 no 675, use was made of the indeterminate reference to harm caused to others by a processing of personal data with neither a definition of the unlawful processing nor an invocation of the injustice of the damage as a selective criterion of the compensable harm, but expressly referring to the repealed Art 11 of the Privacy Code on the processing procedures and the requisites of the data for a reconstruction of the objective content of such unlawful processing. See on this aspect, in jurisprudence: E. Navarretta, 'Commento Sub art. 1 del D Lgs., 30 giugno 2003, n. 196', in C.M. Bianca and F.D. Busnelli eds, *La protezione dei dati personali* n 3 above, 250, which shows the indeterminacy of the principles as per Art 11 of the Privacy Code, deeming that the unlawful conducts originate from a definition of illegality ascribable to the *non jure* area.

[24] D. Messinetti, 'I nuovi danni' n 13 above, 552. According to the illustrious author, 'the question of personal damage, brought back to the conduct's reprehensible character in itself, in consideration of the special nature of the injured value, proposes anew the significance of the person's juridical value in its plainest dimension: the illegal conduct'.

[25] According to the jurisprudence favourable to acknowledgement of the special nature of such liability for unlawful processing, only the *conduct's unlawfulness* is significant, there being no need to demonstrate the injustice of the damage since this is presupposed by the law, and consequently the compensation for the *damage's effect* or the damage *in re ipsa* is configurable. These considerations have been formed in relation to civil liability pursuant to Art 15 of the previous Privacy Code: but now analogous considerations may be pertinent for Art 82 of the GDPR, also in light of the GDPR's recital 146, which expressly evokes the concept of *harmful*

will therefore be significant exclusively in terms of *quantum debeatur*.

The more traditional approach rigidly anchored in the common Aquilian rules – based on fault – does not, it is repeated, seem convincing in that it tends to minimise the special nature of the strict liability subsystem set out in the area of personal data protection[26] – which is not based on fault but on the mere infringement of GDPR rules – and, consequently, to lessen the potential of the deterrent function and the function of protection of the data subject, weaker party in an asymmetrical relationship with the data controller.

All the more so now when the purpose of the GDPR is, if anything, precisely the opposite, ie to harmonise, at EU level, the regime of strict liability for unlawful acts in the strategic sector of data processing, attenuating the legal peculiarities and traditions of the Member States' respective legal systems.

III. Subjective Profile: Typical Roles of Personal Data Recipients

As regards the subjective profile, it is useful to summarize the types of relevant actors foreseen by the GDPR and concerned by the new special regime of strict civil liability for unlawful processing of personal data.[27]

event. The question of liability for illegal processing, therefore, is posed in terms of autonomy with respect to the traditional legal model as per Art 2043 Civil Code, insofar as it is built in function of conduct reprehensible in its unlawfulness, assessed *ex ante* through the prescription of principles and rules of conduct regarding the processing's legality which discount further ascertainment of causation of an unjust damage, rightly presupposing same by reason of the breach of the guideline regarding the processing's legality. See in this regard: E. Lucchini Guastalla, 'Il nuovo regolamento europeo sul trattamento dei dati personali: i principi ispiratori' *Contratto e impresa*, 106 (2018); E. Lucchini Guastalla, 'Privacy e Data Protection: principi generali', in E. Tosi ed, *Privacy Digitale* (Milano: Giuffrè, 2019), 88; D. Messinetti, 'I nuovi danni' n 13 above, 543; F. Bilotta, 'La responsabilità civile nel trattamento dei dati personali', in G. Panetta ed, *Circolazione e protezione dei dati personali* (Milano: Giuffrè, 2019), 445 ; F. Colonna, 'Sistema della responsabilità civile da trattamento dei dati personali', in R. Pardolesi ed, *Diritto alla riservatezza e circolazione dei dati personali*, n 3 above; A. Thiene, 'Segretezza e riappropriazione di informazioni di carattere personale: riserbo e oblio nel nuovo Regolamento europeo' *Nuove leggi civili commentate*, 443 (2017); G. Ramaccioni, *La protezione dei dati personali e il danno non patrimoniale* (Napoli: Jovene, 2017), passim.

[26] See on this subject: G. Alpa, *La responsabilità civile*' (Milano: Giuffrè, 1999), 206; G. Alpa, 'Nuove figure di responsabilità civile di derivazione comunitaria' *Responsabilità civile e previdenizale*, 5 (1999); G. Alpa, *Il diritto privato nel prisma della comparazione* (Torino: Giappichelli, 2004), 269, who evidences the multiplication of subsystems of EU origin with respect to the general model of liability outlined by the civil code and the prevalence of their special character over traditional law.

[27] G. Finocchiaro, *Il nuovo Regolamento europeo sulla* privacy *e sulla protezione dei dati personali* (Bologna: Zanichelli, 2017), 12; G. Finocchiaro, 'Introduzione al Regolamento europeo sulla protezione dei dati' *Nuova giurisprudenza civile commentata*, 1 (2017); E. Lucchini Guastalla, 'Il nuovo Regolamento Europeo sul trattamento dei dati personali: i principi ispiratori' *Contratto e Impresa*, 106 (2018); V. Cuffaro, 'Il diritto europeo sul trattamento dei dati personali' *Contratto e Impresa*, 1098 (2018); A. Mantelero, 'Responsabilità e rischio nel Regolamento UE 2016/679' *Nuove leggi civili commentate*, 144 (2017); V. Ricciuto, 'La patrimonializzazione dei dati personali. Contratto e mercato nella ricostruzione del fenomeno' *Diritto dell'informazione e*

The applicable legal regime is, indeed, differentiated by the GDPR according to the different subjective qualification of the injuring party, as follows: Data Controller (Art 24 GDPR); Data Processor or Sub-Processors (Art 28 GDPR); and person in charge of the protection of personal data, so-called *Data Protection Officer* (DPO – Art 37 GDPR).

The Controller (Art 24 GDPR) is liable for damages caused by its processing that breaches any rule prescribed by the regulation in question. Similar liability also exists in the case of multiple Joint Data Controllers, whose liability is thus cumulative.

The principle of cumulation, albeit on the basis of different prerequisites of application, applies also in the case of multiple Data Processors.

The Sub-Processors, on the other hand, are significant only in the *internal relations* between Processor-Sub-Processors, the liability of the Processor alone having external effects.

On the other hand, on the basis of the special rules examined here the new role of the DPO does not appear to be directly liable towards third parties: nothing excludes, however, legal action on the basis of the common rules of the *Aquilian* liability.[28]

In all the aforementioned cases –multiple Controllers of the same processing and multiple Processors – there arises, with an external effect, a true and proper joint and several obligations – undifferentiated – of compensation for the entire damage suffered by the data subject, irrespective of the effective causal contribution of the individual subjects involved in the data processing chain, which is typical of an objective liability.

For the internal effects, however, different causal concurrence will be important in determining the harmful event resulting from the unlawful data processing.

In the light of an increased safeguarding of the data subject having suffered damage from the unlawful processing of personal data – to whom the new European legislation intends to ensure full and effective compensation for the damage suffered – the rule of joint and several liability for compensation for the damage caused by the data processing, laid down in Art 82(4) GDPR, must apply in the case where more controllers, more processors or more of both are involved.

The foregoing is consonant with the provisions of the Civil Code (Art 2055), pursuant to which if the damage is imputable to more than one person, each is jointly and severally liable for the whole of the damage towards the injured party, who thus is not affected by the possible insolvency, untraceability or non-imputability of any of the injuring parties.[29]

dell'informatica, 689 (2018); M.L. Gambini, *Principio di responsabilità e tutela aquiliana dei dati personali* (Napoli: Edizioni Scientifiche Italiane, 2018), passim; M.L. Gambini, *Dati personali e Internet*, (Napoli: Edizioni Scientifiche Italiane, 2008), passim; S. Rodotà, *Tecnologie e diritti* (Bologna: il Mulino, 1995).

[28] On this profile see, more thoroughly, E. Tosi, *Responsabilità civile* n 1 above.

[29] Pursuant to Art 2055 Code Civil, not only are all those having contributed to the

Finally, the previous generic invocation of 'whoever causes injury' adopted first by Art 18 of Law no 675 of 1996 and then by Art 15 (now repealed) of the Privacy Code is to be deemed superseded: the need to conform the national legislation to the GDPR's requirements calls, therefore, necessarily to activate only for the *data subjects as identified* under the regime of special liability set forth by aforementioned Art 82.

On the other hand, the common rules of civil liability pursuant to Art 2043 of Civil Code continue to apply to other offenders not defined by the regulation in question.

IV. Objective Profile: The Illegality of Conduct in the Light of Accountability Principle

As regards the objective profile, Art 82, para 1, GDPR refrains from identifying a subset of more serious instances of unlawful conduct, confining itself to invoke 'an infringement of this Regulation', hence any breach of the GDPR's rules of conduct,[30] thus ensuring the maximum possible protection for the data subject.

Processing not conforming to the GDPR – more precisely, unlawful processing as giving rise to the right to compensation – in view of recital no 146

> 'also includes processing that infringes delegated and implementing acts adopted in accordance with this Regulation and Member State law specifying rules of this Regulation'.

