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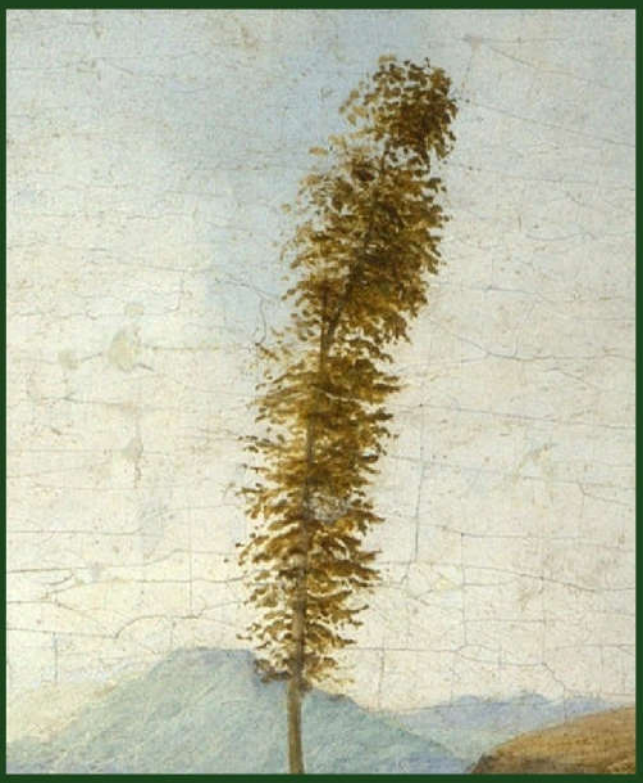

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Remembering Carlos Fernández Sessarego

Juan Alejandro Espinoza Espinoza*

A teacher affects eternity;
he can never tell where
his influence stops.

Henry Adams

The departure of a loved and admired being – my mentor was – is always a reason for a nostalgic look towards the past, reliving memories and trying to recover the moments of the shared existential journey. Thus, my memory went back to 1984, when the Civil Code, once defined by Francesco Busnelli as one of the pillars of Private Law in Latin America, was enacted – the Code of which, as Giovanna Visintini justly stated, Carlos Fernández Sessarego is the father.

Indeed, in 1965, when Fernández Sessarego was the Minister of Justice, the Commission in charge of the study and revision of the (then-governing) 1936 Peruvian Civil Code was created by Supreme Decree. The 1936 Code would give way, almost twenty years later, to the 1984 Peruvian Civil Code.

This Code strongly shows the influence of the Italian 1942 Codice Civile. The influence appears particularly strong in Book I, Rights of Persons (of which Fernández Sessarego was draftsman);[1] Book VII, Sources of Obligations (which includes the contractual regulation); and Book II, Juridical Acts.

Book II – deserving a separate mention within the national experience – was inspired by the Contracts Book of the Italian Civil Code, particularly in its treatment of the juridical categories of form, representation, interpretation, condition, term, simulation, invalidity (within which are counted the nullity and the annullability), error, malice and violence, among others.

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[1] Indeed, it is pointed out that 'the 1984 codifier, by formulating the draft of the Rights of Persons Book, took more into account the Italian theory and – to a lesser extent – jurisprudence than the very 1942 Italian Civil Code, which across the years since its enactment has been subjected to lucid comments and abundant and well documented criticism. (C. Fernández Sessarego and C. Cárdenas Quirós, 'Estudio preliminar comparativo de algunos aspectos del Código civil peruano de 1984 en relación con el Código civil italiano de 1942' *El Código civil peruano y el Sistema jurídico latinoamericano* (Lima: Cultural Cuzco, 1986),107.

Therefore, the Italian Civil Code – as well as the legal theory and case law, which explain it and enrich it – happens to be a necessary reference for the interpretation of the national legislative models. However, in the 1980s, besides the translated works of Francesco Messineo, Domenico Barbero, and some others, there was not much written about contemporary Italian juridical experience.

Fernández Sessarego, in this context, built bridges: his neat and prolific production rendered an account of the most recent theoretical, legislative and jurisprudential tendencies of the Italian Private Law. *Additionally, he showcased the Peruvian Private Law and made it circulate in the international juridical panorama. This was, in my opinion, his greatest accomplishment*.

The diffusion of the emerging Italian juridical theory made by this distinguished jurist can be noted across his prolific work, materialized in the Peruvian Civil Code as well as in his juridical writings. Without aiming to be exhaustive, some of his major contributions concerned:

1. The recognition the unborn as a subject of law (Art 1 Civil Code):

> '(D)eserving consideration are, among many others, the lucid opinions of Bianca, Busnelli, Oppo, Biscontini, Traverso, and all the others who have contributed – to different extents – to shape a realist conception of the juridical quality of the unborn'.[2]

2. The regulation of the right to intimacy (Art 14 Civil Code): Thus,

> 'the right to privacy of disclosure or reserve is widely treated by theory and has been subjected of a rich jurisprudence in Italy. It has, to a great extent, been an inspiration to the aforementioned norm. Many Italian authors work on the subject. It would suffice to remember Ravá, Ligi, Pugliese, De Cupis, Vassalli, Rodotà, Rescigno, Palladino, De Mattia, Galli and Franceschelli'.[3]

3. The normative treatment of legal persons, in which 'is perceived, along with various tranches, the valuable intake of a particularly rich Italian legal theory'. Many authors have, somehow, contributed to sustaining diverse approaches reflected in the legislation concerning legal persons in the Peruvian Civil Code. It would suffice to quote Ascarelli, Catalano, D'Alessandro, Magni, De Giorgi, Frosini, Galgano, Giannini, Orestano, Rescigno, Scarpelli, Bianca, Zatti, among many others.[4]

4. In Latin America, Fernández Sessarego was a pioneer in spreading, in the early 1990s, the recognition and protection of the right to identity. He did valuable and interesting research on the legislative, theoretical and jurisprudential

[2] ibid 109.
[3] ibid 112.
[4] ibid 117.

underpinnings of the Italian juridical experience.[5]

5. The introduction of the concept of harm to the person ('*daño a la persona*') in the Civil Code and the Latin-American juridical system. Fernandez Sessarego took inspiration from the writings of Paradiso, De Giorgi, Bonillini, Rotondi, De Cupis, Messineo, Rescigno, Busnelli and the Italian jurisprudential tendencies.[6]

One must note the philosophical vision Fernández Sessarego had on Law. It was materialized in his undergraduate thesis, *Sketch for an ontological determination of Law* (*Bosquejo para una determinación ontológica del derecho,* 1950). Presented at the Law School of Universidad Nacional Mayor de San Marcos – the oldest in America –, he set there the foundations of specific tridimensionalism. In it,

> 'the juridical science (...), or plainly Law, is constituted by the integration of three elements: norm-thinking, human conduct-object and value-purpose. Three elements that belong to the domain of Law, that demand each other mutually, and that, being linked, essentially constitute the juridical science'.[7]

In 1992, Fernández Sessarego was invited to the Convention promoted by the *Istituto di Diritto Privato della Facoltà di Giurisprudenza* of the University of Genova. It was named '*Il Diritto dei Nuovi Mondi*' and organized by Giovanna Visintini. He fascinated the audience when he exposed, in perfect Italian, '*Un nuovo modo di fare diritto*'. In this lecture, he developed his thinking, influenced by the existentialism and personalism currents and keeping present the co-existence of the human being.

Fernández Sessarego – like Carnelutti, for whom 'the fact, which is the act, has to be observed, as far as it is possible, over reality'–,[8] incarnated these concepts in juridical institutions such as the abuse of right, the tridimensional vision of the legal person, the harm to person, and – in particular – the harm to the life project, which

[5] C. Fernández Sessarego, 'El derecho a la identidad personal' *Tendencias actuales y perspectivas del Derecho Privado y del Sistema Jurídico latinoamericano* (Lima: Cultural Cuzco, 1990), 55-102.

[6] C. Fernández Sessarego, 'El daño a la persona en el Código Civil de 1984' *Libro Homenaje a José León Barandiarán* (Lima: Cultural Cuzco, 1985), 163-222.

[7] C. Fernández Sessarego, *El Derecho como libertad. Preliminares para una filosofía del Derecho* (Lima: Librería Studium Ediciones, 1987), 68. The creators of specific tridimensionalism are Miguel Reale y Carlos Fernández Sessarego. Both of them, without knowing each other, developed this new conception of Law; agreeing on the inseparability of its elements but differing in some aspects. The works written on the subject are not few. David Sobrevilla y Domingo Garcia Belaunde follow suit in their book *El Derecho como libertad*, ibid, which is the edited version of a – currently unpublished – part of Carlos Fernandez Sessarego's thesis. In a similar fashion, Carlos Torres y Torres-Lara does a comparison in an article entitled *Un nuevo libro*: *El Derecho como libertad* (Lima: Dominical, 1988), 14.

[8] F. Carnelutti, *Metodología del Derecho* (México D.F.: Unión Tipográgica Editorial Hispano-Americana, 1940), 55, translated by A. Ossorio.

> 'is permanent and accompanies the subject until his death. It compromises his existential destiny and, therefore, constitutes a radical frustration of the human being'.[9]

Beginning one year from the enactment of the Peruvian Civil Code, Fernández Sessarego organized international congresses attended by personalities as Pietro Rescigno, Giovanna Visintini, Francesco Busnelli, Pietro Perlingieri, among others. Without aiming to be exhaustive, I recall the following events: 'The Peruvian Civil Code and the Latin-American Juridical System' (9-11 August 1985), 'Current tendencies and perspectives of Latin-American Private Law and Juridical System' (5-7 September 1988), and 'The Spanish Civil Code and the Hispanic-Latin-American Codification' (16-18 November 1989), in which Luis Díez-Picazo was present.

These meetings were wonderful opportunities for the Peruvian juridical community to be in touch 'live' and directly with the most important figures of Argentinean Civil Law, such as Guillermo Borda, Aída Kemelmajer de Carlucci, Luis Moisset de Espanés, Jorge Mosset Iturraspe, Santos Cifuentes, Atilio Anibal Alterini, and many others. The attendance to these events was massive and, when it was Fernández Sessarego's time to talk, one confirmed he was an excellent speaker, with a great capacity to keep his audience captivated.

It must be kept in mind that in the Foundations of the 2012 draft of the Argentinean Civil and Commercial Code it was stated that 'the Peruvian Civil Code, which has two texts, has been much quoted in Latin-American private law'.[10] These are Arts 1984 (concerning moral harm) and 1985 (regarding the harm to the person). Even Art 1738 of the Argentinean 2014 Civil and Commercial Code expressly recognizes the 'interference in the life project' as a compensation criterion. This reveals that the influence of Fernández Sessarego's thinking largely surpasses national borders.

The connection with Italy in Fernández Sessarego's scientific journey culminates with his active support as a member of *The Italian Law Journal*'s Advisory Board. This Journal having as its objective promoting the transnational dialogue about the Italian juridical culture and experience.

Fernández Sessarego always encouraged his protegees to research, write and spread the results. When, in 1990, I had the boldness of publishing the first edition of my 'Studies on the Rights of Persons' (*'Estudios de Derecho de las Personas'*), I dared to ask him to write a prologue. He accepted without hesitating. I allow myself to quote some of his advice:

> 'These young men begin a career, which I hope to be brilliant. That will

[9] C. Fernández Sessarego, 'Un nuovo modo di fare diritto', in G. Visintini ed, *Il Diritto dei Nuovi Mondi*. Atti del Convego promosso dell'Istituto di Diritto Privato della Facoltà di Giurisprudenza, Genova 5-7 novembre 1992 (Padova: CEDAM, 1994), 274.

[10] *Anteproyecto del Código Civil y Comercial de la República Argentina*, *Fundamentos*, 232.

> depend, to a great extent, on their silent persistence in the effort constant study supposes; in their spirit to renounce everything that disturbs their vocation, in their scientific humbleness. But, as well, on their recognition of the merits of others, on their solidarity with their vocation companions, on the honesty of their quotes, on not rushing too much in achieving easy and immediate successes, on not getting discouraged by the inevitable setbacks they will find along their way, and, overall, on their moral quality. They shall not forget that the best teaching is that of example'.

These words are more than valuable if we keep in mind that we face an ethical crisis not only in Peru but around the world, since corruption has also globalized.

I finish this very brief review with the words José León Barandiarán, Fernández Sessarego's mentor, would use, reflecting the intellectual curiosity of his disciple.

> 'What do we expect of Fernández Sessarego? We do not know. One moment he has an idea. Right then he comes up with another. He is eternally creating. He is a man of great abundance in interests and issues regarding juridical didactic. He is full of curiosity. What will we hear today about Fernández Sessarego? There is always a huge interest in hearing him because in his classes, whenever he speaks, on any occasion and circumstance, he shows enthusiasm. He gives a personal experience full of warmth, full of fervour, because he is a professor par antonomasia. A professor, I think Goethe said, is a man who knows to wake up curiosities; or, rather, who knows to wake up enthusiasms'.

One of the phrases I liked the most of Carlos Fernández Sessarego's undergraduate thesis was the one regarding the essence of Law. In it, he referred to love and said we should 'love men the way Christ did and love things the way Francis did'.

I think the essence of life is expressing love in all of its ways, without forgetting its most sublime sense: solidarity, which is shown through service vocation. A life dedicated to oneself is an egoist life; a life dedicated to others is a life that transcends. It is everyone's chore to look for the just balance, certainly, departing from loving oneself – as Fromm said –, to be able to love others. I am convinced my mentor achieved this happy middle point.

Rousseau on War

Gianluca Sadun-Bordoni*

If you want peace, understand war
Liddell Hart

Abstract

Rousseau's theory of war codified the classical laws of war, as a relation between States, providing a paradigmatic vison of the anarchy of the international system. He was an early critic of theories such as domestic analogy, democratic peace, and the liberal faith in globalization. Furthermore, his analysis may also be useful to the understanding of contemporary post-classical developments pertaining to war and the law of war.

I. Rousseau and the Law of War

Now that an entire age of international relations, which began with the end of World War II, is declining, the time has come to reconsider the classical philosophy of international law and international politics from a perspective that is not conditioned by the paradigm that prevailed in the age now behind us.

This primarily holds true for the decisive turning point that Rousseau, in the second half of the 18th century, impressed upon juridical and political thought. The huge influence that Rousseau exercised on democratic and pacifist thought has largely obscured the strong 'realistic' component of his theories: Rousseau, in fact, tried to combine a normative view of law and politics with a realistic account of human nature.

The best way to understand this attempt is to analyze his theory of war, which is probably the most neglected part of his political thought.

Yet in the tradition of international law, developed since the end of the 19th century, there is a common awareness that the basic character to which the law of war conforms is the concept of war defined by Rousseau.

It was in fact Rousseau who clearly presented war as a relation between States, according to the basic 'classic' conception of law of war, codified in the Hague Conventions of 1899 and 1907, based on 'symmetric war', or on war as a clash between organized armies.[1] This was so, even if there was growing awareness,

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[1] A. Cassese, *International Law* (Oxford-New York: Oxford University Press, 2nd ed, 2005),

after the Napoleonic wars, that modern war tends to assume new forms, involving civilians, thus constituting the 'total war', as described by Clausewitz.

In this sense, Rousseau's work, more than that of Hobbes, is also the basis of the theory of the anarchic character of the system of international relations, or the Westphalian system, and for this reason Waltz, in *Man, the State and War* (1959) drew on Rousseauian theory, and not Hobbesian, as a model for the 'third image' of war (that regarding the anarchic character of the system).

So, for international lawyers and political scientists, role played by Rousseau in international relations theory and in the theory of war is clear (although perhaps the same may not be said for philosophers).

On the other hand, the attempt to overcome the anarchic character of the international system after World War II has been largely inspired by Kant: therefore, a comparison between the two doctrines becomes necessary. Although the extent to which Kantian thought is indebted to Rousseau is well known, in the theory of international relations and war there seems to be a clear opposition. A deeper analysis should also investigate whether or not this is true, and to what extent.

A careful reassessment of Rousseau's and Kant's international thought can begin by reconsidering the analysis of great scholars of international relations, which specialists of Rousseau and Kant have unjustly neglected.

It was in fact Kenneth Waltz, as well as Stanley Hoffman, between the end of the 1950s and the beginning of the 1960s, who initiated the re-evaluation of Rousseau regarding the theory of war for the philosophy of international relations.[2] Waltz also made a significant contribution to Kant's interpretation, departing from Kant's 'pacifist' vision that circulated in the aftermath of World War II, starting from Friedrich's *Inevitable Peace*, and the idea of Kant's theory as the philosophical foundation of the UN.[3] Waltz writes correctly that Kant

> 'has, as many liberals do not, an appreciation of politics as struggle, an idea of possible equilibrium not as simple and automatic harmony but always as something perilously achieved out of conflict'.[4]

Regarding Rousseau, it is interesting to notice that this analysis of Waltz and Hoffmann was very different from Schmitt's condescending view of Rousseauian theory of war in *Nomos of the Earth* (1950).[5] Schmitt even maintained that the successful reception of Rousseauian theory of war from scholars of international

400. On Westlake and the classical doctrine see M. Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law. 1870-1960* (Cambridge: Cambridge University Press, 2004), 84.

[2] S. Hoffmann, 'Rousseau on War and Peace' 57 *The American Political Science Review*, 317-333 (1963); K. Waltz, 'Kant, Liberalism and War' 56 *The American Political Science Review*, 331-340 (1962).

[3] C.J. Friedrich, *Inevitable Peace* (Harvard: New York, Greenwood Press, 1948).

[4] K. Waltz, n 2 above, 339 b.

[5] Cf C. Schmitt, *Nomos of the Earth* (New York: Telos Press, 2nd ed, 2006), 149.

law was the result of a misunderstanding. Probably what emerges here is a difference between two different kinds of 'realism', and (part of) our task is to favour a re-appreciation of the classical tradition, represented by Rousseau.

Over the course of the last decades, the comprehension of Rousseauian thought was augmented by philology: Waltz and Hoffman had at their disposal Vaughan's edition of the political writings of Rousseau (1915), in which the fundamental writings on war were present: the analysis of Saint-Pierre's project of perpetual peace and an important fragment on the state of war that Vaughan considered a remaining portion of the work on *Institutions Politiques* that Rousseau planned and of which he would have developed only the part that is known as *Du Contract Social*. Whereas in the summary of *Du contract social* which was presented in the fifth book of *Émile* the treatment of international relations was announced as an object of analysis, in the final version of *The Social Contract,* the project is expressly abandoned. It is generally assumed that this is the general reason for why *Institutions politiques* was not realized.

Vaughan, however, grasped the importance of this fragment on war:

> 'It is one of the most notable pieces that ever came from the hand of Rousseau (…). It is therefore of no merely historic – still less, of antiquarian – interest. It is a contribution, and a contribution of the first moment, to what is still a burning question of the day'.[6]

This was written in 1915, but it still holds true for contemporary age.

In 1965, a new manuscript was acquired by the Geneva Library, which was critically edited as an appendix to the second edition of Pléiade's third volume of Rousseau's works.[7] In this edition, the previous fragment on the state of war was published after the writings on Saint-Pierre, with the conviction that all these texts were derived from the dialogue established by Rousseau with the work of Saint-Pierre.

The strict connection between the two fragments appeared immediately clear, and recently the hypothesis was affirmed that they are actually two parts of the same text (probably drafts of the *Principes du droit de la guerre* which Rousseau mentioned in a letter of March 1758): from an internal analysis – above all the fact that in these texts the project of perpetual peace is not mentioned – the hypothesis is also advanced that these precede the writings on Saint-Pierre.[8]

Rousseau's general thesis had already been introduced in *Discours sur l'inégalité* and was returned to in the first book of the *Geneva Manuscript* (the first

[6] J.J. Rosseau, *The Political Writings of Jean Jacques Rousseau*, with Introduction and Notes by C.E. Vaughan (Cambridge: Cambridge University Press, 1915), I, 284-285.

[7] J.J. Rousseau, *Œuvres complètes* (Paris: Gallimard, 1964), III (quoted as OC in the text).

[8] Cf B. Bernardi and G. Silvestrini, 'Présentation de l'édition', in B. Bachofen and C. Spector eds, *J.J. Rousseau, Principes du droit de la guerre. Écrits sur la paix perpétuelle* (Paris: Vrin, 2008), 19. This is the critical edition of Rousseau's writings on war; we quote it as *Principes* in the text, followed by the reference to the *Œuvres complètes*.

version of the *Contract social*): criticizing both Hobbes and theorists of natural law such as Grotius and Pufendorf, Rousseau denies (contrary to the theory of Hobbes) that the natural state of man is a state of war, and also denies (contrary to Grotius) that man is a 'social animal' (the theory of *appetitus societatis*). The natural condition of man, contrary to what Hobbes maintains, is that of isolated individuals, little inclined to socialization, between whom there may occasionally be clashes but not wars, which presuppose a social organization.[9] War is therefore a social product, 'a permanent state which requires constant relations' and therefore war essentially takes place between States, rather than between individuals (*Du contract social*, I, 4; OC, III, 357).

II. The Anarchy of the International System

However, it is here first and foremost necessary to clarify a misunderstanding: Rousseau resumes Montesquieu's critique of Hobbes, according to which the author of *Leviathan* had considered as a 'state of nature' a condition which was, however, already intrinsic to the civilized human being. Rousseau contrasts this construction by arguing for a more primordial state of nature which is instead characterized by the simple goodness of the human being. This then becomes the yardstick whereby the course of history and society are to be assessed. In his assessment, however, the analysis of the Genevan coincides with that of Hobbes' more than he himself would prefer to admit. For Rousseau, war is a social relation (therefore absent in the 'true' state of nature) and becomes endemic with the emergence of society:

> '*la Société naissante fit place au plus horrible état de guerre',* 'Infant society became a scene of the most horrible warfare' (*Discours sur l'inégalité*, OC, III, 176).

Also in *Émile*, Rousseau concedes to Hobbes that

> '*c'est une disposition naturelle à l'homme de regarder comme sien tout ce qui est en son pouvouir. En ce sens le principe de Hobbes est vrai jusq'à certain point*', 'man naturally considers all that he can get as his own. In this sense, Hobbes' theory is true to a certain extent' (OC, IV, 314).

And in a lesser known passage, from the *Essai sur l'origine des langues*, he admits that in the state of nature holds the *ius in omnia* ('*chacun, dit-on, s'estimoit*

[9] This view of man's original isolation in the state of nature, in which war was absent, seems to derive from Lucretius' *De rerum natura*, V, 930, although Rousseau's actual acquaintance with Lucretius is a disputed one. See M. Black, 'De rerum natura and the Second Discours', in R. Grant and P. Stewart eds, *Rousseau and the Ancients/Rousseau et les Anciens* (Montreal: North American Association for the Study of Jean-Jacques Rouseeau, 2001), 300.

le maitre de tout; cela peut être', 'Each, it is said, esteemed himself the master of everything; that might be so'), but denies the consequences drawn by Hobbes:

> '*les hommes, si l'on veut, s'attaquoient dans la rencontre, mais ils se rencontroient rarament*', 'Men, if you like, attacked one another upon meeting, but they rarely met'.

And paradoxically he concludes:

> '*Par tout régnoit l'état de guerre, et toute la terre étoit an paix*', 'everywhere the state of war reigned and the whole Earth was at peace' (OC, V, 396).

Anyway, the endemic conflict that is absent in the state of nature, becomes a reality in the social state, because being an *artificial creature*, the State lacks a determinate size and therefore there aren't definable conditions of equilibrium, given the structure of inequalities between the States:

> '*il est forcé de se comparer sans cesse pour se connoitre*', 'it is forced to compare itself in order to know itself' (*Principes*, 54; OC, III, 605);

the rank of a State depends on what the others are and plan. From here, the permanent character of the state of war, *l'état de guerre* follows:

> '*l'ètat de guerre est naturel entre les puissances*', 'the state of war is natural between the powers' (*Principes*, 59; OC, III, 607).

As artificial entities, States possess a force that is always only relative; they never feel secure, structurally they depend upon context, upon the 'system' (*Principes*, 54; OC, III, 605). And this system of States

> '*tend à leur destruction mutuelle*', 'tend to their mutual destruction' (*Principes*, 55; OC, III, 1899).

All this, explains why Waltz, as previously mentioned, could assume that Rousseau's theory, and not that of Hobbes, was a theoretical model of international anarchy.

The condition of socialized man is that of a 'mixed condition', as Rousseau indicated: he is subject to the needs of the social state (with its strong inequity) and to the liberty of the state of nature, in the relations between States, which implies a permanent state of war: therefore he is secure in neither state.

This is the 'manifest contradiction' of the social condition: while he seeks, through society, to guarantee himself a lasting peace, man creates conditions of permanent war. From here Rousseau's paradoxical conclusion follows:

> '*la guerre est née de la paix*', 'war is born of peace' (*Principes*, 44; OC, III, 610).

What is remarkable, already at this stage of the analysis, is that this view implies the falsity of the so called 'domestic analogy'; that is, the idea that the same procedure followed by individual men in the social contract originating civil society may and should be replicated by individual States originating an international 'civil society', pacific by nature.[10] This view, although rejected in advance by Hobbes, was instead regarded favorably by Kant, as a moral hope, and is nowadays at the basis of many 'cosmopolitan' suggestions.[11] As we shall see, this is not the one astonishing difference between Rousseau and contemporary democratic 'globalism', which is also more naïve than Kantian view.

Another consequence of the artificial character of the State, in Rousseau's perspective, is also its weak internal cohesion: the sum of the public powers is always inferior to the sum of the private powers. The State therefore should compensate for the precariousness of its existence with the strength of the passions: that is passions must be aroused to cement the unity of the State (by which Rousseau intuits the logic of modern nationalism). But from this follows also the ferocity of war, which reduces the natural sentiment of piety that limits the violence in relationships between men.

Another fundamental theory of Rousseau is that this permanent state of war does not depend upon the internal form of States: the '*regle de justice*', 'rule of justice', valid within the State, does not apply to international relations where natural law reigns. The consequence is that

> '*n'est pas impossibile qu'une république bien gouvernée fasse une guerre injuste*', 'it is not impossible that a well-governed Republic makes an unjust war' (*Discours sur l'économie politique*, OC, III, 246).

This is a clear criticism of the later-developed theory of 'democratic peace', as well as a difference with respect to Kant, whose work is considered to have been the origin of this theory.[12] The relationship of Kant to the theory of democratic

[10] The term 'domestic analogy' was coined by H. Bull, 'Society and Anarchy in International Relations', in H. Butterfield and M. Wight eds, *Diplomatic Investigations* (London: Allen & Unwin, 1966), 35. See H. Suganami, *The Domestic Analogy and World Order Proposals* (Cambridge: Cambridge University Press, 1989).

[11] Kant writes in *Perpetual Peace*: 'Second definitive article for a perpetual peace: 'Peoples, as states, like individuals, may be judged to injure one another merely by their coexistence in the state of nature (ie, while independent of external laws). Each of them, may and should (*kann und soll*) for the sake of its own security demand that the others enter with it into a constitution similar to the civil constitution, for under such a constitution each can be secure in his right'. Akademie-Ausgabe, VIII, 354 (quoted as AA, in the text); translation in I. Kant, *Toward Perpetual Peace and other Writings on Politics, Peace and History*, edited by P. Kleingeld (New Haven-London: Yale University Press, 2006), with reference to the page of the Akademie-Ausgabe.

[12] Starting from a seminal article of M. Doyle, 'Kant, Liberal Legacies and Foreign Affairs'

peace is a complicated question; yet in fact he wrote, in the *First definitive article for perpetual peace*:

> 'if (as must be the case in such a constitution) the agreement of the citizens is required to decide whether or not one ought to wage war, then nothing is more natural than that they would consider very carefully whether to enter into such a terrible game, since they would have to resolve to bring the hardships of war upon themselves' (AA, VIII, 351).

Apart from the fact that this is merely a prediction of a probable prudential attitude, and apart from the fact that historical experience cast Kant's assumption into doubt (as Habermas has also recognized),[13] I think it is worth mentioning that, according to Kant, the transition toward a republican State cannot be accomplished independently from international relations:

> 'The problem of establishing a perfect civil constitution is dependent on the problem of a lawful external relation between states and cannot be solved without the latter.' (*Idea of a universal history on a cosmopolitical plan*, 1784, Seventh proposition) ('*Das Problem der Errichtung einer vollkommnen bürgerlichen Verfassung ist von dem Problem eines gesetzmäßigen äußeren Staatenverhältnisses abhängig und kann ohne das letztere nicht aufgelöset werden*') (AA, VIII, 24).

The importance of this passage is often overlooked, although not by Waltz.[14] I will return to it later.

Another crucial theory developed by Rousseau is that of the weakness of common interests, and thus the weakness of the idea that common interests can prevent war: Rousseau says, that which is an advantage for all is an advantage for none, whereas what one seeks is *relative* advantage, given the competitive system of States. Neither is the interdependence created by trade a factor of peace; here Rousseau, as Hoffman keenly observed, attacks the very heart of international liberalism, which in recent years nurtured trust in globalization.[15] According to Rousseau, reciprocal dependence increases distrust and suspicion and is not actually a factor that increases pacification, but instead contributes to the tensions of the 'state of war'. Here too, in fact, there is a difference with respect to Kant who shares the confidence in the theory of '*doux commerce*'. As he writes in the *First supplement of the guarantee for perpetual peace*:

> 'The spirit of commerce, which is incompatible with war, sooner or

(1983), now in Id, *Liberal Peace. Selected Essays* (London-New York: Routledge, 2012).

[13] See J. Habermas, 'Kant's Idea of Perpetual Peace: At Two Hundred Years Historical Remove', in Id, *The Inclusion of the Other* (Cambridge MA: MIT Press, 1998), 165.

[14] K. Waltz, n 2 above, 337 b.

[15] S. Hoffmann, n 2 above, 321.

later gains the upper hand in every state' (AA, VIII, 368).

Here too, disillusionment with this optimistic view is not so much about the prevalence of spirit of commerce, which is nowadays widespread as never before, but about the confidence that this could prevent war.

In any case, the pessimistic conclusion of Rousseau is that Saint-Pierre's project of perpetual peace is not only unrealizable (moreover, Kant also says that perpetual peace is unrealizable, '*eine unasfüihrbare Idee*', *Metaphysik der Sitten*, AA, VI, 350) but it is difficult to say if it is actually desirable, given that it could only occur by opposing particular interests

> '*par des moyens violens et redoutable à l'humanité*', 'through violent and terrific means for humanity' (*Principes*, 126; OC, III, 600).

It is here that Rousseau foreshadows the fatal concept of 'the war to end all wars'!

This all relates to Rousseau's analysis of international relations and of war as a permanent condition of the anarchic system of States.

III. Rousseau, Clausewitz and New Forms of War

However, there is another crucial aspect of the Rousseauian analysis of war that could perhaps be useful for the understanding of the contemporary post-classical developments of war and law of war.

Rousseau maintains indeed that war aims to

> '*détruire l'Etat ennemi*', 'destroy the enemy State', or at least to weaken it by 'all possible means' (*Principes*, 59; OC, III, 607).

Yet as the State is founded on the 'social pact', it is the true aim of war to destroy it, as it forms the essence of the State. Such a pact is embodied not only in political institutions and in militaries, but in all that which constitutes the concrete life of a community: well-being, security, trust between citizens and the State, cultural identity, and so on. Rousseau wrote that

> 'it is from the social pact that the political body receives unity and the common self' ('*c'est du pacte social que le corps politique reçoit l'unité et le moi commun*') (*Principes*, 56; OC, III, 1900).

and the State is as strong as is the common will to observe and defend the social pact. Consequently, if the State cannot be radically destroyed, it can be weakened; if it is not possible to strike at the center, one can strike at the parts:

> '*si l'on ne lui peut ôter l'existence on altére au moins son bien-être, si*

> *l'on ne peut arriver au siége de la vie, on détruit ce qui la maintient: on attaque le gouvernement, les lois, les moeurs, les biens, les possessions, les hommes*', 'If it is not possible to eliminate existence, you can at least impair well-being, if it is not possible to reach the center of life, you can destroy that which maintains it: you can attack the government, the law, the customs, the goods, the possessions, the people' (*Principes*, 56-57; OC, III, 1900-1901).

In summary, one can attack

> '*la convention publique et tout ce qui en resulte*', 'public conventions and all that depends upon them' (*Principes*, 60; OC, III, 608).

One may ask if these contemplations by Rousseau potentially anticipate new kinds of war, which we have seen develop after World War II in particular, beyond clashes between organized armies, in scenarios in which war loses its traditional form, and almost everything can become a means of war. In this case, Rousseau was not only the theorist of war in its classical, interstate form, codified by the international law of war, but also the forerunner of its postclassical development. Kant's theory remains instead within the frame of the classical international system, apart from the dispute between the 'statist' or 'cosmopolitan' interpretation of his political thought.[16]

Rousseau's analysis leads thus to the question, whether there is a connection, and what, between these different forms of conflict, or traditional and new kinds of war. This also permits the question of whether there does exist an opposition between the analysis of Rousseau and that of Clausewitz, which many scholars of international law assume to be central.

The starting point is that with World War II we experienced the limits of traditional warfare: '*détruire l'Etat ennemi*', as Rousseau says, or the pushing of war 'to its utmost bounds', as Clausewitz says, could lead to a nuclear Holocaust.

This forces Great Powers to transform their strategies, aiming more to weaken, than to destroy, the existential condition of the enemy State ('*si l'on ne peut arriver au siége de la vie, on détruit ce qui la maintient* (…)' as Rousseau says). This was the case of the Cold War, where the Soviet Union collapsed not because of a military defeat, but because of its lack of economic and social strength. This makes war less bloody, but more diffused, and more sustained over time, and this becomes therefore 'war without restraints', as theorized by Chinese strategists.[17] This kind of strategy is in part also at the disposal of less powerful States, or various insurgents, or terrorist groups, producing the post-conventional diffusion of war to which we are witness outside of the surrounded Western world.

[16] See on this A. Hurrell, 'Kant and the Kantian Paradigm in International Relations' 16 *Review of International Studies*, 183-205 (1990).

[17] Q. Liang and W. Xiangsui, *Unrestricted Warfare* (Beijing: LA Literature and Arts Publishing House, 1999).

In this sense, the problem is not just the opposition between the Rousseausque and Clausewitzean model. As we have seen, the classical doctrine of law of war is 'Rousseauesque', and such substantially remains, also after World War II.[18] However, the Clausewitzean description of war's 'absolute form' is still at the center of the political and philosophical debate. It is therefore important to better define the relationship between the two models, beyond their alleged opposition.

In summary, the distinction between the two models would be that Rousseau is at the origin of the idea of war as a relation between States, codified by international law (the distinction between combatants and civilians, etc). Clausewitz, on the other hand, would have shown, after Napoleon, that this model would be superseded by a new concept of war, the 'total war', that involves the entire population and tends toward its 'absolute form', which is composed of pure destructiveness. Some interpretations of Clausewitz, from Deleuze to Girard, have insisted that this absolute form is for Clausewitz the 'true' form of war.[19]

Yet actually, by reversing the argument, it is also true that Clausewitz is still the bearer of trust in the political manageability of war, that is the assignment of limited scope that is placed by the *rationality of the State* (and it is just such faith in the rationality of the State, central in Clausewitz, which is also central for classic interpreters such as Aron).[20]

On the other hand, Rousseau seems to intuit that the classic inter-State form of war can degenerate into a conflict in which all of the forms of existence of the State are invested, cancelling the distinction between State and 'society' and involving, as possible targets, the citizens and their concrete forms of existence. If the social pact, says Rousseau,

> 'could be broken with a single hit, suddenly there would no longer be war; and with this single hit one would kill the State and not even one man would die'. ('*si le pacte sociale pouvait être tranché d'un seul coup, à l'instant il n'y aurait plus de guerre; et de ce seul coup l'État serait tué, sans qu'il mourut un seul homme*') (*Principes*, 60; OC, III, 608).[21]

[18] A. Cassese, n 1 above, 404.

[19] Cf G. Deleuze and F. Guattari, *Mille plateaux* (Paris: Éditions de Minuit, 1980); R. Girard, *Achever Clausewitz* (Paris: Carnets nord, 2007). This kind of interpretation contrasts both Aron's view of Clausewitz in *Penser la guerre* (Paris: Gallimard, 1976) (Girard calls it '*la lecture rationaliste de Aron*', 27) and the classical interpretation within military theory, given by Howard and Paret in their introduction to the translation of Clausewitz's *On War* (Oxford: Oxford University Press, 2008) (first edition 1976).

[20] Recent interpretations tend to stress the evolution of Clausewitz's thinking, assigning the faith on rationality of politics to a later stage of it. See B. Heuser, *Reading Clausewitz* (London: Pimlico, 2002); A. Herberg-Rothe, *Clausewitz's Puzzle. The Political Theory of War* (Oxford-New York: Oxford University Press, 2007).

[21] There is here also a striking analogy with the famous thesis on Sun Tzu, according to which the ideal objective of war is 'breaking the enemy's resistance without fighting'; Sun Tzu, *The Art of War* (North Clarendon, VT: Tuttle Publishing, bilingual edition, 2016), chapter III.

Such a perspective is furthermore recalled when today one analyzes such forms of war as cyber warfare, which aim to dismantle the enemy by hitting its heart, as with, for example, information networks.

Yet, even more than the opposition between the Rousseauvian and Clausewitzean models, is their striking *complementarity* character.