The new special civil liability regime outlined by Art 82 GDPR[31] contains a

commission of the single unlawful act jointly and severally obliged to compensate, but also the authors of several acts or omissions, constituting distinct unlawful acts all causally linked to the damage, are so obliged. In this regard, *ex multis* in case law: Corte di Cassazione 3 May 2016 no 8643, *Giurisprudenza italiana*, 2345 (2016); Corte di Cassazione 24 September 2015 no 18899, *Pluris Banche dati giuridiche*; Corte di Cassazione 25 September 2014, no 20192, *Responsabilità civile e previdenziale*, 2058 (2014); Corte di Cassazione 12 March 2010 no 6041, *Massimario giustizia civile*, 360 (2010); Corte di Cassazione 18 July 2002 no 10403, *Il Foro Italiano*, I, 2147 (2003); Corte di Cassazione 4 June 2001 no 7507, *Repertorio del Foro Italiano*, 'Responsabilità civile', no 38 (2001).

[30] See recital no 75 according to which: 'The risk to the rights and freedoms of natural persons, of varying likelihood and severity, may result from personal data processing which could lead to physical, material or non-material damage, in particular: where the processing may give rise to discrimination, identity theft or fraud, financial loss, damage to the reputation, loss of confidentiality of personal data protected by professional secrecy, unauthorised reversal of pseudonymisation, or any other significant economic or social disadvantage; where data subjects might be deprived of their rights and freedoms or prevented from exercising control over their personal data'. See, besides, recital no 83 of the GDPR.

[31] See on the new civil liability for the processing of personal data, in addition to E. Tosi, *Responsabilità civile* n 1 above, passim; M.L. Gambini, *Principio di responsabilità* n 9 above, passim; M. Ratti, 'La responsabilità da illecito trattamento dei dati personali nel nuovo Regolamento', in R. Finocchiaro ed, *Il nuovo Regolamento europeo* n 27 above, 615

reference to the *act* consisting in whatsoever activity qualifiable as data processing not in conformity with the rules therein, pursuant to the broad notion outlined in Art 4(2) GDPR.[32]

An act – more precisely, activity of personal data processing – which, it is repeated, becomes illegal whenever it is conducted in breach of the GDPR mandatory rules.

To be recalled *ex multis* (no exhaustivity asserted) are the fundamental principles[33] applicable to the processing of data (Art 5 GDPR), which substantially confirm principles already known in the 'old' Privacy Code:[34] (a) lawfulness, fairness and transparency; (b) limitation of purpose; (c) data minimisation; (d) accuracy; (e) storage limitation; (f) integrity and confidentiality.

The EU reform also introduces the new fundamental *principle of accountability* (Art 5 GDPR), establishing the Controller's liability.[35]

The *accountability principle*[36] is an expression of the general *precaution principle*,[37] the strengthened liability under Art 2050 Civil Code and especially

[32] Precisely: 'any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction'.

[33] See in general G. Alpa, 'I principi generali', in G. Iudica and P. Zatti eds, *Trattato di diritto privato* (Milano: Giuffrè, 2nd ed, 2006), passim.

[34] The jurisprudence formed under the repealed Art 15 of the Privacy Code – now replaced on this specific point by Art 82 GDPR – enhanced the close connection with the Privacy Code as a whole: the latter states principles and conditions of lawfulness of the processing of personal data and sets forth the procedures and limits within which it may be affected. In this perspective, the remedy of compensation becomes an instrument for fastening the aforementioned protection system, designed to ensure abidance by the regulatory framework. See in this respect: D. Messinetti, *I nuovi danni* n 13 above, 564; G. Ramaccioni, *La risarcibilità del danno non patrimoniale da illecito trattamento dei dati personali* (Napoli: Jovene, 2017), 268; F. Di Ciommo, 'Il danno non patrimoniale da trattamento dei dati personali', in G. Ponzanelli ed, *Il nuovo danno non patrimoniale* (Milano: Giuffrè, 2004), 274; S. Sica, 'Commento Sub artt. 11-22', in S. Sica and P. Stanzione eds, *La nuova disciplina della* privacy *(d.lgs. 30 giugno 2003, n. 196)*, (Bologna: Zanichelli, 2005), 8; F. Colonna, 'Il sistema della responsabilità civile da trattamento dei dati personali', in R. Pardolesi ed, *Diritto alla riservatezza* n 3 above; G. Resta and A. Salerno, *La responsabilità civile* n 3 above, 660.

[35] See also recital no 74 of the GDPR.

[36] G. Buttarelli, 'The accountability principle in the new GDPR' (Luxembourg, 30 September 2016:), during a speech as EDPS at the European Court of Justice stated about accountability principle meaning that: it helps in moving data protection from theory to practice. Accountability goes beyond compliance with the rules it implies culture change. As such, accountability needs to be embedded in the organisation'.

[37] See *Communication on the precautionary principle* COM/2000/0001 final wich states as follows: 'The precautionary principle is not defined in the Treaty, which prescribes it only once - to protect the environment. But in practice, its scope is much wider, and specifically where preliminary objective scientific evaluation, indicates that there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the high level of protection chosen for the Community. (…) The precautionary principle should be considered within a structured approach to the analysis of risk

established under European law under Art 191 of TFUE specifically for environmental protection from scientific and technical uncertainty.[38]

The *precaution principle*[39] is based on the acknowledgement of the scientific and technological failure to foresee every risk with reference to development of new technologies: the *black swan effect* using an emblematic expression of Nassim Taleb.[40]

Evaluation and *ex ante* risk management under GDPRcan be duly applied also to data processing in the digital surveillance society.

Not only adequate technical and organizational measures of data processing risk prevention but even broader measures of *precaution* related not only to a probable risk but also to a mere possibility, provided that the risk is typical of data processing as assessed on a case-by-case basis.[41]

Furthermore, Art 5(2) GDPR states that, in addition to having to guarantee compliance with the aforesaid principles in order to *manage and prevent the risk* associated with the processing of personal data, the Controller must be able to *demonstrate* such compliance: it is deemed that in this complex articulation of duties – referred mainly to data controller but also to the data processor – the

which comprises three elements: risk assessment, risk management, risk communication. The precautionary principle is particularly relevant to the management of risk. (…). Recourse to the precautionary principle presupposes that potentially dangerous effects deriving from a phenomenon, product or process have been identified, and that scientific evaluation does not allow the risk to be determined'.

[38] The principle is not new but is emerging in the international debate before GDPR enactment: Working Party ex Art 29 of Council Directive 95/46/EC, 'Opinion 3/2010 on the principle of accountability' (Bruxelles, 2010); OECD *'Guidelines on the Protection of Privacy and Transborder Flows of Personal Data'* (Parigi, 1980): '*A data controller should be accountable for complying with measures wich give effect to the principle stated above*' (Art 14). Furthemore: The Center for Information Policy Leadership, *Data Protection Accountability: The Essential Elements A Document for Discussion,* (Galway, 2009) part of a wider set of studies *Accountability-Based Privacy Governance Project* (Galway, 2009-2013). Accountability it is one of the main concepts of the *APEC Privacy Framework* (Singapore, 2015) and its cross border privacy rules. In this respect also *Binding Corporate Rules* ('BCRs'), which are used in the context of international data transfers, reflect the accountability principle.

[39] The *precaution principle* is already included in civil liability strentghened regime under Art 2050 Code Civil for dangerous activities. See on precaution principle: A. Vivarelli, *Il consenso al trattamento dei dati personali nell'era digitale* (Napoli: Edizioni Scientifiche Italiane: 2019), 184; F. De Leonardis, *Il principio di precauzione nell'amministrazione del rischio* (Milano: Giuffrè: 2005); U. Izzo, *La precauzione nella responsabilità civile* (Padova, CEDAM, 2007), 642; E. Del Prato, 'Il principio di precauzione nel diritto privato: spunti' *Rassegna di diritto civile*, 34 (2009).

[40] N. Taleb, *Black Swan* (New York: Random House, 2007).

[41] The precaution principle is an elastic one and is connected also to objective liability doctrine: it can be minimized or maximized by legislator. At its severe consequences can be, ipothetically, even cover the unforeseen and unforseable. But this extreme extension interpretation is not endorsed by authoritative doctrine on liability: see P. Troimarchi, *La responsabilità civile: atti illeciti, rischio e danno* (Milano: Giuffrè, 2019), 74, wich criticizes extremist lectures of precaution principle because even strict liability has to be fair and economic sustainable by entrapreneurs. Otherwise, the concept itself of objective or strict liability – ie liability without fault – will be hinderend if automatically extended by law to cover, at any economic cost, the unknown at the state of the art technnology and insofar the incalculable risks too.

essence of the new *principle of accountability* may be perceived.

Art 6 of the GDPR also establishes parameters of lawfulness of the processing – in addition to the general principles outlined in Art 5 – essentially, as already noted, for the purposes of the related assessment of the illegality of conduct: *principle of fairness, transparency, accuracy and proportionality*.

An innovative and at the same time insidious principle in terms of compliance in that it may be determined, case by case, concretely in relation to the type of data processed and to the Controller's procedures and organisational structure.

In application of this principle, the Controller, pursuant to Art 24 GDPR, must implement, as well as periodically review and update, *adequate technical and organisational measures* so as to guarantee and *be able to demonstrate* that the processing operations are conducted in compliance with the new regulation.

For this purpose, it is incumbent to take into account the assessment parameters prescribed by the GDPR, among which: (i) nature of the processing and of the data processed; (ii) scope, context and purpose of the processing; (iii) associated risks, with differentiated probability and gravity for the rights and freedoms of natural persons; (iv) quantity of data processed and number of data subjects; (v) state of the technology; (vi) economic sustainability.

On the basis of the rules of accountability – which mark the shift from the previous regulatory model inspired by the prevailing, if not exclusive, significance of the *ex-post liability* to an evolved and complex regulatory model centred on the valorisation, first and foremost, but not only, of the *imposition of responsibility*, conscious and documented, *ex ante* – the principles set down by the new regulation cease to be mere formal and abstract obligations and become adaptable and flexible obligations in relation to the actual demands of application that have emerged – case by case, concretely – from the necessary preliminary analysis and the specific, more precisely personalised self-diagnosis of each individual Controller.

In substance, the introduction of the *principle of accountability* entails the burden of adopting a new *preventive and responsible* approach in data protection management on the part of individual business organisations, marking the emergence of complex *administration and prevention duties differentiated* on the basis of the *specific risk* associated with the particular personal data processing put into practice.

V. Liability Objectification for Unlawful Data Processing

Art 82(3) GDPR, in establishing that Controllers or Processors are exempted from liability if they demonstrate that the harmful event *is in no way ascribable* to themselves, follows – in strengthening the extension of liability for unlawful processing of personal data – the path already drawn by EC Directive 95/46, which in its Art 23 called for the fixing of a similar liability regime based on proof

of no imputability of harmful event.[42]

Jurisprudence and prevailing case law in regard to the nature of the special liability for unlawful processing of personal data – emerged under the repealed Art 15 of the Privacy Code but, insofar as compatible, applicable to the new, analogous (in many respects) regime prescribed by Art 82 GDPR prefer the qualification in terms of *strict liability*,[43] more precisely presumption of liability *tout court* for the injuring party who will be bound, in order to avoid the burden of liability, to provide proof of unforeseeable circumstances, force majeure, or act of a third party or of the injured party.[44]

According to another jurisprudential and case law orientation, it should be rather qualified as an *aggravated liability*[45] in a strict sense, based on the presumed

[42] Aforesaid Directive's recital no 55 further exemplified the aforesaid principle in specifying that 'any damage which a person may suffer as a result of unlawful processing must be compensated for by the controller, who may be exempted from liability if he proves that he is not responsible for the damage, in particular in cases where he establishes fault on the part of the data subject or in case of force majeure'.

[43] On the objective nature of liability pursuant to Art 2050 Civil Code see, in general without specific reference to the processing of personal data, in the jurisprudence: G. Alpa and M. Bessone, *La responsabilità del produttore* (Milano: Giuffrè, 1999); G. Alpa and M. Bessone, *La responsabilità. Rischio d'impresa – assicurazione – analisi economica del diritto* (Milano: Giuffrè, 1980), II, 1; M. Franzoni, 'Responsabilità per l'esercizio di attività pericolose', in G. Alpa and M. Bessone eds, *La responsabilità civile* (Torino: UTET, 1987), II, 462, since the case law does not seem inclined to consider the examination of the diligence practised in adopting preventive measures; P. Trimarchi, *Rischio e responsabilità oggettiva* (Milano: Giuffrè, 1961), 11; P. Trimarchi, *La responsabilità civile: atti illeciti, rischio, danno* (Milano: Giuffrè, 2017), 405: it is a matter of a particular example of strict liability, more precisely of an objectively avoidable liability for risk, based on business risk; M. Comporti, *Esposizione a pericolo e responsabilità civile*, (Napoli: Edizioni Scientifiche Italiane, 1965), 176.

[44] See, in favour of the qualification of the liability for unlawful data processing in terms of strict liability: M. Franzoni, 'Responsabilità derivante da trattamento dei dati personali', in G. Finocchiaro and F. Delfini eds, *Diritto dell'informatica*, (Milano: Giuffrè, 2014), 831; G. Resta and A. Salerno, *La responsabilità civile per il trattamento dei dati personali*, n 3 above, 670, interpret the reference to Art 2050 Civil Code in the sense of the mere inversion of the burden of proof in favour of the injured party and extension of the duty of care incumbent on the injuring party; F. Colonna, 'Il danno da lesione della privacy' *Danno e Responsabilità*, 18 (1999); P. Ziviz, 'I danni non patrimoniali', in P. Cendon ed, *Il diritto italiano nella giurisprudenza* (Torino: UTET, 2012), 367. See in this regard *ex multis*: Tribunale di Bari 23 July 2010, *Responsabilità civile e previdenza*, 864 (2010); Tribunale di Pordenone 16 April 2010, *Danno e responsabilità*, 215 (2011); Tribunale di Lecce 5 August 2008, *Responsabilità civile e previdenza*, 2541 (2009); Corte di Cassazione 14 May 2013 no 11575, *Guida al diritto*, 57, 33 (2013); Corte di Cassazione 17 December 2009 no 26516, *Massimario Giustizia civile*, 12, 1704 (2009); Corte di Cassazione 4 May 2004 no 8457, *Il Foro Italiano*, I, 2378 (2004). See in this regard, in the related case law: Corte d'Appello di Milano 11 April 2017 no 1519, unpublished; Tribunale di Trento 11 September 2015 no 863, unpublished.

[45] On the nature of the liability pursuant to Art 2050 Civil Code see, in general, in the jurisprudence: C.M. Bianca, *Diritto Civile*, *La Responsabilità* n 4 above, 709. Likewise, in the prevailing case law one notes some decisions that expressly admit the presumption of fault to be borne by the injuring party in the case as per Art 2050 Civil Code: Corte di Cassazione 5 July 2017 no 16637, *Massimario Giustizia civile* (2017), for which, in a matter of liability for exercise of a dangerous activity, in order to overcome the presumption of fault placed on the party exercising

fault of the subject performing tasks of personal data processing and on the inversion of the burden of proof onto the injured party: the injuring party may escape the burden of liability only by demonstrating, in this case, that it has adopted all appropriate measures – of prudence, care and diligence – to avoid the damage in accordance with the principles and rules of personal data processing prescribed by current legislation (thus, previously, the *Privacy Code* and the implementing legislation; now the GDPR, the *harmonised Privacy Code* and the implementing legislation compatible with the new EU regulatory framework).[46]

It has, however, been acutely observed that the debate between objectification and aggravation of the liability – 'our continuing to wonder whether it is a question of attenuated strict liability or of liability for presumed fault' – risks turning 'into a sterile doctrinal dispute – with no basis in case law': such jurisprudential view opts for an intermediate solution in terms of liability the contents of which may be entrusted only to the 'living law' called upon to supplement the content of the exonerating proof.[47]

At this point it is a matter of correctly framing the regime of liability for the unlawful processing of personal data laid down in Art 82 GDPR, between subjective and objective reading.[48]

As has been said above, the GDPR regulates solely the processing of data carried out in the exercise of business and professional activity in a broad sense – those effected by the natural person for the exercise of merely personal or domestic activities are excluded –, introducing principles and rules of conduct that are very structured and penetrating from the viewpoint of the fundamental, and immanent, principle of *ex ante* imposition of liability that permeates the entire EU regulatory apparatus in view of a diligent and mindful management of

such activity by Art 2050 Civil Code the simple proof of the unforeseeability of the harm is not sufficient, the injuring party having, instead, to prove that the harm could not have been avoided via the adoption of the preventive measures which the standards of the activity or common diligence imposed; Corte di Cassazione 20 May 2016 no 10422, *Massimario Giustizia civile* (2016).

[46] F. Macario, 'La protezione dei dati personali nel diritto privato europeo', in V. Cuffaro and V. Ricciuto eds, *Il trattamento dei dati personali* n 3 above, 48, n 104 and 108, expresses himself in terms of aggravated liability for presumed fault. See the most recent rulings of the Court of Cassation, which discern in Art 15 of the Privacy Code a hypothesis with inversion of the burden of proof regarding the injuring party's liability, more precisely: presumed fault: Corte di Cassazione 25 January 2017 no 1931, *Responsabilità civile e previdenza*, 837 (2017), with a note by F. Foglia, 'Unlawful reporting in Central Risks and in *re ipsa* damages'.

[47] F.D. Busnelli, 'Il "trattamento dei dati' personali" nella vicenda dei diritti della persona: la tutela risarcitoria', in V. Cuffaro et al eds, *Trattamento dei dati e tutela della persona* (Milano: Giuffrè, 1999), 185.

[48] Among the first commentaries will be noted: (*i*) for an *objective reading*: E. Tosi, 'Responsabilità civile per trattamento illecito dei dati personali' n 25 above, 619 and 650; A. Parisi, 'Responsabilità e sanzioni', in S. Sica et al eds, *La nuova disciplina europea della* privacy (Padova: CEDAM, 2016), 300, according to whom the European legislator, in the 'amended regulation has in a certain manner, in turn, transposed the severity of Italian law, deeming it, in this matter, more adequate'; (*ii*) for a *subjective reading*: M. Ratti, 'La responsabilità da illecito trattamento' n 31 above, 618 and 628; M.L. Gambini, *Principio di responsabilità* n 9 above, 75.

the risks associated with data processing in order to mitigate the harmful potential with respect to the fundamental rights of the person, including the rights to the safeguarding of personal data, confidentiality and personal identity.