Starting from different historical experiences and philosophical presuppositions, both seem to have intuited that the classical form of modern war, as a clash between States, tends to be overcome by 'total war', involving society as a whole. Clausewitz experienced the Napoleonic wars, and so had a first concrete example of this disruptive tendency, and yet he nonetheless preserved a faith in the rationality of politics as a possible limitation of this tendency. Rousseau instead derived his analysis from a general consideration of the nature of modern States and of inter-State system, with its inertial tendency to pure reciprocal destructiveness, transcending the distinction between State and society.

Combining the two analyses would therefore be important for understanding the general nature of war and its phenomenology, also in contemporary forms, with the evaporation of the clear distinction between war and peace, toward the new and disquieting experience of a new global war or 'war without restraints'.[22]

Instead of the domestic analogy, invoked by cosmopolitans, the opposite could be true: that is, the unmanageability of international disorder could also affect the internal order, undermining the 'social pact', the conditions of civil coexistence. It is most likely that this is what occurred following World War I, and this may be what is currently developing, if we consider, for example, the effects of immigration on European societies.

What is new, is that in our contemporary age, such effects are not only the unintentional consequences of a given crisis, but also of conscious targets of unconventional forms of war, which are aimed at weakening the internal order of a State. And these forms concern not only 'irregular' combatants, insurgents or terrorists, but also, covertly, organized States and even the Great Powers, for whom the struggle for global power has clearly returned.

We must consider, therefore, not only 'asymmetric' and 'unconventional' forms of war ('new in its intensity, ancient in its origins', as John Kennedy said) but also the whole phenomena of 'war by other means'.[23] The latter also concern organized States, but never rule out the possibility of becoming a 'conventional' war, as a clash between organized armies, with the constant tendency to '*détruire l'Etat ennemi*' (Rousseau), or to push war 'to its utmost bounds' (Clausewitz).

This also confirms what Kant guessed, when he wrote, as we have seen, that a good civil constitution 'is dependent on the problem of a lawful external

[22] See Q. Liang and W. Xiangsui, n 17 above.

[23] R. Blackwill and J. Harris, *War by Other Means: Geoeconomics and Statecraft* (Cambridge MA: The Belknap Press of Harvard University Press, 2016).

relation between states' and apart from this cannot be achieved.[24]

Therefore, the analyses of both Rousseau and Kant, although different, show a clear realistic understanding of the structure of inter-State relations, and a limited confidence in the rationality of the State. Kant himself recognized the will to power of the State:

> '(…) There seems to be a propensity in human nature (…) that makes each and every state strive, when things go its way, to subjugate all others to itself and achieve a universal monarchy (…)'.[25]

In this way, the international system is constantly in a state of war, as Hobbes maintained, and the tendency to a war for 'global' power is always present. The possibility of a 'perpetual peace' is ruled out by Rousseau and assigned by Kant to the confidence in a hidden 'plan of nature', in the teleological structure of history.

Certainly, the fact remains that for Rousseau human nature, as such, is not aggressive, and thus war is just a product of civilization, although probably unavoidable, as civilization itself.

Kant instead admits that in human nature there are violent drives, and criticizes Rousseau's idealization of the state of nature, quoting journals written by explorers which refer to primitive forms of life. Kant also shares Rousseau's diagnosis of the evils of civilization, but considers that, within civilization, it is however possible to also reach morality from culture in the context of international relations. Even without considering the trust placed by Kant in the goals of nature, such a perspective is based on a 'democratic peace hypothesis' and on the theory of '*doux commerce*': such ideas enjoyed great popularity in the last decades, contributing to Kant's success as philosopher of cosmopolitanism and pacifism. It is a unilateral picture, that neglects the realistic elements of Kant's thought. But, above all, it is a vision of politics that overlooks the reasons which impelled Rousseau to reject both the idea of democratic peace and of *doux commerce*, reasons that could turn out to be more topical than those of democratic pacifism.

Globalization tends to favour, instead of a pacific interdependence, an obscure dissemination of unconventional forms of war, without overcoming the traditional peril of conventional war, also between Great Powers, with its tendency to the Clausewitzean absolute form. This is clearly present in the mind of the most important political leaders of the world: that is why the Chinese President Xi Jinping invited Americans and Chinese not to fall in the 'Thucydides Trap', impressively referring to the destructive war for hegemony in which Athens and Sparta were opposed.

This means that limited conflicts (commercial, cyber etc) always has the

[24] I. Kant, 'Idea *for a Universal History from a Cosmopolitan Point of View*', in Id, *Akademie-Ausgabe* n 11 above, VIII, 24.

[25] I. Kant, 'Religion within the Limits of Reason', in Id, *Akademie-Ausgabe* n 11 above, VI, 123.

potential to degenerate into a global war between Great Powers, today as ever before. And, in spite of nuclear dissuasion, war could aim at the traditional goal of destroying the enemy.

Therefore, new forms of war are do not necessarily supersede traditional ones but may act merely as preludes to them.[26]

In the second *Discours,* Rousseau prophesied, at the extreme stage of historical development, the vanishing of any residual sense of justice and the dominion of the law of the strongest, in a '*nouvel Etat de Nature*', not at the beginning, but at the end of history (OC, III, 191).

If we contemplate Rousseau's analysis of social development and inter-State system, we might reach a diagnosis of a possible new state of nature that could become tremendously real.

[26] For an opposing view see M. Kaldor, 'Inconclusive Wars: Is Clausewitz still Relevant in these Global Times?' 1 *Global Policy*, 271-281 (2010).

Personal Rights and Sport Injuries: The Civil Liability Between Risk and Negligence

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Abstract

The sports phenomenon is a form of manifestation of the human personality, necessary for the growth and maturation of human beings as individuals and as members of the social groups to which they belong.

The practice of sport, as it happens for the great variety of so-called lawful dangerous activities, even if promoted and encouraged to promote values such as loyalty and fairness, respect for rules, legality, integration and protection of diversity and democracy, can also represent a danger to the fundamental legal assets of the person, namely life, health and mental and physical integrity.

In the light of Italian legal theory and case-law on civil liability in sport, this work proposes to discuss the implementation of the general principle of neminem laedere – summarised in the general clause of Art 2043 of the Civil Code and considered regulatory protection for the guarantee of inviolable rights – in terms of the application of the theory of acceptable risk to have individual models that would exclude negligent behaviour.

I. Premise: The Question

Sport is a complex phenomenon that can be studied from a variety of viewpoints: it is an economic activity, it is socially relevant and it has a well-structured organisation that has been conceived in the past as a genuine legal system.

However, sport is above all a human activity that can be traced back to a personal right and as such must be balanced against the protection of other primary interests, such as the health and physical and mental integrity of its practitioners.

In the light of Italian legal theory and case-law on civil liability in sport, this work proposes to discuss the implementation of the general clause of *neminem laedere* in terms of the application of the theory of acceptable risk in order to highlight how and to what extent it is necessary to be able to have individual models to assess behaviour that would exclude negligent behaviour when performing lawful risky activities that are characterised by a normal degree of aggressiveness.

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II. The Value of Sporting Activities According to Prevailing Interest

The Italian Constitution does not include an express provision that guarantees the right to practise sport as a personal right; but this lack, the politico-ideological and historical reasons of which have repeatedly been emphasised,[1] has not prevented the interpreters[2] from believing that they could still make a positive evaluation in terms of lawfulness and value, thanks to the theory of prevailing interest[3] elaborated in the light of the principles and fundamental freedoms of the legal system, the foremost being the personalist principle[4] and that of formal and substantial equality and freedom of association.

The sports phenomenon is in fact a form of manifestation of the human personality, necessary for the growth and maturation of human beings as individuals and as members of the social groups to which they belong. It finds its maximum expression in private sports law associations established pursuant to Book I of the Civil Code to promote values such as loyalty and fairness, respect for rules, legality, integration and protection of diversity and democracy.

In the light of the principle of horizontal subsidiarity pursuant to Art 118 of the Constitution, the aforementioned entities are appointed to promote activities of general interest according to the 'Third Sector Code', introduced with decreto legislativo 3 July 2017 no 117,[5] thus contributing to achieving the social function of sport, in turn proclaimed by the Treaty of Lisbon[6] and promoting the

[1] See A.G. Parisi, 'Sport, diritti e responsabilità: un confronto con l'esperienza francese' *Comparazione e diritto civile*, 1-36 (2010). The author states that the Italian constitutional legislator did not recognise the right to sport in the Charter because of its link with the past political regime. See also G. Manfredi, 'La giuridificazione dello sport' *Giurisprudenza italiana*, 485-494 (2016); the latter author stresses that in the last century sport gained a political and social relevance and it became an instrument for building consensus.

[2] R. Frascaroli, 'Sport' *Enciclopedia del diritto* (Milano: Giuffrè, 1990), XLIII, 514-538; A. Marani Toro, 'Sport' *Novissimo digesto italiano* (Torino: UTET, 1971), XVIII, 42-54; regarding the case-law, see M. Calciano *Diritto dello sport. Il sistema della responsabilità nell'analisi giurisprudenzial*e (Milano: Giuffrè, 2010), passim, and V. Frattarolo, *Lo sport nella giurisprudenza* (Milano: Giuffrè, 1984), passim.

[3] F. Antolisei, *Manuale di diritto penale* (Torino: UTET, 1985), 271 and F. Mantovani, *Diritto penale* (Padova: CEDAM, 2017), 233.

[4] See P. Perlingieri, *La personalità umana nell'ordinamento giuridico* (Napoli: Edizioni Scientifiche Italiane, 1972), 131.

[5] Re the Third Sector Code, see R. Rametta, *Profili civilistici degli enti del Terzo Settore* (Roma: Aracne, 2018); on the relationship between sports associations and the Third Sector Code refer to V. Bassi, 'Associazioni sportive dilettantistiche ed enti del terzo settore' *Rivista di diritto sportivo*, 349-364 (2017).

[6] See G. Liotta, L. Santoro, *Lezioni di diritto sportivo* (Milano: Giuffrè, 2018); G. Manfredi, n 1 above, 485-494; S. Bastianon, 'La funzione sociale dello sport e il dialogo interculturale nel sistema comunitario' *Rivista italiana di diritto pubblico comunitario*, 391-411 (2009); J. Zylberstein, 'La specificità dello sport in ambito europeo' *Rivista di diritto ed economia dello sport*, 59-70 (2008); the latter author states that the European Commission observed in its 'White Paper on Sport' (2007), the 'specificity of sport' includes '(…) a pyramid structure of competitions from grassroots to elite level and organised solidarity mechanisms between the different levels and

improvement of the level of individual and collective well-being in society.

The practice of sport, as it happens for the great variety of so-called lawful dangerous activities, even if promoted and encouraged, can also represent a danger to the fundamental legal assets of the person, namely life, health and mental and physical integrity.[7]

As a consequence, since under Italian private law there is no specific discipline of civil liability in sport, case-law was burdened with the task of establishing the legal value of sporting activities, that is, when the right to practise sport should be extended, and when this right should succumb to the protection of the right to life and/or the psychophysical integrity of human beings, which can sometimes be injured by sporting activities.

Indeed, the Courts have referred in this area to the principle of *neminem laedere* summarised in the general clause of Art 2043 of the Civil Code and considered regulatory protection for the guarantee of inviolable rights.[8]

III. The Legal and Theoretical Development of the Assumption of Risk

The theory of acceptance of sports risk[9] was developed from Italian case-law.

According to this, damage to the physical integrity of the individual, the subject of the sporting risk, for harm that occurs in the context of the sporting

operators, the organisation of sport on a national basis, and the principle of a single federation per sport'.

[7] Refer to L. Di Nella, *Il fenomeno sportivo nell'ordinamento giuridico* (Napoli: Edizioni Scientifiche Italiane, 2000), 258; according to the author there are different kinds of sporting activities, some based on body contact and violent, allowed by the rules of the game; in this case the legal evaluation of the sporting behaviour is difficult because it needs a solution of an antinomy, between opposite interests: on the one hand the promotion of the sporting activity and on the other hand the safeguarding of the safety of the players.

[8] About the legal nature of liability in sport, see: A. Scialoja, 'Responsabilità sportiva' *Digesto delle discipline privatistiche. Sezione civile* (Torino: UTET, 1998), XVII, 410-417; E. Bonvicini, *La responsabilità civile* (Milano: Giuffrè, 1971), 145; the authors identify sporting liability as a genus in its own right as it meets the principles and rules of the sports. On the other hand, to configure sporting liability as a kind of civil liability, see: G. Ponzanelli, 'Le regole ordinarie di responsabilità civile nell'attività sportiva', in P. Rescigno et al, *Fenomeno sportivo ed ordinamento giuridico*. Atti del 3° Convegno Nazionale della Società Italiana degli Studiosi del Diritto Civile - Capri 27-29 Marzo 2008 (Napoli: Edizioni Scientifiche Italiane, 2008), 161-170; G. De Marzo, 'Accettazione del rischio e responsabilità sportiva' *Rivista di diritto sportivo*, 8-26 (1992); G. Alpa, 'La responsabilità sportiva in generale e nell'attività sportiva' *Rivista di diritto sportivo*, 471-489 (1984); and V. Frattarolo, *La responsabilità civile per le attività sportive* (Milano: Giuffrè, 1984). Regarding the role that sport has in the promotion and in the achievement of human rights by specific classes of people (women, people with disability, minors, foreigners, etc), see P. Donnelly, 'Sport and human rights' *Sport in Society*, 381-394 (2008); also, refer to J. Caudwell and D. McGee, 'From Promotion to Protection: Human Rights and Events, Leisure and Sport' *Leisure Studies*, 1-10 (2018), and E. Isidori, 'Sport as Education: Between Dignity and Human Rights' *Procedia Social and Behavioral Sciences*, 686-693 (2015).

[9] See L. Di Nella, n 7 above, 349-360; V. Frattarolo, n 8 above, 408-514; M. Calciano, n 2 above, 47-66.

event is not considered unlawful and therefore indemnifiable, as it does not occur where there is unlawful behaviour; the harm to the participant is the 'concrete expression of normal danger', depending on the type of activity concerned.

In particular, it was recognised that the participant in the competition accepts the rules and principles both in the abstract and when he/she becomes a member of the sports organisation upon registration, or at the time of enrolment in the sporting event. In relation to the specific behaviour in the individual race or sporting event, this consent would also include the risk of suffering injuries during the competition.

It is a legal theory that has also been developed in common law systems where sporting liability falls within the law of tort,[10] in particular in the tort of negligence, one of the elements of which is the breach of a duty of care. In this case, the assumption of risk has the function of excluding the duty of care and consequently preventing the person who assumes the risk of damage that may derive from the negligent conduct of others from taking legal action to obtain compensation for negligence.

However, the difficulty of proving awareness of the acceptance of risk has in some cases led to the belief that the implied assumption of risk is unsatisfactory as a form of primary assumption of risk based on the theory of inherent risk;[11] it has instead led to a demand for a voluntary assumption, which, in Italy, has also favoured the extension, by some scholars, of the clause in question to a conventional negotiation process.[12]

Since the assessment of liability does not presuppose the existence of a protected legal situation, but rather the duty of care, in an attempt to justify the basic aggression inherent in sports activities, recourse was made, in terms of psychology, to a figure other than simple negligence – namely, to recklessness,[13] halfway between guilt and malice, occurring when the harmful action is coupled with aggression that goes beyond what is normal, or in the case of an action carried out with awareness that it will cause harm, or create a dangerous situation, or a situation that would signal danger to a reasonable person.

Therefore, the difficulty of evaluating both recklessness and the standard of care[14] required by a reasonable person has led to a quid pluris being considered

[10] See G. Alpa et al, *Diritto privato comparato. Istituti e problemi* (Bari: Laterza, 2018).

[11] See L. Santoro, *Sport estremi e responsabilità* (Milano: Giuffrè, 2008), in particular 36. See also J.N. Drowatzky, 'Assumption of Risk in Sport' 2 *Journal of Legal Aspect of Sport*, 92-100 (1992).

[12] L. Santoro, n 11 above, in particular 36. See also J.N. Drowatzky, n 11 above, 92-100.

[13] L. Santoro, n 11 above, 46; M. Ferrari, 'Rischio sportivo e responsabilità sciistica: spunti comparatistici da Francia e Stati Uniti' *Danno e responsabilità*, 633 (2006) and, if allowed, refer to M. Cimmino, *Rischio e colpa nella responsabilità sportiva* (Napoli: Liguori Editore, 2006).

[14] On this point see T.M. James and F. Deeley, 'The standards of Care in Sport Negligence Cases' 1 *Entertainment law*, 104-108 (2002), commentary to *Caldwell* v *Maguire and Fitzgerald* [2001] EWCA 1054; J. Kitchen and R. Corbett, *Negligence and Liability - A Guide for Recreation and Sport Organizations* (Alberta: Centre for Sport and Law, 1995). The author states that the

necessary, based on the recognition of the 'prevailing circumstances', in order to take into account not only the normal standards represented by the rules of the sport, but also additional factors related to sporting practice.[15]

In the Italian legal system the theory of assumed risk has many weaknesses, due to its abstract and generic nature and to the reference to the concept of normal, which varies from sport to sport. This has made it necessary, in fact, to verify on a case-by-case basis what the specific harmful events were for which some form of civil liability could have been excluded and consequently some compensation obligation by the party causing the damage.

Moreover, although, under the Italian legal system, the reconstruction of civil liability in the sport has undoubtedly been influenced by criminal theory and related case-law in criminal proceedings, has found itself having to assess and justify even behaviour that causes serious harm to the integrity of the practitioners, the scholars of civil law have not failed to point out how civil liability and criminal responsibility 'move on distinct planes with different dynamics and purposes that do not coincide'.[16]

Indeed, according to theoretical guidelines developed on the Art 2043 of the Italian Civil Code, the civil liability is characterised by the atypical nature of the offense; consequently, under the law of tort the unlawful conduit and its contents are not previously established by a specific and typical rule, such as it happens under the Criminal Code; therefore, it explains the exquisitely case-based nature of civil liability that ends up being anchored to a variety of subjective figures, conducts, and of 'socially adequate models of conduct' that it is up to the interpreter to identify.

A legal path has thus been initiated, enriched by copious academic works,[17] providing an opportunity to reflect on the legal significance of sports regulations.[18]

standard of care is related to various factors: written standards include government statutes and regulations, unwritten standards as common practices, discipline or profession. The case-law refers to court decisions and common sense refers to intuition based on one's knowledge and experience that something does not seem safe or right and the ability to perceive significant risks and act accordingly.

[15] For the relevance of all reasonable care, taking account of your circumstances see G. Gearty, 'Tort Liability for Injuries Incurred during Sport and Pastimes' 3 *The Cambridge Law Journal,* 371-373 (1985); S. Greenfield et al, 'Reconceptualising the Standard of Care in Sport: The case of Youth Rugby in England and South Africa' 18 *Potchefstroom Electronic Law Journal*, 2184-2217 (2015).

[16] Underlines this aspect, L. Di Nella, n 7 above, 310 and 333.

[17] For an interesting analysis, see A.P. Benedetti, 'Responsabilità civile sportiva. Un esempio di diritto consuetudinario?', in G. Famiglietti ed, *Sport e ordinamenti giuridici* (Pisa: Edizioni Plus, 2009), 189-199; the author states that there is an unwritten rule according to which the participant in a sporting activity accepts the possible consequential damages and the social community accepts this as well. Re the relationship between the penal liability and the civil liability see L. Di Nella, n 7 above, 257-261; see also R. Frau, 'La r.c. sportiva', in P. Cendon ed, *La responsabilità civile* (Torino: UTET, 1998), X, 307. A large reconstruction of judicial liability involving the various positions is found in M. Pittalis, *Fatti lesivi e attività sportive* (Padova: CEDAM, 2016).

[18] On this aspect, see L. Di Nella, 'Il sistema sportivo, tra unitarietà dell'ordinamento e orientamenti giurisprudenziali' *Actualidad Jurídica Iberoamericana*, 53-70 (2015); A. Lepore,

In reconstructing the legal nature of assumed risk, two opposing tendencies have been identified, one in private law[19] and the other in public law.[20]

Based on the assumption that there is agreement among athletes that they accept that there is a risk of events occurring during a race that may damage their physical integrity, some academics have readily traced the permitted risk back to the level of a contract, with all the consequences that this approach implied from the point of view of the conclusion and the way in which the will and capacity to put it into effect manifests itself.

Simply consider the problems that arise in identifying the moment when the agreement is made, the validity of a contract in which the will tacitly manifests itself and the possibility that a minor is a party to the contract.[21]

Looking at it from a more public law perspective, others have preferred to identify a non-codified[22] ground for justification in assumed risk, or one of the grounds for non-liability already codified as the exercise of the right[23] or the consent of the entitled party.[24]

The premise of these latter positions was the consideration that sporting activity is authorised by law for its benefits and therefore represents the content of the exercise of a right, that is, the right to practise sports, based on Art 2 of the Constitution.

The constitutional guarantee of sporting activities has been used to justify

'Fenomeno sportivo e autonomia privata nel diritto italiano ed europeo' *Actualidad Jurídica Iberoamericana*, 132-174 (2015); C. Alvisi, *Autonomia privata ed autodisciplina sportiva. Il Coni e la regolamentazione dello sport* (Milano: Giuffrè, 2000); according to the latter author, in the past scholars emphasised the link between the public relevance of sporting rules and the public role played by Sports Federations in sporting legal systems. See also M.P. Pignalosa, 'Ordinamento sportivo e fonti private' *Jus civile*, 646-673 (2017); the author underlines the legal contractual value of sporting rules in the light of the Melandri Decree. See also R. Caprioli, 'Il significato dell'autonomia nel sistema delle fonti del diritto sportivo nazionale' *Nuova giurisprudenza civile commentata*, 283-289 (2007). Regarding the case law, see Corte di Cassazione 5 April 1993 no 4063, *Il Foro italiano*, 136 (1994), commentary by G. Vidiri, 'Natura giuridica e potere regolamentare delle federazioni sportive nazionali'; Corte di Cassazione 11 February 1978 no 625, *Il Foro italiano*, 862 (1978).

[19] On this point see F.D. Busnelli and G. Ponzanelli 'Rischio sportivo e responsabilità civile' *Responsabilità civile e previdenza*, 286-287 (1984); G. De Marzo, n 8 above, 8-26; G. Alpa, n 8 above, 471-489.

[20] F. Albeggiani, 'Sport' *Enciclopedia del diritto* (Milano: Giuffrè, 1990), XLIII, 538-599.

[21] See Corte di Cassazione 6 December 2011 no 26200, *Danno e responsabilità*, 257-265 (2012), with commentary by V. Carbone, 'La responsabilità dei genitori per carenze educative: danni provocati dal figlio minore per carenze educative'.

[22] The Court stated that sporting activities are not only admitted, but also encouraged by the legal system because of their benefits on the health and well-being for the harmonious development of the whole community. See Corte di Cassazione-Sezione V Penale 21 February 2000 no 1951, *Cassazione Penale*, 1634 (2000), with commentary by A. D'Ambrosio, 'La responsabilità per le lesioni cagionate durante un'attività sportiva'.

[23] Refer to F. Albeggiani, n 20 above, 550-554; F. Fracchia, 'Sport' *Digesto discipline pubblicistiche* (Torino: UTET, 1999), XIV, 467-477.

[24] See here: C. Pedrazzi, 'Consenso dell'avente diritto' *Enciclopedia del diritto* (Milano: Giuffrè, 1961), IX, 140.

so-called 'basic violence',[25] considered lawful within the subjective limits of the consent of the participant to the competition and the objective limits of the eligibility of the practitioner and compliance with the rules.

By virtue of this thesis, offensive behaviour that does not infringe regulations has been deemed lawful on the basis of the absence of culpability, although not technically attributable to the exercise of a genuine right;[26] while, in another view, the injuries resulting from the violation of the rules were also justified, provided that the violence was necessary for the dynamics of the game and was compatible with the protection of the practitioner's health.[27]

In this last aspect, the common interpretations in the above theories resulted, in any case, in the prohibition of acts of use of one's own body enshrined in the Italian legal system by Art 5 of the Italian Civil Code, according to which, in fact, an agreement by which the protection of one's physical integrity, consenting to permanent reductions, is substantially renounced.[28]

On closer examination, it is a measure that has rendered the application of the neminem laedere clause to sport difficult, given the absence of a normative definition of the fault in the civil code and the atypical nature of the tort of injurious damages; as will be seen below, it has led to a reduction in the role of the grounds for justification and a different relevance of illegality, placing at the centre of the evaluation of the unlawful act the equivalence of the conflicting interests so as to establish whether the exercise of the law, although apparently legitimate, does not in reality lead to an unjustified sacrifice of another equally relevant interest.[29]

Although it is clear that the aforementioned rule expresses, in any case, a general prohibition on doing as one wishes with one's own body, the definition of the scope of the rule has once again been referred to the adaptive interpretation of the case-law that still today, by virtue of the evolution of society and customs, finds itself reworking the boundaries within which to contain the aforementioned prohibition.

It should be added that, when the code came into force, the rule was inspired by a purely patrimonial logic, which had permeated all the codification, for which the body was seen as an asset external to the subject to whom it belonged and

[25] See G. De Francesco, 'La violenza sportiva ed i suoi limiti scriminanti' *Rivista italiana di diritto e procedura penale*, 597 (1983).

[26] F. Mantovani, n 3 above, 233.

[27] G. De Francesco, n 25 above, 587-591.

[28] Read extensive bibliographical references in G. Cosco, 'La disposizione del corpo tra disciplina codicistica e complessità del sistema delle fonti' *Ordines*, 108-156 (2015); S. Rossi, 'Corpo umano (Atto di disposizione sul)' *Digesto discipline privatistiche* (Torino: UTET, 2012), Agg, 216-251. See also L. Di Nella, 'Lo sport. Profili metodologici', in L. Di Nella ed, *Manuale di diritto dello sport* (Napoli: Edizioni Scientifiche Italiane, 2010), 13-64; the author stresses that the sporting activity consists in a particular performance of the body, achieved by physical movements and using sports equipment, and it can be dangerous for a person's physical integrity.

[29] About this point, refer to L. Di Nella, n 7 above, 327, and A. Lepore, *Responsabilità civile e tutela della persona-atleta* (Napoli: Edizioni Scientifiche Italiane, 2009), 106.

therefore it could be used pursuant to Art 832 of the Civil Code, albeit within the codified limit of the prohibition of a permanent and therefore irreversible reduction.

The promulgation of the Constitutional Charter marked, instead, a turning point in a personalist sense, which permitted the identification of a rule in Art 5 aimed at protecting the individual's fundamental and inviolable right to physical integrity, as an expression of the broader concept of the right to health. Consequently, the permanent lessening of it has been considered an unlawful act that also damages the primary good of health explicitly guaranteed by Art 32 of the Charter.

This development has not prevented an evaluation, in terms of lawfulness, of acts that involve parts of one's body; nevertheless, the principle that has been recognised as the foundation of these 'freedoms' is not that of patrimonialism, but solidarism, in the light of which are justified, for example, organ donations or transplants and the term 'disposition' does not seem suitable.[30]

It can therefore be said that the principle in Art 5 is a conflict between different, sometimes opposing, private and public interests.

All the more so since the right to physical integrity is complex with two meanings; positive with reference to the physical attributes of the person, such as allowing the normal performance of vital functions; and negative in relation to the absence of impairments that undermine these functions and that are not due to natural and biological causes, such as the natural course of time.

Moreover, the concept of physical integrity, as well as being relative from a chronological point of view, is also relative from the psychological point of view, since the severity of the injury is also evaluated with regard to the life of the relationship, to the non-compromise of the individual's relationships in the social groups in which they usually display their personality. In this sense, the right to integrity concerns not only the body in terms of its physical composition and essence, but also its psychological dimension.[31]

IV. Assumed Risk, the Observance of the Rules of the Game and the Relevance of the Subjective Element of Culpability

[30] Legge 26 June 1967 no 458 has also derogated from the general rule set by the Civil Code, in some cases of particular moral and social value, as in the case of kidney donation. Consider legge 4 May 1990 no 107, which states that human blood cannot be the object of alienation for profit. See M.C. Venuti, 'Novità e prospettive in materia di trapianti d'organo' *Nuova giurisprudenza civile e commerciale*, 305 (2014); Id, 'Atti di disposizione del corpo e principio di gratuità' *Diritto di famiglia e delle persone*, 827 (2001); T.O. Scozzafava, *I beni e le forme giuridiche di appartenenza* (Milano: Giuffrè, 1982), 549.

[31] Re the legal value of physical integrity, see Corte Costituzionale 18 July 1991 no 356, *Il Foro italiano*, 2697 (1991) and Corte Costituzionale 27 December 1991 no 485, *Il Foro italiano*, 72 (1993); the Court stated that this right concerns the spiritual, cultural, affective and social sphere and all activities, situations and relationships in which people express themselves in their human personality.

The case-law in civil law has adopted and distinguishes between the rules of competition as the first criterion, ie technical rules issued by the Federations under the regulatory autonomy they are recognised as having, with the aim of regulating the individual sport, and which are therefore suitable for identifying all the conduct to be considered lawful insofar as it is in compliance with them.[32]

In this way, a first type of risk likely to be accepted by the athlete has been identified with reference to the conduct of games that complies with the aforementioned rules, assuming, for example, that the athlete has accepted the risk of harmful events arising from the practice of a violent sporting activity such as boxing or martial arts, provided that such events were the product of scrupulously 'regulated' conduct by the so-called technical rules of the 'competition' (intended to prevent possible damage to athletes on the playing field – with reference to football, let us consider the prohibition on 'charging the goal keeper').

This has resulted in a relativisation of assumed risk in practice, in relation to the different sports disciplines.

That said, it should be noted that various guidelines have been developed on the relationship between the violation of the rules of competition, assumed risk and liability:

a) a first reconstruction[33] makes the area of civil liability coincide with the violation of the competition rules without further ado.

b) According to a different guideline,[34] the violation of a sporting rule does not necessarily imply the emergence of a civil liability, since it is precisely with regard to foul play that is contrary to the regulations of the sport that assumed risk would operate, which every athlete knowingly assumes when they play sport. As has been pointed out in the light of this theory, it is then up to the case-law to actually identify which actions of foul play are covered by the acceptance of risk and therefore not a source of liability and which ones cannot be justified under this reasoning.

c) Finally, it is believed that the athlete, whether or not he/she complies with the rules of the competition, and therefore must always respect the general principles of the set of rules, including, primarily, that of neminem laedere and of fair play, which requires the sportsperson to be vigilant and humane and not to act with disregard for the adversary.[35]

[32] See L. Di Nella, n 7 above, 285; and V. Frattarolo, n 8 above, 19.

[33] For example, as noted by the case-law – Corte di Cassazione 6 March 1998 no 2486, *La Responsabilità civile*, 1099 (1999) – the federal norm envisaged for the game of hockey in striking the ball (which requires the player not to play or not to try to play the ball with any part of the stick above shoulder height), is laid down to avoid the risk of accidents in the use of a dangerous instrument during the game and a violation constitutes a ground for fault under Art 2043 of the Civil Code.

[34] V. Frattarolo, n 8 above, 48.

[35] Corte di Cassazione 9 October 1950, *Responsabilità civile e previdenza*, 55 (1951), with commentary by O. Cecchi, 'Lesioni colpose nelle partite di calcio'.

Moreover, with reference to certain, not necessarily violent,[36] sports, the case-law has in fact raised the threshold of punishment, justifying, this time, conduct that possibly conflicts with the competition rules, as attributable to the so-called normal risk implicit in any sport.

The Civil Court of Cassation in the leading case submitted to the Supreme Court in 2002[37] drew up a precise guideline – which still prevails in decisions not only in civil proceedings but also in criminal proceedings – according to which, it is common knowledge that during a competition the resulting anxiety to win, physical fatigue and sometimes excessive competitive stress can lead to involuntary violations of the competition rules; in these circumstances

> 'the threshold of 'assumed risk' cannot be said to be exceeded, provided that there is a functional link between the foul play and the game action and that the foul play is not intentionally intended to harm the opponent, as there is not an open violation of the fundamental rule of sporting honesty'.

On that occasion, the Court, with regard to the game of football, considered that it cannot be in any doubt that such a game, like any sports activity characterised by

> 'competitiveness and a certain degree of physical confrontation between the participants to achieve a favourable result in the confrontation, involves a risk to the safety of the players that is inherent in carrying out the activity itself, which is certainly permitted by the law and, indeed, promoted and encouraged by the State. No violation of a rule arises, in fact, "outside" the game itself, which cannot be effectively played without energy, aggression, speed, rapidity of decisions and instinctive reactions that are generally considered incompatible with a high degree of consideration for the safety of others and with constant respect for the rules of the game, aiming at a result, the attainment for which – as has been observed – a certain degree of audacity and recklessness is indispensable'.

[36] The literature stresses that 'we can remember how on the one hand there are sports in which physical contact between the participants is practically entirely excluded, such as volleyball, tennis, most of the disciplines of athletics, and on the other hand there are instead sports in which contact and physical encounters are functionally related to the nature of the sport practised, as in the case of football, rugby and boxing. Furthermore it should be noted that there are different 'intermediate' sports, where physical contact is limited: for example basketball, which is a 'no-contact game', In practice it allows limited contact between the players, but sanctions those above a certain 'intensity threshold'. In general, however, for every sport, the rules issued by the various federations determine the contact limits-physical encounter between the participants'. See A.P. Benedetti, 'Sport violento - sport pericoloso: tra libertà di disporre del proprio corpo e risarcimento del danno', in U. Breccia and A. Pizzorusso eds, *Atti di disposizione del proprio corpo*, (Pisa: Pisa University Press, 2007), 367-376.

[37] Corte di Cassazione 8 August 2002 no 12020, *Danno e responsabilità*, 532-536 (2003), commentary by M. Della Casa, 'Attività sportiva e criteri di selezione della condotta illecita tra colpevolezza ed antigiuridicità'.

The above guidance, a clear attempt to provide the interpreter with more certain criteria for assessing liability in sport, does not seem to have completely cleared up the misunderstandings that the legal significance of the risk entail in the reconstruction of the offence, nor does it do so even today, especially in relation to culpability.

This is because if, assessing the merits of the interests made on the basis of the recognition that the risk is inherent in the performance of the activity, which is certainly allowed by the law and, indeed, promoted and encouraged by the State, involves the acknowledgment of a greater degree of predictability of harmful events which is associated with a lower preventability of these harmful events (in the sense that the harmful event is highly probable), nevertheless, the acceptance of the risk for the social benefit of the activity itself does not on its own automatically exempt either the athlete from observing the precautionary rules or the judge from verifying them.

Moreover, it should be noted that a risk that is accepted is not predetermined objectively but is based on a parameter, that of normality (of the risk),[38] which, on closer inspection, is not only an objective risk, bound to the type of sport, but also subjective, assuming for the purposes of assessing the specific risk the persona of an average sportsperson, who is prudent and aware, and who, when he/she becomes part of the sporting order or at the time of registration in the individual sporting event, knows the rules and undertakes to observe them, accepting, or assuming that he/she has accepted, the dangers associated with that activity.

In this respect, the theory according to which

> 'the assumed risk must be considered to coincide with the observance of the technical rules, which, according to an assessment made by the secondary regulations (that is, by the rules of the sport), identify the limit of the reasonable risk component of which each practitioner must be fully aware from the moment he/she decides to practise a particular sport competitively',[39]

can only denote an underlying uncertainty regarding the placement of the sporting risk in an unlawful framework; indeed, it seems that it is more likely to be situated in the area of culpability, when there is a move from the abstract assessment of the lawfulness of the sport to the genuine ascertainment of civil (or criminal) liability.

All the more so if one considers that, in the aforementioned leading case of 2002, the Court of Cassation, which states that only in a first approximation can compliance with the competition rules indicate a first distinction between what

[38] See R. Frau, 'La responsabilità civile sportiva nel calcio: collegamento funzionale all'azione di gioco, tipologia di gara e qualità dei partecipanti' *Responsabilità civile e previdenza*, 2250-2264 (2011); see also M. Della Casa, n 37 above, 532-536.

[39] R. Beghini, *L'illecito civile e penale sportivo* (Padova: CEDAM, 1999); M. Sferrazza, 'La scriminante sportiva nel gioco del calcio' *Rivista di diritto ed economia dello sport*, 49-74 (2008).

is lawful and what is unlawful in a sporting context, we are left to understand that there is no automatic connection between the violation of the sporting rule and the bypassing of the risk, at least when there is a hypothesis of a physiological development of an action carried out in the excitement of competition that is exceeded in the harmful act.

It follows in similar hypotheses, that when there is a violation of the rules it is necessary to establish whether there should be liability. Assumed risk does not seem to be able to contribute, but rather culpability, because not only can the same sports rules be considered common rules of prudence or leges artis, able to include a generic or specific fault according to Art 43 of the Criminal Code, but above all because it seems that the psychological attitude of the subject with respect to the foul play reveals it.

In fact, in the aforementioned sentence, we read verbatim that

> 'the judge, having ascertained the characteristics of the event that produced personal injury to a participant in a sports activity carried out by another participant, will affirm the liability of the agent in the case of actions performed for the specific purpose of causing harm, even if they do not include a violation of a rule of the activity performed; b) will exclude liability if the injuries are the result of an act carried out without violating the rules of the activity and if, despite the violation of the rule specifically related to the sporting activity, the action is functionally connected to it, considering that in both cases the functional link is excluded from the use of a degree of aggression or impetuosity incompatible with the characteristics of the sport practised, with the context in which the activity specifically takes place, or with the quality of the participants'.