Such analytical behavioural obligations, which contribute to the outlining of a model of abstract conduct that is diligent and compliant with the GDPR, as has been observed in the jurisprudence, operate ambiguously between the objective level, as elements constitutive of the offence, and the subjective level, colouring the requisite of the fault of the processing's author with a peculiar content of specificity that ends up being translated into objective fault.[49]

The foregoing has been noted at least in those cases where the rules adopt a precise definition of the obligations placed on controllers and processors of data. Similarly to what is prescribed in the contractual context, an abstract model is outlined that is made up of mandatory guidelines for conduct to be followed in personal data processing, laid down by the GDPR: the infringement of these mandatory rules constitutes in itself negligence or incompetence irrespective of subjective evaluations regarding the conduct's unlawfulness.[50]

Furthermore, it seems proper to include in the scope of application strict objective parameters of liability for unlawful processing pursuant to Art 82 GDPR by reason of the *principle of accountability* emerging from the combined provisions of the GDPR's Arts 5.2 and 24.1.

The *obligation of preliminary analysis and prevention of the differentiated risk*, of varying probability and gravity owing to the data processing conducted, shall be evaluated under most rigorous criterion of *qualified contractual diligence* pursuant to Art 1176, para 2 of Civil Code in correlation with the fulfilment of the regulations' reinforced analytical obligations, emerging in the overall structure of the GDPR, incumbent on data controllers and processors.

Indeed, the ordinary criteria for evaluating non-contractual conduct are not deemed adequate and sufficient:[51] standing in relief, with reference to the special

[49] See in this respect ibid 76.

[50] Thus G. Visintini, *I fatti illeciti*, II, *L'imputabilità e la colpa in rapporto in rapporto agli altri criteri ali imputazione della responsabilità* (Padova: CEDAM, 1998), 163; G. Visintini, 'Dal diritto alla riservatezza alla protezione dei dati personali' *Diritto dell'informazione e dell'informatica*, 8-9 (2019). On the process of objectification of civil liability in general one may see: F.D. Busnelli, 'Nuove frontiere della responsabilità civile' *Jus*, 41 (1976); G. Alpa and M. Bessone, 'I fatti illeciti', in P. Rescigno ed, *Trattato di diritto privato* (Torino: UTET, 1982), XIV, 295; G. Alpa, 'Relazione introduttiva Seminario di Pisa' *Responsabilità civile e previdenza*, 675 (1977); S. Rodotà, 'Relazione di Sintesi seminario Pisa' *Responsabilità civile e previdenza*, 3 (1978); V. Zeno Zencovich, *La responsabilità civile da reato* (Padova: CEDAM, 1989), 33 and 57; C. Salvi, *La responsabilità civile* (Milano: Giuffrè, 1998), 110; C.M. Bianca, *Diritto Civile*, 5, *La Responsabilità* n 4 above, 575.

[51] For arguments in favour of extensive application of Art 1176 Civil Code also in matters of tort, again placing the notion of diligence within that of fault via the reference to negligence, imprudence and incompetence, see in general: L. Mengoni, 'Obbligazioni "di risultato" e obbligazioni "di mezzi". Studio critico' *Rivista del diritto commerciale* I, 205 (1954); L. Corsaro, 'Colpa e responsabilità civile: l'evoluzione del sistema italiano' *Rassegna di diritto civile*, 298 (2000); A. Ravazzoni, 'Diligenza' *Enciclopedia giuridica* (Roma: Treccani, 1989), XI, 1; M. Bussani, *La colpa*

civil liability concerned, is the data processing conduct required under the GDPR, to be pursued with qualified diligence, further reinforced by the duty of analysis and differentiated prevention of the associated risk.

It is the Data Controller, in view of the economic analysis of the law and of the *principle of accountability* pursuant to Art 5.2 of the GDPR, who can, and must, in the analysis of the associated risk prior to the start of processing – thus before the occurrence of the harmful event –, better than anyone else, check the cost-benefit analysis of the choices made for technical and organisational adequacy under the GDPR.[52]

This complex task falls to the Data Controller in order to foresee and exclude, or at least reasonably mitigate, the risk of a burden of strict civil liability for unlawful *ex post* processing not adequately assessed – during the *ex ante* analysis of the risk associated with the processing – with consequent compensation for damage, pecuniary and non-pecuniary, in particular, suffered by the data subject-injured party.

It is therefore deemed necessary to embrace the qualification of civil liability for the unlawful processing of personal data governed by Art 82 GDPR in terms of *strict liability* for business risk arising from the activity of processing of personal data in breach of the rules of conduct designed to protect the data subject.

In the regulatory framework outlined by the GDPR, there is registered, as must again be pointed out, a significant change of perspective in light of the principle of accountability by virtue of which it is the Controller's duty to analyse and manage the differentiated risk associated with the data processing activity, in the implementation of *civil liability's general principles of prevention and precaution* up to the limits of the socially, economically and legally acceptable business risk, account being taken of the standards of the technology involved and of the costs of such implementation, inclusive of the *typical risk*, even if rare.

Excluded, on the other hand, insofar as it is unreasonable and disproportionate, is the *atypical* risk, which therefore does not fall within the precautionary duty.[53]

VI. Violation of the Fundamental Rights to Privacy and Protection of Personal Data: Non-Pecuniary Damage from Unlawful Processing and Admissibility of Claim for Damage *in Re Ipsa*

soggettiva. Modelli di valutazione della condotta nella responsabilità extracontrattuale (Padova: CEDAM, 1991).

[52] P. Trimarchi, *Rischio e responsabilità oggettiva* (Milano: Giuffrè, 1961), 50.

[53] On the basis of the principle of business risk and the correlated efficiency parameter, also from the point of view of the economic-legal, cost-benefit analyses, 'liability must be ascribed to those who have control over the general conditions of the risk and are able to translate the risk into cost by inserting it harmoniously into the game of profits and losses, with the instrument of insurance or self-assessment': one may see in this regard P. Trimarchi, *La responsabilità civile: atti illeciti, rischio, danno* (Milano: Giuffrè, 2017), 415.

Art 82.1 GDPR expressly allows that

> 'Any person who has suffered *material or non-material damage* as a result of *an infringement* of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered'.[54]

The expression used in the Italian translation of the GDPR – 'material or immaterial damage' – is certainly not well-chosen: it would have been more correct, legally, to invoke 'pecuniary or non-pecuniary damage'.

Despite lexical inaccuracy aside, the statement of material or immaterial damage is certainly comparable with the previous regulation before harmonisation set forth by Art 15.2 of the Privacy Code – and even earlier by Art 29.9 of Law no. 675 of 1996, the first Italian law on protection of personal data – which expressly allowed compensation for *pecuniary damage* as well as for *non-pecuniary damage*.

This provision is particularly significant because it still enables compensation for personal injury even when the pecuniary damage is marginal or absent: as a rule, in fact, what is significant in the unlawful processing of data is the *damage of non-pecuniary nature* consequent to a violation of fundamental rights to confidentiality, protection of personal data and personal identity.

Assessment of offensiveness that has already been assessed *ex ante* – in a general and abstract manner – by the EU legislator: the provision in Art 82.3 GDPR satisfies, indeed, even the most restrictive readings going back to Art 2059 of Civil Code and overcomes, for the good, the problem of quantum solved by the legislator pro-actively.

The non-pecuniary damage is an injury which arises exclusively in cases of offences, either expressly foreseen by law, in accordance with the principle of specificity of the subjective moral damage with a sanctioning function or, more generally, in the case of infringement of constitutionally qualified personal rights or interests, including those of economic nature.

As already noted, breach of the rules of conduct governing processing as per Art 82 GDPR entails in itself a compensable injury: however, such a reading – an acceptable one – of the *unlawful conduct* and of the *damage in re ipsa* does not, at the moment, seem to enjoy the approval of current case law, where the contrary interpretation in favour of the *damage as consequence*, in application of the general rule of Art 2043 of Civil Code, prevails.[55]

[54] For a recent study of the special civil liability delineated by the GDPR and, particularly, regarding the emergence of non-pecuniary damage under moral damage in the area of compensable harm from unlawful processing of personal data for the safeguarding of the individual's fundamental rights to privacy and protection of personal data: E. Tosi, 'Responsabilità civile' n 1 above, 199. One may also see, in the jurisprudence on the new civil liability for the processing of personal data: M.L. Gambini, *Principio di responsabilità* n 9 above, passim; M. Ratti, 'La responsabilità da illecito trattamento dei dati personali' n 31 above, 615.

[55] One may see *ex multis* Corte di Cassazione 4 August 2011 no 17014; Corte di Cassazione 15 July 2014 no 16133; Corte di Cassazione 8 February 2017 no 3311. Most recently, Corte di

In its ruling no 207 of 8 January 2019, the Supreme Court restated the impossibility of recognising non-pecuniary injury *in re ipsa*, even in a case of infringement of inviolable rights such as that to the safeguarding of personal data, confirming, moreover, that not even the violation of the fundamental right to data protection escaped the ascertainment of the 'gravity of the violation' and the 'seriousness of the injury' as a non-pecuniary loss, of a personal nature, actually sustained by the data subject.[56]

This questionable orientation underestimates the special character of the liability regime in question and does not note the differences, for the purposes of the burden of proof, between the question of existence of an injury arising from unlawful processing – which is *in re ipsa* in the breach of the data processing rule, more precisely in the *unlawful conduct* – and the quantum of the damage, which is indeed the object of proof, although proof is facilitated by presumptions and fair and just award.

Moreover, for the protection of this fundamental right the aforesaid ruling of the Court of Cassation deems it necessary to apply the *balancing* of compensation for damage *with the principle of solidarity* pursuant to Art 2 of the Constitution, which the *principle of minimal tolerance* of violation is intrinsic to.

The extension of this criterion (elaborated within the realm of civil liability, in general, in order to check frivolous litigations), to the special provision in question,

Cassazione 8 January 2019 no 207 has reaffirmed, along the traditional path, unacceptable for the reasons set forth in the present study, the dominant orientation: 'In the event of unlawful processing of personal data for unlawful reporting to the central credit register, the damage, whether pecuniary or non-pecuniary, cannot be considered *in re ipsa* for the fact itself of the performance of the dangerous activity. Even within the context of application of Art 2050 Civil Code, the damage and particularly the 'loss', must always be alleged and proved by the party concerned' (Corte di Cassazione 25 January 2017 no 1931), and also 'In the event of unlawful processing of personal data, in the present case for unlawful reporting to the central credit register (...) the non-pecuniary damage can never be *in re ipsa*, but must be alleged and proved by the plaintiff, on pain of a denaturing of the functions of Aquilian liability. The plaintiff's position is, however, facilitated by the burden of proof more favourable, as described in Art 2050 Civil Code, than under the general rule of Aquilian damage, as well as by the possibility of demonstrating the damage even via simple presumptions alone and by fair and just compensation' (Corte di Cassazione 5 March 2015 no 4443). For the fundamental rights of the person, in fact, the balancing with the principle of solidarity pursuant to Art 2 of the Constitution, of which the principle of minimal tolerance of damage is an intrinsic precipitate. *Contra,* see: Corte di Cassazione 30 July 2014 no 17288; Corte di Cassazione 24 May 2010 no 12626, available at www.cortedicassazione.it.

[56] 'The 'gravity of the violation' concerns the determinative moment of the harmful event, as a prejudicial impact on the right selected – whether by the legislator or the interpreter – as deserving of Aquilian protection and its import is bound to reflect on the injustice of the damage, which cannot be predicated as such when minimum offensiveness of the damage itself obtains. The 'seriousness of the injury', on the other hand, concerns the level of the consequences of the violation, ie the area of the obligation of redress, which centres on the reality of the loss suffered (the so-called injury-consequence): the 'non-serious' prejudice excludes the existence of a loss of usefulness deriving from a violation, even when the latter has surpassed the threshold of offensiveness'.

seems rather to be the result of an 'unjustifiable hermeneutic mistake'.[57]

For this reason, also in light of the evident *sanctioning-deterrent function* of the liability for unlawful processing of personal data emerging from the GDPR,[58] the orientation in favour of the theory of the *damages's effect* is deemed preferable, albeit absent from the most recent case law, according to which the damage *ex se* of protected property occurs *ipso iure* as a result of the *unlawful conduct* – in the matter at hand the fundamental right to privacy and the fundamental right to protection of personal data – without the need to give further proof of the *injustice of the damage* in order to obtain compensation.[59]

As has been noted, the current case law of the twin rulings of the United Sections of San Martino 2008,[60] which elaborated the aforementioned *double filter* – of the *grave offence* and of the *serious damage* –, is of a different opinion which, it is reiterated, is not acceptable in such context of application, in this writer's opinion, it being a question, indeed, of fully protecting against the infringement of fundamental personal rights and not, on the contrary, of limiting, by recourse to artificial conceptual expedients, the compensation for the non-pecuniary damage.

As concerns the burden of proof, the united sections of the Court of Cassation have, however, admitted – to counterbalance and facilitate the difficult proof of non-pecuniary damage and of its calculability – testimony and documentary and prima facie evidence.

The inherent contradiction in terms contained in the joint rulings of San Martino 2008 is evident, for they incorrectly allow that the infringement of a fundamental personal right may be qualified as *trivial* in the absence of the aforementioned double filter of admissibility.[61]

[57] Thus, textually, A. Thiene, 'Segretezza',n 25 above, 443.

[58] A. Di Majo 'La responsabilità civile nella prospettiva dei rimedi: la funzione deterrente' *Europa e Diritto Privato*, II, 289 (2006).

[59] See, in this regard, *ex multis*: Tribunale di Napoli 29 November 2013 available at www.giustiziacivile.com; Tribunale di Milano 23 September 2009, *Corriere del merito*, 19 (2010); Corte d'Appello di Milano 19 June 2007, *Corriere giuridico*, 1319 (2001); to which may be added Corte di Cassazione 1 December 1999 no 13358, *Danno e responsabilità*, 322 (2000); Corte di Cassazione 19 May 1999 no 4852, *Il Foro Italiano*, I, 2874 (1999); Corte di Cassazione 18 April 2007 9233, *Danno e responsabilità*, 151 (2008).

[60] Corte di Cassazione-Sezioni unite 11 November 2008 no 26972. With this decision – along with three other associated rulings (Corte di Cassazione-Sezioni unite 11 November 2008 nos 26973; 26974; 26975), all handed down at the same time and better known as *joint rulings of San Martino 2008* – the united sections of Cassation not only settled the previous disagreements on the compensation of the so-called existential injury, but also, more generally, thoroughly reviewed the prerequisites and the content of the notion of '*non-pecuniary damage*' pursuant to Art 2059 Civil Code The decision first of all reaffirmed that non-pecuniary damage could be compensated only in the cases provided by law: on the one hand, in cases where compensation was expressly prescribed, for example should the unlawful act comprise the elements of an offence; on the other hand, in cases where compensation for the damage in question, although not expressly prescribed by an ad hoc law, must be admitted on the basis of a constitutionally oriented interpretation of Art 2059 Civil Code, because the unlawful act had seriously infringed a right directly protected by the Constitution.

[61] On the problem of the difficult calculability of non-pecuniary damage, see V. Di Gregorio,

Indeed, this assessment will never affect the quantum, since the infringement of a fundamental right protected by the Constitution cannot be considered either insignificant or futile, but solely on the level of the award a quantification may be admitted through monetisation of the discomfort of the person consequent to the fundamental right's violation.[62]

The heart of the problem is, therefore, to ensure the criterion of pain and suffering, the *just* non-pecuniary compensation – that is, non-income related – consequent to the actual existence and gravity of the non-pecuniary prejudice, biological damage and non-pecuniary damage, in accordance with the principle of *full compensation for the damage*.[63]

Attentive jurisprudential study has criticised this approach articulated between pecuniary damage under Art 2043 of Civil Code and non-pecuniary under Art 2059 of Civil Code, noting, correctly, the appropriateness of valorising a different bipolar reading which, in order to ensure respect of the hierarchy of sources and values, will consider Art 2043 of Civil Code as a

> 'central rule (concerning any damage, pecuniary or not, provided it be unjust), and to limit the function of Art 2059 of Civil Code to that of sanctioning and its scope of application only to cases of subjective moral injury'.[64]

The case law provision of the aforementioned *double filter* to admit compensation for non-pecuniary damage deriving from infringement of constitutionally protected fundamental rights seems, therefore, irrational and

La calcolabilità del danno non patrimoniale. Criteri di valutazione e discrezionalità del giudice (Torino: Giappichelli, 2018), 95: '(...) the vagueness of the boundary between prima facie evidence and damage *in re ipsa* in the field of non-pecuniary damage from damage to reputation does not allow a clear demarcation between the two regimes of production of evidence, considering that, as for other types of damage, the signs to ascertain existence of damage on the basis of presumptions also represent the parameters of the *quantum*'.

[62] See in this regard F. Quarta, *Risarcimento e sanzione nell'illecito civile* (Napoli: Edizioni Scientifiche Italiane, 2013), 127, according to whom the argument of the modest magnitude of the damage 'is lacking in persuasiveness already starting from the consideration of the – supreme – rank of the interests involved, but it is even less persuasive if one notes that such a criterion of discernment is, indeed, inoperative for damages of pecuniary nature, always reputed significant, without quantitative limits'. Conte voices similar perplexities in F. Quarta 'Il difficile equilibrio tra l'essere e l'avere: considerazioni critiche sulla nuova configurazione del danno non patrimoniale' *Giurisprudenza italiana*, 1030 (2009).

[63] On this point see in the jurisprudence P. Perlingieri, 'L'onnipresente art. 2059 c.c. e la "tipicità" del danno alla persona' *Rassegna di diritto civile*, 520 (2009), according to whom 'the category of the person does not lend itself to disaggregations and splittings, to relative and distinct categories of injuries having only a descriptive and nominalistic value', the importance here lying only in the guarantee of full compensation for the damage sustained. In the same sense in case law: Corte di Cassazione 24 March 2011 no 6750; Corte di Cassazione 13 January 2016 no 336 (available at www.cortedicassazione.it), which confirmed the inadmissibility of the autonomous category of existential damage; Corte di Cassazione 13 May 2011 no 10527, *Il Foro italiano*, I, 10, 2708 (2011).

[64] On the sanctioning function of Art 2059 Civil Code see G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), 85.

must be rejected.

In summary, this critical conclusion is grounded, on the one hand, in the unjust nature of the regulatory asymmetry prescribed for pecuniary damage, which is not subject to the check for admissibility through the *double filter*, and non-pecuniary; on the other hand, in the unjust nature of the compression of the safeguarding reserved for the fundamental personal rights of constitutional level, with the reversal of the hierarchy of sources as a result of which the Constitutional rule would be in a position subordinate to Art 2043 of Civil Code.