Up to now we can say that, for the purpose of balancing the right to practise sport and the right to psychological and physical integrity, rather than having an abstract scheme of justifications, it is diligence that should be the criterion for assessing sports liability (of the athlete), from the point of view of prudence and expertise appropriate to the type of game and sporting discipline, used as criteria for considering as exempt from liability conduct directed at the action of the game and not towards the intentional harm of the opponent's physical integrity.[40]

There are two reasons for this, the first being that for which the sportsperson has always the duty to model his/her conduct on the general rules of prudence, diligence and loyalty, balancing the interests connected to the aims of the competition with the superior requirement of respect for physical integrity,

[40] Refer to A. Lepore, n 29 above, 106. According to the author it is necessary to re-evaluate the concept of diligence in the light of the constitutional principle of solidarity to protect the right to health of the athlete. See also A.G. Parisi, 'Sport ad alto rischio e lesione di diritti personalissimi. Responsabilità civile e penale', in L. Cantamessa et al eds, *Lineamenti di diritto sportivo* (Milano: Giuffrè, 2008), 307-401.

his/her own life and the lives of his/her opponents.[41]

Secondly, in this sense the case-law on legitimacy not surprisingly seems to have been evolving even more recently; in a recent ruling[42] it was stated that

> 'even for the purposes of defining non-contractual liability, fault is substantiated in the non-observance of laws, regulations, rules and disciplines, as well as in the objective violation of diligence, prudence and competence, on which the subject must base his/her conduct (even) in relationships in daily life'.

These conclusions have led to a series of reflections, fuelling a debate that is no longer dormant and that in substance relates to the identification of the content of diligence, or, as Anglo-Saxon scholars put it, the standard of care to which the practitioner is required to conform during sporting activity.

In fact, in the case referred to in the 2002 ruling, the Supreme Court came to the conclusion, which is considered questionable, that 'damage caused by the intervention of a professional is undoubtedly less than that caused by an amateur'.

In an attempt to coordinate 'compliance with competitive aims and the need to protect the person',[43] it is vitally important to establish whether and when the sporting rules are sufficient to stipulate the boundaries of the practitioner's diligence or when they are incomplete, and these gaps have to be covered by common rules. The question of the binding nature of sporting rules remains open.

Moreover, in the reconstruction of the relationship between sporting rules and the rules of ordinary diligence, it must be established whether the former reveal common rules of prudence or they constitute specific rules, ie leges artis, to justify recourse not to the bonus pater familias model but to professional diligence laid down in Art 1176, para 2, Civil Code.

Based on the assumption that the purpose of some sporting rules is to prevent harmful events[44] since even though sport is essentially a technical affair, which is expressed in competition, as a 'technical and competitive form of the game' it also needs rules intended to prevent the risk of damaging events.

For this purpose, scholars recognise that certain rules of conduct would be prescribed, especially in violent or dangerous sports.

Regarding this aspect, in the alternative between considering these rules to be real and proper public legal norms or legally indifferent technical rules,[45] a new approach has recently come to the fore thanks to a reinterpretation of the sporting

[41] Tribunale di Roma 4 April 1996, *Responsabilità civile e previdenza*, 1247 (1996), with commentary by R. Frau, 'Responsabilità civile e competizioni sportive non ufficiali: il caso della gara di scherma'.

[42] Corte di Cassazione 20 February 2015 no 3367, available at www.dirittoegiustizia.it.

[43] L. Di Nella, n 7 above, 327.

[44] V. Frattarolo, n 2 above, 19; P. Luiso, *La giustizia sportiva* (Milano: Giuffrè, 1975), 35.

[45] See, V. Furno, 'Note critiche in tema di giochi, scommesse e arbitraggi sportivi' *Rivista trimestrale di diritto e procedura civile*, 619 (1952).

phenomenon, conceived not as a set of rules, but as a system and subject of multilevel sources, which, in the light of the principle of horizontal subsidiarity and freedom of association, is framed more generally in the framework of the general legal system.[46]

Therefore, sports entities in most cases are legal persons under private law who are primarily considered incrimination centres of subjective situations in the state system, capable of acts and behaviour relevant to the rules of this system, so that, by applying the private association framework to the macro-organisation of sport, sporting rules are nothing but the product of the associative contractual autonomy of the intermediate bodies recognised by the state and of the self-regulation which is its characteristic expression in private law pursuant to Art 1322 of the Civil Code.

According to this reconstruction, it remains to be seen whether they are relevant in the context of culpability in the same way as genuine leges artis, the result of sanctioning specific safeguards, dictated and indicated by reason of the nature of the activity (possibly professional) exercised, as a type of self-discipline similar to the self-regulation codes of the professions[47] or to common prudential rules.

In the first case, they should bind experienced sportsmen, since in general the expression leges artis is used in respect of subjects technically liable for the exercise of an art or profession; thus, if you do not wish to believe that the recipients are professional sportspeople, because this expression is abused and non-technical in relation to sports law, since competitive sports cannot be strictly and technically attributed to the concept of a profession as outlined in Art 2229 of the Civil Code, therefore, since professional sport is not organically regulated, it could be recognised that the sporting rules are at least binding on all the registered competitors. However, this solution ignores the unexplored and grey area of non-competitive, amateur and para-sporting activities, which nonetheless are competitions aimed, albeit occasionally, at determining a winner.[48]

Given all of this, legal scholars consider that the recognition of diligence cannot just depend on sporting regulations, especially if these are private rules that are sometimes insufficient to preserve the health of the athlete.[49]

By virtue of this reconstruction, civil liability in sport would be based on more elastic and case-based criteria. This, however, should allow, starting from the unwritten favor legis for sporting activities, a functional and finalistic recognition of the act to verify, not only on the basis of the rules but also the principles, first and foremost that of protection of the person, if it was suitable for the purpose for which it was accomplished.

[46] n 11 above.
[47] A. Lepore, n 29 above, 126.
[48] L. Di Nella, n 7 above, 361 and 367.
[49] A. Lepore, n 29 above, 134.

To this end, the parameter for assessing conduct should be the duty of diligence related to the capabilities of the practitioner, with the damaging party bearing the economic burden of only the damage that he could and should have avoided.[50]

The conclusion should therefore be diametrically opposed to that professed in the 2002 judgment, requiring a higher threshold of diligence the higher the level of professionalism of the performer and his/her ability for self-determination with regard to the sporting event.

The exercise of the right to sport does not play a role in a civil judgment as a ground for justification in the strict technical sense because it is not automatic, as the comparison of the interests concerned cannot be the result of an ex ante evaluation by the legislator, as happens in hypotheses about exonerating circumstances in the strict sense, but from an actual balancing, meeting the external limit of the general clauses – first and foremost the abuse of rights.

V. Observations on the Limits to the Theory of Assumed Risk. The Position of the Other Holders of Qualified Positions in the Sporting Event: Organisers, Parents and Instructors

The reconstruction of the operative area of assumed risk cannot disregard the responsibility of other subjects that have qualified positions in the sporting event, in the light of abstract cases that are different from the one outlined, despite its atypical nature, by Art 2043 of the Civil Code, and based on the personal quality of the responsible person or on the qualified relationship of the subject with things or with the nature of the activity carried out; these are typical examples, which are frequently used as a reference point in sport, which appears even more noteworthy given that they are subject to a more onerous regime for the alleged injuring party.

a) This is said, for example, with regard to the position of the organiser of sporting events, who appears as the subject who has the duty of supervising the performance of the event in order to prevent damage and avert danger to the physical safety of the athletes and third parties such as the spectators. The case-law has taken a restrictive view of this. In fact, the organiser has a series of behavioural duties that are increasingly required by diligence, the fulfilment of which is intended to prevent damage, even to third parties. In particular, it is necessary to check the adequacy, danger and safety compliance of the 'technical means' used by the participants, insofar as it is believed that no complaint can be made against the organiser if, despite the fact that conformity with the regulations of the technical means used has been attested, these latter, due to their intrinsic characteristics and the use made of them, have caused damage to

[50] If allowed, refer to M. Cimmino, 'Autodeterminazione del minore e responsabilità civile' *Famiglia e diritto*, 148 (2012).

the athletes or others.[51]

The aforementioned activity requires various orders of prescriptions to be observed: those dictated by the rules of public order, with the dual aim of protecting the safety of athletes and spectators (on the one hand), and that of guaranteeing the sport as a whole (on the other), those sanctioned by sports regulations and those of common prudence.

The Court of Cassation has held that

> 'it is true that the voluntary conduct of sporting activity involves the voluntary exposure of the athlete to the intrinsic risk connected to the discipline practised, but the acceptance of the risk certainly does not exclude the liability of the competition organiser or of the sports instructor which remains in all cases in which they have violated the rules that safeguard the safety of the junior athletes (specific fault), or the rules of common prudence and diligence (general fault)'.[52]

To confirm the above it is useful to remember that there has been no shortage of scholars who even claimed that the organisation of sporting events should itself be classified as a dangerous activity, pursuant to Art 2050 of the Civil Code, taking into account a series of factors such as the presence of spectators, the intrinsically dangerous nature of the activity itself, the type of means used, and the places where the activity is practised.[53]

b) There is also considerable case-law in relation to the instructor's liability; in particular when it involves minors entrusted to instructors or experts in a sport, whether practised at a recreational or competitive level.[54]

[51] According to the scholars – see P. Dini, 'L'organizzatore e le competizioni: limiti alla responsabilità' *Rivista di diritto sportivo*, 476 (1971) – the organiser of a sporting event promotes the 'meeting' between two or more athletes, with the aim of achieving a result in one or more sporting disciplines. The legal system imposes specific obligations on the owners of the facilities and organisers to ensure the safety of all the participants and spectators. On this point see also M. Pittalis, 'La responsabilità contrattuale ed aquiliana dell'organizzatore di eventi sportivi' *Contratto e impresa*, 150-197 (2011); and on the relationship between the position of the organiser of sporting event and the qualities of the owner and manager of the structure, refer to M. Franzoni, 'Lo sport nella responsabilità civile', in P. Rescigno et al, *Fenomeno sportivo* n 8 above, 137.

[52] Corte di Cassazione 9 April 2015 no 7093, *Giurisprudenza italiana*, 1062 (2015), with commentary by P. Valore, 'La responsabilità del gestore di maneggio'.

[53] Organising motorcycle races (even if regular) on a circuit open to traffic was considered dangerous. Also considered dangerous were: the management of a go-kart track, the organisation of bob races, even in a competition approved by the competent International Federations, managing a riding school (where, in riding, a person is considered a 'beginner', or young), trampoline management, taekwondo, mountaineering, riding, hunting (due to the intrinsic danger of the vehicles used), air navigation, recreational or sports flights. On the other hand, free-weight gymnastics, 'costume' (or 'Florentine') soccer, soccer management, 'bumper car' tracks, managing a ski facility, or managing a ski lift were not considered dangerous. See S. Galliani and A. Piscini, 'Riflessioni per un quadro generale della responsabilità civile nell'organizzazione di un evento sportivo' *Rivista di diritto ed economia dello sport*, 113-123 (2007).

[54] M. Pittalis, n 51 above, 150-197.

It is known, in fact, that when teaching and when starting a sporting activity, instructors play a particular role in terms of directing and supervising their students, in the light of which, in the event of harm, their liability is configured pursuant to Arts 2047 and 2048 of the Civil Code. In this respect, it should be noted that the concept of 'preceptor' has undergone continuous evolution on an interpretative level, today including not only those who look after the education of minors in substitution of parents, but also those who are involved in a teaching activity, including, therefore, the teachers of a sporting discipline, or the school teachers of physical education.

This is a case in point that has not been free from interpretative doubts since the liability of the supervisor can be established on the basis of two different norms based on different assumptions of Art 2047 of the Civil Code, which clearly refers to the unlawful act of the incompetent, and the subsequent rule, of Art 2048 of the Civil Code, that instead presupposes the level of intent and of will of the author of the act, ie even that of a student who is a minor; a condition to be determined on a case-by-case basis, since it could entail, for a minor capable of will and intent, personal liability for the damage with his/her own assets, but jointly with their parents.

It should also be borne in mind that assessing the adequacy of the supervision is particularly delicate, and should be appraised by means of various parameters, such as taking into account the age and degree of maturity of the young athletes, in the specific case; consequently, the probability of invoking the liability of the instructor will be greater in the case of a student who is a minor and who is inexperienced in the sporting discipline, and these situations will require maximum vigilance in terms of continuity and attention.

The case-law on this aspect[55] and on legitimacy has recently held that the jurisprudential principles developed on the subject of sporting lessons and activities carried out during school time are also comfortably applicable to sports courses in private amateur associations as they are not competitive activities and are private schools responsible for teaching a sport, as in the case at issue.

The salient feature of this reconstructive position is the affirmation of the necessity that, for the purpose of configuring liability pursuant to Art 2048 Italian Civil Code, the mere fact of having organised a sporting competition for students is not sufficient, since it is necessary that the damage is the consequence of a culpable behaviour that includes an unlawful act undertaken by another student engaged in the game and also that, in relation to the seriousness of the specific case, the school did not implement all the measures necessary to avoid harm.

In the present case, the trial judge held that

> 'to understand the content of the supervisory obligation and the rules of caution and prudence that can be claimed of the sports school in

[55] Tribunale di Firenze 28 January 2018 no 180, available at www.coni.it.

> question, during the course of the lessons, it is useful to understand the true nature and the dynamics of the sport in question in relation to the age of the injured party and to the principle of expected self-responsibility; that in order to examine the liability of the tutor or organiser of a sporting event, it is necessary to determine whether the damaging event is attributable to the athlete, to the tutor's organisational or precautionary deficiencies, or falls within the scope of the so-called sporting justification'.

Lastly, under the theory of the student causing harm to himself/herself, the provision of Art 2048 of the Civil Code seems to come up against application limits.

Indeed, the Supreme Court has held that the provision of Art 2048 is inapplicable in relation to this hypothesis by virtue of the fact that its provisions could only refer to damage caused to third parties.

Therefore, with a very cogent reconstruction it has applied another provision that is not even the general one of Art 2043 of the Civil Code, but that of Art 1218 of the Civil Code, which governs contractual liability, and therefore classifies the liability of the tutor as a contractual liability, with the result that it makes matters of evidence easier for the injured party.

In more detail, the United Sections state:

> 'in terms of literal interpretation, Art 2048(2) refers expressly to the damage caused by the unlawful act of the student, which presupposes an objectively unlawful act that is detrimental to a third party. And then, since the conduct of the student who is causing harm, not to a third party but to him/herself, cannot be considered objectively unlawful (...) this hypothesis must remain outside the scope of Art 2048(2) of the Civil Code'.[56]

The hypothesis, on which the Supreme Court's theory rests, is that of social contact,[57] on the basis of which a contractual relationship is established in fact even in the absence of a contract *tout court*, but thanks to the factual assumption of the student's being entrusted to the teacher, which triggers duties to protect the student from harm.

By virtue of this reconstruction, since in general the instructor is a school auxiliary – think of educational establishments or ski schools – it is believed that a genuine contract can be found in the enrolment in the school, which determines the establishment of a contractual relationship in all respects, but only with the

[56] Corte di Cassazione 26 January 2016 no 1322, *Rivista di diritto sportivo*, 409-416 (2016) with commentary by A. Di Majo, 'Attività sportiva scolastica e responsabilità civile'; Corte di Cassazione 17 February 2014 no 3612, *Danno e Responsabilità*, (2014), 900-905, with commentary by C. Daini, 'Danno da autolesione di un allievo (minore) di una scuola sci'; see also F. Di Ciommo, 'La responsabilità contrattuale della scuola (pubblica) per il danno che il minore si procura da sè: verso il ridimensionamento dell'art. 2048' *Il Foro italiano*, I, 2635 (2003).

[57] See B. Tripodi, 'Condotta autolesiva dell'allievo e responsabilità contrattuale della scuola sci' *Danno e responsabilità* 169 (2013), commentary to Corte di Cassazione 11 June 2012 no 9347.

school.

However, since the student is entrusted to the instructor and through him/her, the contractual relationship between instructor and student is, as already mentioned, based on the social contact and is always regulated by the provision of Art 1218 of the Civil Code.

c) In relation to the damage that occurred during a sporting activity, the Supreme Court also called in parental responsibility[58] pursuant to Art 2048 of the Italian Civil Code, founded on the parents' failure to fulfil the duties set out in Art 147 of the Civil Code, which regulates parent-child relationships.

Under Art 2048 of the Civil Code, parents are required to prove that the minor was given a sound education and that adequate supervision was provided in line with his/her age, character and temperament.

It is therefore occasionally necessary, in cases of harm caused by a student to the detriment of another student, to establish

> 'whether an anomalous behaviour of this kind, that is voluntary and violent, and in any way justifiable, even if it was not committed during part of the game and in the excitement of the moment, but deliberately and when the game was at a standstill, was an indication of inadequate education with respect to the civil dictates of relationships and sporting life, the responsibility for which – in the absence of precise evidence of release – could only allegedly fall on the parents, who have failed to fulfil their duties with regard to the obligations pursuant to Article 147 of the Civil Code'.

It can be said that parents will not have to compensate for the damage caused by their child during a sporting activity if they show that they have properly introduced the child to the sport and have adequately supervised the child on the occasion of the unlawful act; and, again, when they exercised vigilance suitable for the degree of education and upbringing of their child.

If it is true that parents, in turn, have the obligation to instruct and educate their children according to the child's inclinations and natural abilities, in terms of unlawful acts, however, it is necessary to consider the other side of the picture, so that, from a viewpoint of self-responsibility and self-determination, if the minor is subject to protection, then he/she must also be considered responsible for his/her own conduct, so more attention needs to be paid to the evaluation of his/her ability to understand and take action.

Indeed, potentially and abstractly, the parents will always be responsible for

[58] Corte di Cassazione 6 December 2011 no 26200, *Danno e responsabilità*, 257-269 (2012), with commentary by V. Carbone, 'Responsabilità dei genitori per carenze educative: danni provocati dal figlio minore in una sosta della partita di calcio'. See also Corte di Cassazione 31 March 2017 no 8553, available at www.coni.it. For sporting activities involving minors, see A.G. Parisi, 'Sport minori e responsabiltà genitoriale' *Comparazione diritto civile*, 1-21 (2016); V. Putuortì, 'Manifestazione sportiva tra minori e responsabilità dell'organizzatore' *Persona e mercato*, 271-288 (2011); M. Franzoni, n 51 above, 141, and, if allowed, refer to M. Cimmino, n 50 above, 143-158.

the actions carried out by their children, with obvious implications in terms of the opportunity for compensation for damages deriving from the unlawful act of the minor.

Moreover, this rule does not differentiate between minors based on their age, so that the liability regime for an offence of a seventeen-year-old is the same as that for the same offence by a twelve-year-old (as long as both are able to genuinely understand and take action in the case concerned).

The legislator, therefore, has not provided for a graduation of liability that takes into account 'older minors';[59] nor has the case-law indicated precise interpretation criteria according to the age of the child close to acquiring the full capacity to act. This is different from other systems (for example, the French and German systems) that have a discipline similar to ours.[60]

Moreover, during the preparatory work on the current Civil Code there was also the proposal to introduce a progressive system for the minor acquiring the capacity to act, in line with intellectual and moral maturity; in the end, however, a radical solution was opted, for which, through the watershed of Art 2 Civil Code, minority was established as a condition of the person's general legal incapacity, in order to satisfy the requirements of certainty of trade, and therefore from the viewpoint of protecting economic needs.

Today this view has changed and it is necessary to be aware of it, especially in relation to adolescence. In fact, some European legislations, in identifying the age below which a child is not considered responsible, are arriving at ever lower ages.[61]

These observations seem to be consistent with the discipline of family relations, based on the change in the institution of parental authority in 'parental responsibility' carried out by the Italian legislator in 2012 with the introduction of the new Art 316 of the Civil Code, the expression of an evolving path that started with the entry into force of the Constitutional Charter and that was marked by the transition from an institutional and authoritarian conception of the family to one that considers the family as a community, founded on the mutual solidarity of its members, all bearers of autonomous subjective rights,

[59] Regarding older minors see S. Patti, 'L'illecito del quasi maggiorenne e la responsabilità dei genitori: il recente indirizzo del *Bundesgerichtshof*' *Rivista di diritto commerciale*, 27 (1984); and E. Maschio, 'Responsabilità *ex* art. 2048 c.c. e grandi minori' *Diritto di famiglia*, 875, (1988).

[60] F. Giardina, ' "Morte" della potestà e "capacità" del figlio" ' *Rivista di diritto civile*, 1609-1620 (2016); Id, 'Capacità d'agire', in A. Barba and S. Pagliantini eds, *Commentario del codice civile - Delle persone*, 360-394 (Torino: UTET, 2012); F. Occhiogrosso, 'Discernimento', in G. Contri ed, *Minori in giudizio. La Convenzione di Strasburgo* (Milano: Franco Angeli, 2012), 49-57; P. Rescigno, 'Il primato della capacità del minore', ibid 89-97; G. Anzani, 'Capacità di agire e interessi della personalità' *Nuova giurisprudenza civile commentata*, 509-520 (2009); G. Alpa, 'I contratti del minore. Appunti di diritto comparato' *Contratti*, 517 (2004).

[61] See M. Porcelli, 'Minori di età e rapporti giuridici non patrimoniali' *Il Diritto di famiglia e delle persone*, 581-593 (2018); S. Stefanelli, 'Verso la capacità di agire del minore: il caso degli atti giuridici in senso stretto' *Il Foro italiano*, 604-609 (2018); P. Stanzione, 'I contratti del minore' *Europa e diritto privato*, 1237-1386 (2014); G. Berti De Marinis, 'La protección de los menores en el ámbito contratual' *Revista boliviana de derecho*, 80-97 (2016).

interests and, basically, of duties and responsibilities.

VI. *Follows*: Guidelines from Recent Case-Law on Procedure and Judgments on the Merits

From these uncertainties, I still take into account the recent case-law on procedure and judgments on the merits, which does not always reach unequivocal solutions.

Recently, for example, the Supreme Court of Cassation[62] has held that

> 'the liability of a custodian of a playground where soap football is played is not excluded by the injured party's decision to use the equipment provided for by the regulation as being necessary for the performance of the sporting activity, even if the injured party may have thought it was suitable for performing the protective function required by the nature of the game'.
>
> 'A soap football player's decision to use a helmet that proved unsuitable for providing protection is certainly not down to a so-called elective risk and is not sufficient to interrupt the etiological connection between the supply of the helmet to the player and the injuries suffered by the latter'.[63]

The facts of the case originated from a harmful event that occurred following a fall occurred during a soap football match; according to the victim, who took legal action against the manager of the structure for compensation for damages due, the failure to adopt the necessary precautions and technical devices both in relation to the state of wear of the structure used for the game and to the characteristics of the protective helmet, fails on the two degrees of merit.

In fact, the Court of Appeal had found that the game's regulation required, among other things, prohibition on playing soap football without using suitable equipment, and that, the players having been made aware of the said regulation, the decision to continue playing despite the helmet having been found to be unsuitable for providing the specific protection was a ground that validly

[62] Corte di Cassazione 19 January 2018 no 1254, *La Nuova giurisprudenza civile commentata*, 1052-1063 (2018), with commentary by P. Garraffa, 'La responsabilità del gestore di un impianto di calcio "saponato" '; see also L. Ripa, 'I doveri di protezione del gestore di un impianto sportivo: verso una prospettiva relazionale della sua responsabilità civile' *Rassegna di diritto ed economia dello sport*, 131-154 (2017); the latter author criticises R. Campione, *La responsabilità dei gestori e degli utenti delle aree destinate alla pratica degli sport invernali* (Padova: CEDAM, 2009).

[63] In this case, the applicant had found that the helmet supplied to him was 'small', ie it did not properly fit the size of his head; however, according to the Court, wearing a helmet perceived as 'small' is a circumstance that can lend itself to two interpretations, both to justify a perception of a mere lack of comfort of the protective equipment, and to perceive its inability to perform the protective function. Therefore, based on common logic, the conclusion that the applicant, having taken part in the game with a helmet of smaller size than he needed, culpably decided to play and taking the risk of doing so in the absence of suitable protection, is not acceptable.

interrupted the causal link between this unsuitability and the injuries; ultimately, according to the Territorial Court, given the peculiarity of the game, consisting of sliding, the harmful event had to be attributed not to non-compliance with the normative prescription that requires the owner of items held in safe custody to adopt the appropriate precautions to avoid damage to others, but to the imprudence of the injured party.

By appeal on a point of law, the appellant criticised the contested decision, which had not recognised the defendant's liability pursuant to Art 2051 of the Civil Code, despite the fact that some circumstances were not disputed, such as the qualities of owner and manager of the structure in which the events took place acknowledged by the other party, the fact that the harmful event occurred following the fall during the five-a-side match, as well as the fact, also not disputed, that the owner had provided helmets that were not suitable for the game.

The Supreme Court accepted the appeal, excluding – censuring the subsumption error by the lower court – that the damage suffered had been caused exclusively, interrupting the causal link attributable to the condition of the helmet, by his conscious choice to use it despite having perceived its inability to perform the protective function required by the nature of the game.

The judges ruling on matters of procedure also observed that, in substance, the judges ruling on the merits would have done well to verify whether and how the practitioner's acquired awareness of the dangerousness of the game in relation to the circumstances and, in particular, to the structure for playing it and the equipment used, as well as the appropriate method of demonstrating this awareness, and whether these would be understood unequivocally and comprehensibly by the man in the street.

According to the judges of the Supreme Court, considering that the 'thing' that would have been the cause of the damage would have been the unsuitable helmet and that this had in fact been provided by the operator, the matter, as it occurred in this case, did not present the characteristics required by the abstract case that was applied, that is Art 2051 of the Civil Code; the contested judgment had therefore erroneously subsumed the factual situation under the principle of law which it declared was applicable, because it was not definitively ascribable to the conscious choice of the injured party (so-called elective risk), who, although able to realise the dangerousness of the thing using ordinary diligence, decided to use it anyway.

The ruling concerns the relevance in the specific context of the injured party's conscious acceptance of a particular type of risk and assumes the conscious acceptance by the injured party of a particular type of risk, namely using unsuitable equipment, in order to exclude the liability of the custodian of the said equipment, so-called elective risk; in the present case, while forming part of the broad issue of civil liability for sports activities, the hypothesis of damage to the athlete is attributable not to other participants and/or competitors, but to the use of

unsuitable sports equipment.

The matter, in the light of the precedents set by case-law invoked both by the judge ruling on the merits of the case and the judge ruling on procedural matters, although interpreted differently by them, is an opportunity to reflect on the real practical limits of the assumption of risk in sport, so-called assumed risk, since it is legitimate to ask whether it only pertains to the practitioners' conduct or touches upon the conduct of third parties, such as managers, and may go as far as encompassing the use of equipment and/or sports facilities.

The decision of the Supreme Court claims that elective risk, as the judges ruling on the merits already had, excludes the liability of the manager of the sports facility pursuant to Art 2051 Civil Code as custodian of the equipment provided for playing the game, in the light of the most recent case-law according to which this type of risk occurs whenever abnormal, undisputable and excessive behaviour takes place, thereby creating risk conditions unrelated to normal levels of behaviour; in similar theories, the elective risk seems to be assessed in relation to the qualities of a thing in such a way that the conscious acceptance by the injured person who, though being able to understand the danger based on his/her ordinary diligence, chooses to use it equally excludes the custodian's liability for the thing itself.[64]

In this respect, careful consideration must be given to the relationships between assumed risk and elective risk, in the light of the considerable and heated debate, in terms of theory and case-law, on sports liability, to verify the function of these types of risk in the context of the offence.

They seem to fully confirm the perplexities mentioned above of the complaints of the applicant, who, in the Supreme Court of Cassation, wonders whether the approach is correct according to which the awareness of the dangerousness of the equipment, rather than of the structures, is sufficient of itself to exclude the causal link with regard to the manager's liability, given that the injured person, as a casual player,

> 'could not have fully and by himself understood the high risk inherent in practising the sport with a helmet that later turned out to be not approved',

as it would have been unlawful to accept the risk of exposing one's mental and physical integrity to permanent injuries such as those encountered during the trial.

Focusing on an aspect of certain importance, in the light of a useful distinction between

> 'the acceptance of the risks of accidents from collisions during the game

[64] Corte di Cassazione 31 July 2012 no 13681, *Danno e responsabilità*, 717-723 (2013), with commentary by A.P. Benedetti, 'Infortunio durante una partita di calcetto e responsabilità del custode della struttura sportiva'; on the role and the liability of the manager, refer to M. Franzoni, n 51 above, 137.

and the risks deriving from the possible dangerousness of the structures',

the injured party claims that the only event that could interrupt the causal link would have been and should only be unforeseeable circumstances, that is to say a factor outside the subjective sphere of the practitioner, which he could not foresee and which therefore cannot be subsumed to the scope of accepted risk; in other words, an external element (which can also be the fact of a third party or of the injured party him/herself), qualified by the nature of unpredictability and exceptionality; however, the use of an unsuitable helmet cannot be considered in this way.

According to the applicant's argument, the predictability of the event had to be borne by the manager, who should have prevented it by supplying a suitable helmet or by stopping the game; to reason differently, it is argued, would mean placing a 'duty of oversight' of the elements of danger related to the playing area that would be too burdensome to the practitioner, since

> 'it is difficult to imagine that before any activity a normal sportsperson has the skills to be able to check the safety of the area',

not ignoring, moreover, the trust that those who use a sports facility managed by a professional operator put in its safety conditions, given that otherwise the function of Art 2051 of the Civil Code to attribute the liability to those who are in a position to control the risks inherent in the use of the thing would be eliminated.[65]

The Court of Cassation also recognises in the ruling under review the importance of the subjective aspect in the reconstruction of the offence, having regard to the psychological attitude of the sportsperson during the game, specifying that

> 'according to common experience, it must be assumed that the fact of playing with a small helmet represents an element that does not automatically justify the consequence that it was perceived as unsuitable as protection, both because although it was a small helmet this had not prevented P., evidently, from wearing it, and because the helmet being "small", precisely because this smallness had not prevented it from being worn, could also induce the conviction of playing only with a lower degree of comfort and not a lack of suitable protection.

[65] On this issue, see an interesting reconstruction about Sky Sport by L. Salvadori, 'Percezione del rischio valanghe ed errori cognitivi' *Rivista di diritto sportivo*, 143-157 (2018); the author analyses the role played in the athlete's decision by cognitive bias as overconfidence, that is an excessive confidence in the correctness of your judgements; see also U. Izzo, 'Safety and Liability in the practice of Skiing: How Law and Cognitive Sciences Shape the Driving Factor of Winter Tourism' 12 *The Entertainment and Sports Law Journal*, 3 (2014).

> In other words, wearing a helmet perceived as "small" is a circumstance that lends itself both to justify a perception of the mere lack of comfort of the instrument of preservation from danger, and to a perception of being unsuitable for performing this function'.

Therefore, the judges of the Supreme Court maintain that the different guideline is not applicable in the case in question, according to which

> 'the danger of the inert thing does not constitute the custodian's responsibility, but is simply a clue from which to return, pursuant to Art 2727 of the Civil Code, to the proof of the causal link between the *res statica* itself and the damage'.[66]

From the above it is possible to envisage a distinction between the risk of accidents and collisions in the course of the game deriving from the possible dangerousness of the structures and/or equipment. In this last case, in fact, the assumed risk would not help to exclude liability based on Art 2043 of the Civil Code; rather, it would be a case of liability for a dangerous activity or things in custody.

A very recent ruling by the Court of Tivoli seems to corroborate this.

The incident in question stems from an accident that occurred during a motorcycle race where a sportsman reported some personal injuries; in fact, when he fell near a curve, he was then run over by the other participants in the race.[67]

Following the incident, the victim asked the race organiser for compensation for financial damages (under contractual and non-contractual pursuant to Art 2050, or, subordinately, pursuant to Arts 2049, 2051 and 2043 of the Civil Code) and non-pecuniary damage incurred. This is because, according to the plaintiff, the track was built incorrectly and, for this reason, the race director was negligent as he was unable to check that the race was progressing correctly and interrupt it in the event of an accident.

The defendant claimed that he had all the certificates and all the authorisations required for the proper organisation of the sporting activity. He also stated that all of the motorcycle racers had had the opportunity to practise on the track free of charge and that the plaintiff, like all the other participants in the race, had not reported any problems with the terrain. The defendant (the organiser) subrogated his insurance company and the race director, for the defendant to be held harmless in the event of an unfavourable outcome.

The Court of First Instance classified the liability of the organiser according

[66] Corte di Cassazione 5 September 2016 no 17625, available at www.giustiziacivile.com, with comment by F. Cioni, 'Pericolosità della cosa in custodia inerte e prova del nesso causale tra *res* e danno subito dal pedone su pubblica via'.

[67] Tribunale di Tivoli 10 October 2018, available at www.coni.it, with commentary by C.G. Carriero, 'La responsabilità *ex* art. 2050 c.c. dell'organizzatore di gare motociclistiche'.

to the provisions of Art 2050 of the Civil Code.

It pointed out that, although by way of first approximation the qualification of the sports activity as dangerous is excluded in case-law for the acceptance of risk, the actual evaluation of such dangerousness is left to the trial judge, who, besides his/her judgment on the *id quod palerumque accidit*, also evaluates the prior availability (*rectius* the duty to prepare) of specific precursory measures to carry out these activities and evidently aimed at guaranteeing their safety.

The consequence of this is that causality exists only and simply in the presence of the etiological link between the exercise of the activity and the harmful event, a causal link that can be excluded from the conduct of the injured party only if this is in itself sufficient to cause the event and not also concurrent; it follows that the provision of the exonerating circumstance for the injuring party is needed because it is the only evidence that can exclude the causal link, since proof of the possible causal contribution of the injured party's conduct is not sufficient.

The court concludes that, since it is a *probatio diabolica*, it borders on being a case of unforeseeable circumstances.

In the case in point, the conduct of the motorcyclist who causes the accident when negotiating the bend is not sufficient to exclude the causal link, but it will be the proof that the injuring party, ie the organiser, has taken the appropriate measures to exclude harmful events and so it has a double function, excluding both causality and culpability.

VII. Conclusions

By virtue of the social dimension and the educational role of sport, now fully recognised by domestic and supranational law, it is appropriate to rethink the relationship between the right to participate in sport and the right to physical integrity, as between civil liability and sporting responsibility, and, lastly, the limits of the assumed risk, in view of the higher need for protection of the person.

Lastly, an aspect that is worthy of remark is that of the awareness of the inherent risk in the activity carried out, which should be a prerequisite for acceptance of the risk of suffering an injury; not only because, and not inasmuch as, this aspect is regarded as being implicitly presumed in the decision to participate in the competition, but primarily because it seems to be extended to the theory of sporting activity practised by minors, even though these are covered by the special theory of liability under Arts 2047 and 2048 of the Civil Code.

The recognition of a non-utilitaristic dimension of sport as a leisure activity, the growing attention paid to the phenomenon of sport in its non-competitive manifestations and more generally the social role of sport at community level lead us to understand the need for a renewed reflection on the limits of assumed risk, for example in relation to non-competitive, amateur and/or friendly contexts.

In any case, one cannot lose sight of the need to promote sporting activities

at every level due to their important social function, which nowadays is increasingly promoted in national and supranational policies relating to the growth of personal well-being.[68]

It has long been known that health is no longer looked at in pathological terms, that is, it is no longer identified with the absence of disease, but with a much more complex concept, namely mental and physical well-being. This is difficult to define, is constantly evolving and has long been the subject of in-depth studies conducted with the aid of the life sciences.[69]

In this way a social and relational value of the concept of well-being and health was outlined, based on the awareness that health does not depend only on the absence of biological agents that randomly cause disease, but is the result of a harmonious, natural and complete development of the individual in every aspect of his/her existence, including their relationship with the environment around them and the ability also to manage their free time through physical exercise, physical activity or sport.[70]

The opportunity for greater rigour in the evaluation of those behaviours that can jeopardise the mental and physical integrity of the individual appears to be emerging, even though these behaviours are the result of the freedom of self-determination and the exercise of personal rights.

At the same time, one cannot fail to notice a number of uncertainties and contradictions in the relationship between sporting activity, personal protection and liability.

Indeed, it is necessary to consider a difficulty in framing certain activities which, although carried out outside official contexts, nevertheless are very competitive, such as competitions between friends.[71]

In the same way, one cannot fail to highlight a fundamental contradiction inherent in the relationship between assumed risk and sporting professionalism, where the latter, because of the experience and preparation, would impose a more stringent application of the rules of liability.

[68] See A. D'Andrea, 'La funzione sociale dello sport nell'ordinamento internazionale, europeo ed italiano' *Revista dos tribunais*, 279-306 (2017); L. Ripa, 'La tutela del giovane atleta nell'equilibrio tra specificità dello sport e diritto comunitario' *Actualidad Jurídica Iberoamericana*, 190-244 (2015); F. Blando, 'Il ruolo dello sport nella costruzione della nuova Europa: ideologie e sfide' *Norma. Quotidiano di informazione giuridica*, 1-23 (30 January 2009).

[69] D. Morana, *La salute come diritto costituzionale* (Torino: Giappichelli, 2015); V. Durante, 'La salute come diritto della persona', in S. Rodotà and P. Zatti eds, *Trattato di Biodiritto*, 579-600 (Milano: Giuffrè, 2011).

[70] On the results of national and international research on human development, and according to the capability approach theory, see M. Nussbaum and A. Sen, *The Quality of Life* (Oxford: Clarendon Press, 1993).

[71] Corte di Cassazione 22 October 2004 no 20597, with commentary by R. Conti, 'Il braccio di ferro tra amici non è competizione sportiva' *Danno e responsabilità*, 509 (2005). See also Tribunale di Cassino 8 November 2017, *Rivista di diritto sportivo*, 237-257 (2017) with commentary by F. Bisanti, 'La responsabilità civile sportiva: esegesi, struttura e profili applicativi con particolare riferimento a una gara ciclistica amatoriale'.

Despite the noble aims for which sports activities are intended, contemporary society often reflects a tarnished image of it; for example, this happens when victory is sought at all costs, frustrating the idea of competition as a confrontation between athletes moved by a non-utilitaristic spirit; or when there is violence, not only physical, but also verbal or discriminatory, and finally, when violence is completely gratuitous and unjustified.[72]

Moreover, even the terminology used in case-law does not seem to be very precise, maintaining that the competition component is not incompatible with amateur sport, played for leisure and enjoyment.

For all of the above, it can be seen that adopting the criterion of balancing constitutionally significant interests,[73] such as the greater interest in promoting sports activities with the interest in preventing personal injury, appears ever more appropriate. In this sense, it may be useful to refer to the precautionary principle[74] that operates for human activities. The current state of scientific knowledge and technological progress for this does not permit a potentially harmful influence for the interests concerned to be excluded, but does not affirm it either.

The precautionary principle has been extended to any area characterised by scientific uncertainties involving fundamental human rights;[75] important applications of this are, for example, decreto legislativo 9 April 2008 no 81 on the protection of health and safety in the workplace (in particular, Art 15) and decreto legislativo 6 September 2005 no 206 (Consumer Code) in terms of safety and product quality.

In the latter case the legislation is based on the notion of a safe product, identified in what

> 'under normal or reasonably foreseeable conditions of use, including the duration and, if necessary, commissioning, installation and maintenance, does not present any risk or presents only minimal risks, compatible with the use of the product and considered acceptable in compliance with a high level of protection for the health and safety of people (...)'.

Indeed, the above principle is multifaceted: it is the basis of political and legislative action by institutions and the basis of risk management studies carried

[72] It is very important to promote the social and legal value of ethics in sport; see F. Valenti, 'Lealtà sportiva etica e diritto' *European Journal of Sport Studies*, 1-27 (2014); the author stresses that aggression has unfortunately become a necessary and essential part of the game, almost a rule of the game; in consequence, according to the Sports Code of ethics it is essential to promote fair play. The latter scholar analyses the relevance of this in the legal system by identifying its foundation in good faith. See also A. Marini, 'Etica e Sport', in P. Rescigno et al, *Fenomeno sportivo* n 8 above, 53-57.

[73] On this aspect see G. Perlingieri, 'Ragionevolezza e bilanciamento nell'interpretazione della Corte Costituzionale' *Actualidad Jurídica Iberoamericana*, 10-51 (2019).

[74] M.G. Stanzione, 'Principio di precauzione tutela della salute e responsabilità della P.A. Profili di diritto comparato' *Comparazione diritto civile*, 1-34 (2016).

[75] F. Follieri, 'Decisioni precauzionali e stato di diritto. La prospettiva della sicurezza alimentare' *Rivista italiana di diritto pubblico comunitario*, 1495-1530 (2016).

out by companies for their own benefit;[76] but according to academics, it can also be applied by case-law in cases of dispute. In fact, the Court of Justice adopts this principle in consumer protection against damage from foodstuffs.[77]

On the basis of this principle, in the event of a dispute, depending on the risk, it is necessary to assess the relationship between the probability of the event and its possible consequences to verify the compliance of precautionary rules and non-discriminatory measures, and to reverse the burden of proof.

Criminal law scholars[78] discuss the role of this principle in the reconstruction of liability on the basis of its relationship with the classic categories (causality, danger, culpability); however, it should be stressed that these traditional categories need to be reinterpreted in the light of the new phenomenology of damages; therefore, for example, in the case of the reconstruction of civil liability in sport a more adequate evaluation of the typology of the sporting risk is necessary in the light of the problematic case-law.

The negligent liability based on precaution is governed by generic precautionary rules: since there is no certainty, specific culpability cannot be construed because there is no close causal connection between the violation of the rule and the verification of danger.

The precautionary principle distinguishes between certain, uncertain or residual risks: in the case of certain risks, causation and damage are proven (scientifically), and it seems appropriate to require the implementation of specific preventive measures: given the nature of the activity carried out, it is a case of verifying whether such measures existed and whether these had been applied (see the case of the management of sports facilities and the organisation of non-competitive events).

Therefore liability will depend on the reconstruction of the causal link and on the appreciation of the compliance with precautionary rules.

In the case of uncertain risks, however, the evaluation is more difficult and in such cases the use of the precautionary principle will be more stringent since the degree of uncertainty should at least lead to a more rigorous judgment in terms of appreciation of culpability, for example in the case of extreme sports.[79]

[76] On this point see S. Pugliese, *Il rischio nel diritto dell'Unione europea tra principio di precauzione, proporzionalità e standardizzazione* (Bari: Cacucci Editore, 2017).

[77] See Case C-180/96 *United Kingdom* v *Commission*, Judgment of 5 May 1998, *Raccolta*, I, 2265 (1998).

[78] V. Militello, 'Diritto penale del rischio e rischi del diritto penale tra scienza e società', in C.D. Spinellis et al eds, *Europe in Crisis: Crime, Criminal Justice, and the Way Forward. Essays in honour of Nestor Courakis* (Athens: Ant. N. Sakkoulas Publishers L.P., 2017), 223-238.

[79] L. Santoro, *Sport estremi e responsabilità* (Milano: Giuffrè, 2008). In the case-law refer to Tribunale di Terni 4 July 2002, *Rivista penale*, 840 (2002) in which the Court states that in the case of rafting the adjective 'extreme' is a soft synonym and that other adjectives are appropriate to this sporting activity, ie deadly; according to this theory, in all extreme sports the aim of the participant is not the competition, but the risk involved and the deep thrill. We can relate the above opinion to sports such as: freestyle jet skiing; barefoot water skiing; wakeboarding, skateboarding, freestyle motocross, bicycle motocross, freestyle skiing; snowboarding.

In this case, according to the precautionary principle, since it identifies the probability (or eventuality) of a 'danger' as a harmful potential of a given activity.

Consequently, if the balanced legal goods are pre-eminent (think of health, the environment, etc) the existence of risk in sporting activities (*rectius*: danger of injury, future and potential) justifies the adoption of precautionary rules that can be traced, as mentioned, to the competition rules.

Finally, in the case of residual risk, since it is a normal risk inherent in the performance of human activities, the theory based on assumed risk case-law as a cause of justification could be applied; take the example of a football match, but one played by experienced adults.

This criterion in fact applies the general rule of *neminem laedere* flexibly, that takes into account, on a case-by-case basis, circumstances such as age, training, the degree of maturity of the sportsperson and the environmental conditions in which the competition takes place; with the potential for the parameters for assessing conduct to return to being those of the rules of common prudence.

In the case of minors or amateurs, as can be seen from the soap football judgment, we could fall back on the hypothesis of uncertain risk, and then request a more rigorous assessment of the liability of the sports equipment manager.

The idea of redrawing the boundaries of sporting liability for a more effective protection of the right to mental and physical integrity, by reason of the conditions in which the sporting practitioner finds himself, brings to mind, on the one hand, the debate on the nature, foundation and evolution of bodily rights from the standpoint of the subject's self-determination, and on the other, the issue of the attribution of risks for activities that are capable of causing harm and that are characterised by their widespread appearance in society at large.[80]

Legislative policy choices are required under the first aspect to define as much as possible the limits and content of the right to sport; in relation to the second, instead, to avoid the risk of legitimate and harmful or dangerous activities falling on society.

Under the first aspect, it evokes what has been described as a passage

> 'from the consideration of abstract man to that of man in his different phases of life and in his different states, as a child, as an adult, as a woman, as an elderly person, as a sick person, as a worker, with respect to which the content of the relative rights is redrawn, by virtue of the situation of the life lived'.

[80] In particular, scholars argue about the relationship between rights of the person and contractual freedom; G. Cricenti, *I diritti sul corpo* (Napoli: Jovene, 2008); G. Resta, *Autonomia privata e diritti della personalità. Il problema dello sfruttamento economico degli attribuiti della personalità in una prospettiva comparatistica* (Napoli: Jovene, 2005), 13; C.M. D'Arrigo, 'Il contratto e il corpo: meritevolezza e liceità degli atti di disposizione dell'integrità fisica' *Familia*, 794 (2005); S. Rodotà, 'Ipotesi sul corpo "giuridificato" ' *Rivista critica di diritto privato*, 447 (1994).

It is therefore a case of continually evolving rights whose definition is primarily in the case-law that takes into account, in this global and multifaceted contemporary society, those multi-level systems of sources, among which an increasingly dialectical and not always hierarchical relationship is being created.[81]

[81] M.A. Sandulli ed, *Codificazione, semplificazione e qualità delle regole* (Milano: Giuffrè, 2005).

Essays

The Influence of Foreign Legal Models on the Development of Italian Civil Liability Rules from the 1865 Civil Code to the Present Day

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Abstract

The development of Italian civil liability rules since the 1865 Civil Code to the present day is clearly marked by the influence of foreign models. This article tries to detect these foreign influences, starting from those of the French Code Napoléon on the 1865 Civil Code, moving on to those of Pandectist legal thinking on the 1942 Civil Code, and ending with the influences of the common law experiences and European legislation on some sectors of Italian tort law. The final results of this research is a much more complicated and nuanced picture than what is expected, as the Italian system has not only been a passive receptacle of ideas developed in other countries, but has also been able, throughout its history, to mould those foreign ideas with original concepts, so creating an original system, largely independent from its sources of inspiration.

I. Introduction

The purpose of this article is to give a brief account of the influence of legal foreign models on Italian civil liability law, starting from the 1865 Civil Code until the present day. This chosen starting date is closely linked to the year of the political unification of Italy, that is 1861, as before that date the territories that are part of Italy today were fragmented in a number of different political entities, with different legal models. Italian political unification entailed therefore also a legal homogenization.

The investigation shall hence start from the 1865 Civil Code, a code strongly influenced by the French Code Civil, which implemented in all the Italian courts a system of civil liability based on the liability for fault, while French case law and scholars' opinion generally largely influenced Italian judges and academics. Then we shall deal with the influence of the German Pandectist School on Italian scholars at the end of the 19th century.

The next step will concern the investigation of the civil liability rules provided for by the 1942 Civil Code. We shall try to understand which rules of the Code were the fruit of the influence of the German model, which continued to be inspired by the French model and which were instead an original production of

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the Italian legislator.

We will then concentrate our attention on the problems arising in the field of civil liability because of the widespread industrialization experienced by Italy after the second half of the last century, and on the rising interest of Italian scholars for foreign legal experiences and theories concerning this new field of damages. Due to the necessity to limit our investigation to a single sector of this field of damages, we shall subsequently examine the implementation of European rules on the compensation of product damages in Italy, leaving aside subjects such as that of the compensation of Environmental damages,[1] although it equally finds its roots in the European legislation and plays a relevant role in the Italian legal system. The issue of the compensation of damages caused by medical malpractice will be left out of this article as well, notwithstanding we can clearly trace in it the influence of foreign national models and of international conventions (an easy example of this can be found when considering the issue of informed consent), because it alone would require an entire article.[2] Not to mention some very specific fields, such as those of the compensation of the damages caused by the violation of privacy rights, of the competition rules, of the rules provided for the protections of clients in banking contracts and so on.

Lastly, we shall end our overview examining the overturn of Italian case law recently made by the Joint sessions of the Italian *Corte di Cassazione*, in a case concerning the recognition of foreign decisions awarding punitive damages.

II. The 1865 Italian Civil Code

Italy first came into contact with the rules of the French Civil Code, commonly also called *Code Napoléon*, when Napoleon's army entered the Italian territories at the beginning of the 19th century and, at his fall, with the enactment by some of the Italian states of civil codes modelled on the same Code Napoléon.[3]

[1] On the subject, please read, P. Perlingieri, *Il danno ambientale con riferimento alla responsabilità civile* (Napoli: Edizioni Scientifiche Italiane, 1991) and B. Pozzo, *Il danno ambientale* (Milano: Giuffrè, 1998).

[2] On Italian medical liability, in english, P. Ricci et al, 'Medical Responsibility and Liability in Italy', in S. Ferrara et al eds, *Malpractice and Medical Liability* (Verlag Berlin Heidelberg: Springer, 2013), passim; A. Scarso and M. Foglia, 'Medical Liability in Italy', in A. Bernhard and A. Koch eds, *Medical Liability in Europe. A Comparison of Selected Jurisdictions* (Berlin Boston: De Gruyter, 2011), passim; C. Di Marzo, 'Medical Malpractice: The Italian Experience' 87 *Chicago Kent Law Review*, 53 (2012); A. Feola et al, 'Medical Liability: The Current State of Italian Legislation' 22 *European Journal of Health Law*, 347 (2015); A. De Luca, 'Compensation Schemes for Damages Caused by Healthcare and Alternatives to Court Proceedings in Italy' *Annuario di diritto comparato e di studi legislativi*, 89 (2018) and N. Coggiola, 'Medical Liability Law in Italy', in S. Taylor ed, 'La responsabilité médicale: perspectives compares' 23 *Journal du Droit de la Santé et de l'Assurance Maladie*, 45 (2019).

[3] Codice per Regno delle Due Sicilie (1819); Codice per gli Stati di Parma, Piacenza e Guastalla (1820); Codice Civile per gli Stati di S.M. il Re di Sardegna e Codice Civile per gli Stati Estensi.

After the unification of the different territories under the Kingdom of Italy in 1861, the first Italian Civil Code was enacted in 1865. Although some territories of northern Italy were formerly exposed to the model provided by the Austrian Civil Code, when they were part of the Kingdom of Lombardy-Venetia,[4] political reasons were probably critical in the decision to follow the French civil code model in the drafting of the new Italian code as France, contrary to Austria, actively supported the political unification of Italy.[5]

That French model of civil liability is based on the general rule of liability for fault which, as we all know, was largely built on Domat and Pothier legal thinking, and therefore on the writings of the seventeen and eighteen centuries natural law scholars and their forerunners.[6] That model provides a general rule for the liability for fault, which can be used in every case where all the elements of the legal provision could be found, and some special liability rules, provided for cases where the defendant finds himself in a certain situation because of the existence of a link between the defendant and certain persons or thing.

In truth, the Italian 1865 Civil Code actually followed the French model so closely that most of the civil liability rules are actually a mere translation of the rules of the Code Napoléon, starting from the title of the book devoted to civil liability, which was literally translated from '*Des délits et des quasi-délits*' in '*Dei delitti e dei quasi-delitti*', that is to say 'Of Delicts and Quasi-Delicts'.[7]

The two following articles, providing the general rule of the liability for fault, Art 1151 establishing '*Qualunque fatto dell'uomo che arreca danno ad altri, obbliga quello per colpa del quale è avvenuto, a risarcire il danno*', and Art 1152, establishing '*Ognuno è responsabile del danno che ha cagionato non solamente*

[4] On the issue G.P. Massetto, 'Responsabilità extracontrattuale' (diritto intermedio) *Enciclopedia del diritto* (Milano: Giuffrè, 1988), XXXIX, 1170-1171 and M.V. Simone, *Percorsi del diritto tra Austria ed Italia* (Milano: Giuffrè, 2006), passim.

[5] P. Grossi, *Il diritto nella storia dell'Italia unita* (Napoli: Edizioni Scientifiche Italiane, 2012), 17 and A. Flamini, 'Dei delitti e dei quasi delitti', in R. Favale and C. Latini eds, *La codificazione nell'Italia postunitaria 1865-2015* (Napoli: Edizioni Scientifiche Italiane, 2016), II, 5.

[6] On the subject F. Parisi, '*Alterum non Laedere*: An Intellectual History of Civil Liability' 39 *American Journal of Jurisprudence*, 317 (1994) and G.P. Massetto, n 4 above, 1099. For a general overview of the development of tort law in Europe, please read C. Von Bar, *The Common European Law of Torts* (Oxford: Oxford University Press, 1998 and 2000), I and II, passim, and G. Alpa, 'General Remarks on Civil Liability in the European Context' 4 *The Italian Law Journal*, 47 (2018); for some interesting comparative insights on the subject, please read M. Bussani and A.J. Sebok eds, *Comparative Tort Law: Global Perspectives* (Cheltenham, UK; Northampton, MA, USA: Edward Elgar, 2015), passim and M. Bussani and V.V. Palmer, *Pure Economic Loss in Europe* (Cambridge: Cambridge University Press, 2003), passim.

[7] G. Valditara, 'Dalla *lex Aquilia* all'art. 2043 del Codice Civile', in F. Milazzo ed, *Diritto Romano e terzo millennio: Radici e prospettive dell'esperienza giuridica contemporanea* (Napoli: Edizioni Scientifiche Italiane, 2004), passim; P.G. Monateri, *La sineddoche: formule e regole nel diritto dei contratti e delle obbligazioni* (Milano: Giuffrè, 1984), passim; G. Alpa, 'Unjust Damage and the Role of Negligence: Historical Profile' 7 *Tulane European Civil Law Forum*, 147 (1994); M.F. Cursi, *Iniuria cum damno. Antigiuridicità e colpevolezza nella storia del danno aquiliano* (Milano: Giuffrè, 2002), passim.

per un fatto proprio, ma anche per propria negligenza o imprudenza', are as well the mere translation of the respective Arts 1382 and 1383 (now Arts 1240 and 1241) of the Code Napoléon, which dictate

> '*Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer*' and '*Chacun est responsable du dommage qu'il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence*'.

The translation from French into Italian is so literal, that we can use the *Legifrance* official English translation, which respectively says 'Every act whatever of man that causes damage to another, obliges him by whose fault it occurred to repair it' and 'We are responsible not only for the damage occasioned by our own act, but also by our own negligence or imprudence',[8] to translate both the French and Italian rules. These rules therefore provided the liability and the consequent obligation to compensate the damages occurred, for every human fact which caused with fault an injury to another person.

It is important to point out that the fault of the defendant was translated into Italian with the word *colpa*, which encompassed the same meaning of the French word *faute*, as it denoted at the same time either the negligent and intentional wrongdoing and the wrongfulness of the action of the defendant. The roots of this tradition could be easily traced in Roman law and in *ius commune,* which equated *culpa* with *iniuria*.[9]

Also the rules on the vicarious liability of the parents, masters, employers, teachers and artisans, and on the liability for the damages caused by things, animals and buildings, provided for by Arts 1153, 1154 and 1155 were as well the product of the plain translation of Arts 1384, 1385 and 1386 of the Code Civil, building the civil liability on the fault of the tortfeasor, according to the French legal tradition.

The only novelty introduced in the 1865 Civil Code, in comparison with the rules of the French Code Civil, was Art 1156, providing the joint and several liability of the multiple tortfeasors, which was unknown in the French system.

The influence of the Code Napoléon on the Italian 1865 Civil Code was openly acknowledged both by the Italian drafters and scholars. Moreover, that influence did not fade after the enactment of the Code, as both Italian scholars and judges generally abided by the French scholarly writings and French case law, which always supported the idea that the only source of civil liability was that based on the fault of the defendant.[10]

[8] French Civil Code, available at www.legifrance.gouv.fr.

[9] M.F. Cursi, n 7 above, 68-69.

[10] M. Graziadei, 'Liability for Fault in Italian Law: The Development of Legal Doctrine from 1865 to the End of the Twentieth Century', in N. Jansen ed, *Liability for Fault* (Oxford: Oxford University Press, 2010), 126, 130. For a general overview of the influence of French and German

Nonetheless, that general principle of fault liability was soon challenged by some Italian judges and scholars, with reference to cases of vicarious liability. In fact, soon after the enactment of the 1865 Italian Civil Code, some of the then still existing five different 'regional' supreme courts applied the rules on the vicarious liability of the employer or on the liability for the damages caused by animals or things without taking into consideration the existence of the fault of the defendant, although others courts supported instead the traditional idea that the defendant could exonerate himself from the liability when he could prove that he was not at fault.

That same fault principle was also disputed by the majority of the Italian scholars, who held that the rules on the vicarious liability of the employers and of the owners or custodians of the animals were strict liability rules, when reasons of public order or social protection were at a stake.[11] Among these scholars, we could cite Nicola Coviello[12] who, influenced by the writings of Viktor Mataja[13] and Josef Unger,[14] held that the principle of *naeminem laedere* implied the liability of the tortfeasor when a right was violated and Venezian, who affirmed that, in cases of vicarious liability of the employers for the damages caused by their employees, the requirement of the fault of the employers was a fiction, as in those cases their liability was rooted on strict liability.[15]

Another exception to the general abiding of Italian judges and scholars by the French juridical and scholarly interpretation is represented by the scarce application of the first section of Art 1153, providing for the liability of the guardian for the damages caused by the things in his custody. In fact, contrary to the extensive use made by French courts of this rule, in every case of damages in which a thing was involved, on the basis of an interpretation which was strongly supported by Raymond Saleilles, Italian courts seldom used that rule.[16]

Moreover, in contrast to the French system tradition, that always held the

legal models on the Italian legal thinking and practice, please read A. Guarneri and A. Gambaro, 'Italie', in Association Henri Capitant, *La circulation du model juridique Français* (Paris: Litec, 1994), 77. For a complete list of foreign works translated into Italian in the XIX century, M.T. Napoli, *La cultura giuridica europea in Italia: Repertorio delle opere tradotte nel XIX° secolo* (Napoli: Jovene, 1986), 7.

[11] G. Cazzetta, *Responsabilità Aquiliana e frammentazione del diritto comune civilistico: 1865-1914* (Milano: Giuffrè, 1991), 327.

[12] N. Coviello, 'La responsabilità senza colpa' *Rivista italiana di scienze giuridiche*, 188 (1897).

[13] V. Mataja, *Das Recht des Schadensersatz vom Standpunkte der Nationalökonomie* (Leipzig: Dunker und Humblot, 1888).

[14] J. Unger, *Handeln auf eigene Gefahr, ein Beitrag zur Lehre vom Schadenersatz* (Jena: Fisher, 1893).

[15] G. Venezian, *Danno e risarcimento fuori dai contratti* (Roma: Atheneum, 1918, first privately circulated after 1886).

[16] For an investigation on the subject, L. Barassi, 'Contributo alla teoria della responsabilità per fatto non proprio in special modo a mezzo di animali' *Rivista italiana di scienze giuridiche*, XXIII, 3, 325 (September 1987); XXIV, 1 and 2, 174 (December 1897); XXIV, 3, 397 (February 1898); XXV, 1, 56 (April 1898).

public administration liable for the civil compensation of the damages occurred because of its fault, in Italy the public administration had for a long time been shielded from the application of the rules on civil liability, and therefore from any duty to compensate the damages caused by its negligence, in force of a restrictive interpretation of the categories of compensable damages. This limitation of the civil liability of the public administration was, interestingly, not only the consequence of the willingness to protect, for mere economic reasons, the public administration against civil actions but also the outcome of the efforts to establish, in the newly unitary Italy, an independent system of public administration, endowed of its own damages compensation mechanism.[17]

Nevertheless, under a systematic point of view, we should not forget that Italian lawyers adopted the French idea providing that the exercise of a right of the defendant could not be used as a shield against the liability for damages, in force of the traditional Roman formula *qui suo iure utitur naeminem laedit*,[18] when there was on the part of the defendant an abuse of such a right.[19] And that Francesco Carnelutti, an Italian leading scholar, adopted the theories of Marcel Planiol[20] when he stated that the general provision of Art 1151 of the Italian Civil Code of 1865 did not introduce new rights or duties in the legal system, but rather merely sanctioned the violation of already existing rights or duties, and therefore that rule had to be classified as a *secondary norm*.[21]

While the French Civil law tradition was spreading all its influence on Italian civil law in the days following the enactment of the 1865 Civil Code, at the turn of the century a new foreign model came onto the scene, that of the German BGB. That code, which entered into force on the 1 January 1900, as is known draws its inspiration from the theoretical elaborations of the German Pandectist School and differed in many ways from the French Civil Code, as well as on the issue of civil liability.

In those days, the majority of Italian scholars extensively read and commented the new German code and their German colleagues' writings, often with admiration but, in the end, the newly enacted BGB model did not actually immediately influence the interpretation of the 1865 Civil Code rules on civil liability, but

[17] G. Cazzetta, n 11 above, 130 and 471; R. Caranta, 'Public Law Illegality and Governamental Liability', in D. Fairgrieve et al eds, *Tort Liabilities of Public Authorities in Public Perspectives* (London: British Institute of International and Comparative Law, 2002), 271; Id, *La responsabilità della pubblica amministrazione* (Milano: Giuffrè, 1993), passim.

[18] Ulp. D. 50.17.155.1.

[19] G. Giorgi, *Teoria delle obbligazioni nel moderno diritto italiano* (Firenze: Eugenio e Filippo Cammelli, 1882), V, 255 and G.P. Chironi, *La colpa nel diritto civile odierno* (Torino: F.lli Boca, 2nd ed, 1902), II, 500.

[20] M. Planiol, *Traité Élémentaire de Droit Civil* (Paris: Librairie Générale de Droit et de Jurisprudence, 4th ed, 1907), II, §§ 863, 865, 866, 868.

[21] F. Carnelutti, 'La distinzione tra colpa contrattuale e colpa extracontrattuale' *Rivista di diritto commerciale e di diritto generale delle obbligazioni*, II, 743, 744 (1912) and Id, *Il danno ed il reato* (Padova: CEDAM, 1926), 62.

with reference to the requirement of the unlawfulness of the act that caused the damages, to establish a case of liability for fault.

In truth, that requirement was already embedded in the French law, as it traces its roots in the ill-defined notion of *iniuria* which established, with other requirements, the delictual liability at the time of the *ius commune*,[22] and which subsequently evolved in the distinction between the two autonomous concepts of *iniuria* and *culpa* made by natural law scholars.[23] For the drafters of the Code Civil it was in fact clear that, to establish the liability of the defendant, it was necessary to have a wrongful act, that is to say a violation of a right.[24] That idea was generally accepted without further discussion by the French scholars after the enactment of the same code.[25]

When the 1865 Italian Civil Code introduced a system of civil liability closely modelled on the French Civil Code, the idea that a liability for fault could exist only when the defendant committed a wrongful act, violating a right, was transferred into the Italian legal system. Therefore, in the last two decades of the 19th century, when German scholars introduced their Italian colleagues to the concept that delictual liability requires the existence of the two distinct elements of fault and unlawfulness, the attitude of the latter on the point did not substantially change. Nonetheless, it should not be denied that in those days the Italian scholars started to devote more attention to the issue of the unlawfulness of the action of the defendant, which was identified by their German colleagues as *Rechtswidrigkeit* or *Widerrectlichkeit*, and consequently stressed the importance of the element of what they labelled as *antigiuridicità* or *illiceità* for the coming into existence of the delictual liability of the defendant.[26]

Moreover, the influence on Italian scholars of the German legal thinking can also be traced when dealing, in civil liability cases, with the nature of the right that must be violated in order to establish the liability of the defendant. In fact, some Italian scholars, in contrast with those colleagues which held that the violation of any right amounted to compensable damages,[27] adhered to the

[22] Ulp. D. 47.10.1 pr; Ulp. D. 9.2.5.1; R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford: Oxford University Press, 1996), 998, 1004.

[23] N. Jansen, *Die Struktur des Haftungsrechts: Geschichte, Theorie und Dogmatik außervertraglicher Ansprüche auf Schadensersatz* (Tubingen: Mohr Siebeck, 2003), 299, 327, 338; M.F. Cursi, n 7 above, 39-57; M. Graziadei, n 10 above, 126, 130.

[24] B. de Greuille, in P.A. Fenet ed, *Recueil Complet des Travaux Préparatoires du Code Civil* (Paris: Ducessois, 1827), XIII, 474 '*toute individu est garant de son fait; c'est une des premières maximes de la société (…) Ce principe, consacré par le projet, n'admet point d'exception; il embrasse tous les crimes, tous les délits, en un mot tout ce qui blesse les droits d'un autre*'.

[25] P.G. Monateri, 'La Synecdoque Française' *Revue Internationale du Droit Comparé*, 7 (1987).

[26] N. Jansen, 'Duties and Rights in Negligence: A Comparative and Historical Perspective on the European Law of Extracontractual Liability' 14 *Oxford Journal of Legal Studies*, 443, 461 (2004) and M. Graziadei, n 10 above, 126, 131 and 139 where the reader can find further details on the notion of unlawfulness in Italian law.

[27] C. Fadda, *Rapporti del conduttore coi terzi in tema di danni* (Torino: Unione Tipografica

German legal thinking and affirmed that only the violation of a right enforceable *erga omnes,* such as the right of ownership, could be a source of delictual liability. As a consequence, all the infringements of the so called *relative rights*, such as those rights arising out of a relationship between creditor and debtor, were not considered as compensable rights.[28]

That interpretation was quick to become the common opinion, adopted by the majority of the Italian scholars and courts, even under the ruling of the following 1942 Italian Civil Code, until was fought and reversed at the end of the last century, as we shall shortly see. Nevertheless, it should also not be forgotten that some Italian scholars, probably influenced by the provisions of §1293 of the Austrian Civil Code,[29] held that there existed a 'right to the integrity of the patrimony', and that the violation of that right had to be considered a source of delictual liability,[30] so allowing the protection of the rights arising from the obligations.

Another fruit of the influence of the German legal thinking could be found in the distinction between intentional actions and negligent actions, unknown to the French legislator, which under the notion of *fault* covered both the negligent and intentional wrongdoing and also the wrongfulness or *iniuria*. Therefore, by the end of the 19th century, also the Italian jurists started to draw a distinction between the negligence (or culpability) of the defendant, called *colpa,* which referred to the same concept of the German word *Verschulden*, and was employed for cases of lack of care, in line with the German notion of *Fahrlässigkeit,* and the intentional wrongdoing, called *dolo*.[31] We shall find that distinction in the provisions of the 1942 Italian Civil Code.

Closely linked to the requirement of the *colpa* or *dolo* for the finding of civil liability, was the precondition of the free will of the defendant when the action or omission was made. That concept, elaborated by *natural law* legal thinking under the Latin name of *imputativitas,* was subsequently translated into Italian with *imputabilità,* when it is adopted in the 1942 Civil Code under the influence of the German Pandectists.

Approaching the end of the century, the hurdles to access compensation by the victims of injuries consequence of industrial accidents, caused by the requirement of the fault of the defendant, were becoming more and more evident.

Editrice, 1891), 100-101.

[28] C. Ferrini, 'Delitti e quasi-delitti' *Digesto Italiano* (Torino: UTET, 1887-1889), I, 727, 732; R. de Ruggiero, *Istituzioni di diritto privato* (Milano: Principato, 6th ed, 1934), II, 495-6, §126; V. Polacco, *Le obbligazioni* (Milano: Athenaeum, 2nd ed, 1915), I, 26, 502; F. Carnelutti, 'Appunti sulle obbligazioni' *Rivista di diritto commerciale e di diritto generale delle obbligazioni*, I, 533, 544 (1915). On the issue, A. Guarneri, *Diritti reali e diritti di credito: valore attuale di una distinzione* (Padova: CEDAM, 1979), 100.

[29] M. Graziadei, n 10 above, 126, 133-134.

[30] A. Giovene, *Il negozio giuridico rispetto ai terzi* (Torino: Unione Tipografica Editrice, 2nd ed, 1917), 85-86.

[31] M. Graziadei, n 10 above, 126, 139-140.

That situation was harshly criticized by some scholars, as it was an undisputable advantage for the employers.[32] Some courts tried to protect the injured workers holding that the employer liability could be affirmed, in those cases, even when he or she had acted with *culpa levissima,* that is to say when the fault was a minor fault, usually not considered a legal basis for compensation.[33] Others tried instead to compensate the workers stating that their damages arose out of a contractual relationship, and therefore the employer had the burden to prove that he was not liable for the injuries of his or her employees, on the basis of the rules on the contractual liability.[34]

In the end, ten bills were introduced in the Italian Parliament from 1878 to 1898, aimed at modifying the rules on the liability of the employers for cases of industrial accidents. Those bills all provided for the compensation of the damages occurred to the employees, but for the cases where the injuries were the consequence of the same employee's acts or omissions or of causes outside the control of the employer. They were in practice trying to introduce a no fault system of liability in cases of industrial accidents, inspired by the German law of 7 June 1871 on the compensation of deaths and injuries caused by train operations, but they were constantly rejected affirming that they infringed the principle of equality of arms in civil litigation and that fault was an essential element for the compensation of damages.[35]

In the end, the introduction of the Workmen's Compensation statute of 7 March 1898, establishing a compulsory workers' insurance for all the damages suffered as a consequence of their professional activity, provided a sometimes limited but nevertheless prompt protection of the injured workers, and therefore stopped all the attempts to introduce no fault liability rules in the Civil Code in those cases.[36] That statute was clearly inspired by other European examples, above all the German Workers' Compensation Law of 6 July 1884, promoted by Otto von Bismarck, but also the similar law of Austria of 1887, and those enacted by Norway in 1894 and by Finland in 1897.[37]

[32] F. Schupfer, *La responsabilità dei padroni per gli infortuni sul lavoro* (Roma: Botta, 1883); G.P. Chironi, 'Della responsabilità dei padroni rispetto agli operai e della garanzia contro gli infortuni sul lavoro' *Studi Senesi*, 127, 231 (1884). For an historical perspective on the issue, please refer to L. Gaeta, *Infortuni sul lavoro e responsabilità civile: alle origini del diritto del lavoro* (Napoli: Edizioni Scientifiche Italiane, 1986), 102.

[33] Corte di Appello di Firenze 26 January 1895, *Filangieri*, 360 (1865).

[34] Corte di Cassazione 6 December 1895, *Giurisprudenza Italiana*, I, 76 (1896) and Corte di Cassazione 26 April 1896, *Foro italiano*, I, 601 (1896). For a contrary opinion, Corte di Cassazione 26 March 1986, *Foro italiano*, I, 608 (1896).

[35] G. Cazzetta, n 11 above, 166-173.

[36] ibid 409-469; G.G. Balandi, 'Un caso di archeologia giuridica: ciò che resta oggi del "rischio professionale" ' *Rivista giuridica del lavoro e della previdenza sociale*, 93 (1976); C. Castronovo, 'Alle origini della fuga dal Codice. L'assicurazione contro gli infortuni tra diritto privato generale e diritti secondi' *Jus*, 338 (1985).

[37] G. Ricca Salerno, 'L'assicurazione degli operai' *Annuario delle scienze sociali e politiche*, 380 (1883).

III. The 1942 Italian Civil Code

In 1942, the new Italian Civil Code was enacted. In that Code we can see the sign of the emerging autonomy of Italian law toward foreign influences, as even if it is easy to identify in it French and German legacies, it is also nonetheless possible to find some original solution, exclusive to the Italian system.[38]

The structure of the 1942 Italian Civil Code is in fact inspired by the French Code Civil, either in the general partition and organisation, and in the part of the code devoted to the issue of civil liability. Regarding this latter point, it is important to underline that the drafters of the 1942 Italian Civil Code firmly excluded the idea to introduce in the new code a system of typical liability, that is to say a liability typified for every single case of wrongdoing and injury, on the model provided for by the rules of the BGB. In fact, § 823(1) of the BGB states that

> 'a person who wilfully or negligently injures the life, body health, freedom, property, or other rights of another contrary to law is bound to compensate him for any damage arising there from and the same obligation attaches to a person who infringes a statutory provision intended for the protection of others',

and other sections of the same BGB provide other liability rules aimed to protect important interests.

The refusal of the drafters of the 1942 Civil Code to follow the German model was explicitly and sharply justified in the preparatory works, stating that they rather preferred 'not to get lost in a punctilious case system'.

But, although the drafting of civil liability rules of the 1942 Civil Code was generally inspired by the French model, and the liability for fault was based on a system of atypical liability, nonetheless the influence of the German legal thinking, which as we saw before already influenced Italian jurists under the ruling of the 1865 Code, in the last decades of the 20th century, deeply permeated some features of the new Civil Code.

In the first place, the heading of the chapter devoted to civil liability was changed, from 'Of Delicts and Quasi-Delicts' into 'Of illicit facts' ('*Dei fatti illeciti*'), under the influence of the thinking of Puchta and of the German model. This

[38] For an insightful introduction to the rules of Italian civil liability, read P. Perlingieri, 'Le funzioni della responsabilità civile' *Rassegna di diritto civile*, 115 (2011) and Id, 'Constitutional Norms and Civil Law Relationships' 1(1) *The Italian Law Journal*, 17 (2015) (originally 'Norme costituzionali e rapporti di diritto civile' *Rassegna di diritto civile*, 95 (1980)). For an overview in English of the rules on civil liability of the 1942 Italian Civil Code and their implementation by Italian courts, please read M. Graziadei and D. Migliasso, 'Italian Report', in B. Winiger et al eds, *Digest of European Tort Law: Essential Cases on Natural Causation* (Wien-New York: Springer-Verlag, 2007); M. Graziadei et al, 'Italian Report', in B. Winiger et al eds, *Digest of European Tort Law: Essential Cases on Damages* (Wien, New York: Springer-Verlag, 2011); M. Graziadei et al, 'Italian Report', in B. Winiger et al eds, *Digest of European Tort Law: Essential Cases on Misconduct (*Berlin-Boston: De *Gruyter*, 2018).

change is certainly the expression of the willingness of the drafters to distance the Italian rules from the French traditional distinction between delicts and quasi-delicts, and to adopt instead the German idea that a damage can be compensated only if the fact that caused it was *non jure*, that is to say if it infringed a third person rights and the tortfeasors were not entitled to that infringement.