The application of the aforesaid special liability, similarly to what occurs for cases of offences, as has already been noted, allows compensation for the damage, pecuniary or non-pecuniary, suffered by the data subject with the mere ascertainment of the *unlawfulness of the conduct* in breach of the GDPR, there being no need to prove the additional common requisite of *injustice of the damage*.[65]

The regulation of compensation for non-pecuniary damage is, traditionally, placed under the strict provision of Art 2059 of Civil Code. While Art 2043 of Civil Code. submits compensation for pecuniary damage to the principle of atypicality of the Aquilian offence, in the sense that harm to whatsoever interest protected by law may generate the obligation to pay compensation for pecuniary damage, Art 2059 of Civil Code., conversely, states the opposite rule according to which compensation for non-pecuniary damage is admitted only in the typical cases foreseen by the law, as precisely in the case at hand given the express provision of Art 82.1 GDPR.

Furthermore, it has recently been affirmed by an attentive doctrinal study that Art 2043 of Civil Code can be the venue of remedy in compensatory function – for both pecuniary and non-pecuniary damage: the compensation with a sanctioning function for *subjective moral damage* within the scope of Art 2059 of Civil Code might enable the obtaining – with account taken of the gravity of the conduct and of the damage – of an *ultra-compensatory* award, more precisely, one in addition to the full compensation.[66]

[65] Thus E. Tosi, 'Responsabilità civile per illecito trattamento dei dati personali' n 1 above, 247. See, in the same regard: V. Roppo, 'La responsabilità civile per trattamento di dati personali' *Danno e resposanibilità*, 663 (1997); E. Lucchini Guastalla, 'Trattamento dei dati personali e danno alla riservatezza' *Responsabilità civile e previdenza*, 632 (2003).

[66] On the point of the rediscovery of the original *ultra-compensatory* sanctioning function of Art 2059 Civil Code, see in particular F. Quarta, 'Una proposta di rilettura dell'art. 2059 c.c. quale fonte di sanzione civile ultracompensativa', in S. Di Raimo et al eds, *Percorsi di diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2012), 301; F. Quarta, *Risarcimento* n 13 above, 146; to which may be added F. Quarta, 'Ingiustizia del danno e analitica della responsabilità civile' *Rivista di diritto civile*, 29 (2004); E. Navarretta, 'Bilanciamento di interessi costituzionali e regole civilistiche' *Rivista critica di diritto privato*, 625 (1998). Conclusions further confirmed, as has already been noted in the course of the present study, by the recent decision of the Corte di Cassazione-Sezioni unite 5 July 2017 no 16601 made in regard to the recognisability of foreign rulings for punitive damages, which in opting for a more modern multi-purpose reading repudiated a mono-functional reading of civil liability.

According to this evocative reinterpretation of the compensable damage – grounded in a new functional bipolarity, on the one hand compensatory and, on the other, sanctioning – nothing would seem to preclude a use of civil liability, source of obligation, for the sanctioning of a certain type of conduct, with the award of ultra-compensatory damages, provided – let it be reiterated – that the offence be distinctive and that such remedy be expressly provided by law.

Even when remaining in the compensatory field it appears, therefore, possible to attempt a rereading of the overall phenomenon which, although governed by the general *principle of solidarity*, rediscovers the original *ultra-compensatory sanctioning function*, which is compatible with it, to remedy the *subjective moral damage* foreseen by Art 2059 of Civil Code. – with account taken of the objective and subjective gravity of the injuring party's conduct – without prejudice to the *compensatory* function of full reparation of the damage – pecuniary and non-pecuniary – under Art 2043 of Civil Code.[67]

VII. Strengthened Person Fundamental Rights Protection Integrated Approach: Law Remedies and Sanctions Converging of European Consumers and Data Subject Regulations

The digital surveillance society's pervasive 'attacks' on the effective protection of the fundamental rights to privacy, protection of personal data and personal identity thus necessitate a new, more modern and less traditional repeated approach, inclined to valorise the particular *preventive, deterrent and sanctioning* function embedded in the rules of compensation for damage arising from the unlawful processing of personal data pursuant to Art 82 of the GDPR, as well as from the regulation in its overall structure.[68]

The fragility of the safeguards of fundamental personal rights in the digital context must be counterbalanced by a legal instrument that will be adequately protective and sanctioning.

The progressive *capitalisation of the right to exclusive use and control of personal data* and the *asymmetry of the data processing relationship* accentuate this regulatory need: in recent EU legislation a steady, emblematic convergence of the regulations on consumer protection and on the protection of personal data has been registered.[69]

[67] On the atypical nature of the non-pecuniary damage G. Perlingieri, 'Sul giurista che "come il vento non sa leggere"' *Rassegna di diritto civile*, 400 (2010), according to whom it is not correct 'to consider the damage to the person typical and that to property atypical because the hierarchy of legal values would thus be disrupted'.

[68] D. Messinetti, 'I nuovi danni' n 13 above, 549.

[69] V. Ricciuto, 'I dati personali come oggetto di operazione economica. La lettura del fenomeno nella prospettiva del contratto e del mercato', in N. Zorzi Galgano ed, *Persona e mercato dei dati* n 3 above, 95; V. Ricciuto, 'La patrimonializzazione dei dati personali. Contratto e mercato nella riscostruzione del fenomeno' *Diritto dell'informazione e dell'informatica*, 689 (2018); to which

Digital content and digital services are, in fact, often provided online in the context of contracts that do not prescribe the consumer's payment of a price but rather his communication of personal data to the operator.[70]

The sanctioning perspective also emerges in the framework delineated by the recent directive (EU) 2019/2161 which amends directive 93/13/EEC and directives 98/6/EC, 2005/29/EC and (EU) 2011/83 for better application and modernisation of EU rules on consumer protection by introducing a pecuniary sanction system similar to that prescribed by Art 83 GDPR.[71]

This functional, protective and sanctioning approach in the digital context cannot, however, disregard adequate valorisation of and compensation for non-pecuniary damage, in particular moral injury, which must be facilitated and not, on the contrary – as has been critically remarked above – artificially filtered by case law.

The special nature and multifunctionality[72] of civil liability for unlawful processing of personal data introduced by Art 82 GDPR (compared with the ordinary regime as per Art 2043 of Civil Code.) having been acknowledged, it is a matter, in conclusion – with general admission of the *reintegrative-compensatory function*[73] – of enhancing, in the light of the observations made in the course of

may be added, most recently, P.F. Giuggioli, 'Tutela della privacy e consumatore', in E. Tosi ed, *Privacy digitale* n 1 above, 263.

[70] To be noted on this point are the recent directives (EU) 2019/770 on certain aspects of contracts for the supply of digital content and digital services and directive 2019/2161/UE which amends directives 93/13/EEC (unfair terms in consumer contracts), 98/6 (indication of prices on consumer products), 2005/29 (unfair business-to-consumer commercial practices in the internal market) and 2011/83 (consumer protection in distance contracts) for a better application and a modernisation of EU rules on consumer protection. By way of example, after the amendment made by directive (EU) 2161/2019, directive (EU) 83/2011 will apply not only, as is currently the case, to service contracts, including digital service contracts which require the consumer to pay or undertake to pay a price, but also to contracts for the supply of content online irrespective of whether the consumer pays a price or provides personal data as consideration.

[71] Directive (EU) 2019/2161 introduces, among other sanctioning provisions, the new Art 24 of directive (EU) 83/2011, which establishes as follows: 'Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive (…) 3. Member States shall ensure that when penalties are to be imposed in accordance with Article 21 of Regulation (EU) 2017/2394, they include the possibility either to impose fines through administrative procedures or to initiate legal proceedings for the imposition of fines, or both, the maximum amount of such fines being at least four per cent of the trader's annual turnover in the Member State or Member States concerned. For cases where a fine is to be imposed in accordance with paragraph 3, but information on the trader's annual turnover is not available, Member States shall introduce the possibility to impose fines, the maximum amount of which shall be at least two million'.

[72] For a teleological-functional reading of the civil liability system, in general, see the jurisprudence: S. Rodotà, *Il problema della responsabilità civile* n 4 above, 89; P. Perlingieri, 'La responsabilità civile tra indennizzo e risarcimento' n 4 above, 1066.

[73] One may see in this regard: E. Navarretta, 'Commento *sub* Art 29, Tutela della "privacy" ' in C.M. Bianca and F.D. Busnelli eds, *Tutela della* "privacy" n 9 above, 693; M. Franzoni, 'Dati personali e responsabilità civile' *Responsabilità civile e previdenza*, 908 (1998); F. Di Ciommo, 'Il danno non patrimoniale' n 34 above, 274; G. Comandè, 'Commento sub Art 15', in C.M. Bianca and F.D. Busnelli eds, *La protezione dei dati personali* n 3 above, 362; G. Resta and A.

this study, the additional *preventive-dissuasive-sanctioning function* with respect to other conduct prejudicial to the rights of the injured party or of other potential sufferers of such effects harmful to their person.