Moreover, the articles devoted to civil liability of the 1942 Code are no longer a prone translation of the articles of the Code Napoleon, as under the 1865 Civil Code, but are instead an original elaboration of the French and German legal thinking, when not a completely autonomous legal elaboration.

A clear illustration of the syncretism between the French and German influences is represented by Art 2043 of the 1942 Civil Code, which states:

> '*Risarcimento per fatto illecito. Qualunque atto doloso o colposo che causa ad altri un danno ingiusto obbliga colui che ha commesso il fatto a risarcire il danno*'.

The English translation of that rule is a burdensome task, as many of the terms used in it have juridical implications which render the English translation almost impossible. To our purposes, we can point out that the generally used translation of that rule is that provided for by Mario Beltramo, Giovanni Longo and John Henry Merryman, which is, by now, the only English translation of the entire 1942 Italian Civil Code, providing

> 'Compensation for illicit facts. Any fraudulent, malicious, or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages'.[39]

However, a probably more accurate translation, involving a deep consideration on the meanings and sources of the terms used by the drafters, is that proposed by Michele Graziadei, which states

> 'Any intentional or negligent act, which causes unlawful harm to another, oblige the person who committed the act to provide compensation'.[40]

The first novelty of this rule, when compared to the general rule on the liability for fault of the 1865 Italian Civil Code and of the *Code Napoléon*, consists in the addition of a title to the article, which underlines the existence of an added requirement for the damage to be compensated, that the fact that caused the injury was an 'illicit' fact. Moreover, the article not only rephrases the original French rule on the liability for fault, but also introduces an additional element, that of the *danno ingiusto*, that is to say the requirement of an *unlawful harm* or *unjustified injury*, or *wrongful damage*, depending on the preferred translation,

[39] M. Beltramo et al, *The Italian Civil Code* (New York: Oceana, 1991).
[40] M. Graziadei, n 10 above, 126 and 141.

that is to say the requirement that compensation for an extra contractual injury can be asked for only where that same injury is contrary to the law.

The roots of this idea of the requirement of the unlawfulness, in Italian *antigiuridicità*, may be found in the Italian translation of the second French edition, by Charles Aubry and Frédéric-Charles Rau, of the '*Handbuch des französichen Civilrechts*', published in 1868. In this work the various elements of the delictual liability are clearly separated, and it is explicitly stated that civil liability always requires the action or omission that caused the damages to be unlawful, that is to say *illecita*.[41] Later, the Latin word *iniuria* was translated by Bernhard Windscheid in his Lehrbuch des Pandektenrecht with the German word *Widerrechtlichkiet* and that word, in turn, translated into Italian with *ingiustizia*[42] and shortly after with *antigiuridicità*.[43]

In any case, the additional requirement of the unjustified injury was interpreted by the Italian courts, for many years, as it provided a list of protected interests, analogous to that provided for by § 823 BGB, so that the compensation of the damages was only possible when one of the enlisted rights was infringed, with a serious limitation of the number of cases in which the compensation was awarded. That interpretation was largely upheld by the leading Italian scholars at the times of the enactment of the 1942 Civil Code, who supported this thesis on the basis of the limited number of protected interests under the *Lex Aquilia* in Roman Law,[44] and firmly affirmed by the Italian Corte di Cassazione in the notorious *Superga case*.[45] That decision, which denied the liability of the tortfeasor for the damages that are not the direct consequence of his or her action, such as in the case of the infringement of the credit rights of a third toward the victim of the tortious action, was criticized by many Italian scholars, who in those days started to affirm that the compensation of delictual liability could not be framed in the narrow provisions of § 823(1) BGB, but should be expanded so as to include the violation of the rights arising from contracts.[46]

That situation changed in 1971, when the Italian Corte di Cassazione held that also the infringement of the contractual rights by a third party constitutes a compensable damage.[47] This decision once more brought together the Italian and French attitudes toward the notion of compensable damages. The enlargement

[41] F. Fulvio ed, *Corso di Diritto Civile Francese per C.Z. Zachariae* (Napoli: Rondinella, 1868), 69-70, paras 443, 444 and 446.

[42] B. Windscheid, *Lehrbuch des Pandektenrecht* (Frankfurt: Rutten and Loening, 5th ed, 1882), vol 2711, para 455. Italian translation: B. Windscheid, *Diritto delle Pandette*, translated by C. Fadda and P.E. Bensa (Torino: Unione Tipografica Editrice, 1891), 759, para 455.

[43] G. Brunetti, *Il diritto civile* (Firenze: Bernardo Seeber, 1906), cfr title of § 8.

[44] A. De Cupis, *Il danno: Teoria generale della responsabilità civile* (Milano: Giuffre, 1946), 286; A. Fedele, *Il problema della responsabilità del terzo per pregiudizio del credito* (Torino: Unione Tipografica Editrice, 1954), 132.

[45] Corte di Cassazione 4 July 1953 no 2085, *Foro Italiano*, I, 1087 (1953).

[46] A. Guarneri, n 28 above, 138-139.

[47] Corte di Cassazione-Sezioni unite 26 January 1971 no 174, *Foro Italiano*, I, 342 (1971).

of the categories of compensable damages was then lastly increased in 1999, when the same Italian Corte di Cassazione affirmed that the public administration was obliged to compensate the damages occurred as a consequence of the violation of the legitimate interests of the citizens.[48] Those decisions were supported by the majority of the Italian scholars, who had been affirming for a long time the open ended, indeterminate nature of the concept of *wrongful damage* in our Code. Today, it is therefore generally held that that concept includes every violation of a 'legally protected interest'.[49]

Another novelty of the 1942 Code was the introduction in Art 2043 of the distinct terms of *colpa* and *dolo* to describe respectively the lack of due care and the intention in the action or omission of the tortfeasor. This distinction took the place of the undistinguished usage of *colpa* for both cases, inherited by the comprehensiveness of the definition of *fault,* which traditionally incorporates either the wilful acts of the tortfeasor and those which are the consequence of negligence or lack of care.

Moreover, although the rules on the liability for damages caused by things and animals and the collapse of buildings, provided for by Arts 2051, 2052 and 2053 of the 1942 Civil Code, were still inspired by the provisions of the Code Napoléon, their text was modified, to give space to the instances of those Italian courts and scholars who, as we saw before, held that in these cases the liability of the defendant is a strict liability or that the defendant's liability should be based on the presumption of his or her fault. Those rules were therefore rewritten, giving rise to a specific head of liability, based on the rigorous duty of care of the defendant, if not her or his actual strict liability.

The new formulation of these rules also consolidated the different application made by the French and Italian courts of the rule on the liability for things. As is known, in fact, starting from the famous *Jand'heur*[50] decision, the liability provided for by Art 1384 of the Code Civil traditionally applied also to cases of damages caused by things through human agency, so establishing a system of strict liability created by case law. In Italy, on the contrary, the analogous rule was only applied when the damages were caused by the thing itself or by unknown causes, and not to damages caused by things through human agency. That difference was most probably the consequence of the early adoption, in Italy, the 30 June 1912, of the statute on automobile accidents, that undercut the

[48] Corte di Cassazione-Sezioni unite 22 July 1999 no 500, *Danno e responsabilità*, 965 (1999) with notes by V. Carbone, P.G. Monateri, A. Palmieri, R. Pardolesi, G. Ponzanelli, V. Roppo; *Foro Italiano*, I, 2487 (1999) with notes by A. Palmieri, R. Pardolesi and *Foro Italiano*, I, 3201 (1999) with notes by R. Caranta, F. Fracchia, A. Romano, E. Scoditti.

[49] For a first detailed investigation on the issue, please read, among the others, M. Franzoni, 'L'illecito', *Trattato della responsabilità civile* (Milano: Giuffrè, 2010), 867; P.G. Monateri, *La responsabilità civile* (Torino: Unione Tipografica Editrice, 1998), 100; A. Fedele, *Il problema della responsabilità del terzo per pregiudizio del credito* (Torino: Unione Tipografica Editrice, 1954), 99-103; B. Gardella Tedeschi, *L'interferenza del terzo nel contratto* (Milano: Giuffrè, 2008), 284.

[50] Cour de Cassation, chambres réunies 13 February 1930, *Recueil Sirey* 1930.1.121.

need to expand the rule on the liability for damages caused by things to cases of traffic accidents.[51] In any case, when the 1942 Civil Code was enacted, the Italian scholars interpreted the rules on the liability for the damages caused by things or animals as special cases of liability for fault,[52] although today it is generally held that those rules are provisions of strict liability, which only requires the proof of causation.[53]

On the contrary, the rules on the vicarious liability of the parents of the Italian 1942 Civil Code, largely changed from those set out by the French Civil Code and the 1865 Italian Civil Code, that provided the liability of the parents (and in Italy also of the tutors) in cases of damages caused by the minor of age children living with them, with the only exception of the cases in which the parents (or tutors) could prove that they were unable to prevent the harmful fact of the minor.

In fact, the 1942 Civil Code introduced with Art 2046 the idea that a person incapable of understanding and intending, that is to say without natural capacity, could not be held responsible for the compensation of the damages he or she caused under that condition. Art 2046 in fact provides:

> 'Person not chargeable with injury. A person who was incapable of understanding or intending at the time he committed the act causing injury is not liable for its consequences, unless the state of incapacity was caused by his own fault'.[54]

Therefore, to be a source of compensable damages, the harmful action of the tortfeasor must be an act of free and actual will.

Moreover, this distinction between cases where natural capacity exists and cases where it does not, was also applied to minors, with the consequent different treatment between minors who are naturally capable and minors who are not naturally capable.[55] That distinction was largely accepted by scholars and courts.[56] As a consequence, Arts 2047 and 2048 of the Italian Civil Code now respectively provide:

Art 2047

[51] M. Cozzi, *La responsabilità civile per danno da cose: diritto italiano e francese* (Padova: CEDAM, 1935).

[52] G. Comandè and G. Ponzanelli, 'Italian Report', in F. Werro and V.V. Palmer eds, *The Boundaries of Strict Liability in European Tort Law* (Durham: Carolina Academic Press, 2004).

[53] See, eg, Corte di Cassazione 11 January 2005 no 376, *Danno e responsabilità*, 1101 (2005).

[54] English translation by M. Beltramo, n 39 above.

[55] A. De Cupis, n 44 above, II, 140.

[56] Corte di Cassazione 18 May 1953 no 1812, *Foro Italiano* I, 1451 (1953); Corte di Cassazione 10 August 1964 no 2291, *Giustizia civile*, I, 2190 (1964); Corte di Cassazione 10 April 1964 no 1008, *Giustizia civile*, I, 2190 (1964); M. Pogliani, *Responsabilità e risarcimento da illecito civile* (Padova: CEDAM, 1969), 130; G. Alpa and M. Bessone, 'I fatti illeciti', in P. Rescigno ed, *Trattato di diritto privato* (Padova: CEDAM, 1982), 323; S. Patti, *Famiglia e responsabilità civile* (Milano: Giuffrè, 1984), 248.

'Injury caused by person lacking capacity. If an injury is caused by a person incapable of understanding or intending, compensation is due from those who were charged with the custody of such person, unless they prove that the act could not have been prevented.

If the person injured is unable to secure compensation from the person charged with the custody of the person lacking capacity, the court, considering the financial conditions of the parties, can order the person who caused the injury to pay equitable compensation'.

Art 2048

'Liability of parents, guardians, teachers and masters of apprentices: A father and mother or guardian, are liable for the damage occasioned by an unlawful act of their minor not emancipated children, or of persons subject to their guardianship who reside with them. The same provision applies to a parent by affiliation.

Teachers and others who teach an art or profession are liable for the damage occasioned by the unlawful act of their pupils or apprentices that are under their supervision.

The persons mentioned in the preceding paragraphs are only relieved of liability if they prove that they were unable to prevent the act'.

Therefore, today, in cases of damages occurred in consequence of the actions of minors who are not able to intend and understand, parents and tutors must pay the compensation for the damages caused by the minor only if they are not able to prove that the harmful act of the incapable person could not have been prevented. If the victims cannot be compensated by the responsible person, the court, considering the financial situation of the parties, can order the minor who caused the injury to pay the victim an equitable compensation.

Instead, in cases of damages occurred in consequence of the actions of minors that are able to intend and understand, parents and tutors must pay the compensation for the damages caused by the minor only if they are not able to prove that they were unable to prevent the harmful act. Their liability for the compensation shall be joint and several with the liability of the minor.

That is to say that in the first case parents and tutors will be liable for not preventing the damages (so called *culpa in vigilando*), while in the second case they will be liable for not adequately raising and educating their children (so called *culpa in educando*).[57]

[57] See for example Corte di Cassazione 13 February 1970 no 348, *Giurisprudenza italiana*, I, 1034 (1979) and Corte di Cassazione 1 April 1980 no 2119, *Massimario della Giurisprudenza italiana*, 531 (1980).

It is interesting to point out that the rule providing the exclusion of the liability of the naturally incapable person is the logical consequence of the general requirement, rooted as we underlined above in the French civil system, of the fault of the defendant to affirm his or her liability. Nonetheless, it must be stressed that the rule providing for the power of the judge to order the incapable person to pay an indemnity to the victims in cases where his or her parents or tutors were unable to pay for the compensation, or proved that they could not prevent the incapable person from causing the damage, clearly abandons the fault principle to favour strict liability. The origins of this equitable exception to the general requirement of imputability as a prerequisite of liability can be traced, thanks to the mention explicitly made by Art 76 of the 1927 Draft Italian Code of Obligations,[58] written by a French-Italian codification commission, in § 829 of the BGB and the Prussian Landrecht, which contemplated strict liability. It should however not to be forgotten that, even if not mentioned, § 1310 of the Austrian Civil Code contained the same provisions.

The code of 1942 also introduced, with Art 2054, a long and detailed provision, devoted to the circulation of motor vehicles and, with Art 2050, a provision devoted to the compensation of the damages caused by a dangerous activity. Both diverted from the general fault rule of the Code Civil tradition, to protect the harmed victims by the means of strict liability or of the inversion of the onus of proof of the fault of the defendant.

Certainly the rules on the liability for traffic accidents were modelled on Art 2, regio decreto 31 October 1873 no 1867, concerning the damages caused by railways circulation, which was clearly inspired by the 1838 Prussian legislation on railways and on Art 5 of the above cited Italian law on traffic accidents of 1912, modelled on the German law of 1909 on traffic accidents. The provision on damages caused by dangerous activities may also be seen as a broadening of those same rules.[59]

That latter rule, which provides:

> 'Whoever causes injury to another in the performance of an activity dangerous by its nature or due to the means employed is liable to pay compensation, unless he proves that he has taken all suitable measures to avoid the injury',

was certainly very innovative in those days. In fact, it was aimed at protecting all those situations where a dangerous activity was involved, because of its same

[58] Commissione Reale per la riforma dei Codici, *Progetto di codice delle obbligazioni e dei contratti: testo definitivo approvato a Parigi nell'ottobre 1927* (Roma: Provveditorato generale dello Stato, 1928).

[59] M. Graziadei, n 10 above, 126 and 156-159. An overview of the evolution of the concept of fault in Italian law and court decisions could be found in M. Graziadei et al, 'Italian Report', in B. Winiger et al eds, *Digest of European Tort Law: Essential Cases on Misconduct (*Berlin Boston: De *Gruyter*, 2018), 40-42.

dangerousness, on the basis of criteria of no fault liability.

Actually, Art 2050 was probably too brave for the times, and in fact it was neglected by Italian scholars and judges for a long period, but for a few cases that were potentially highly dangerous. The rationale and usefulness of Art 2050 were nevertheless highly praised by Pietro Trimarchi, one of the leading Italian scholars of the times, who at the end of the 1970s held that the rule was indisputably a strict liability rule, contrary to those that held its nature of presumption of liability or fault liability.[60] The interpretation given by Trimarchi and the changing attitudes of Italian judges toward the rights of the victims of tortious cases entailed a new approach to Art 2050 starting from the 1970s, when it began to be used as a ductile tool for the protection of the victims of all those activities that, although not labelled as dangerous, are intrinsically risky or dangerous because of the means used.

IV. The Industrialization and the Emergence of the Issue of Defective Products

Starting from the 1950s Italy benefitted of a rapid and massive industrialization, with the consequent unavoidable rise of the number and entity of cases of damages caused by the new productive procedures, tools or defective products. This latter field, that is to say the domain of the compensation for damages caused by defective products, was especially relevant, because of the large amount of damages caused and victims involved.

Italian courts were therefore invested of a new range of problems, which Italian judges dealt with by using in innovative ways the traditional tools of the 1942 Civil Code. One of the remedies used was, as mentioned above, the widening of the cases where Art 2050 provisions could be applied, by the means of the enlargement of the concept of *dangerous activity*.

Another tool frequently used by the judges was the presumption of the fault of the defendant under the provisions of the general rule on the liability for fault, Art 2043, in cases where the defendant was a factory or an entrepreneur, and the petitioner was an individual who, because of his or her weaker position toward the defendant, was not able to prove their fault. That subterfuge was firstly used by the Italian Corte di Cassazione in 1964, in the famous Saiwa case, in which the court, given the impossibility for the consumer injured by a packet of spoilt biscuits to prove the negligence of the defendant producer, affirmed that in the case it could be presumed that the harm was caused by the producer's fault, and that therefore it was on the producer to prove that the damages were not the consequence of its fault.[61]

[60] P. Trimarchi, *Rischio e responsabilità oggettiva* (Milano: Giuffrè, 1961), passim. For a first information on the discussion on the nature of Art 2050, P.G. Monateri, n 49 above, 107.

[61] Corte di Cassazione 25 May 1964 no 1270, *Foro Italiano*, I, 2098 (1965).

Not only that decision was often imitated by other Italian courts, where it was too onerous or impossible for the victim to prove the defendant's fault, and there was a disproportion of means between the petitioner and the defendant, but it also gave some leading Italian scholars the occasion to investigate some foreign experiences in similar cases. That court decision was in fact first largely commented by Federico Martorano,[62] who examined the issue in a comparative perspective, under the light of common law experiences, and later by other scholars, such as Mario Bessone, who investigated the issue of producer liability with regard to German, French and, especially, North American experiences[63] and Guido Alpa, who approved the approach adopted by the judges of the Corte di Cassazione, holding that in those cases the fault of the defendant should be presumed.[64]

To tell the truth, other scholars before them had already investigated the issue of defective products, under a comparative point of view, although they had more traditionally applied to the issue the rules provided for the liability of the seller. First of all, we should remember Gino Gorla, who started to examine the problem already under the rules of the 1865 Civil Code, and then published in the 50s two writings in which he offered some solutions inspired by the French case law and by the common law.[65] He pointed out, in fact, that, starting from the second half of the 19th century, some French courts affirmed that the seller was strictly liable (or almost strictly liable) for the damages caused by the defective products sold to the buyer, in force of the seller guarantee.[66] In those cases the words of Art 1646 of the Code '*frais occasionnés par la vente*' were in fact interpreted as allowing the courts to compensate all the buyer's losses consequent to the sale, with the only exception of the *lucrum cessans* (loss of earnings).[67] In truth, other more strict positions had been adopted by some French scholars[68] and judges, who hold that the seller, manufacturer or professional trader were liable for the loss arising out of defective products, because the guarantee of

[62] F. Martorano, 'Sulla responsabilità del fabbricante per la messa in commercio di prodotti dannosi (a proposito di una sentenza della Cassazione)' *Foro Italiano*, V, 13 (1966).

[63] M. Bessone, 'Prodotti dannosi e responsabilità dell'impresa' *Rivista trimestrale di diritto e procedura civile*, I, 97 (1971).

[64] G. Alpa, *Responsabilità dell'impresa e tutela del consumatore* (Milano: Giuffrè, 1975), 58.

[65] G. Gorla, 'Considerazioni in tema di garanzie per i vizi redibitori' *Rivista trimestrale di diritto e procedura civile*, 1272 (1957); Id, 'Considerazioni sulla giurisprudenza francese in tema di garanzia per i vizi redibitori', in *Studi in onore di Francesco Messineo* (Milano: Giuffrè, 1959), 231.

[66] The first decision holding that interpretation seems to be Cour de Cassation 29 July 1847, *Recueil Sirey* 1848.1.705.

[67] The first decision in that sense was Cour de Cassation 21 October 1925, *Recueil périodique et critique mensuel Dalloz* 1926.19, containing the previous case law on the issue, with note by L. Josserand and *rapport* of B. Célice.

[68] R.J. Pothier, 'Vente', in Id, *Oeuvres* (Paris: Eugène Crochard, 1929-1934), no 213; J. Hamel, 'Vente', in M. Planiol and G. Ripert eds, *Traité pratique de droit civil français* (Paris: Librairie Générale de Droit & de Jurisprudence, 1956), X, 141; L. Josserand, note to Cour de Cassation 21 October 1925, *Recueil périodique et critique mensuel Dalloz* 1926.19.

the sale contract provided their liability for professional negligence and their strict liability for the loss. The existence of the fault of the seller was, pointed out Gorla, sometimes presumed by French courts, and his or her guarantee on the goods even extended to the loss suffered by the buyer *dans ses autres biens*.[69] In his opinion, the French case law was the outcome of the development of non-roman streams of *ius commune*, contrasting with the tradition adopted by the codes, which had the purpose to mend the new social and economic needs.[70]

If Gorla could not approve the French case law on the issue of the sellers' liability, he nevertheless admitted to share its aims of protection of the consumers, when their contract of sale was entered with a professional seller, and concerned certain categories of goods. In his opinion, Italian Art 1494 of the 1942 Civil Code had to be interpreted as to requiring the professional negligence of the seller and therefore as to imposing him to prove he or she was not liable for the damages caused by the sold defective products.[71]

In the following decade, other scholars, such as Trimarchi and Stefano Rodotà, started instead to follow a new path, which tried to find in the civil liability rules the solution to the problems resulting from the growing Italian industrialization. In their opinion, in fact, those rules could be used as an efficient tool to allocate profits and damages between consumers and producers.[72] Their innovative research led to the opening of a new field of research, that concerning the compensation of damages caused by defective products and the related producer liability. Among the scholars who devoted their efforts to these researches, three must be remembered as having the most influence on the Italian legal thinking on the issue.

First of all, it should be noted that in 1974 Ugo Carnevali published a book entirely devoted to the subject of producers' liability.[73] His research was deeply influenced by the French jurisprudence and by some American scholars, among them William Lloyd Prosser, Frederick Reed Dickerson and Friedrich Kessler.[74] Under the suggestion of their legal reasoning, he held that in cases of damages caused by defective products, the liability of the seller in force of his or her contractual liability for the defects of the product should be excluded, as it is costly and complex and as only the producer is actually able to control the productive system of the goods and their marketing. Therefore, he stated that in those cases only the producer should be held liable for the possible negative

[69] G. Gorla, 'Considerazioni in tema di garanzie' n 65 above, 281.

[70] G. Gorla, 'Considerazioni sulla giurisprudenza francese' n 65 above, 253.

[71] G. Gorla, 'Considerazioni in tema di garanzie' n 65 above, 1288 and 1292.

[72] P. Trimarchi, n 60 above, passim; S. Rodotà, *Il problema della responsabilità civile* (Milano: Giuffrè, 1964), passim.

[73] U. Carnevali, *Responsabilità del produttore* (Milano: Giuffrè, 1974).

[74] W.L. Prosser, 'The Assault upon the Citadel (Strict Liability to the Consumer)' 69 *Yale Law Journal*, 1099 (1960); F.R. Dickerson, *Product Liability and the Food Consumer* (New York-Westport: Greenwood Press, 1951); F. Kessler, 'Product Liability' 76 *Yale Law Journal*, 926 (1967); S. Simitis, *Grundfragen der Produzentenhaftung* (Freiburg: Mohr, 1965).

consequences of the products defects, on the basis of the rules of civil liability. The recourse to the civil liability of the producer was in fact, in his opinion, the only way to compensate the victim of the defective product, avoiding the short limitation time provided for the liability of the seller,[75] and as well sidestepping the lengthy procedures to recover damages in 'chain sales', which could not allow the compensation of the victim. He therefore proposed to establish a system of strict liability of the producers for all the damages caused by defective products, which could effectively protect the consumer providing the liability of the producer even in cases in which the harm was not the consequence of his or her negligence.

Another Italian scholar who strongly influenced the Italian debate was Guido Alpa, who in 1975 published a book devoted to the enterprise liability and the consumer protection, where he underlined the shortcomings of the protection of the consumers in Italy, in comparison with other foreign legal systems.[76] His inspiration was especially drawn from the North American common law experience, where the judges, he pointed out, had been able to establish a system of strict liability of the producers for the damages caused by the products put on the market, on the basis of the new theories on product damages allocation and economic analysis of law. That new system, he noticed, had been able to overcome the limited boundaries of negligence, fault and privity of contract and modify the 1964 version of § 402 of the Restatement of Torts. Furthermore, he also investigated the English, French and German systems, concluding that to provide an effective protection of the consumers, it was essential to hold the liability of the producers in any case in which the defect of the product could be attributed to the organisation of this latter.

Five years later the same Alpa edited a book, jointly with Mario Bessone, aimed at exploring the issue of product damages and producers' liability in a comparative perspective which, besides articles on the Italian experience, contained essays written by foreign scholars. John Spencer wrote in fact on the North American and English system, Wolfgang Marshall von Bieberstein on the German, Bill Dupwa on the Swedish, Ewoud Hondius on the Dutch, Philippe Malinvaud and Genevieve Viney on the French, Angel Rojo on the Spanish, and Jorge Barrera Graf on the Mexican, while the same Alpa took into examination the European Community projects on the consumer protection against defective products.[77] Moreover, Alpa also wrote in the book an essay which investigated

[75] In truth, the issue of the limitation time of the seller liability was at the centre of a heated debate among Italian scholars, see eg in favour of the application of the shorter terms of the guarantee action P. Greco and G. Cottino, 'Della vendita', in A. Scialoja and G. Branca eds, *Commentario del Codice Civile* (Bologna-Roma: Zanichelli, 1962), 224-225 and the contrary opinion supporting the application of the longer terms of the compensation action, A. De Martini, *Profili della vendita commerciale e del contratto estimatorio* (Milano: Giuffrè, 1950), 391; L. Mengoni, 'In tema di prescrizione della responsabilità del venditore per danni derivati dai vizi della cosa' *Rivista di diritto commerciale e di diritto generale delle obbligazioni*, II, 927 (1953).

[76] G. Alpa, *Responsabilità dell'impresa* n 64 above, 61.

[77] G. Alpa and M. Bessone, *Danno da prodotti e responsabilità dell'impresa* (Milano: Giufrè,

the issue of producer insurance for the damages arising out of defective products, especially in no-fault systems, such as those recently introduced in cases of car accidents in some USA States and in cases of car accidents and working injuries in New Zealand. In that essay it is clear that Alpa was in those days influenced, in his research, by the writings of the American scholars Guido Calabresi, Walter J. Blum and Harry Kalven, Page W. Keeton and Jeffrey O'Connell, who he largely cites. His interest in the American experience also transpires in another essay, written by him and published in the same book, dealing with the North-American experience on the circulation of defective products.

Amid these scholars mainly influenced by the French and common law legal thinking, we should also mention Carlo Castronovo, who was instead largely inspired by German scholars.[78] On the basis of the influence of that foreign scholarship, Castronovo suggested that to cases of damages arising out of defective products the traditional rule on the liability of the seller be applied, provided for by Art 1494 of the Italian Civil Code, which states the contractual liability of the seller for the damages arising out of defective goods, jointly with the analogical application of Art 2049 of the same Code, providing the liability of the employer for the damages caused by the unlawful acts of his or her employees.[79]

V. The Influence of the European Union Law

Starting from the end of the 1950s, the Italian legal system saw the introduction of a relevant novelty. In 1957, in fact, Italy, with France, Belgium, Germany, the Netherland and Luxembourg, established the European Economic Community, which later evolved in today European Union, consisting of twenty-seven member states.

That supranational entity is endowed, among others, as long as we are concerned, of legislative powers in the field of the free circulation of goods and services among the member States, and aimed to protect the safety and health of its citizens and the rights of consumers. These powers were used by the European Commission, aware of the large number of cases of damages caused by defective products, to enact the Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions

1980).

[78] F. Leonhard, *Die Haftung des Verkäufers für sein Verschulden beim Vertragsabschlusse* (Göttingen: Dieterich, 1986); D. Medicus, 'Vertragliche und deliktische Ersatzansprüche für Schäden aus Sachmängeln', in O. Bachof, E. Kern, *Tübinger Festschrift für Eduard Ker* (Tübinger: Mohr, 1968), 317; J. Esser, *Schuldrecht* (Heidelberg: Muller, 1969), II; W. Leisler, 'Schadensersatz wegen Sachmängeln. Rechtshistorisches zu § 463 BGB', in H. Hulbam and H. Hübner eds, *Festschrift für L. Schnorr von Carolsfeld* (Berlin: Carl Heymanns, 1972) are among the many German scholars he cited.

[79] C. Castronovo, *Problema e sistema nel danno da prodotti* (Milano: Giuffrè, 1979).

of the Member States concerning liability for defective products[80].

That Directive, in truth, provided Italian citizens with rules aimed at compensating the victims of damages caused by defective products which the Italian legislator, notwithstanding the lively research activities of some Italian scholars examined above, lacked to provide. And it certainly marked Italian law with its innovative approach to defective products damages compensation.

The European Directive was implemented in the Italian system by decreto del Presidente della Repubblica 24 May 1988 no 224 and its rules and following modifications are now part of the Italian Consumer Code, although their application is not limited to consumers, but may be used in every case of damages caused by a defective product. The novelty of the law consists in the establishment of a system of strict liability of the producer in cases of damages arising out of defective products, notwithstanding the existence of a contractual relationship between producer and consumer. The product is deemed to be defective, when it is 'unsafe' in relation to all the circumstances of the case for the user, and that defect caused harm to the same user. To ask for the compensation of the damages suffered, the victim of the defective product only has to prove that he suffered damages, and that those damages are the consequence of a defect of the product, but does not need to prove, as under the general rule for negligence of the Italian Civil Code, the fault of the producer.

It must be underlined that even if the new rules provided for by the European Directive clearly follow the model of strict liability of the producer offered by the United States experience, nevertheless they are, under many aspects, original in their approach and formulation, mainly because they rely on the reasonableness of the user and may be applied only when this latter used the product as it could reasonably be expected, in compliance with the warnings and instructions given by the producer.[81]

Notwithstanding the introduction of the European rules on products liability, it must be pointed out that Italian courts often preferred to continue to use Arts 2043 and 2050 of the Italian Civil Code in cases of product damages, although the application of the traditional rules implied the presumption of the negligence of the manufacturer, in place of the requirement of its probation by the petitioner.[82] On the contrary, the same courts completely stopped applying

[80] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L210/29.

[81] For a first comparative approach, please read G. Howells, *Comparative Product Liability* (Aldershot: Dartmouth, 1993); D. Fairgrieve ed, *Product Liability in Comparative Perspective* (Cambridge: Cambridge University Press, 2005) and D. Fairgrieve at al, 'The Product Liability Directive: Time to get Soft?' 4(1) *Journal of European Tort Law*, 1 (2013).

[82] U. Carnevali, 'Responsabilità del produttore e prova per presunzioni' *Responsabilità civile e previdenza*, 481 (1996); A. Palmieri, 'Dalla 'mountain-bike' alla bottiglia d'acqua minerale: un nuovo capitolo per un'opera incompiuta' *Foro Italiano*, I, 3664 (1998) and R. Pardolesi, 'La responsabilità per danno dei prodotti difettosi' *Nuove leggi civili commentate*, 650 (1989).

Art 1494, providing the contractual liability of the seller for the damages arising out of defects of the products sold, to cases of damages caused by defective products.[83]

In truth, it should not be ignored that the application of Art 2043 Civil Code, providing the liability for fault, in cases of product damages, is actually often used by the courts as a tool to compensate the victims where the manufacturer cannot be identified, or the court prefers to hold severally and jointly liable the manufacturer and other persons, by reason of their vigilance duties to protect the buyer/consumer, or when it would otherwise be impossible to compensate the damaged persons on the basis of the European rules. A good example of this case law are the decisions of the Italian Corte di Cassazione in which the Italian Ministry of Health was held liable for the harm suffered by the petitioners following the contraction of HIV, hepatitis B and hepatitis C as the consequence of transfusions of infected blood or use of infected blood products.[84] In those cases, the liability of the defendant Ministry of health was held on the basis of Art 2043 Civil Code, because in the opinion of the judges it had negligently omitted to pursue its duties of monitoring and vigilance in the production and marketing of the blood and blood products. Those decisions were certainly motivated by policy reasons, as it would have been impossible to condemn the manufacturers of the defective blood and blood products on the basis of the Council Directive 85/374 /EEC on defective products. In other cases, the joint application of Art 2043 and of the product liability provisions was used to hold both the seller and the producer jointly and severally liable.[85]

Likewise, Art 2050 Civil Code was sometimes applied jointly or in place of the product liability provisions, in cases of damages that have traditionally been considered the consequence of dangerous activities, such as damages arising out

[83] After the entry into force of decreto del Presidente della Repubblica 24 May 1988 no 224, there is apparently only one published decision, of a first instance Court, Tribunale di Firenze 5 April 2000, *Archivio civile*, 208 (2001) and *Foro Italiano Repertorio*, entry 'Responsabilità civile', 5760, no 210 (2001) applying the provisions of Art 1494 Civil Code, even if jointly to the provisions of decreto del Presidente della Repubblica 24 May 1988 no 224.

[84] Corte di Cassazione 31 May 2005 no 11609, *Responsabilità civile e previdenza*, 101 (2006), with note by M. Poto, 'Le emotrasfusioni infette, i nuovi traguardi della giurisprudenza di merito, la posizione della Cassazione'. The case was also commented by N. Coggiola, 'La Cassazione afferma la responsabilità del Ministero della Salute per i danni da sangue ed emoderivati infetti' *Responsabilità civile e previdenza*, 296 (2006) and in English 'The Italian Ministry of Health Held Liable for the Damages Arising out of Contaminated Blood and Blood Products' 3 *European Review of Private Law*, 451 (2007). It is interesting to point out that the decision of the Corte di Cassazione substantially confirmed the first and second instance decisions: Tribunale di Roma 27 November 1998, *Foro Italiano*, I, 313 (1999) with note by U. Izzo, 'Circa la responsabilità per danni da trasfusioni di plasma ed emoderivati infetti da HIV' and Corte di Appello di Roma 23 October 2000, *Danno e responsbailità,* 1067, (2001) with note by U. Izzo, 'La responsabilità dello Stato per il contagio di emofilici e politrasfusi: oltre i limiti della responsabilità civile'.

[85] Tribunale di Firenze 5 April 2000, *Archivio civile*, 208 (2001) and *Foro Italiano Repertorio*, entry 'Responsabilità civile', 5760, no 210 (2001).

of gas cylinders[86] and the production or marketing of pharmaceutical products[87] and of blood products.[88]

The judicial outliving of the application of the Italian Civil Code rules to cases now also ruled by the product damages provisions, and the limited recourse to the new rules by courts, lawyer and consumers, was labelled by some Italian scholars as a failure of the implementation of the European directives, due to cultural and organizational issues of the Italian legal system.[89] Other scholars underlined, instead, that the existence of dispute transactions in cases of product damages and the general augmentation of product safety should be taken into consideration in the assessment of the effects of the introduction of the new rules.[90]

VI. By Way of Conclusion: The Recognition of Foreign Decisions Awarding Punitive Damages

A final mention should be made, as a sort of conclusion to this excursus on the foreign influences on Italian law, to a recent judicial decision of the Joint Sections of the Italian Supreme Court, because in my opinion that decision clearly depicts the relationship today between foreign influences and the Italian legal system.

The case concerned the recognition in Italy of a US decision awarding punitive damages, a category of damages which is not generally acknowledged

[86] Corte di Cassazione 17 July 2002 no 10382, *Diritto ed economia delle assicurazioni*, 261 (2003); Corte di Cassazione 2 April 2001 no 4792, *Foro Italiano Repertorio*, entry 'Responsabilità civile', 5760, no 337 (2001); Tribunale di Perugia, 7 June 2000, *Rassegna giuridica umbra*, 699 (2000); Corte di Cassazione 4 June 1998 no 5484, *Giurisprudenza italiana*, 707 (1999); Corte di Cassazione 19 January 1995 no 567, *Giurisprudenza italiana*, I, 276 (1995).

[87] Tribunale di Roma 20 June 2002, *Foro Italiano*, I, 3225 (2002); *Diritto e giustizia*, 23, 58 (2002) with note by A.G. Cianci; *Responsabilità civile e previdenza*, 1103 (2002) with note by U. Carnevali, 'Farmaco difettoso e responsabilità dell'importatore-distributore'. Corte di Cassazione 27 July 1991 no 8395, *Giurisprudenza italiana*, I, 1332 (1992) with note by A. Barenghi, 'In tema di farmaci difettosi'; Corte d'Appello di Roma 17 October 1990, *Giurisprudenza italiana*, I, 816 (1991) with note by G. Tassoni, 'La produzione di farmaci tra l'art. 2050 c.c. ed i cosiddetti "development risks" '.

[88] Tribunale di Ravenna 28 October 1999, *Danno e responsabilità*, 1012 (2000); Corte di Cassazione 27 January 1997 no 814, *Foro Italiano Repertorio*, entry 'Responsabilità civile', 5760, no 211 (1997); Corte di Cassazione 1 February 1995 no 1138, *Disciplina del commercio e dei servizi*, 592 (1995); Corte di Cassazione 20 July 1993 no 8069, *Foro Italiano*, I, 455 (1995) and *Giustizia civile*, I, 1037 (1994) with note by A. Barenghi, 'Brevi note in tema di responsabilità per danni da emoderivati difettosi tra *obiter dicta* e regole giurisprudenziali'; Corte di Cassazione 15 July 1987 no 6241, *Responsabilità civile e previdenza*, 421 (1988) with note by G. Tassoni, 'Responsabilità del produttore di farmaci per "rischio da sviluppo" e art. 2050 c.c.'.

[89] G. Alpa, 'La dottrina sulla responsabilità del produttore. Il rischio d'impresa alle soglie del 1992' *Responsabilità civile e previdenza*, 645 (1988); A. Palmieri, 'Dalla 'mountain-bike alla bottiglia d'acqua minerale' n 82 above, 3664; G. Ponzanelli, 'Responsabilità del produttore' *Rivista di diritto civile*, II, 215 (1995).

[90] F. Cafaggi, 'La responsabilità dell'impresa per i prodotti difettosi', in N. Lipari ed, *Trattato di diritto privato europeo,* (Milano: CEDAM, 2nd ed, 2003), IV, 536.

by the Italian legal system. That recognition had been previously traditionally excluded, lastly by two decisions of the Corte di Cassazione, which resolutely held that punitive damages were contrary to the Italian system of compensation and infringed Italian public policy, as the ideas of punishment and sanction remained external to the Italian system of compensation, which does not evaluate the conduct of the defendant for compensation purposes.[91]

But when the same issue was lately submitted again to the judgment of the Joint Sections of the same Supreme court, the Court reversed the previous case law with an innovative decision, no 16601 of 5 July 2017,[92] in which it stated that, although punitive damages are not generally recognized by the Italian legal system, it is nevertheless possible to grant the exequatur to foreign decisions awarding punitive damages, provided that they comply with some requisites.

Leaving aside for reasons of space and consistency the detailed description

[91] Corte di Cassazione 19 January 2007 no 1183, *Foro Italiano*, I, 1460 (2007) with note by G. Ponzanelli, 'Danni punitivi: no grazie' *Danno e responsabilità*, 1225 (2007), with note by P. Pardolesi, 'Danni punitivi all'indice' *Europa e diritto privato*, 1129 (2007), with note by G. Spoto, 'I *punitive damages* al vaglio della giurisprudenza italiana'; *Corriere giuridico*, 497 (2007), with note by P. Fava, '*Punitive damages* e ordine pubblico: la Cassazione blocca lo sbarco'; *Giurisprudenza italiana*, 395 (2008), with note by A. Giussani, 'Resistenze al riconoscimento delle condanne al pagamento dei *punitive damages*: antichi dogmi e nuove realtà'; *Responsabilità civile e previdenza*, 188 (2008), with note by G. Miotto, 'La funzione del risarcimento dei danni non patrimoniali nel sistema della responsabilità civile and Corte di Cassazione'; Corte di Cassazione 8 February 2012 no 1781, *Foro Italiano*, I, 1449 (2012); *Danno e responsabilità*, 609 (2012), with note by G. Ponzanelli, 'La Cassazione bloccata dalla paura di un risarcimento non riparatorio'; *Corriere giuridico*, 1068 (2011), with note by P. Pardolesi, 'La Cassazione, i danni punitivi e la natura polifunzionale della responsabilità civile: il triangolo no!'. On the issue, in English, please read F. Quarta, 'Recognition and Enforcement of U.S. Punitive Damages Awards in Continental Europe: The Italian Supreme Court's Veto' 31 *Hastings International & Comparative Law Review*, 753 (2008).

[92] Corte di Cassazione-Sezioni unite 5 July 2017 no 16601, translated in English by F. Quarta in 3(2) *The Italian Law Journal*, 593 (2017), with note by L. Coppo 'The Grand Chamber's Stand on the Punitive Damages Dilemma'. The decision was, obviously, largely commented, among the others by A. Palmieri and R. Pardolesi, 'I danni punitivi e le molte anime della responsabilità civile'; E. D'Alessandro, 'Riconoscimento di sentenze di condanna a danni punitivi: tanto tuonò che piovve'; R. Simone, 'La responsabilità non è solo compensazione'; P.G. Monateri, 'I danni punitivi al vaglio delle Sezioni unite', all published in *Foro Italiano*, I, 2630, 2639, 2644 and 2648 (2017); A. Di Majo, 'Principio di legalità e di proporzionalità nel risarcimento con funzione punitiva' *Giurisprudenza italiana*, 1792 (2017); M.E. La Torre, 'Un punto fermo sul problema dei 'danni punitivi"; G. Corsi, 'Le Sezioni Unite: via libera al riconoscimento di sentenze comminatorie di *punitive damages*'; G. Ponzanelli, 'Polifunzionalità tra diritto internazionale privato e diritto privato'; P.G. Monateri, 'Le Sezioni Unite e le funzioni della responsabilità civile', all published in *Danno e responsabilità*, 421, 429, 435 and 437 (2017); M. Grondona, 'Le direzioni della responsabilità civile tra ordine pubblico e *punitive damages*' *Nuova giurisprudenza civile commentata*, I, 1392 (2017); A. Gambaro, 'Le funzioni della responsabilità civile tra diritto giurisprudenziale e dialoghi transnazionali'; P.G. Monateri, 'Le Sezioni Unite e le molteplici funzioni della responsabilità civile'; G. Ponzanelli, 'Le Sezioni Unite sui danni punitivi tra diritto internazionale privato e diritto interno', all published in *Nuova giurisprudenza civile commentata*, II, 1405, 1410 and 1413 (2017); C. Scognamiglio, 'Le Sezioni unite ed i danni punitivi: tra legge e giudizio' and A. Briguglio, 'Danni punitivi e delibazione di sentenza straniera: *turning point* 'nell'interesse della legge' ', both in *Responsabilità civile e previdenza*, 1109, 1597 (2017); Francesca Benatti, 'Benvenuti danni punitivi... o forse no!' *Banca, borsa e titoli di credito*, 575 (2017).

of the case and of the court reasoning to other scholars,[93] we can simply summarise here that the case concerned the compensation asked by a biker, following the severe brain injuries he sustained as a consequence of the crash that occurred while he was driving a motorcycle in a motocross practice race. The biker sued the American retailer of the helmet he was wearing and its Italian manufacturer, holding that the damages he suffered were caused by the defects of the helmet. The American retailer reached a settlement agreement with the injured biker, agreeing to pay him around one million dollars, and subsequently the District Court of Florida held that the Italian producer was obliged to pay back the American retailer for the money he paid following the settlement. As the Italian producer did not oblige the retailer, this latter brought the case to Italy, in front of the Corte di Appello di Venezia, which granted the exequatur of the Florida judgment in the Italian system. The Joint Sections of the Corte di Cassazione, to which the Italian producer appealed, ruled out the possibility that the Florida decision concerned the payment of punitive damages, but nevertheless decided to pronounce, ex officio, on the principle of law that should be affirmed in the case, stating that:

> 'In the current legal system, the purpose of civil liability law is not just to make the victim of a tort whole again, since the functions of deterrence and punishment are also inherent in the system. The American doctrine of punitive damages is therefore not ontologically contrary to the Italian legal system. However, the recognition of a foreign judgment awarding such damages is subject to the condition that the judgment has been rendered in accordance with some legal provisions of the foreign law guaranteeing the standardization of cases in which they may be awarded (*tipicità*), their predictability, and their outer quantitative limits. The enforcing court must focus solely on the effects of the foreign judgment and on their compatibility with public policy'.[94]

It is certainly interesting to investigate the reasons of the shift of the attitude of the judges of the Italian Corte di Cassazione from the denial of the possibility to award the exequatur of foreign courts decisions condemning the tortfeasors to punitive damages payments, to a position where that exequatur may be awarded, provided the existence of certain conditions, because we can

[93] In English, please read A. Venchiarutti, 'The Recognition of Punitive Damages in Italy: A Commentary on Cass Sez Un 5 July 1917, 16601, AXO Sport, SPA v. NOSA Inc' 9(1) *Journal of European Tort Law*, 104 (2018) and B. Pozzo, 'The Enforcement of Foreign Decisions Concerning Punitive Damages' 5 *European Review of Private Law*, 661 (2018) for a detailed examination of Italian substantive law, of the scholarly debate on punitive damages and on the Court reasoning, and E. D'Alessandro, 'Recent Trends in Enforcing US Punitive Damages Awards in Italy' 22 *Zeitschrift für Zivilprozess International*, 77 (2017) for the insightful description of the procedural issues of the case and the interesting comparative approach.

[94] Translation by F. Quarta, n 92 above, 604.

recognise in that shift the influence of a multiplicity of factors.

First of all, it should be remembered the influence of some precedents of the same Corte di Cassazione, as in cases of damages caused respectively by the unauthorized publication of a photograph[95] and by the violation of the copyright,[96] that Court held that the compensation system could also perform a sanctioning function. Shortly after, the Corte di Cassazione also affirmed, in a decision which recognized the exequatur of a Belgian court decision providing the compensation of damages, that in the Italian legal system the payment of the damages caused by the tortfeasor does not merely have the purpose of restoring the damages suffered by the victim, but may also have the secondary aims of sanctioning the tortfeasors and deterring them from tortious actions.[97]

Secondly, the contribution of Italian scholars must not be undervalued, as for a long time a number of them have been debating, largely under the influence of foreign influential colleagues and courts decisions, especially but not uniquely from the United States[98] on the legitimacy and opportunity to enforce the civil liability functions of sanction and deterrence, and therefore also on the legitimacy and opportunity of the introduction of punitive damages in the Italian system.[99]

[95] Corte di Cassazione 11 May 2010 no 11353, *Foro italiano*, I, 534 (2011), with note by P. Pardolesi, 'Abusivo sfruttamento di immagine e danni punitivi'.

[96] Corte di Cassazione 15 April 2011 no 8730, *Foro italiano*, I, 3073 (2011), with note by P. Pardolesi, 'Violazione del diritto d'autore e risarcimento punitivo/sanzionatorio'.

[97] Corte di Cassazione 15 April 2015 no 7613, with note by A. Mondini, ' "*Astreintes*" ordine pubblico interno e danno punitivo' *Foro italiano*, I, 3966 (2015); with note by F. Benatti, 'Dall'*astreinte* ai danni punitivi: un passo ormai obbligato' *Banca borsa e assicurazioni*, 679 (2015); with note by A. Venchiarutti, 'Le *astreintes* sono compatibili con l'ordine pubblico interno. E i *punitive damages*?' *Responsabilità civile e previdenza*, 1899 (2015); with note by A. Mendola, '*Astreinte* e danni punitivi' and by A. Di Majo, 'I confini mobili della responsabilità civile' *Giurisprudenza italiana*, 562 (2016); on the same issue, G. Ponzanelli, 'Novità per i danni esemplari?' *Contratto e impresa*, 1195 (2015).

[98] Among the others, G. Ponzanelli, 'I *punitive damages* nell'esperienza nordamericana' *Rivista di diritto civile*, I, 435 (1983); V. Zeno-Zencovich, 'Il problema della pena privata nell'ordinamento italiano: un approccio comparatistico ai '*punitive damages*' di '*common law*'' *Giurisprudenza italiana,* IV, 12 (1985); G. Ponzanelli, 'I *punitive damages*, il caso texano e il diritto italiano' *Rivista di diritto civile,* II, 405 (1987); G. Ponzanelli, '*Punitive damages* e *due process clause*: l'intervento della corte suprema Usa' (comment to US Supreme Court, 4 marzo 1991, Pacific Mutual Life Insurance co v Haslip) *Foro italiano*, IV, 235 (1991); Id, 'L'incostituzionalità dei danni punitivi *grossly excessive*' *Foro italiano*, IV, 421 (1996); A. Musy, '*Punitive damages* e resistenza temeraria in giudizio: regole, definizioni e modelli istituzionali a confronto' *Danno e responsabilità*, 1121 (2000); G. Ponzanelli, 'La 'costituzionalizzazione' dei danni punitivi: tempi duri per gli avvocati nordamericani' *Foro italiano*, IV, 356 (2003); P. Sirena, 'Il risarcimento dei danni c.d. punitivi e la restituzione dell'arricchimento senza causa' *Rivista di diritto civile*, I, 531 (2006); G. Ponzanelli, 'I danni punitivi sempre più controllati: la decisione Philip Morris della Corte Suprema Americana' *Foro italiano*, IV, 179 (2008); P. Pardolesi, 'Danni punitivi' *Digesto delle discipline privatistiche, Sezione Civile, Aggiornamento* I (Torino: UTET, 2007), 445; Francesca Benatti, *Correggere e punire. Dalla* law of torts *all'inadempimento del contratto* (Milano: Giuffé, 2008), 106; S. Patti, 'Pene private' *Digesto delle discipline privatistiche, sezione civile*, (Torino: UTET, 2004), XIII, 351; M.G. Baratella, *Le pene private* (Milano: Giuffrè, 2006), passim.

[99] On the issue, F.D. Busnelli and G. Scalfi eds, *Le pene private* (Milano: Giuffrè, 1985); P. Sirena, *La funzione deterrente della responsabilità civile, alla luce delle riforme straniere e*

Although it could not be affirmed that the majority of Italian scholars are favourable to the introduction of punitive damages in our system,[100] as a large number of them still hold a critical approach to the issue,[101] it may certainly be inferred from the reading of the decision under discussion that the existing international academic and judicial debate on punitive damages has certainly found its way to the Italian judges seating in the Joint Panel of the Corte di Cassazione. A clear example of this inference can be found at point 7.1 of the decision, dealing with the issue of the United States case law on punitive damages.

Thirdly, the Italian system is not completely unaware of punitive damages, as it already knows a number of cases where the law provides for the payment of non-compensatory amounts of money where some legal rules are infringed,[102] such as the cases of defamation by press, where the victim is entitled to receive a compensatory sum irrespective of the punishment of the offender and in addition to the compensation for the economic damages, compensatory sum which can amount to all the profits resulting from the defamation[103] or the cases of discrimination law, where the compensation to the victim may be based, to quantify it, on the act of discrimination as a retaliation against a judicial action or other activity of the victim aimed to comply with the principle of equal treatment.[104] In other cases, where the compensation of the damages suffered by the victim would not constitute an

dei Principles of European Tort Law (Milano: Giuffrè, 2011); and F. Quarta, *Risarcimento e sanzione nell'illecito civile* (Napoli: Edizioni Scientifiche Italiane, 2013). On the consequences of the conduct of the tortfeasors, P. Cendon, *Il dolo nella responsabilità extracontrattuale* (Torino: Giappichelli, 1974), and more P.G. Monateri et al, *Il dolo, la colpa e i risarcimenti aggravati dalla condotta* (Torino: Giappichelli, 2014).

[100] Among the scholars in favour of the recognition of foreign decisions awarding punitive damages, we can cite, G. Ponzanelli, 'Danni punitivi: no grazie' n 91 above; P. Pardolesi, 'Danni punitivi all'indice' n 91 above; G. Ponzanelli, 'La Cassazione bloccata' n 90 above; A. Giussani, *Resistenze al riconoscimento* n 91 above; A. Riccio, 'I danni punitivi non sono, dunque, in contrasto con l'ordine pubblico interno' *Contratto e impresa*, 859 (2009).

[101] Among the scholars against the recognition of foreign decisions awarding punitive damages, please read C. Castronovo, 'Del non risarcibile aquiliano: danno meramente patrimoniale, c.c. perdita di chance, danni puntivi, danno c.d. esistenziale' *Europa e diritto privato*, 315 (2008); M. Barcellona, 'Funzione compensativa della responsabilità e private enforcement della disciplina antitrust' *Contratto e impresa*, 120 (2008); A. De Pauli, 'L'irriconoscibilità in Italia per contrasto con l'ordine pubblico di sentenze statunitensi di condanna al pagamento dei danni 'punitivi' *Responsabilità civile e previdenza*, 2100 (2007). For a comparative investigation, please read R.A. Brand, 'Punitive Damages and the Recognition of Judgments' 43 *Netherlands International Law Review*, 143 (1996).

[102] C. Scognamiglio, 'Danno morale e funzione deterrente della responsabilità civile' *Responsabilità civile e previdenza* 2485 (2007); A. Riccio, n 100 above, 859.

[103] Art 12 legge 8 February 1948 no 47; on the issue, M. Grondona, 'Danno morale da diffamazione a mezzo stampa e ambito di rilevanza dei danni punitivi' *Responsabilità civile e previdenza*, 836 (2010); P. Cendon, 'Pena privata e diffamazione' *Politica del diritto*, 149 (1979).

[104] Art 28, para 6, decreto legislativo 1 September 2011 no 150; on the issue G. Carapezza Figlia, *Divieto di discriminazione e autonomia contrattuale* (Napoli: Edizioni Scientifiche Italiane, 2013), 49; C. Troisi, *Divieto di discriminazione e forme di tutela. Profili comparatistici* (Torino: Giappichelli, 2012), 172.

actual economic punishment for the tortfeasor, because of the entities of his or her earnings due to the infringement of the legal provisions, the Italian law provides for the disgorgement in favour of the victims of the profits made by the tortfeasor. The main examples of this legal provisions are the rules today provided for, following the implementation of the Enforcement Directive, by Art 125, para 2, decreto legislativo 10 February 2005 no 30 (Industrial Property Code)[105] and Art 158, para 2, legge 22 April 1941 no 633 (Copyright Law).[106]

Lastly, we should not forget to cite the equally probable influence of the case law of other European Courts. In fact, despite the foreclosure of a landmark decision of the German Federal Court of Justice (Bundesgerichtshof, BGH) in 1992, in a similar case,[107] decision which rejected the possibility to recognize in Germany a foreign court award of punitive damages, it should be pointed out that the courts of France[108] and Spain,[109] which belong to the same legal

[105] On the issue, among the others, L Nivarra, 'L'enforcement dei diritti di proprietà intellettuale dopo la direttiva 2008/48/CE' *Diritto industriale*, 45 (2005); P. Pardolesi, 'Un'innovazione in cerca d'identità: il nuovo art. 125 codice proprietà industriale' *Corriere giuridico*, 1605 (2006); V. Di Cataldo, 'Compensazione e deterrenza nel risarcimento del danno da lesione di diritti di proprietà intellettuale' *Giurisprudenza commerciale*, 20 (2008); M.S. Spolidoro, 'Il risarcimento del danno nel Codice della Proprietà Industriale. Appunti sull'art. 125 C.P.I.' *Rivista di diritto industriale*, 153 (2009); G. Floridia, 'Risarcimento del danno e reversione degli utili nella disciplina del diritto industriale' *Rivista di diritto industriale*, 10 (2012).

[106] On the issue, among the others, G. Floridia, 'Proprietà intellettuale, illecito concorrenziale e risarcimento', in G. Floridia et al, *Il risarcimento del danno da illecito concorrenziale e la lesione della proprietà intellettuale. Atti del Convegno, Castel Gandolfo 20-22 marzo 2003* (Milano: Giuffé, 2004); A Plaia, *Proprietà intellettuale e risarcimento del danno* (Torino: Giappichelli, 2005).

[107] Bundesgerichtshof 4 June 1992, *Neue Juristische Wochenschrift*, 3096 (1992); for comments on the decision, among the others, N. Jansen and L. Rademacher, 'Punitive Damages in Germany', in H. Koziol and V. Wilcox eds, *Punitive Damages: Common Law and Civil Law Perspectives* (Berlin Heidelberg: Springer Verlag, 2009), 75; P. Hay, 'The Recognition and Enforcement of American Money Judgments in Germany. The 1992 Decision of the German Supreme Court' 40 *American Journal of Comparative Law*, 729 (1992); E. D'Alessandro, 'Pronunce americane di condanna di *punitive damages* e problemi di riconoscimento in Italia' *Rivista di diritto civile*, I, 383 (2007).

[108] Cour de Cassation 10 December 2010 no 09-13303, *Bulletin civil* no 248 (2010); among the comments, please read V. Wester-Ouisse, 'La Cour de Cassation ouvre la porte aux dommages punitifs!' *Revue Responsabilité civile et assurances*, Etude no 5 (2011); J. Juvénal, 'Dommages-intérêts punitifs: comment apprécier la conformité à l'ordre public international?' 6 *Juris-Classeur périodique* G, 256 (2011); I. Gallmeister, *Recueil Dalloz*, 24 (2011); F.-X. Licari, 'La compatibilité de principe des punitive damages avec l'ordre public international: une décision en trompe-l'oeil de la Cour de cassation?' *Recueil Dalloz*, 423 (2011); P. Stoffel-Munck, *Juris-Classeur périodique* G, 435 no 11 (2011). In English, V. Wester-Ouisse and T. Thiede, 'Punitive Damages in France: A New Deal?' 3 *Journal of European Tort Law*, 115 (2012); B. West Janke and F.-X. Licari, 'Enforcing Punitive Damage Award in France after Fontaine Pajot' 60 *American Journal of Comparative Law*, 775 (2012).

[109] Tribunal Supremo, Sala de lo Civil, 13 November 2001, *Auto del Tribunal Supremo* 1803/2001. For comments on the decision, among the others, J. Carrascosa González, 'Daños punitivos: Aspectos de derecho internacional privado europeo y español', in M. J. Herrador Guardia ed, *Derecho de daños* (Pamplona: Aranzadi, 2013), 383; L.F. Reglero Campos, 'Conceptos generales y elementos de delimitación', in L.F. Reglero Campos and J.M. Busto Lago eds, *Tratado*

tradition of the Italian system, have in recent times granted the exequatur to foreign decisions awarding the victims the payment of punitive damages.

To conclude, it is my opinion that, on one hand, attention must be paid not to overestimate the impact of the decision of the Joint Sections of the Italian Corte di Cassazione no 16601 of 2017, mainly because that overruling is only theoretical and exclusively concerns the issue of the recognition of foreign decisions awarding punitive damages. That decision, in fact, only dealt with the issue of the exequatur of foreign decisions, and therefore only concerns the private international field, and certainly did not recognize the existence of rights to a compensation of punitive damages in the Italian system, but for the cases where the law explicitly provides for them.[110]

On the other hand, it is also important not to underestimate the possible impact of that decision on the Italian legal system and, last but not least, on the Italian economic system. In fact, not only does this decision allow, under certain conditions and when they are imposed by a foreign court, the enforcement of the obligations to pay punitive damages on persons and legal persons established or incorporated in Italy, but also deprives these latter of the legal shield that for a long time had been protecting them from their foreign creditors, causing substantial injustices toward their victims and relevant consequences for the markets and the reliability of the Italian legal and economic system. It is in fact not by chance that the Court stated, at point 7.1 of the decision, that

> 'What counts is to reiterate that the recognition of a punitive damages award is always subject to an evaluation of the effects that the foreign decision may have in Italy'.[111]

Therefore, it may be hinted that not only the Italian Corte di Cassazione undertook the *revirement* under discussion because of the influence of the foreign court decisions and of the foreign and Italian doctrine, but also out of a sense of economic reality, because denying the award of punitive damages in that case would mean protecting an Italian economic player to the detriment of the reliability of the Italian legal and economic system. In so doing, once again, the Italian legal operators, in this case the judges of the Corte di Cassazione, proved to be capable of moulding foreign legal influences and national original concepts in the field of civil liability into an original system, as they have always done in the past, starting with the 1865 Civil Code.

de Responsabilidad Civil (Pamplona: Thompson Reuter Aranzadi, 5th ed, 2014), I, 89. In English, P. del Olmo, 'Punitive Damages in Spain', in H. Koziol and V. Wilcox eds, *Punitive Damages: Common Law and Civil Law Perspectives* (Berlin Heidelberg: Springer Verlag, 2009), 137; S.R. Jablonsky, 'Translation and Comment, Enforcing U. S. Punitive Damages Awards in Foreign Court. A Recent Case in the Supreme Court of Spain' 24 *Journal of Law & Commerce*, 225 (2005).

[110] Of the same opinion, A. Venchiarutti, n 93 above, 104.

[111] Translation by F. Quarta, n 92 above, 604.

Essays

Can We Afford to Separate Politics from Administration? Designing Powers in the Service of Implementation

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Abstract

This Article investigates the impact of a possible neo-Weberian view of organizational behavior on formulations about the separation of powers. This neo-Weberian view of organizational behavior is called here the 'administrative behavior hypothesis' and it leverages one century of scholarship. The results of such an investigation are encouraging, as management sciences may induce changes in the formulation and implementation of law, with an impact on current approaches to constitutional reform, and consequently to economic development across the globe. The administrative behavior hypothesis appears persuasive, and future studies might investigate more avenues, beyond the basic recommendation provided here.

Laws indeed there are: But who is he observes them?

We are a charity, but not for our employees.

I. Introduction

Scholars of public law and political theory have been revising Montesquieu's model of the separation of powers nearly three centuries after its original formulation in 1748. Likewise public law appears to be based on the Weberian typical ideal view of rational behavior of public administration, a view that has also been revised over the course of the last century by both management sciences and micro-economics. This article investigates the interaction between these two strands of scholarship and the impact of a possible *neo*-Weberian view of organizational behavior on formulations about the separation of powers. This *neo*-Weberian view of organizational behavior is called here the 'administrative behavior hypothesis'. The results of such an investigation are encouraging, as management sciences may induce changes in the formulation and implementation of law, with an impact on current approaches to constitutional reform, and

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consequently to economic development across the globe. The administrative behavior hypothesis appears persuasive, and future studies might investigate more avenues, beyond the basic recommendation provided here.

This Part I is focused on Bruce Ackerman's work on the new separation of the three classical powers.[1] Ackerman deals with the separation of powers in three respects: (1) the boundaries between parliament and the executive; (2) the germane point about the possible separation of politics from administration; and (3) new powers that need to be introduced. Accordingly, there are three Sections within this Part I.

1. Curbing Executive Power Through Parliament

In terms of the line of separation between legislative and the executive, Ackerman is concerned with the relationship between President and Parliament, be the latter adversarial or friendly according to the majority represented there. Ackerman prefers the European parliamentarian system to the American presidential system because the former curbs the influence of politics (ie, of the executive or the President in the case of the US) on public administration. Ackerman wants to avoid the 'spoils system' by means of tighter parliamentary controls over the executive branch, as is the case in the European systems, notwithstanding France's semi-presidential arrangement.[2]

2. The Division Between Politics and Administration Within the Executive

Ackerman's general point is about the separation of politics from administration. In the first section – discussing the points mentioned above – he deals with this question at the level of the powers: legislative vs executive vs judicial. He then tackles the same issue one level below, examining the executive branch: here, in his view,[3] is where the second element of separation of powers is located, namely 'the division between politics and administration'. This issue is central to the argument in this article. In his Section II, 'Functional Specialization', Ackerman addresses at length the key question at the center of this article: is a separation desirable and possible between politics and administration, especially within the executive branch?

Ackerman directs his attention to within the executive branch and asks the question:

[1] B. Ackerman, 'The New Separation of Powers' 113 *Harvard Law Review*, 633-725 (2000). One limitation of this paper is that the article is founded upon is nearly twenty years old, however it can be noted that Professor Ackerman's current work still includes the acknowledgement of Weberian 'bureaucratic rationality' (B. Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* (Cambridge, Massachusetts: Harvard University Press, 2019), 1).

[2] B. Ackerman's preferred European systems are Germany, the United Kingdom and France.

[3] B. Ackerman, n 1 above.

> 'Should we carve out a space, insulated from direct political intervention, in which judges and bureaucrats may deploy their professional judgment in the service of legislative objectives?'.[4]

He adds:

> 'This Part[5] begins on a constructive note, proposing new forms of separation that may help to realize the promise of a professional judicial and civil service to fair and effective government'.[6]

Ackerman explores the consequences of American-style 'presidentialism' 'on impartial and professional public administration'. In this same section,[7] Ackerman founds his separation of politics from administration (ie constrained presidentialism) no longer on democratic legitimacy (as he does in his previous section, speaking about parliament vs president), but instead on the need for functional specialization between politics and administration within one branch of power: the executive. However, he does acknowledge that politicians should decide on the 'elaboration of basic values' and on

> 'some concrete questions (that) are so important and so difficult to regulate in advance, that they should be reserved for direct decision by high-visibility politicians – a declaration of war can serve as the paradigm'.[8]

The rest should be dealt with by public administration (ie, the bureaucracy).

Ackerman's vision of a functional specialization between politics and public administration 'requires a candid assessment of a nation's cultural and human resources'. He continues:

> 'Before functional separation can make sense, there must be the makings of something I shall call a 'Weberian culture'. At least some talented people must find inspiration in the prospect of professional service to the state. Otherwise, the functional separation of powers will serve merely as a fig leaf for corruption and clientelism. … Public-spirited specialists are … in short supply in many parts of the world – in which case there will be many more important things to worry about than the functional separation of powers'.[9]

What Ackerman makes explicit in these key passages is widely echoed in documents of global public organizations and in the global media. In fact,

[4] ibid 685; notice Ackerman here speaks of judges also as bureaucrats, assimilating them in the administrational, non-political, non-elected areas of public service.
[5] ibid 686 (II Functional Specialization, ie politics vs administration).
[6] ibid 686.
[7] ibid 687.
[8] ibid 687.
[9] ibid 687 (citation omitted).

Ackerman's hypothesis about the existence of a 'Weberian culture' and 'public-spirited specialists' speaks to the existence of a 'class of higher echelons' in public administration as implied by today's media.[10] Such Weberian thinking also permeates much of international law and international and national organizations' policy.[11]

Ackerman's hypothesis also raises a question about what exactly the public administration literature is dealing with: is it the millions of people (and their higher echelons) who are employed by governments or it is only the higher echelons themselves? This question is not pursued in this article. Nonetheless, the intellectual and emotional nourishment of 'public-spirited specialists' is the basic tenet of – for instance – the Harvard Kennedy School (HKS), which Ackerman mentions explicitly,[12] – and of many schools of public administration around the world. Schools of public administration work under the Weberian hypothesis whereby training and endowing as many public managers as possible around the world with the 'right' skills will result in better public administrations and they, the schools, will have made a difference. Such an all-out effort and an expectation of public-spiritedness appears to be aimed not only at the higher echelons but to the whole body of employees on public payroll globally.[13]

3. New Powers to Be Introduced

Ackerman[14] also stresses the need for new branches of power to be independent of one other and of the classical three powers. Historically, the first separate power

[10] 'Mandarin Lessons: Governments Need to Rethink How They Reward and Motivate Civil Servants' *The Economist*, 9 August 2014; 'Aiwa (Yes) Minister: 'The Region's Countries Desperately Need to Reform Their Public Sectors' *The Economist*, 14 November 2015; and 'From Red Tape to Joined-up Government: Latin America's Efforts to Improve Public Policies Are Often Undermined by Politicised and Obsolete Civil Services' *The Economist,* 28 January 2016.

[11] International Monetary (IMF), 'Fund Fiscal Affairs and Legal Departments, Corruption: Costs and Mitigating Strategies' (May 2016) (https://tinyurl.com/y2xe8p22, last visited 30 December 2019), at *iii*, 'Perhaps most importantly, however, addressing corruption requires effective institutions. While building institutions is a complex and time consuming exercise that involves a number of intangible elements that may seem beyond the reach of government policy, the objective is clear: the development of a competent civil service that takes pride in being independent of both private influence and public interference'.

[12] B. Ackerman, n 1 above, 711, 'Similarly, one may try to dissolve the tension between professionalism and American-style separation through a second form of reductionism deriding the 'myth of expertise' that serves as a principal justification for bureaucratic regulation. According to the extreme reductionist version, the folks at the Kennedy School are engaged in criminal fraud when they charge outrageous tuition for a degree in public administration – there is simply no such subject that can be taught. And because it's all politics anyway, there isn't anything wrong with revolving-door politicos' using their presidentially approved intuitions as they take their turn at the bureaucratic helm.

[13] Thomas Hobbes seemingly answers this question in the second part of *Leviathan*, Chapter XXIII, *On the Public Ministers of the Sovereign Power*, where he enumerates rather extensively who is to be regarded as a public minister.

[14] B. Ackerman, n 1 above.

was central banking, motivated by the avoidance of a 'politicized' management of such a function. Ackerman's system of authorities is needed to allow a kind of non-parliamentary executive action, which presidential systems obtain through the president himself. Thus independent authorities appear to wield an executive power that is independent of parliament. Still, the Ackermanian view of independent and separate authorities appears to share with presidentialism an aspiration for effective executive action, taking it out of parliamentary control because parliaments are often fragmented.

II. From Weber to the 'Administrative Behavior Hypothesis'

Part I contained a summary of Ackerman's article on the separation of politics from administration and on the need for new powers. This Part makes observations about the assumption of Weberian public administration inherent in that article.

1. Explication of the Weber Hypothesis

This work focuses on Ackerman because Ackerman is aware of his need for Weber in his theory of the separation of politics from administration; and he makes that explicit. Ackerman's contribution is noteworthy because such explication is not to be found elsewhere in the literature and arguably it has substantial consequences. Ackerman appears to be partially aware of this contribution.[15] In fact, while he accepts the need for a 'Weberian culture', Ackerman does not seem to be aware that the Weberian perspective on bureaucracy is simply a hypothesis, destined to compete with at least one more viable alternative hypothesis.[16]

Let us take time to examine the existence of a hypothesis here: to implement a law, the executive will define (often by law itself) specific actions; such a definition presupposes a hypothesis about the organizational behavior of the public administration tasked with performing such actions. This is an intermediate step: between norms and actions there are organizations that are defined by their organizational behavior.[17] Therefore a norm that is not limited merely to the enunciation of a principle, but prescribes an action, presupposes a hypothesis about organizational behavior.

[15] B. Ackerman, n 1 above, 687.

[16] This is the lesson of G. Allison and P. Zelikow, *Essence of Decision: Explaining the Cuban Missile Crisis* (New York: Longman, 1999), who reveal the existence of implicit hypotheses in explaining foreign policy and explore the relevance and empirical value of three different alternative hypotheses. This study basically extends Allison to public law.

[17] The notion that norms imply implementing organizations is also in S. Holmes and C.R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: W.W. Norton, 1999). From the necessity of implementing organizations, Holmes and Sunstein derive their notion that 'all rights are positive', ie, all rights require expenses. We go further here: norms not only imply the existence of implementing organizations, but also imply hypotheses of organizational behavior about those implementing organizations.

Having said this, Ackerman does consider Buchanan and Tullock's exquisitely political theory of organizational behavior as a possible alternative, but dismisses it as reductionism.[18] However, in doing so, he fails to take into account the mainstream literature on organizational behavior and administrative behavior. Ackerman does not consider management as a third option, over and above law and politics. The literature on organizations and administration, in fact, shows that the hypothesis of Weberian organizational behavior is hardly supported by experimental evidence, but it does not dismiss organizational behavior as 'all politics', as Ackerman appears to.[19]

On the other hand, Ackerman does consider the possible consequences of a Weberian hypothesis remaining unfulfilled and states that, unless we have a class of Weberian bureaucrats,[20] constitutional arrangements in the long run prove unsustainable. Thus his constitutionalism appears to be good only for a few countries in the world – twenty at most, eg, some (not all) of the main OECD countries, covering no more than seventeen per cent of humanity.[21] Nonetheless, it is to be noted here – and it will be argued later – that most of these advanced countries are not satisfied with their bureaucracies. A case in point is *The Economist*'s complaint that the United Kingdom is in the hands of a 'caste of "un-sackable" functionaries'.[22] Moreover, most of the relevant literature that is critical of Weber in fact comes from such countries, which are today regarded as endowed with relatively Weberian bureaucracies.[23]

Moving forward somewhat, it would be helpful to develop a constitutional theory that works for more people, especially in developing countries. Such an effort would follow in the footsteps of Ferrara's *Democratic Horizon*,[24] which tries to found polities on weaker grounds – or less heroic hypotheses – than current theory would have it. It is an ambition of this article to contribute to a more robust theory of the separation of powers and of institutional design.

[18] W.H. Riker et al 'The Calculus of Consent' 6 *Midwest Journal of Political Science*, 408 (1962); B. Ackerman, n 1 above, 711 and 719.

[19] B. Ackerman, n 1 above, 711.

[20] Upon closer reflection, Weberian bureaucrats appear to be an evolution of Plato's ruling class of guardians, who know how to rule and understand ruling as a craft. However, differently than Plato's guardians, bureaucrats ideally don't 'rule', and, if they do so, they 'usurp' power from the legislative representatives of 'the people' (as in liberal theory), or from 'the people' themselves (as in populist imagery).

[21] B. Ackerman has in mind the United States (n 1 above, 688), Germany, the United Kingdom, and France. Adding the rest of the European Union, the United States, Canada, Australia, New Zealand, Japan, and India, his is a constitutional theory for one-third of humanity at most.

[22] 'Mandarin Lessons' n 10 above.

[23] They are called '*neo*-Weberian' rather than 'non-Weberian' because they operate within the horizon of rationality of intentions, but do not imply a rationality of outcomes, as Ackerman expects Weberian bureaucrats to deliver. Outside the English-speaking community, let us recall: in France, M. Crozier, *The Bureaucratic Phenomenon* (Chicago: Chicago University Press, 1964), and in Austria, L. von Mises, *Bureaucracy* (Glasgow: W. Hodge & Company, Limited, 1945).

[24] A. Ferrara, *The Democratic Horizon. Hyperpluralism and the Renewal of Political Liberalism* (New York: Cambridge University Press, 2014).