Indeed Art 82 GDPR, as formulated, while embedding a marked deterrent and sanctioning function with respect to the compensation of *subjective moral damage* deriving from unlawful processing of personal data, does not introduce a category of *punitive damages*, a task left to the national legislators and thus remaining in the sphere of civil liability.[74]

In favour of an interpretation strongly characterised by the preventive-deterrent-sanctioning function of the GDPR as a whole are the robust administrative pecuniary sanctioning framework of Art 83[75] – on the basis of which the sanctions must be *effective, proportionate and dissuasive* – as well as the penetrating powers (investigative, corrective-sanctioning, authorising and consultative) bestowed on the supervisory authorities by articles 57 and 58 of the GDPR.[76]

With particular reference to the compensatory remedy, which in this broader context must be correctly framed, the following functional aspects of the GDPR are significant:

– the centrality assumed, in the exemplification of the offence and in the judgment on liability, of the principles of fairness, lawfulness and transparency as related to multiple articulated behavioural duties which the subjective figures of the processing must necessarily fulfil;

– the strengthening and broadening of the typical substance of the duty of qualified diligence and protection required of the data controller and the data processor;

– the innovative principle of accountability whereby, in valorising qualified diligent conduct in a preventive and even precautionary perspective as regards

Salerno, *La responsabilità civile* n 3 above, 658; A. Di Majo, 'Il trattamento dei dati personali tra diritto sostanziale e modelli di tutela', in V. Cuffaro et al eds, *Trattamento dei dati e tutela della persona* (Milano: Giuffrè, 1999), 238; P. Ziviz, 'Trattamento dei dati personali e responsabilità civile: il regime previsto dalla l. 675/1996' *Responsabilità civile e previdenza*, 1307 (1997).

[74] In private law as well the principle borrowed from criminal law *nulla poena sine lege* applies; thus G. Bonilini, 'Pena privata e danno non patrimoniale', in F.D. Busnelli and G. Scalfi eds, *Le pene private* (Milano: Giuffrè, 1985), 311. In this sense see also M.L. Gambini, *Principio di responsabilità* n 9 above, 134-135.

[75] Violation of the provisions of Art 83 GDPR is subject to administrative fines of up to €10,000,000 or, for companies, of up to two per cent of the previous year's total worldwide revenue if greater than said amount (article 83.4); the most serious violations are subject to administrative fines of up to €20,000,000 or, for companies, of up to four per cent of the previous year's total worldwide revenue if greater than said amount (Art 83.5 and 83.6). Each supervisory authority ensures that the administrative fines imposed pursuant to Art 83, para 4, 5 and 6 will be *effective, proportionate and dissuasive* in each individual case. When deciding, in each individual case, whether to impose a fine and to fix the amount thereof, the Supervisory Authority will take due account of the evaluation parameters of infringements set by Art 83.2 GDPR.

[76] On the penetrating and heterogeneous powers of the independent supervisory authorities for the protection of personal data see G. Busia, 'Il ruolo dell'autorità indipendente per la protezione dei dati personali', in N. Zorzi Galgano ed, *Persona e mercato dei dati* n 3 above, 306.

management of the risks associated with the processing of personal data, the special rule of typical liability delineated in Art 82 GDPR is also reflected, emphasising new functions;

– the heavy burden of exonerating proof borne by the injuring party: proof of absence of imputability, *in any manner*, of the harmful event;

– full compensability of pecuniary damage and non-pecuniary damage, in the latter case also ultra-compensatory remedy.

Nothing prevents *de iure condendo* the legislators of individual member states – in accordance with Art 84.1 GDPR – from assessing the appropriateness of further strengthening the protection rules by prescribing real punitive damages, not existing to date, which must be *effective, proportionate and dissuasive*.

Further forcing the construction, such general canons set down with reference to the *administrative fines* under the same Chapter VIII of the regulation in question, together with means of recourse and liability, as per Art 83.1 GDPR, could easily be applied also to the compensatory remedy.

Compensation for unlawful processing of personal data, as well as being *full* in relation to the injury suffered, could be quantified by the judicial authority, through analogy – at least, it is reiterated, as regards subjective moral damage alone –, in order to satisfy the requirements of *effectiveness* and *proportionality* to the gravity of the harmful conduct and of *dissuasiveness against future engagement in illegal conduct*: more precisely, in an *ultra-compensatory* perspective.[77]

A*n axiological-functional reading* of this remedy, as has been observed, in the sphere of civil liability, although one may not speak, it is reiterated, of punitive damages in the strict sense, may cause a re-emergence and valorisation of the ultra-compensatory nature – proper to Art 2059 of Civil Code. since its original codification, as is stated in the *Relazione al Codice Civile*[78] – which would allow an award of *differential damages* in addition to the compensation for harm suffered:

> 'the adequacy of the reaction, no longer to the suffering endured by the injured party, but to the reprehensible nature of the injurer's conduct'.[79]

It is thus clear that Art 2043 of Civil Code can be the venue of redress in the compensatory function – both for pecuniary and non-pecuniary damage: the compensation with a sanctioning function for *subjective moral damage* within

[77] It will also be useful, in a perspective of ultra-compensatory remedy for subjective moral damage, to refer to the assessment parameters set by Art 83.2 GDPR for analysis of conduct punishable by fine.

[78] *Relazione del Ministro Guardasigilli al Codice Civile*, 803 (*G.U.* 4 April 1942 no 79-*bis*). Significant offences against the legal order – in the sense clarified by the *Relazione* in regard to Art 2059 Civil Code – are at present no longer limited to the criminal offence but comprise violations of the person's fundamental rights and constitutional interests: the higher the rank of the fundamental right violated and the more significant the injuring party's conduct, from both the objective and subjective points of view, the graver such offences will be.

[79] F. Quarta, 'Una proposta di rilettura dell'art. 2059 c.c. n 25 above, 317.

the scope of Art 2059 of Civil Code could allow the acknowledgement – with account taken of the gravity both of the conduct and of the injury – of an *ultra-compensatory* burden, more precisely an addition, with a sanctioning function, to full compensation.[80]

For the foregoing reasons it seems proper to conclude with a multi-functionality nature of liability articulated, on three levels, by the special regime outlined in Art 82 GDPR: (i) remedial-compensatory; (ii) preventive-deterrent; (iii) dissuasive-sanctioning.[81]

The enhancement of the specific sanctioning-deterrent – more precisely, *ultra-compensatory* – function of the *subjective moral damage* is also reflected in the appropriate broadening, in this axiological-functional perspective, of the meshes of justiciability of the special compensatory remedy in the specific context of unlawful processing of personal data – with respect to all compensable damages, both pecuniary and non-pecuniary – following the ascertainment of the injuring party's *unlawful conduct* alone, more precisely, of the damage *in re ipsa*.

A *function that is protective* of the *weaker subject* – the *data subject* – which comes not only through the enhancement of the *ultra-compensatory sanctioning function* of the *subjective moral damage* but also through the *facilitation of the injured party's access* to the compensatory remedy.

Indeed, the more concrete the possibility for those harmed by unlawful processing to easily accede to the compensatory remedy pursuant to Art 82 GDPR – in its triple function of *compensation, prevention and sanction* –, the better both the prevention of the risk of unlawful processing and the deterrence of operators (ie the processing's subjective roles, Controller and Processor) from such conduct will be, thus the better will they comply with the general statute laid down by the GDPR.

The compensatory remedy, with particular reference to a fundamental personal right lesion, is a controversial instrument, given the intrinsic difficulty involved in translating the values of the person offended into a pecuniary benefit: for this reason, in the specific context, the non-pecuniary damage's sanctioning function, as against the traditional compensatory function, deserves enhancement.[82]

With the 2019 San Martino rulings – eleven years on from the well-known joint rulings of the United Sections of San Martino 2008 – the Third civil section

[80] According to G. Bonilini, *Il danno non patrimoniale* n 13 above, 299, it seems possible to deduce from the writings preparatory to the enactment of the Civil Code of 1942 a propensity to punish the injuring party's conduct rather than to satisfy the injured party.

[81] In this regard see M.L. Gambini, *Principio di responsabilità* n 9 above, 136. In general: P. Perlingieri, 'Le funzioni della responsabilità civile' *Rassegna di diritto civile*, 115 (2011) for whom civil liability 'cannot have a single function, but a plurality of functions (preventive, compensatory, sanctioning, punitive) that may coexist with each other'.

[82] On the reasons for the scarce success in applying the compensatory instrument, considered a remedial technique of closure, one may see, more thorough, R. Pardolesi, 'Dalla riservatezza alla protezione dei dati personali: una storia di evoluzione e discontinuità', in R. Pardolesi ed, *Diritto alla riservatezza e circolazione dei dati personali* (Milano: Giuffrè, 2003), I, 27.

of Cassation, along the path traced by its own 2018 *Decalogue*, continues the work of reconciling the various orientations, largely seeking to ensure a uniform interpretation of the law, aimed at redrawing the contours of the new *personaldamage Charter*.[83]

Among these will be mentioned Corte di Cassazione 11 November 2019 no 28989 which – while reaffirming the entirety and unity of the assessment for *non-pecuniary damage* requiring rigorous proof in order to avoid unjust duplications[84] – admits the autonomous enhancement, with respect to biological harm, of that component of the *subjective moral damage* which is the expression of a violation having no organic basis and is thus extraneous to the medico-legal determination.[85]

The rebirth of the *subjective moral damage* due to the San Martino 2019 rulings argues in favour of the multifunctional reading of civil liability: a reading further confirmed by the famous decision of United Sections Supreme Court of Cassation no. 16601/2017 which, in a case regarding the recognisability of foreign rulings awarding punitive damages, repudiated a mono-functional reading of civil liability[86] in establishing the important legal principle according to which 'in

[83] The important decisions of San Martino 2019 address various problems of civil liability, some of which are limited to the specific context of healthcare, others being of general relevance: informed consent (Corte di Cassazione 11 November 2019 no 28985); the healthcare facility's recourse against the worker having engaged in serious misconduct (Corte di Cassazione 11 November 2019 no 28987); the question of differential damage (Corte di Cassazione 11 November 2019 no 28986) and remedy for non-pecuniary damage (Corte di Cassazione 11 November 2019 nos 28988 and 28989); the burden of proof borne by the patient in suits against a healthcare facility in contractual matters (Corte di Cassazione 11 November 2019 nos 28991 and 28992); the damage resulting from loss of chance (Corte di Cassazione 11 November 2019 no 28993); issues related to the non-retroactivity of the substantive rules and, to the contrary, the retroactivity of the Insurance Code's criteria for assessment of damages (Corte di Cassazione 11 November 2019 nos 28990 and 28994), available at www.cortedicassazione.it.

[84] The reference of the ruling in Corte di Cassazione 11 November 2019 no 28989 (available at www.cortedicassazione.it) raises perplexity as to the need to ascertain the *minimum damage threshold*, in the sense of demanding a rigorous demonstration 'of the gravity and seriousness of the damage, and of the suffering endured by the injured party'. As already noted critically with regard to San Martino 2008, it is important not to superimpose the burden of proving the harm suffered by the injured party upon that – altogether different – relating to the application of the additional filter intended to exclude the admissibility of *trivial injuries* from the area of protection: a filter unacceptable as concerns the safeguarding of fundamental personal rights.

[85] Again Corte di Cassazione 11 November 2019 no 28989 highlights, moreover (recalling the previous rulings of Corte di Cassazione 27 March 2018 no 7513, and Corte di Cassazione 28 September 2018 no 23469), available at www.cortedicassazione.it, the fact that as regards non-pecuniary damage from damage to health, on the other hand, duplication is not constituted by 'the joint award of damages for the biological damage and of a further sum as compensation for injuries having no medico-legal basis, because they have no organic basis and are extraneous to the medico-legal determination of the percentage degree of permanent disability, being represented by *inner suffering* (such as, for example, distress of the soul, shame, loss of self-esteem, fear, despair). It follows that, when there is deduced and proved the existence of one of these injuries not having a medico-legal basis, they must be the object of a separate assessment and award'.

[86] On the various functions of civil liability see: C. Salvi, 'Il paradosso della responsabilità civile' *Rivista critica di diritto privato*, 123 (1983); C. Salvi ed, «Danno», in *Digesto delle discipline*

the current legal system, civil liability does not have the sole task of restoring to its former state the material sphere of the person having suffered an injury, for the functions of deterrence and sanction are internal to the system'.[87]

This important principle elaborated by the United Sections of the Court of Cassation, applies *a fortiori* to the multifunctional reading with reference to special civil liability pursuant to Art 82 GPDR.

In this perspective it can be registered an enhancement of the *deterrent and sanctioning function* which is fully compatible, indeed appropriate in light of the *principle of ex ante accountability*, of the marked preventive and precautionary nature in the perspective of analysis, management and mitigation of operational and differentiated risks associated with the processing of personal data.

In order to ensure the effectiveness of the compensatory remedy provided by Art 82 GDPR there must, therefore, occur a progressive abandonment of the unjustified filters of the prevailing case law on harm to the person arising from unlawful data processing, which betray the dominant consequentialist view of the offence.[88]

This legal provision is particularly significant because it allows to remedy personal injury always, even when the pecuniary damage is marginal or absent: what is significant, above all, in the unlawful processing of personal data is the harm of the *non-pecuniary damage* resulting from violation of the fundamental rights to confidentiality, protection of personal data and personal identity.

For the foregoing reasons, it seems proper to welcome the proposed re-reading of the *ultra-compensatory damages for subjective moral damage* under Art 2059 of Civil Code – autonomous with respect to the *compensatory remedy for non-pecuniary damage* under Art 2043 of Civil Code – in order to safeguard the fundamental rights to confidentiality and protection of personal data and identity.

Finally, there is no shortage of original attempts in jurisprudence, which can

privatistiche, sezione civile (Torino: UTET, 1989), V, 66; C.M. Bianca, *Diritto Civile*, 5, *La Responsabilità* n 4 above, 5; P.G. Monateri, 'La responsabilità civile', in R. Sacco ed, *Trattato di diritto civile* n 14 above, 3; G. Alpa, 'La responsabilità civile' *Trattato di Diritto civile* (Milano: Giuffrè), IV, 131; M. Barcellona, 'Funzione e struttura della responsabilità civile: considerazioni preliminari sul "concetto" di danno aquiliano' *Rivista critica di diritto privato*, 211 (2004); P. Perlingieri, 'Le funzioni della responsabilità civile' *Rassegna di diritto civile*, 115 (2011); D. Messinetti, 'Danno giuridico' n 13 above, 483, for whom 'the balancing of interests is a selective operation indispensable for the activation of the compensatory function'; G. Ponzanelli, 'Pena privata' *Enciclopedia giuridica* (Roma: Treccani, 1990), XXII, 1, warns that the choice between the various functions depends 'on the extension that must be attributed to the illustration of non-pecuniary damage by Art 2059 Civil Code'; C. Scognamiglio, 'Le Sezioni Unite della Corte di Cassazione e la concezione polifunzionale della responsabilità civile' *Giustiziacivile.com*, 1, (2017).

[87] Corte di Cassazione-Sezioni unite 5 July 2017 no 16601. *Contra*, the reading of the institute of civil liability also in sanctioning terms, see the Court of Cassation's previous orientation: Corte di Cassazione 19 January 2007 no 1183, *Corriere giuridico*, 497 (2007); Corte di Cassazione 12 June 2008 no 15814; Corte di Cassazione 8 February 2012 no 1781, *Il Foro Italiano*, I, 1449 (2012); Corte di Cassazione 11 September 2012 no 15163 available at www.cortedicassazione.it.

[88] Thus A. Thiene, 'Segretezza' n 25 above, 443-444.

merely be mentioned in this study as they fall outside the purpose of this paper, to go, for a more effective protection of the rights of the person – beyond the limits of the remedies of damages restoration, *compensatory and ultra-compensatory* – including the *restitutive remedies against undue enrichment*[89] and the *management of agency without authority*,[90] in order also to obtain retrocession of wealth unduly obtained through unauthorised commercial exploitation of personal data.

The re-emergence and rebirth of *subjective moral damage* ultimately translates into a *just reinforced protection*, through the enhancement of the *deterrent-sanctioning function* of observance of the rules of *lawfulness, fairness and transparency* in the processing of personal data, *directly* protective of the injured data subject – the weaker party in the *asymmetrical relationship* of data processing – more precisely, of the human person and the dignity of the same and, *indirectly*, of the *lawfulness, fairness and transparency* of the market and of the legal system in general.[91]

It is a common purpose of legislation and jurisprudence to increase protection of the fundamental rights of the person – to privacy, personal data and dignity – against pervasive power of *digital surveillance capitalism*.

The main path to follow to rebalance an asymmetric relationship and protect the weaker party from the superpower of the Data Controller – under an economic, contractual, technological and information point of view – is, at the end, that of progressive convergence and intersection of the protective, personal and collective, remedies and sanctions regulations on *consumer protection* and *personal data subject protection* laws.

[89] See A. Thiene, 'La tutela della personalità: dal neminem laedere al suum cuique tribuere' *Rivista di diritto civile*, 387 (2014). In this regard see also the considerations of A. Nicolussi, 'Autonomia privata e diritti della persona' *Enciclopedia del diritto* (Milano: Giuffrè, 2011), 147; and P. Sirena, 'La restituzione dell'arricchimento e il risarcimento del danno' *Rivista di diritto civile*, 75 (2009), according to whom the reference to the sum of money which the holder of the right could have requested in order to grant the right of exploitation of the attributes of his personality is closely connected to the principle of restitution of unjust enrichment.

[90] For the recovery of profits gained from the usurpation of another's exclusive right, Arts 2028 et seq of the civil code, to be applied not only in the traditional case of solidarity-based management of a third party's property intended to procure a benefit for the absent owner, but also in the hypothesis of predatory management leading to the appropriation of wealth to which the owner is entitled. See in this regard: P. Sirena, *La gestione di affari altrui. Ingerenze altruistiche, ingerenze egoistiche e restituzione del profitto* (Torino: Giappichelli, 1999), 65.

[91] The enhanced safeguarding provided by the GDPR, in fact, is intended not only to protect the data subject's fundamental rights and individual freedoms but also to protect collective interests and the market in general: in this sense, the provision of Art 80 GDPR enabling the data subject to mandate associations active in the field of personal data protection to lodge complaints and exercise the rights referred to in Arts 77, 78 and 79 on his behalf, and, where provided for by Member State law, to bring action for damages pursuant to Art 82. Furthermore, wrongful exploitation of data subjects-consumers-users' personal data may also entitle them to bring Class Actions pursuant to Art 140-*bis* Consumer Code. for the purposes of ascertaining liability for damages suffered by consumers, in order to protect homogeneous individual rights as well as collective interests.