Ackerman's cultural argument appears to run as follows: to be able to do effective constitutionalism, there is a need for an appropriate culture. Such argument could also be formulated as follows: while all virtuous administrations seemingly look alike, the misfunctioning of public administration is often thought to be specific to the culture and 'civicness'[25] (or lack thereof) of the country being observed and not connected to the intrinsic inefficiencies of that country's organizational arrangements – the arrangements of public administrations around the world of course being the very subject of public law. It is interesting that organizational cultures are also studied in private business;[26] however, this has never hindered a comparison of businesses across countries in the way that it has hampered comparative public law and public administration. So, in paraphrasing the opening lines of Leo Tolstoy's novel *Anna Karenina*, one could say: 'Efficient businesses are all alike; every inefficient public administration is inefficient in its own way'. But this is not the case: that is why this is a 'trap'; the 'Tolstoy Trap'. It is clear that, if a country is democratic to begin with, there is not much need to perfect constitutional law, or it can manage to function with constitutional arrangements that are less than robust: 'civicness', after all, is the capability to complement law through culture, custom, and shared values. On the other hand, unless one wants to argue that constitutional law applies only to people who are already democratic, guidance must be formulated for those belonging to developing or democratizing societies. While a country's political regime must clearly be in line with its people's virtues, *à la* Montesquieu, there is nonetheless a need to avoid a constitutional determinism whereby no innovation is possible. The approach proposed here aspires to be in line with such an understanding.

2. The Administrative Behavior Hypothesis

Weber's hypothesis on bureaucratic behavior should not receive exclusive consideration when formulating constitutional law. An alternative hypothesis should be put forward in which assumptions about bureaucrats' ethics – eg, expectations of altruism or professionalism – are no more demanding than in hypotheses held regarding employees in other sectors of the economy. Public law should therefore make provisions to orient organizational behavior *vis-à-vis* public administration in the same way that they already do regarding all other organized and individual actors in society and the economy. A less onerous set of assumptions is key in formulating a hypothesis that stands as an alternative to Weber's: namely, the 'administrative behavior hypothesis', to use Herbert Simon's expression.[27]

[25] R.D. Putnam et al, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton, NJ: Princeton University Press, 1993).

[26] E.H. Schein, *Organizational Culture and Leadership* (Hoboken, NJ: Wiley, 2017).

[27] H.A. Simon, *Administrative Behavior: A Study of Decision-Making Processes in Administrative Organization* (New York: Free Press, 1997).

The tools for orienting behavior accordingly are already available: *viz*, the organizational arrangements[28] once they are brought to bear on, and extended to, public administration. Outlining the nature of such an extension is the intended contribution of this article to the theory of the separation of powers in general and of the separation of politics and administration specifically. In fact, economic literature (especially neoclassical economics) routinely makes the assumption that the public sector works smoothly. The New Institutional Economics[29] argues that institutions play an important role in economic development, but no claim is made that public administration has to be responsible, nor is it questioned how that important role is to be achieved, if it is being enacted appropriately, or whether improvements could be made. There is no literature focusing on the inner workings of the organizations of public administration that evaluates the impact of public administration on the constitutional regime (or arrangements). Part III will present an example of a possible measure for integrating the 'administrative behavior hypothesis' within public law.

The science of management and the sociology of organizations – taught in schools of public management throughout the world –[30] can tell us more than just how to foster, or at a minimum how to prevent undermining, 'public-spiritedness'. The aim of the present work is to identify specific institutions and organizational provisions, and in places intervene in the specifics of the debate about the separation of powers: where and how to separate those powers, and what organizations to build. The point is that what is needed – besides high-echelon and good people – are good institutions and proper organizational arrangements applied to public administration. *Neo*-Weberian theories of administrative (or organizational or bureaucratic) behavior make no reference to people's positive or negative nature, while the Weberian bureaucrat is an idealistic construct that has been mistakenly understood as representing reality.

Why this is *neo*-Weberian: because it is still in the rationality of inputs, but it does not imply rationality of the desired outputs or of the consequences.

3. Public Administration as a Fourth Power

Ackerman's acknowledgement of public administration as a fourth power[31] is in tune with the literature and the administrative behavior hypothesis, which says that public administration has its own interest, which is equivalent to saying it behaves as a fourth independent power. There appears to be a contradiction here

[28] O.E. Williamson, *The Economics of Discretionary Behavior: Managerial Objectives in a Theory of the Firm* (Englewood Cliffs, NJ: Prentice-Hall, 1964).

[29] O.E. Williamson, 'The New Institutional Economics: Taking Stock, Looking Ahead' 38 *Journal of Economic Literature*, 595 (2000).

[30] B. Ackerman, n 1 above, 711 cites the Harvard Kennedy School orthodoxy.

[31] B. Ackerman is also aware of the need to address the issue: 'Constitutionalists should, therefore, extend their thinking to embrace the distinctive structural problems involved in controlling the fourth branch of government: the bureaucracy' (B. Ackerman, n 1 above, 689).

in Ackerman's argument: if public administration is a fourth informal power, how can it be impartial *vis-à-vis* the executive, the other powers, and indeed the citizens? Bureaucrats wield power over politicians: this has been tested in many countries in many occurrences. Ackerman himself presents evidence of the large growth of bureaucracy in the USA from the early stages of the republic to the present day,[32] for which typical evidence can be found in the *neo*-Weberian literature.[33]

4. 'Fixing' Public Administration

Weber's model of a bureaucracy is formulated in a 'constructive' way,[34] to use the language of certain mathematical theorems that demonstrate that their thesis is true by simultaneously describing the process for building it. Such a formulation has resulted in a flurry of activity aimed at better specifying and implementing Weber's prescriptions. In fact, scholars and politicians (implicitly) adhering to the Weberian view of public administration – as well as public opinion – do acknowledge public administration's poor performance and air their concerns about how it might be improved, thus generating a strand of public administration reforms. Such reforms nonetheless remain focused on how to better implement Weberian prescriptions: tighter selection of personnel, more controls, more division of labor (or less division of labor, if the previous reform had more), or higher expectations of ethical behavior from individuals. Such approaches can be seen to some extent as trying to fix Weber with more Weber.

This kind of approach is observable in Ackerman[35] as well when he proposes an 'integrity branch' charged with the task of 'monitoring corruption phenomena'. Transparency and integrity are certainly desired goals. However, we question that such goals should be pursued through the creation of more public organizations. In general, it does not follow that the pursuit of a goal implies the creation of an organization for the sole purpose of pursuing that goal. To argue for this is to subscribe to the implicit hypothesis that current organizations cannot be reformed and their current organizational arrangements are already perfect. In the next section we articulate a different view of organizational behavior which stands on the same plane as Weber's and appears to be largely corroborated by theoretical and empirical evidence.

[32] B. Ackerman, n 1 above.

[33] W.A. Niskanen, 'Bureaucracy: A Final Perspective', in W.A. Shughart and L. Razzolini eds, *The Elgar Companion to Public Choice* (Cheltenham: Edward Elgar, 2001).

[34] M. Weber, 'The Essentials of Bureaucratic Organization: An Ideal-Type Construction', in R.K. Merton et al eds, *The Theory of Social and Economic Organization* (Glencoe, Illinois: The Free Press 1947), *A Reader in Bureaucracy* (Oxford: Oxford University Press, 1952); S. Whimster, *The Essential Weber* (Routledge: London, 2002); E. Hanke and T. Kroll eds, *Max Weber-Studienausgabe: Band I/22,4: Wirtschaft und Gesellschaft. Herrschaft Taschenbuch* (Tuebingen: Mohr Siebeck, 2009).

[35] B. Ackerman, n 1 above.

5. Articulating the 'Administrative Behavior Hypothesis'

It may be helpful to remember that Weber's organizational thinking found expression most notably in the scientific management of Frederick Taylor,[36] which gave rise to the 1914 Ford assembly-line factory. Conversely, Weber can be seen as white-collar Taylorism. Even before Weber, other classics of administrative behavior

> 'provide a different view of organizations from the Max Weber rational and impartial model. The Max Weber model is the basis for the neoclassical model of the profit-maximizing firm and it is also the basis for constitutional and administrative law and public administration organization'.[37]

In fact, the notion in political science of self-serving behavior on the part of organizations goes back at least to Michels,[38] who formulated the 'iron law of oligarchy', focusing his gaze on political parties, which – once established – would only (or primarily) hold the scope of self-perpetuation. It is an ambition of this Article to introduce at this point the whole thread of thinking on organizational behavior, from Mayo and Barnard, in the 1930s,[39] through the Austrian economists, to Charles Lindblom, Herbert Simon, William Niskanen, Graham Allison, and Oliver Williamson.[40] Throughout the twentieth century, organizational science and micro-economics have been revising the rational organization model. Although these thinkers come from very different approaches and disciplines, they have a common denominator: we should not expect rational, impartial, or altruistic behavior from organizations. Charles Lindblom's title conveys the idea: organizational science is 'The Science of Muddling Through'.[41]

There are bodies of literature examining both private and public organizations. Introducing a theoretical concept from the literature at this point in the article is key in demonstrating that public administration organizations do not behave according to the Weberian model. In the following paragraphs we will provide an overview of the key authors who have presented theory and evidence for *neo*-Weberian organizational behavior.

[36] F. Winslow Taylor, *The Principles of Scientific Management* (New York: Harper 1911).

[37] A. Lapiccirella, 'On Bureaucratic Behavior', in M. Di Bitetto et al eds, *Public Management as Corporate Social Responsibility* (Berlin: Springer, 2015).

[38] R. Michels, *Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy* (New York: Free Press, 1962), 1911.

[39] An overview of the development of organizational thinking can be found in an international bestselling book written by McKinsey management consultants: T. Peters and R.H. Waterman Jr, *In Search of Excellence* (New York: Harper & Row, 1982).

[40] E. Mayo, *The Social Problems of an Industrial Civilization* (London: Routledge & K. Paul, 1949); and C.I. Barnard and K. Richmond Andrews, *The Functions of the Executive* (Cambridge, Massachusetts, Harvard University Press 1971).

[41] C.E. Lindblom, 'The Science of Muddling Through' 19 *Public Administration Review*, 79 (1959).

William A. Niskanen formulated the theory of the budget-maximizing bureaucrat.[42] Niskanen, as do many authors in this field, views bureaucracy in a neutral fashion. Bureaucracy is a non-profit organization in which the executive does not appropriate a portion of the difference between income and cost. Niskanen posits a maximizing behavior for the non-profit manager, comparable to the profit-maximizing behavior of the manager of a private firm. But non-profit managers do not maximize profits; rather, they maximize their organization's budget. In subsequent revisions, this notion of the budget is amplified by identifying wider areas of behavior that are not subsumed under the umbrella of profit maximization, making it sufficient to work on budget maximization. Niskanen develops a micro-economics of bureaucracy that is as powerful as the profit-maximizing model of the business firm. One of the insights resulting from the Niskanen model is that bureaucracies either over-deliver, when demand is weak, or under-deliver, when demand is strong: they never get it right. Bureaucracies' factors of production are over-compensated. Niskanen contends that bureaucracies are also present in the private sector, in the form of departments in businesses that are not directly connected to production or market results. Niskanen proposes several remedies for bureaucracies' predicament, all concerned with bringing competition – virtual or real – into the public sector. Virtual competition is understood as benchmarking of performance, which should take place through the development of non-monetary measures of output and outcomes.

Harvey Leibenstein opposed the maximizing view of economic agents and formulated the theory of X-efficiency.[43] He posits a non-maximizing behavior in organizations, both public and private: not all human beings strive for maximization. Leibenstein applies his theory to economic development, insisting that in developing countries people do not spontaneously maximize an objective. There are cultural and historical reasons for this. The idea is that the maximization of any organizational end (profit, budget, influence), still a notion of a Weberian flavor, should be demonstrated and not be assumed *ex ante* as a universal parameter of organizational conduct.

Oskar Morgenstern highlights the prevalence of non-competitive organizations in the economy.[44] He underlines the relative unimportance of the profit-maximizing business firm when the economy is mostly composed of non-competitive, non-profit, monopolistic organizations, both private and public. The implications of this on the present research are significant, focusing as it does on the monopolistic organizations typical of the public administration.

As noted above, Charles Lindblom described organizational behavior as

[42] W.A. Niskanen, 'Non-market Decision Making: The Peculiar Economics of Bureaucracy' 58 *American Economic Review*, 293 (1968).

[43] H. Leibenstein, *General X-Efficiency Theory and Economic Development* (New York: Oxford University Press, 1978).

[44] O. Morgenstern, 'Thirteen Critical Points in Contemporary Economic Theory: An Interpretation' 10 *Journal Economic Literature*, 1163 and 1184 (1972).

'muddling through'. His 'The Science of Muddling Through'[45] is applicable to all organizations, public and private, as is his 'Still Muddling, Not Yet Through'.[46] Lindblom finds that people do not optimize: in their decision-making and organizational life, people just try to improve the present situation, making incremental changes. By way of analogy, the New Institutional Economics (NIE) talks about incremental changes and the time it takes for change to happen.[47] This view comes very close to that of the Austrian School of Economics, the economic theory of which claims there is in fact no steady-state equilibrium, but only a move towards an ever-changing point of equilibrium.

This is a matter of perspective. Lindblom paints a picture in which the organization is underperforming, which raises the question: underperforming relative to what? If there is no optimum (that is, no point of reference to what is optimum), who is to judge underperformance? The only possible metric of performance derives from competition, ie, through a comparison with how other, similar organizations are performing. Competition and comparison have the same root, which is one of plurality, meaning at least two with an implication that more is better.

Herbert Simon formulated the notion of 'satisficing' behavior. He developed a model that assumes 'bounded rationality' in individuals that operate within organizations.[48] Non-maximization is inherent in this model as well. A level of behavior is aimed at that is described as 'satisficing' – one that keeps the actors safe from reprimand and is regarded as sufficient by the higher echelons of the organization or by the public.

Graham Allison made explicit the difference between different possible models of organizational behavior and Weber's model.[49] He developed two models of bureaucracies and the political process that are 'deviant' from the – often implicit – Weberian rational model of organizations. The Weberian model applies to the profit-maximizing business firm as well as to the public administration, inasmuch as everyone in the organization acts in unison with one purpose. No personal goal intervenes in the process or weakens the organization's performance. The first alternative model that Allison proposes is one in which organizational behavior is driven by standard operating procedures (SOPs). Organizations' output at time *t* will be the same as their output at *t*-1. But such behavior may be at odds with rational objectives. The classical example is Allison's study in which the positioning of intercontinental ballistic missiles in Cuba in 1962 should not be interpreted as implying a premeditated attack by the USSR on the USA but is simply the implementation of Soviet weapons deployment procedure throughout allied

[45] C. Lindblom, 'Still Muddling, Not Yet Through' 39 *Public Administration Review*, 517 (1979).

[46] ibid.

[47] O.E. Williamson, n 28 above.

[48] H.A. Simon, n 27 above.

[49] G. Allison and P. Zelikow, n 16 above.

countries. The second Allison model examines the position of individuals in relation to one another. These include relationships of power between individuals, relationships of affiliation, and historical relationships among individuals, all of which may account for their behavior just as much as their pursuit of a rational and common objective. Allison's models are relevant to our research because they demonstrate that organizations – indeed, public organizations – behave very differently from the Weberian model: individuals within organizations pursue their own agendas, and these may include many variables that have no connection with the organization's express mission. This is not to imply individuals' ill will, or even awareness of their conduct, and indeed they may be acting with the best intentions.

Aaron Wildavsky and Jeffrey Pressman emphasize the role of implementation.[50] They highlight the unintended consequences of interaction among different organizations. Although their focus is inter-organizational behavior, the model may be scaled down to apply to the behavior of departments within one large organization. Wildavsky and Pressman demonstrate that statements of intent amount to very little. What matters is the actual output and outcome of the whole process, which, they argue, will inevitably differ from the initial statement. This is their rationale for focusing on implementation. Implementation is highly relevant to public administration: in the literature as well as in public discourse, implementation is often put forward as constituting public administration's key role within wider government – legislatures and politicians formulate policies and write laws; public administration is entrusted with their implementation. These authors show us that public administration's organizational behavior may lead to unintended consequences.

James and Larissa Grunig emphasize how organizations are run by a 'dominant coalition'.[51] The Grunigs are responsible for elevating public relations to a sub-discipline within the management sciences, on a par with marketing and finance. They insist on the notion of a dominant coalition as an organization's de facto governing body. This is an admission that organizations behave more like electoral districts than the rational pyramid depicted in organizational charts.

As with organizational science, a revision of the early models has taken place within the theory of the business firm as it has already been said. This has been the task of the New Institutional Economics (NIE), from Coase[52] to Williamson. Whereas the Max Weber rational model was the basis for the neoclassical 'black box' model of the profit-maximizing business firm, NIE, with

[50] J.L. Pressman and A.B. Wildavsky, *Implementation: How Great Expectations in Washington Are Dashed in Oakland: or, Why It's Amazing That Federal Programs Work at All, This Being a Saga of the Economic Development Administration As Told by Two Sympathetic Observers Who Seek to Build Morals on a Foundation of Ruined Hopes* (Berkeley, CA: University of California Press, 1973).

[51] J.E. Grunig, D.M. Dozier and L.A. Grunig, *Manager's Guide to Excellence in Public Relations and Communication Management* (London: Routledge, 1995).

[52] R.H. Coase, 'The Nature of the Firm' 4 *Economica,* 386 (1937).

its transaction cost theory, followed by its principal-agent theory, explained that workers, managers, stockholders, and indeed everybody in an organization each have their own agenda and objective function that they seek to maximize.[53] Thus NIE cracks open the black box of the neoclassical firm.[54] This article has the underlying ambition of building on this theory and further contributing to opening the black box of Weberian public administration. Oliver Williamson and the New Institutional Economics (NIE) looked deeper into the micro-mechanisms at work within the business firm. Williamson[55] is interested in transaction costs in the private business firm and on the boundaries between a firm and the rest of the economy. These boundaries are more blurred than current discourse might indicate. Williamson notes that managers aim to maximize profits, along with a number of other things, but he does not examine the workings of public administration. It is an intended contribution of the present work to extend Williamson's findings to public organizations.

This overview of neo-Weberian thinking would not be complete without mentioning New Public Management (NPM) which has been the basic staple of government reform since the early 1990s. NPM – and criticism of NPM – however appears to have been concerned more with the practical arrangements of public administration and the consequences of its practice, than with the tracing back to the possible theoretical underpinnings of its innovation.[56] In doing so, it appears to be possibly missing the opportunity for identifying further and wider consequences of the criticism it implicitly leveled at current Weberian thinking.

The aim of this brief overview has been to offer synopses of the contributions of some authors – both in the economics and the sociology of organizations – who present views of organizations that different from the Max Weber rational model. This article proposes grouping these contributions under the syncretistic label of 'administrative behavior hypothesis'. This administrative behavior model remains on the same plane as the Weberian model: each is a view about organizations' actual behavior.

Although the limits of Weberian thinking do not seem to be widely appreciated in public administration, nonetheless some explicit intimations of such a realization can be found. For instance, the Building State Capability program of the Harvard Center for International Development acknowledged that

> 'to escape the trap of stagnant capability and increasing frustration,

[53] O.E. Williamson, *The Economics of Discretionary Behavior* n 28 above; Id, 'The New Institutional Economics' n 29 above.

[54] R.H. Coase, n 52 above.

[55] O.E. Williamson, *The Economics of Discretionary Behavior* n 28 above; Id, 'The New Institutional Economics' n 29 above.

[56] A.C.L. Davies, 'Beyond New Public Management: Problems of Accountability in the Modern Administrative State', in N. Bamforth and P. Leyland eds, *Accountability in the Contemporary Constitution* (Oxford: Oxford University Press, 2013), 333.

new conceptual models of state capability that go beyond the transplantation of the 19th century Weberian state are required'.[57]

Adhering to a view – the 'administrative behavior hypothesis' – that is more likely to predict organizational behavior and future response by public administrations is the means by which proper organizational arrangements will be sought in pursuit of the implementation of laws. Conversely, adopting organizational behavior hypotheses that are less performing in predicting organizational behavior is more likely to lead to unintended consequences within law-making. Both behavioral hypotheses represent an intermediate step in the formulation of law and the proper implementation of it.

6. One Important Difference Between Public and Private Organizations: Monopoly

The administrative behavior hypothesis calls attention to one specific organizational arrangement that all public administration organizations worldwide tend to embody: monopoly. But bureaucracies comprise people with their own agendas and objectives: they tend to be self-serving, both in the private and the public sector – bureaucrats are human beings, of course, just like managers and employees in private enterprise. The only difference, but the critical one, is that bureaucracies are established under monopolistic organizational arrangements, and, importantly, as a result there is no evaluation, no internal, micro-level, checks and balances. Monopolistic organizational arrangements of public administration would seem to preclude any constitutional procedural language regarding the internal functioning of organizations. Whereas constitutions are concerned with checks and balances as regards relationships among the branches of political power, they tend to be silent about conduct within public administration, implicitly trusting the Weberian hypothesis that public administration will behave rationally, in the sense of producing the intended outcomes. The lack of checks and balances makes public organizations behave in an undesirable way.[58] Recall *House of Cards* protagonist Claire Underwood when she says her non-profit organization 'is a charity, but not for our employees'.[59] However, ironically, in real life monopolistic non-profit – ie, public administration – organizations actually do behave as charities for their own employees. Novelist Ian McEwan succinctly

[57] *Building State Capability*, available at https://bsc.cid.harvard.edu/. The website is active as of 28 October 2019; however, at the 2016 date of consultation it included the citation, which at the time of publication is no longer available. We can think of this circumstance as citing the first edition of a book that no longer contains the citation in its second edition. Note that the Harvard Center for International Development (HCID) is located within the Harvard Kennedy School, mentioned by Ackerman as an example of the propagation of Weberian behaviour.

[58] J. Drèze and A. Sen, *An Uncertain Glory: India and its Contradictions* (Princeton, NJ: Princeton University Press, 2013).

[59] *House of Cards*, series 1, episode 4.

articulates the point we are making about public law; in *Sweet Tooth* (2012),[60] on the subject of the expansion of the British intelligence service, he says:

> 'Any institution, any organization eventually becomes a dominion, self-contained, competitive, driven by its own logic and bent on survival and on extending its territory. It was inexorable and blind as a chemical process'.

7. Testing Behavioral Hypotheses Through the Parsons AGIL Model

Here we will compare the two hypotheses about the conduct of public administration organizations in terms of the Parsons AGIL model of living systems.[61] The four AGIL functions are: Adaptation, Goal attainment, Integration, and Latent pattern maintenance. We can see that the living system in question, public administration, when behaving according to the administrative behavior hypothesis, performs the AGIL functions better than a system behaving according to the Weberian hypothesis. This is because the administrative behavior hypothesis sees public administration as less dependent on politics than the Weberian hypothesis. In fact, according to the latter, public administration is a docile instrument in the hands of politics: politics adapts public administration to its own needs (Adaptation); politics sets goals for public administration (Goal attainment); and politics dictates public administration's future (Latent pattern maintenance). So, within a Weberian hypothesis, three of the four metrics are outside the organization's control. However, within the administrative behavior hypothesis, public administration strives to be independent of politics (ie, it retains its own Goal attainment).

The AGIL model may in fact help explain the wide public acceptance of the Weberian model. Under the administrative behavior hypothesis, it is actually in the interest of public administration to represent itself as Weberian, because such a concept of public administration maximizes the social status of its employees in comparison with those in other sectors.

8. Empirical Evidence: The Monopolistic Salary Gap

Empirical evidence of such self-serving behavior on the part of public administration is provided by International Monetary Fund data (see below *Table 1*)[62] showing that the remuneration of public administration employees worldwide is higher than in the manufacturing sector and lower only than the (much smaller)

[60] I. McEwan, *Sweet Tooth* (New York, NY: Nan A. Talese/Doubleday, 2012) (a good read on bureaucracy in the UK secret service).

[61] T. Parsons, R.F. Bales and E.A. Shils, *Working Papers in the Theory of Action* (Princeton, NJ: Princeton University Press, 1953).

[62] IMF, 'Evaluating Government Employment and Compensation, Technical Notes and Manuals' (15 October 2010).

financial sector,[63] thus debunking conventional wisdom about underpaid public sector employees. The root cause of high salaries is easily explained as a monopolistic rent by labor, with labor being a production factor of public administration's monopoly, thus sharing in the benefits of such monopoly status.

Table 1: *Global public sector wages in relation to other economic sectors*[64]

	Number of countries in the study	***Ratio of average PA wage to per capita GDP***	***Ratio of PA to financial sector***	***Ratio of PA to manufacturing sector***
Africa	3	1.3	0.7	1.8
Asia and Pacific	7	1.4	0.9	1.4
Europe	28	1.4	0.7	1.3
Western Hemisphere	11	1.4	0.8	1.3
Middle East and Central Asia	8	1.2	0.5	1.3
European Union	17	1.3	0.7	1.3
Low-income countries	4	1.9	0.7	1.4
Middle-income countries	35	1.4	0.6	1.4
High-income countries	18	1.2	0.8	1.3

PA: public administration

In summary, Part II has presented a critique of the Weberian hypothesis on the impartial behavior of public administration organizations, which underlies the argument for the separation of politics from administration. The possible shortcomings of public law have been shown to be linked with the obsolescence

[63] The financial sector is about one-tenth the size of public administration.

[64] The figures underscored are worth commenting on: low-income countries have the highest PA-to-manufacturing ratios (Africa: 1.8 PA/manufacturing; low-income countries: 1.9 PA/GDP), implying that being a civil servant in low-income countries is a bigger privilege than it is in non-low income countries.

of the model of 'Weberian culture'. An alternative hypothesis, the administrative behavior hypothesis, has been formulated through references to strands of thought ranging from organizational behavior to micro-economics, and the literature that separates us from Weber. Theoretical critique was followed by an example of empirical evidence in order to substantiate the claim that the administrative behavior hypothesis is indeed an effective tool in explaining the reality of public administration and predicting its behavior. It is therefore asserted that public law would benefit by factoring the administrative behavior hypothesis into its theories and prescriptions. For these reasons we answer the title question of this article in the negative: we cannot afford to separate politics from administration. In the next Part, a basic example will be offered as to how public law could integrate the administrative behavior hypothesis into its framework.

III. Conclusion

1. The Implementing Executive

The hypothesis of Weberian behavior on the part of public administration accounts for the lack of attention that has been paid so far to implementation when designing polities and, subsequently, policies. On the basis of an alternative 'administrative behavior hypothesis', in this article a case has been made against the separation of politics from administration within the executive branch. This new hypothesis does not, however, imply reductionism, because there are more ways of curbing the possible negative consequences of hierarchical continuity between politics and administration. As an exercise in Ackerman's 'institutional imagination',[65] let us then put forth a first proposal and identify one possible way to integrate the administrative behavior hypothesis with the current Montesquieuian model of separation of powers, as it is applied in the USA and Europe, Ackerman's focal countries.

In the domain of the separation of powers, the capabilities of the executive branch, which has come to be pre-eminent among the Montesquieu powers, probably need some rethinking. Ackerman's preference for the European parliamentary systems to the presidential model is driven by a desire to curb the pre-eminence of the executive in the US conjugation. The Weberian approach to public administration has led parliaments and executives (and the public after them) to concentrate on legislation and abandon implementation in the hands of public administration. Besides, the (imperfect) idea gained traction that to deal with a new situation, government needed to pass a new law. On the other hand, the administrative behavior hypothesis requires that the executive concentrates on the implementation of existing law; this is, after all, its own unique political function per Montesquieu. Therefore, to integrate the administrative behavior

[65] B. Ackerman, n 1 above, 688.

hypothesis we need to make a normative about-face: leave legislative power to parliament and deprive the executive branch of the capability of proposing laws. This view is one of an 'implementing executive', a 'purist' interpretation of Montesquieu: the executive branch should implement the laws passed by parliament.[66] The executive should not use its parliamentary support to study and propose new laws, as is the case today, both in Europe and the USA. Executive branches today spend most of their time and energy competing with parliaments over new laws.

So, in a nutshell: in applying the administrative behavior hypothesis to the executive, we would like to limit the capability of the executive branch to put forth legislation, so that it instead concentrates on the implementation of laws and the management of the bureaucracy. Such a provision should also diminish pressure to produce new legislation. With the pressure to produce new laws reduced, parliament, in turn, could focus on overseeing the executive's management of public administration, and, critically, its actual outcomes in the real world. Likewise, parliament could practice scrutiny of the judiciary's effectiveness.

The implementing executive is a well-balanced proposal because, on the one hand, it reinforces the executive – overcoming the time-worn and theoretically unsustainable separation of politics from administration – and, on the other hand, it deprives the executive of a large share of the power currently perceived to be at its disposal. The implementing executive meets Ackerman's objective whereby:

> 'Constitutionalists should, therefore, extend their thinking to embrace the distinctive structural problems involved in controlling the fourth branch of

[66] Habermas himself seems to appreciate the role of implementation: 'Democratic theory suffers from an 'under-thematization' of the executive moment, or management, which often gets demonized as the usurper of previously exercised legislative functions.' J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, MA: MIT Press, 1996), 192. We seem to have arrived from a different angle into a discussion that has being going on for a long time. Habermas says exactly the same thing: the executive should just act as an 'administrative body'. For instance, 'The logic of separated powers demands instead that the administration be empowered to carry out its tasks as professionally as possible, yet only under normative premises not at its disposal: the executive branch is to be limited to employing administrative power according to the law' (at 188). Ferrara offers a wider discussion of this: 'An administration limited to pragmatic discourses' argues Habermas, 'must not disturb anything in this universe (of differentiated kinds of discourses) by its contributions' (at 192). This understanding of the executive as a moment of mere administration, based on formal rationality alone, appears more adequate to capture the function of a bureaucracy than the function of governance. The difference between a government and a bureaucracy is overlooked by Habermas because he fails to realize that the programmatic points on which a head of government receives a mandate from the legislature or from the electorate are not to be understood as exhaustive of the governmental action. … The difference between a government and a bureaucracy lies precisely in the interpretive leeway, much larger in the former case … that each is allowed in interpreting its own mandate'. A. Ferrara, *Justice and Judgment: The Rise and the Prospect of the Judgment Model in Contemporary Political Philosophy* (London-Thousand Oaks, California: SAGE, 1999), 57.

government: the bureaucracy'.

The implementing executive widens the options of politics, in the 'openness' view of Ferrara:[67] no longer would there be a single top political position to be sought, the executive premiership. Parliamentary leadership would become equally enticing to a career politician. The outcome of the present argument is germane to Steven Calabresi's'. Democratic Legitimacy: the Cabinet and the Bureaucracy 'in his early critique of Ackerman's article.[68] However a different argument has been developed in this article.

It is however a more complex proposition to frame the implementing executive within Eric Andrew Posner and Adrian Vermeule's[69] perspective. Posner and Vermeule justify their approach on the basis of effectiveness of action, or perhaps of reaction, in relation to specific contingencies requiring fast response such as 11 September 2001, or civil war, or the financial near-meltdown of 2008. Admittedly, the implementing executive has no specific sensitivity to emergency issues: it stems from a global view about public administration, and is concerned with the work of about half a billion employees of public administration globally,[70] considering their general underperformance as Weberian bureaucrats and their compliance (even in the West) with the administrative behavior hypothesis. This is not to say that the implementing executive is necessarily less effective in dealing with emergencies. On the contrary, the very *raison d'être* of the implementing executive is a focus on action and real-world positive impact.

The implementing executive is probably an impossible option right now for developed democracies, as it currently remains some distance outside the norms of public perception. However, it might not be such a far-fetched proposition in some of the world's democratizing polities. The administrative behavior hypothesis provides a robust governance system for the effectiveness of democracies around the world, as it appears to be within the democratic horizons of those one hundred ninety-three countries currently within the United Nations where there is clearly no Weberian culture. And, in any case, an extreme case as formulated here can serve as a template for incremental reform in the long-established democratic polities.

[67] A. Ferrara, n 24 above.

[68] S.G. Calabresi, 'The Virtues of Presidential Government: Why Professor Ackerman Is Wrong to Prefer the German to the U.S. Constitution' 18 *Constitutional Commentary,* 51 (2001). Calabresi later elaborated his argument in a prescription about the European Union's possible constitutional future: S.G. Calabresi and Kyle Bady, 'Is the Separation of Powers Exportable?' 33 *Harvard Journal of Law & Public Policy,* 5 (2010).

[69] E.A. Posner and A. Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford: Oxford University Press, 2010).

[70] This article takes 'the view from below' to public administration: R.S. Brower and M.Y. Abolafia, 'Bureaucratic Politics: The View from Below' 7 *Journal of Public Administration Research and Theory,* 305 (1997).

The theoretical possibility of integrating the administrative behavior hypothesis within the Montesquieuian model should be good news for public law. Relinquishing the Weberian hypothesis before speaking of separation of powers leads to a reversal of fronts *vis-à-vis* Ackerman's predicament:[71] constitutional theory is needed because we do *not* have a Weberian culture. The effectiveness of the executive thus becomes conceptually independent of Weberian assumptions about bureaucratic behavior.

The implementing executive seems to finally answer Dante Alighieri's question: 'Laws indeed there are: But who is he observes them?'[72]

2. Future Studies

Future studies could develop more ways for the 'taming' of public administration, when it is supposed to behave according to the administrative behavior hypothesis. Research might provide recommendations in the following domains: organizational arrangements of public administration, constitutional reform, and supranational institutions and organizations, in the footsteps of the studies that have been leveraged here to argue the obsolescence of the Weberian hypothesis.

On the specifics of the separation of politics from administration, a case for the 'hierarchical integrity' of the executive branch as a whole, comprised of politicians and bureaucrats, from the perspective of conventional organizational theory, could also be pursued. Functional specialization does not warrant hierarchical separation of functions. This argument was not pursued here for the sake of focus.

Through this work on the separation of powers, a general point is made about public law: public law makes an implicit hypothesis of Weberian behavior on the part of public administration: such an assumption needs further investigation. Also, the rational-legal source of authority, in the classical Weberian three-partite taxonomy, may need further investigation. It is rational, but for whom? In general, future studies could investigate what follows when the argument put forth in this article is considered.

This article also revealed a theme of rivalry – rather than healthy competition – among the three classical branches of power, in law production. Therefore, future research could work on devising models to make the relationship among the three powers healthy rather than antagonistic. Organizational separation and constitutional checks and balances do not appear to be enough to establish positive competition that leads to improvements and good results for the population.

[71] B. Ackerman, n 1 above, 687, 'Before functional separation can make sense, there must be the makings of something I shall call a "Weberian culture".'

[72] D. Alighieri, *The Divine Comedy. Purgatory. Canto XVI*, translated by Henry F. Cary (New York: P.F. Collier & Son, 1909-14), vol XX, available at https://tinyurl.com/ssctv9d (last visited 30 December 2019).

Future studies could investigate an extension of the administrative behavior hypothesis to the behavior of the three Montesquieuian powers themselves. For instance, the current resurgence of populism[73] could be interpreted as a failure of the powers (parliament, executive, and judiciary) to gauge social problems and to channel popular sentiment, which is passionate. Such failure may derive from a bureaucratic insulation of the powers from the people, which itself could be explained by the administrative behavior hypothesis applied to the powers themselves. That is, contrary to the Montesquieuian model of efficient competition between the three powers in the service of the people, the three powers behave in a self-serving fashion and become secluded from the people, thus leaving an empty political space at the mercy of forces defining themselves anti-political, or populist.

This article has put forward a possible way in which political science, public law, and management can collaborate towards a culture of implementation. Building on Ackerman's explication of the Weberian hypothesis, through the formulation of an alternative administrative behavior hypothesis, the importance of executive implementation has been brought to the foreground. A place has been found for implementation and outcome assessment within the constitutional order. Legitimacy of law is a necessary condition for a sustainable well-ordered society, but it is not a sufficient condition: legitimate rules may not be effective and therefore may not be sustainable. This is where public management and public policy analysis come into play in the constitutional domain. Management sciences bring to constitutional studies the promise of being applicable the world over.

[73] Examples of the resurgence of populism are provided by the electoral victory of Arvind Kejiriwal in the district of New Delhi, India, December 2013, on an anti-corruption platform. Kejiriwal resigned his top post the following spring. Jimmy Morales, also a comedian, won the Guatemala elections of October 2015. Real estate entrepreneur and media icon Donald Trump won the US presidency in November 2016. Finally, in Italy, comedian Beppe Grillo and his 'Five Star Movement' attracted one-third of the electorate in national elections in 2013 and gained executive power in 2018.

The Enforceability of Smart Contracts

Mateja Durovic* and Franciszek Lech**

Abstract

The development of new technologies has different effects on the existing law. Smart contracts are one of the forms of the new technologies that questions the application of the traditional contract law on commercial transactions using smart contracts. Italy was among the first jurisdictions to recognize full legal validity and enforceability of smart contracts. However, this issue is still being discussed in the United Kingdom. In that context, the enforceability of contractual transactions concluded in the form of smart contracts represents one of the major legal questions. Moreover, the question is whether the existing English contract law needs to be modified in order to secure the enforceability of smart contracts. These issues will be accordingly examined in this paper with the aim to understand better the relationship of the traditional contract law, on the one side, and, smart contracts, on the other side.

I. Introduction[1]

In the recent years, businesses have started increasingly applying smart contracts for a number of diverse commercial transactions. In that context, the principal legal question is whether commercial transaction concluded through the smart contracts will be enforceable before the court. The main legal issue herein is to understand the relationship between the smart contracts, on the one side, and traditional contract law, on the other side.

Therefore, the main objective of this paper is to contribute to the explanation of that relationship in order to understand whether smart contracts are, from the perspective of the traditional contract law, enforceable. This topic has recently attracted a lot of attention in the United Kingdom and this paper will focus on the enforceability of smart contracts under the English law. In that sense, it will be useful to see how common law, as traditionally more business focused and commercial friendly system of rules, respond to the application of the new technologies in commercial transactions.

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[1] This paper was presented at the Kopaonik School of Natural Law. We would like to thank the participants for their comments and suggestions.

II. The Explanation of Smart Contracts

When discussing smart contracts, the first question to touch upon is the terminology and the meaning of the term. The question is whether smart contracts are really contracts at all where a smart contract is just a type of contract. In the existing scholarship, there is a tendency to draw dichotomies and lament vague and confused nomenclature or point out that the notion *smart contract* is actually a misnomer, that smart contracts are neither smart nor that they are contracts, which seems to be true. It has been remarked that *smart contract* is an ironic and unfortunate misnomer, and it would be better off being referred to as 'an "automated transaction manager" or "ATM", but that…has already been taken'.[2] Likewise, the mainstream thinking about smart contracts is substantially questioned, and (one may argue) rightly urges restraint in proclaiming smart contracts as the panacea to all inefficiencies of the legal system, rendering Law, or particularly Contract Law, obsolete. The same authors continue by pointing out how people confuse Blockchain technology with smart contracts and vice versa, forgetting that conceptually the two are independent of each other.[3]

Roberto Pardolesi and Antonio Davola argue that

> '(a)ll topics (of interpretation, arbitration, liability etc), nonetheless, deserve attention *only* if we believe that a smart contract is, at the very end, a (type of) contract: if, on the contrary, they represent mere tools susceptible to be encompassed within the (traditional) contractual practice – as part of legal scholarship defends – then all these questions are devoid of their primary foundations'.[4]

This is especially relevant in context of the above question, casting doubt on the understanding of the concept. If we are to believe that writing contract terms in code is a mere method of streamlining the performance of contracts, then the code itself will not have to be enforceable (as it will always be pegged to some other, at least implied, contract). It is submitted that, all in all, smart contracts, potentially will be a type of contract, rather than just an automation of contractual performance.

What seems to be the case is that legal contracts will require, at least for the near future, a blend between code and natural language.[5] These ties in with the previous point about smart contracts being a method of performance of parts or entire commercial transactions, rather than a contract. Together they lead to an

[2] J.M. Lipshaw, 'Persistence of "Dumb" Contracts' 2(1) *Stanford Journal of Blockchain Law & Policy*, 12 (2019).

[3] R. Pardolesi and A. Davola, 'What is Wrong in the Debate About Smart Contracts' *Luiss Guido Carli University Working Paper*, 13 March 2019.

[4] ibid 6.

[5] M. Durovic and A. Janssen, 'The Formation of Smart Contracts and Beyond: Shaking the Fundamentals of Contract Law?', in L. DiMatteo et al eds, *Smart Contracts and Blockchain Technology: Role of Contract Law* (Cambridge: Cambridge University Press, 2019 forthcoming).

ad hoc answer to the question: smart legal contract can be enforceable when it is a part of an otherwise enforceable and valid natural language contract, imposing a method of performance. That much seems obvious. If two parties agree on a method of performance the court is extremely unlikely to invalidate such a clause because it pertains to an automated coded method.

Some commentators go as far as to claim that smart contracts are merely computer programmes that parties use to perform their contracts not agreements or contracts.[6] Jason Allen's view is a riposte to the critique laid out by Pardolesi et al arguing that:

> 'there is no barrier to a single instrument, written in formal language (ie code), embodying both the contract as such and its automated mechanism of performance'.[7]

Not only then is there wide divergence in views, but in terminology itself. United Kingdom JT defined smart *legal* contracts as 'a smart contract capable of giving rise to binding legal obligations, enforceable in accordance with its terms'; It seems more likely to understand smart contracts as a combination of the smart contract code and traditional legal language in juxtaposition to a smart contract which is computer code.[8]

Cenkus Law instead posited that a smart legal contract is:

> 'a particular application of that type of code (a smart contract)…used to form an organization…used to run an application or it can be used…to actually facilitate a binding legal agreement'.[9]

Differently still, Jelena Madir argued that they are

> 'functionally made up of pieces of smart contract *code*, but critically under the umbrella of an overall relationship that creates legally enforceable rights'.[10]

Hence, while everyone postulates for clarity in definitions that is far from true, complicating vastly the actual task of consensus.

As to *pure* smart contracts – contracts fully in code the position is more difficult. 'Smart (legal) contracts can, in principle, fulfill the requirements for the

[6] P. Cuccuru, 'Beyond Bitcoin: An Early Overview On Smart Contracts' 25(3) *International Journal of Law and Information Technology,* 179-185 (2017).

[7] J.G. Allen, 'Wrapped and Stacked: "Smart Contracts" and the Interaction of Natural and Formal Language' 14(4) *European Review of Contract Law,* 307 (2018).

[8] M. Durovic and A. Janssen, n 5 above, 5.

[9] Cenkus Law, 'Smart Legal Contracts: Explanation and Enforceability' (25 March 2018), available at https://tinyurl.com/qpjfflt (last visited 30 December 2019).

[10] J. Madir, 'Smart Contracts: (How) Do They Fit Under Existing Legal Framework' *Social Science Research Network*, 3 (2018).

formation of contracts, and the problems are not unbridgeable'.[11] It should be pointed out that smart contracts are capable, by virtue of the flexibility and adaptability of the English contract law, and the very process of their formation, of being formed as legally valid contracts, and thus truly *contracts*.

There is a strong discrepancy when it comes to the views of the legal scholars on enforceability range from 'business as usual to predicting the end of contract law'.[12] In principle, it is still unlikely that an otherwise valid and enforceable contract would be deemed ineffective merely because expressed in code. This would be also contrary to the fundamental principle of freedom of contract under English law which entitles also freedom to choose any kind of form for contractual relationships.

There are perhaps a couple of nuances and caveats that should be made. Allen usefully remarked that:[13]

> 'We do not need imagine two stateless castaways swapping fish for coconuts on the high seas to accept the basic proposition that while economic activity nestles within the substrate of a legal system, where one exists, it can also thrive outside the law. Trying to understand smart contracts, and how they might change the contract law of the future, is therefore not an exercise best undertaken from a perspective that puts national law indicia in the foreground. Given the fundamental challenges that Internet-based commerce poses for the system of territorial-based jurisdiction as a whole, it seems disingenuous to deny at the outset that a trans-national body of norms might arise to regulate trans-national ecommerce and e-finance'.

Therefore, a criticism has been made of the approach that faces off the fundamental elements of a contract in a given jurisdiction ('indicia') with the elements of a smart legal contract. It should however be noted that in answering the question in what circumstances a smart legal contract is capable of giving rise to enforceable legal obligations one has to consider the indicia of English contract law. Hence, the conclusion reached about the individual elements of a valid contract remains pertinent and is a strong argument in favour of perceiving smart legal contracts as valid contracts in contract law's eyes.[14]

Perhaps we need to remind ourselves that

> 'the use of binary codes to incorporate and computerize parts of a contract is not a brand-new phenomenon: for example, the usage of electronic format to digitally communicate was already diffused in the product chain before

[11] M. Durovic and A. Janssen, n 5 above, 17.

[12] J.G. Allen, 'Wrapped and Stacked: "Smart Contracts" and the Interaction of Natural and Formal Language' 14(4) *European Review of Contract Law*, 307 (2018).

[13] ibid 11.

[14] M. Durovic and A. Janssen, n 5 above.

internet and e-commerce got massively exploited through EDI (electronic data interchange) technologies',[15]

and that

> 'A blockchain or distributed ledger is similar to any other IT-based message platform used to agree on transactions. Courts have already accepted that the exchange of the email messages can give rise to legally binding contracts in many jurisdictions. Automated performance is common in equities markets and algorithm trading. Existing contract laws (including e-commerce laws), therefore, may in many instances suffice in the case of the formation of smart legal contracts'.[16]

The broad consensus seems to be that pure smart contract (a piece of computer code that encompasses all elements of the parties agreements and is self-standing and independent of any natural language document) *can* be a legally enforceable contract – if both parties have transparency and clarity (had understood, had time to consider and decided to enter into such an arrangement) as to what the code entails, the computer logic encoded in the smart contract, then they can be bound by the outcomes (including, in theory, other subsequent arrangements entered into by the smart contract autonomously), provided that the elements of the contract such as offer, acceptance, consideration and intention to create legal relations are present.[17] Thus we again return to the issue of offer, acceptance, consideration, intention to create legal relations and capacity. That these elements are capable of being satisfied using in a normal smart legal contract formation procedure seems to be undisputable.

Another point is that contract law has to remain flexible to the changing commercial circumstances without the need for major revisions of principle: it had done so throughout times adapting to other forms of remote communication such as telex[18] or email.[19] Automated performance is commonplace in algorithm trading and equities markets.[20] There's little reason to think that smart contracts will be different.[21] Under the English law, parties are free to agree their desired form of communication of acceptance,[22] and so a cryptographic signature should be sufficient.

[15] R. Pardolesi and A. Davola, n 3 above, 17.

[16] US Chamber of Digital Commerce, 'Smart Contracts: Is the Law Ready?' 35 (September 2018), available at https://tinyurl.com/w3bgwqu (last visited 30 December 2019).

[17] Ashurst LLP, 'Smart Contracts – Can Code Ever Be Law?' (1 March 2018), available at https://tinyurl.com/sewol5q (last visited 30 December 2019).

[18] *Entores Ltd* v *Miles Far East Corpn* [1955] 2 QB 327, 333 (Denning LJ).

[19] *Nicholas Prestige Homes* v *Neal* [2010] EWCA Civ 1552, [9]-[12], [20] (Ward LJ).

[20] US Chamber of Digital Commerce, n 16 above, 35.

[21] C. Adams, Research Institute, 'Smart Contracts, Part 2: The Legality' *Hackernoon* (2018).

[22] *Holwell Securities* v *Hughes* [1974] 1 All ER 161, 163 (Russell LJ).

Furthermore, parties can even specify what kind of smart contract communication will constitute acceptance[23] – is it entering the external cryptographic key (more suitable for longer term contracts, where performance is some time in the future) or simply performance of the bargain – say uploading ten ether to the smart contract. Once the parties have validly and voluntarily entered into the initial contract, the smart contract can then enter the parties into additional contracts, which would bind the parties.[24] Any avoidance of doubt could be achieved by a requirement that prior to concluding a smart contract a user is asked to accept the natural language translation of the contract terms and communicate his consent (by clicking 'I agree').[25]

Such a conclusion is not accepted by some commentators. Gonzales et al. argued that smart contracts 'are not contracts in the legal sense' because the 'do not necessarily facilitate or embody exchanges, which all contracts do by definition', instead arguing that smart contracts are

> 'a programming tool, that is too limited to be able to disrupt legal contract practice or deliver on its promise of self-enforcing performance, because enforcement results from a dispute through the mechanisms of the legal system'.[26]

This argument, with respect, is unacceptable and can be refuted. First, it is not part of the legal definition of a contract that it must 'facilitate or embody exchanges', neither is it fully true that smart contracts do not do that. Smart contracts (in the narrow sense meaning computer code) are a tool that enables assets (or their digitized tokens) to change hands if a condition was satisfied – and as such they do *facilitate an exchange* of those assets. Furthermore, 'enforcement' of an agreement does not (a) result from a dispute; (b) does not have to be necessarily implemented by the State via the judicial system. Parties can self-enforce etc.

Smart contracts can be said to be self-enforcing in the sense that once the smart contract has been concluded, and is stored on a blockchain, if the condition is satisfied the assets will change hands, even if the original parties to the contract no longer wish them too. They can also be said to be self-enforcing in the sense that the discretion whether or not to abide by the terms of the contract is taken away from the parties, and once they have concluded a smart contract they will abide by the terms (generally). Accordingly, it is submitted that this kind of broad attacks on smart contracts' identity as contracts can be rejected, and it

[23] J. Madir, n 10 above, 8.

[24] ibid 8.

[25] Clifford Chance, 'Smart Contracts: Legal Agreements for the Digital Age' (2017), available at https://tinyurl.com/qrj6moq (last visited 30 December 2019).

[26] A.G. Rivas et al, 'Smart Contracts and Their Identity Crisis' *Social Science Research Network*, 8 (2019).

cannot be stated that smart contracts will *never* be contracts.

Another line of argument is that 'smart contracts are…not agreements – they are technology for enforcing agreements'.[27] The argument goes that a piece of code unaccompanied by any legal terms 'may not satisfy the requirement of a legally binding contract'.[28] This objection could be met in two ways: (1) it is clear that if a smart contract is just a method of performing of one or more clauses of a natural language (traditional) contract, then the code itself will not be *the* contract; (2) a pure smart contract (without a corresponding natural language contract) will not be a valid binding contract unless the elements discussed above are satisfied. Accordingly, it is wrong to state that a smart contract will never be a legally-valid contract, it is right to think that some smart contracts will fall short of constituting a valid contract, just as a note or natural language communication may fall short of constituting a traditional contract because some defining requirement of a contract in law is missing.[29]

Lastly, a comparative, common law observation can be made. In the United States, a number of states have passed 'blockchain legislation' which expressly have recognised smart contracts as capable of giving rise to enforceable legal obligations. In Arizona, the State Legislature has passed a law that states that

> 'Smart Contracts may exist in commerce. A contract relating may not be denied legal effect, validity or enforceability solely because that contract contains a smart contract term'.[30]

Likewise Tennessee passed a law that states that:[31]

> '§47-10-201: (…) "Smart contract" means an event-driven computer program, that executes on an electronic, distributed, decentralized, shared, and replicated ledger that is used to automate transactions, including, but not limited to, transactions that: (a) Take custody over and instruct transfer of assets on that ledger; (b) Create and distribute electronic assets; (c) Synchronize information; or (d) Manage identity and user access to software applications.
>
> §47-10-202: (a) A cryptographic signature that is generated and stored through distributed ledger technology is considered to be in an electronic form and to be an electronic signature. (b) A record or contract that is secured through distributed ledger technology is considered to be in an electronic

[27] C. Adams, n 21 above.

[28] Ashurst LLP, n 17 above.

[29] For example: *May and Butcher Ltd* v *The King* [1934] 2 KB 17, 21 (Viscount Dunedin) – incomplete agreement or *Felthouse* v *Bindley* (1862) 142 ER 1037, 1040 (Keating J) – no acceptance.

[30] Arizona Revised Statutes, Title 44 Trade and Commerce, §44-7601C.

[31] Tennessee Code, Title 47 (Commercial Instruments and Transactions), Chapter 10, §201 as amended by Senate Bill 1662 in 2017.

> form and to be an electronic record. (c) Smart contracts may exist in commerce. No contract relating to a transaction shall be denied legal effect, validity, or enforceability solely because that contract is executed through a smart contract.'

These Acts ensure that smart contracts can be recognized as legally valid, and moreover, that they can fulfil both the *in writing* and the signature requirements, essentially extending the E-Commerce and Electronic Transactions Provisions to cover smart contracts. Apart from these acts, several states such as Florida,[32] Maryland and Nebraska introduced State Legislation dealing with DLTs and smart contracts. A great overview is provided by the National Conference of State Legislatures website.[33] In relation to that zone, and as part of an experiment, the residents were granted a right to 'to carry out performance and/or execution of transactions by means of a smart contract' and, interestingly the law introduces a presumption that whoever enters into a smart contract understands its terms.[34] Thus if English courts were to strike down pure smart contracts as unenforceable, England would be lagging behind other jurisdictions – perhaps yet another reason why a court in England and Wales would be unlikely to declare that a smart contract can never be a Legal Contract.

The foregoing considerations point to a conclusion that a smart legal contract is capable of giving rise to enforceable legal obligations when it satisfies the traditional elements required for contract formation. As stated correctly by Lord Hodge JSC,

> 'so long as the operation of the computer program can be explained to judges who, like me, may be deficient in our knowledge of computer science, it should be relatively straightforward to conclude that people who agree to use a program with smart contracts in their transactions have objectively agreed to the consequences of the operation of the "if-then" logic of the program'.[35]

From a comparative law perspective, it is useful to have a look at what some of the civil law jurisdictions have done in respect of recognition of enforceability of smart contracts. In that sense, Italy seems to be the most prominent example because it is among the first European jurisdictions which, in 2019, has introduced specific smart contract legislation recognizes smart contract's full legal validity and enforceability in Italy.[36] This law has introduced a definition of smart contracts

[32] Florida House Bill 1357 of 2018, §7(1)(b), (2).

[33] National Conference of State Legislatures, 'Blockchain State Legislation', available at https://tinyurl.com/yak49c3y (last visited 30 December 2019).

[34] Decree of the President of the Republic of Belarus of 21 December 2017 no 8 on Development of Digital Economy, Art 5, para 3.

[35] Lord Hodge, 'The Potential and Perils of Financial Technology: Can the Law Adapt to Cope?' (14 March 2019), 11, available at https://tinyurl.com/yx38chcy (last visited 30 December 2019).

[36] Decreto legge 14 December 2018 no 135.

and has set out the legal effects of adopting such technologies. Accordingly, smart contracts are defined as

> 'computer programs that operate on distributed registers-based technologies and whose execution automatically binds two or more parties according to the effects predefined by said parties'.[37]

Importantly, the same law points out that the smart contracts will satisfy the requirement of the written form (*forma scritta*) of a contract if such a form is required under the Italian law and that is something that is discussed in this paper in the context of English law and written form requirements for a valid contract.

III. The Issue of Interpretation of Smart Contracts

The interpretation of smart contracts is a particularly challenging task.[38] The standard view is that 'legal contracts are written in natural language, which is full of ambiguity, and must be interpreted subjectively by fallible humans. Smart contracts are written in programming languages, which are unambiguous and executed objectively by infallible computers' which could suggest that interpretation will be obsolete – allegedly the time of ambiguity has come to an end. This view is too good to be true.[39] However, it needs to be pointed out that even computer code can be ambiguous: yes the commands are written in straightforward <if> <then> logic, but what the code means is determined by its context and conventions in the communities – which are not as straightforward and change over time. His example includes looking at different versions of Python (coding language) and demonstrating that the meaning of a symbol such as '^' for example change – leading the same code to produce different outcomes.

Hence, it is submitted that coding language is not a panacea to linguistical ambiguousness, and canons of interpretation will remain utilized. Let us first focus on a situation where the agreement between two parties (collectively the 'contract') is contained in both natural language memorandum, and a smart contract code. Allen's interesting thesis is that all contractual promises are not a statement but an 'intentional speech act' – namely conduct signifying something else – in the contractual sense by making an offer I am evidencing an intention to be bound on the terms of my offer. By attributing this characteristic to a contractual promise his logical conclusion is that there is no requirement for any of the contractual communication to be in natural language, since what is

[37] Art 8-*ter*, para 2, (*Tecnologie basate su registri distribuiti e* smart contract) decreto legge 135/18.

[38] M. Cannarsa, 'Interpretation of Contracts and Smart Contracts: Smart Interpretation or Interpretation of Smart Contracts?' 26 *European Review of Private Law*, 773–785 (2018).

[39] J. Grimmelmann, 'All Smart Contracts Are Ambiguous' *Penn Journal of Law and Innovation* (forthcoming).

actually being conveyed is secondary to the intention that the conveyance evidences. Allen reasons that there is thus no obstacle for a computer code to satisfy the 'intentional speech act' requirement and lead to a valid legal obligation.[40] He also argues that a contract can be conceptualized as a *stack* which is composed of certain layers within that stack:

> 'A 'paper' contract, comprises (i) the spoken words through which the contractual terms were negotiated and against which the text was drafted, (ii) the written text, and (iii) legal rules implying terms and governing construction… In a smart contract, (iv) is complemented (or supplanted) by code which is also, incidentally, wholly or partially executable by a machine'.[41]

Furthermore, a smart contract will be a result of some understanding between the parties which is expressed in natural language (since no humans think in computer code) and so the courts should be able to work their way backwards from the code to the objective intentions of the parties etc. This part of Allen's argument however falls when confronted with the fact that a smart contract may be capable of entering into other smart contracts with other parties and so there may be no natural language equivalent for some of the provisions.

> 'Some terms in the smart contract may be concerned with details that are left implicit in the natural language formulation. On the other hand, there may be clauses in the natural language contract that are not included in the smart contract, since their automation is not necessary, possible or even desirable.'[42]

Still it is likely that courts would approach the interpretation of the contract in relation to a broad equivalent of the coded term in natural language, the same way that the court deals with foreign languages by having them translated into English.[43]

If we take the principles of interpretation famously laid out famously by Lord Hoffmann in *ICS*, especially the first two principles:

> '(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

[40] J.G. Allen, n 12 above, 15-16.

[41] ibid 18-19.

[42] G. Governatori et al, 'On Legal Contracts, Imperative and Declarative Smart Contracts and Blockchain Systems' 26 *Artificial Intelligence and Law*, 377-385 (2018).

[43] For example: *United Company Rusal* v *Crispian Investments Ltd* [2018] EWHC 2415 (Comm), [15] (Phillips J).

> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man'.[44]

Accordingly, the court would have an insight into the background which would include the natural language understanding of the parties (or any natural language *wrapper* contract) and would interpret the code against that background. The only problem becomes apparent when we compare Lord Hoffmann's approach with a more recent approach endorsed by the UK Supreme Court, which stresses that the factual matrix 'should not be invoked to undervalue the importance of the language of the provision which is to be construed', and allows recourse to the background only where there is ambiguity.[45] While the difference may appear minute the significance for smart contracts is profound. As argued by Allen, a computer code, if functional (meaning capable of being run, or one that has run successfully) is by definition not ambiguous and clear,[46] which leads to the paradox that

> 'if ambiguity is prerequisite for context to play a role in interpretation and/or construction, the court will never get to the point of asking whether the algorithm's product is really what the human parties intended – even in perverse cases'.[47]

Allen's solution is that courts will have to adapt the established canons of interpretation to look at the context more readily and develop dictionaries which would translate in meta-language the computer code to aid the court reasoning in natural language to distil meaning from computer code.

One can of course also let imagination run wild and suggest that in the not-so-distant future we will have AI or automated dispute resolution procedures, which will be able to scan the computer code, verify it through an Oracle to confirm say absence of duress, illegality etc, and then deliver a verdict. That at this point, even with the new dispute-resolution technologies already in place or being implemented seems to be more like a fancy though. This is why the English courts should be able, without a radical re-organisation of their canons of interpretation to interpret computer code via a method of translation to natural language.

[44] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98, 115.

[45] *Arnold* v *Britton* [2015] UKSC 36, [17] (Lord Neuberger).

[46] J.G. Allen, n 12 above, 26.

[47] ibid 26.

IV. The Anonymous or Pseudo-Anonymous Parties as Contractual Parties

Most blockchain software do not require 'any pre-identification of the users', with the parties appearing simply as 'long strings of random numbers and letters'. Each user is equipped with a pair of cryptographic keys (a public and private one) generated by independent software wallets and kept there.[48] This means that parties can enter into a smart contract without knowing anything about the counterparty except the long string of random numbers and letters that appears.

Technically there is no requirement of knowing the identity of a party with which one contracts. People are free to make an offer to the entire world which would ripen into a contract with whomever acted on it as pointed out in *Carlill* v *Carbolic Smoke Ball Company* more than hundred years ago.[49] This suggests that contracts can be made with parties fully anonymous to the offeror – evidently the defendant had no idea that it was in a binding contract with Mrs. Carlill until she informed them that she wants the £100 reward. Thus, normally a smart contract is capable of giving rise to pseudo-anonymous parties, subject of course to the claimant's ability to prove that (a) they entered into the contract – proof that the cryptographic key is theirs and they used it and (b) identifying who to sue, which can both form significant practical obstacles to enforcement or (more likely given their nature) revision of a smart contract via the judicial path. Perhaps as smart legal contracts become more ubiquitous the host of the blockchain (such as Ethereum for example) would provide a mechanism to identify the parties.

Anonymity is a particular obstacle in relation to contracts subject to a statutory in-writing requirement[50] (discussed below). For example, under the US Statute of Frauds the essentials of the contract must be in writing, and essentials include names of the contracting parties.[51] Furthermore, to be valid identification of a party 'the parties (must) be described in such a manner *as that there can be no fair or reasonable dispute as to the person who is selling or buying*'.[52] Even if the parties know each other identities, but they are not sufficiently identified in the contract, the contract will be invalid.[53] While it is unlikely that an interest in land would be transferred in a smart contract transaction (given the subsequent registration requirements, and the early stages and doubts surrounding the technology), and thus section 2 LP(MP)A 1989 is unlikely to be key, it is possible that in a contract that is subject to in writing requirement, and thus where parties must be identified smart contracts will fall below the required standard. After all, given a string of random letters and numbers there is a possibility of a

[48] P. Cuccuru, n 6 above, 183-184.
[49] *Carlill* v *Carbolic Smoke Ball Company* [1893] 1 QB 256, 268 (Lindley LJ).
[50] Law of Property (Miscellaneous Provisions) Act 1989, section 2.
[51] *Porter* v *Duffield* (1874) LR 18 Eq 4, 6-7 (Jessel MR).
[52] ibid 7.
[53] *Jarrett* v *Hunter* (1886) 34 Ch D 182, 185 (Kay J).

reasonable dispute as to the identity of the person who is selling or buying.

A solution could be to interpret *person* to mean a public address on the blockchain – which means that parties are sufficiently identified whenever it is clear that this cryptographic key (and the person, whomever it is, behind that key) entered into the contract, even if the actual, off-line identity of the ultimate user is unknown. These identified flaws with such an approach, namely that (1) a public address (key) may point to a different smart contract rather than a wallet of a user and (2) the owner of the wallet remains pseudonymous. His solution to advocate for 'development of blockchain identities', which was also discussed above.[54] For most contracts, the pseudonymity will be a practical obstacle to judicial enforcement, rather than an *ex ante* obstacle to forming a binding legal relationship.

V. Fulfilment of the Signature Requirement by Using a Private Key

The statutory requirement that will be discussed by way of example will be section 2 LP(MP)A 1989. The classic interpretation of the word *signed* in s 2(3) LP(MP)A 1989 imposes an ordinary, common sense, meaning on the word an act analogous to putting one's name on the document with their own hand.[55] Thus typing a name on a letter as an addressee does not constitute a signature.[56] The Court of Appeal also held that the signature must be 'obviously so as to authenticate[57] the document', and that the policy of the requirement is motivated by the desire to prevent a party to 'go behind the document and introduce extrinsic evidence to establish a contract'.[58]

This broader proposition is central to answer the question. A cryptographic key is inputted to a smart contract precisely to authenticate the contract, but also to demonstrate assent to the smart contract, and prevent a contract being concocted or imposed on a party without their consent. Thus, the private key operates to fulfil the substance behind the signature requirement, and the only possible obstacle would be the form. An automated email containing a name of the party was taken to constitute a valid signature,[59] and it is submitted that an intentionally placed cryptographic key or password is only *a fortiori*.

Electronic signatures have been recognized as valid by statute,[60] and given

[54] G. Tse, 'Smart Contracts: A Boon or Bane For the Legal Profession' (24 September 2018), Taylor Vinters LLC, available at https://tinyurl.com/yx7yjt6n (last visited 30 December 2019).

[55] *Goodman* v *J Eban Ltd* [1954] 1 QB 550, 555 (Denning LJ).

[56] *Firstpost Homes Ltd v Johnson* [1995] 4 All ER 355, 362 (Peter Gibson LJ).

[57] *Caton* v *Caton* (1867) LR 2 HL 127, 142-143 (Lord Westbury).

[58] ibid 365 (Balcombe LJ).

[59] *Golden Ocean Group Ltd* v *Salgocar Mining Industries PVT Ltd* [2012] EWCA Civ 265, [38] (Tomlinson LJ).

[60] Electronic Communications Act 2000, section 7(1).

their definition[61] cryptographic keys could be recognized as valid electronic signatures without stretching the concept. In the US commentators argued that

> 'Blockchain-based transactional records and the digital signatures associated with these records should also satisfy the statute of fraud's writing requirements',[62]

given that

> 'is no meaningful difference between a typewritten name (valid under US statutory signature requirements) and a digital signature affixed to a transaction triggering a smart contract using public private key cryptography, *assuming the address can be uniquely tied to the signing party*'.[63]

The one remaining challenge therefore remains in tying a public address to a party.

VI. Could a Statutory 'In Writing' Be Met in the Case of a Smart Contract Composed Partly or Wholly of a Computer Code?

In English Law the default position is that there is a lack of writing requirements. Contracts are binding (assuming the foundational elements of a contract: offer and acceptance, consideration, intention to create legal relations, capacity are satisfied) without a requirement for written memorandum of the consensus *ad idem*.[64] Accordingly, even *if* smart contracts are deemed to be unable to meet the writing requirement it does not invalidate the claim that smart legal contracts can be recognized as legally binding agreements, because the most contracts will not have a statutory writing requirement (even if most contracts can be concluded in writing for convenience).

Further, a distinction has to be made between a *wrapped* and *pure* smart contract; a wrapped contract (which is governed by an overarching natural language agreement, meaning code is only part of the arrangement) will self-evidently satisfy the in writing requirement as it is just a part of a written contract – a method of performing few of its provisions (assuming the overarching agreement is written). The following discussion will therefore center on contracts composed wholly of computer code.

[61] ibid section 7(2) defines electronic signature as: 'For the purposes of this section an electronic signature is so much of anything in electronic form as – (a) is incorporated into or otherwise logically associated with any electronic communication or electronic data; and (b) purports to be used by the individual creating it to sign'.

[62] Cardozo Blockchain Report, ' "Smart Contracts" & Legal Enforceability' (October, 2018), 14, available at https://tinyurl.com/w8j8vcw (last visited 30 December 2019).

[63] ibid.

[64] *Halsbury's Laws of England: Contract* (2012) Vol 22, para 220.

There is however a class of contracts, which, to be valid, must be in writing: contracts for sale or other disposition of land,[65] bills of exchange, promissory notes, bills of sale,[66] and regulated consumer credit agreements.[67] The section 2 LP(MP)A requirement definitely is of upmost importance (as the most prominent writing requirement), yet as it deals with land the transaction will have to abide by several other formalities including a deed[68] and registration.[69]

Consequently, a smart contract dealing with land (or more likely with a digitized token representing land), presuming it is for something other than a lease of less than 3 years,[70] would not be the end of the story – there would be other steps where, at least currently, the law requires conventional forms of documentation which cannot be completed online or on a blockchain (such as registration). The point that is being made is that the most stringent in writing requirement under section 2 LP(MP)A would seldom pertain to smart contracts, as it deals with dispositions of interests in land, which under the current regime are largely inapt to be concluded by a smart contract.

Another interesting observation to make is that section 2 LP(MP)A 1989

> 'applies *only* to executor contracts for the future sale or other disposition of an interest in land, *and does not* apply to a contract which itself effects such a disposition'.[71]

The CA held further that a lease is an example of the latter type[72] (hence untouched by section 2 LP(MP)A 1989). If this is true, in our own opinion it should not as section 2(5) of the 1989 Act expressly says that it does not apply to short leases, so logically it should apply to *other* leases (but that is an irrelevant point here); a smart contract of the unilateral type (an offer uploaded to a blockchain, accepted by uploading the consideration, and performed and concluded at the point of acceptance) would automatically and immediately *effect* a disposition of an interest in land – hence under the CA's view of section 2, there would, again, be no in writing requirement. The only possible caveat is that as on the blockchain the interest in land (freehold, leasehold, easement *etc.*) would be represented by a token, the smart contract would not be a disposition of the interest, but of a token, constituting in essence a promise to transfer the actual interest at a later date observing the formalities (such as registration). If that interpretation is

[65] Law of Property (Miscellaneous Provisions) 1989 (LP(MP)A), section 2(1).
[66] *Halsbury's Laws* (no 64), para 224.
[67] Consumer Credit Act 1974, sections 8-9.
[68] Law of Property Act 1925 (LPA 1925), section 52.
[69] Land Registration Act 2002, section 27.
[70] Short leases (leases under 3 years, taking effect in possession without a premium) do not have to be in writing and thus could be concluded orally or by a valid smart legal contract – section 54(2) LPA 1925.
[71] *Rollerteam Ltd* v *Riley* [2016] EWCA Civ 1291, [38] (Tomlinson LJ).
[72] ibid.

instead adopted, then smart contracts would have to abide by the in writing requirements.

Coming back to the main point, there is statutory authority for the proposition that 'writing' includes 'typing, printing, lithography, photography *and other modes of representing or reproducing words in a visible form*'.[73] *Prima facie*, Solidity code, which is used for most of Ethereum smart contracts, would fall within 'mode of representing or reproducing words in a visible form' – it contains words although substitutes formal for natural syntax (words follow the internal logic of a computer-readable code, rather than a natural (ie human) language) – and thus be 'writing'.

An objection can be raised that computer code does not 'represent or reproduce words' – it is meant to convey a list of instructions to a computer, its ultimate objective is to be understood and performed by a machine, not to represent words. However, an IT specialist coding a smart contract has in his mind (or client instructions) a set of objectives *in human language*, that he then translates into computer code, or a smart contract. The Solidity Code (to continue with our example) can thus be said to *represent* the natural language (words) in a way that render them readable to a machine. Hence, smart code could satisfy the statutory writing requirement.

Furthermore, as a string of emails was held sufficient to satisfy the in writing requirement,[74] a smart contract written in code (as a likewise electronic memorandum of an agreed bargain) should be recognized too. Tomlinson LJ reasoned that the point behind the in writing requirement was

> 'to ensure that a person is not held liable as guarantor on the basis of an oral utterance which is ill-considered, ambiguous or even completely fictitious'.[75]

A smart contract, like an email, can also ensure that a party is not held bound by a mere oral utterance – perhaps even *a fortiori* – after all it requires much more effort to write precise computer code (evidencing a clearer intention to be bound) than just to reply 'I agree' in an email. Lastly, Tomlinson LJ urged that 'the statute must however, if possible, be construed in a manner which accommodates accepted contemporary business practice'[76] – again that seems to indicate that once (if?) smart contracts become widely accepted throughout the commercial world, the courts, to accommodate business practice, will refuse to frustrate the obligation on a formality.

Another point can be raised: the legislation on consumer contracts requires

[73] Interpretation Act 1978, s 5, sch 1.

[74] *Golden Ocean Group Ltd* v *Salgocar Mining Industries PVT Ltd* [2012] EWCA Civ 265, [22]; dealing with Statute of Frauds 1677, section 4.

[75] ibid 21.

[76] ibid 22.

that written terms in consumer contracts 'must always be drafted in plain, intelligible language'.[77] As it has been pointed out '(t)he contractual parties are, in principle, free to choose any language for their contract which also includes "computer language" '[78] – this leads to the inevitable difficulty that smart contract written in code may not be 'plain' or 'intelligible' to an ordinary consumer. It is argued that:

> 'Does this issue lead to an a priori prohibition of smart contracting in case of business to consumer transactions? The answer to this question is negative: it does not. However, this mandatory consumer protection requirement obliges businesses to provide consumers with plain, intelligible translations of the computer code which are understandable to them. Only if this condition has been fulfilled, consumer can be bound by a smart contract, and accordingly secures legality of smart contracting in case of business to consumer transactions'.[79]

This interesting solution to the problem would mean that if there are any discrepancies between the computer code and natural language translation provided by the trader to the consumer, the natural translation would take precedence (as that was the document the consumer understood) and also as is required by the Directive 1993/13/EEC on unfair contract terms.[80] This would undermine the viability of smart contracts in regulating B2C transactions – if for every smart contract a natural language translation is needed, and in effect that is the binding document (not the actual computer code), the smart contract is inevitably reduced to a mechanism of contractual performance, rather than being the substance of the contract. However, you seem to agree with the proposition that, in the absence of a natural language translation of the contract or wide prevalence of proficiency in C++, JavaScript, Solidity *etc*, a smart contract would fail the *plain and intelligible* writing requirement under Consumer Protection Legislation.

Certain jurisdictions have introduced legislative provisions that deal exclusively with the application of the in writing requirement to electronically concluded contracts. For example in the Netherlands, an electronic contract satisfies the in writing requirement if: (a) the agreement is and remains accessible for the parties; (b) the authenticity of the agreement is sufficiently guaranteed; (c) the moment on which the agreement was formed, can be determined with sufficient certainty, and (d) the identity of the parties can be assessed with sufficient certainty.[81] The first and the last requirements are said to pose the biggest

[77] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95/29, Art 5 (UCTD); Consumer Rights Act 2015, section 64(3).

[78] M. Durovic and A. Janssen, n 5 above, 26.

[79] ibid 26.

[80] Art 5 Directive 1993/13/EEC on unfair contract terms.

[81] Dutch Civil Code, §6:227a.

challenge to the validity of smart contracts as written contracts.[82] First a continuous line of computer code would not be accessible, in the sense in which that term is understood in Dutch law (which means that the parties are able to access and save its contents in order to be able to inform themselves later about the agreement),[83] as an ordinary consumer would not be able to 'inform' themselves of the contents if written in formal language (code). Secondly, and as discussed above, parties to a smart contract posited on a blockchain could be difficult to assess with sufficient clarity.

Likewise in the US, contracts that require to be in writing under the Statute of Frauds must be signed and (a) reasonably identify the subject matter of the contract (b) be sufficient to indicate that a contract with respect thereto has been made between the parties or offered by the signer to the other party, and (c) state with reasonable certainty the essential terms of the unperformed promises in the contract.[84] That requirement includes a requirement to reasonably identify the contracting parties.[85] This again poses a threat to the ability of smart contracts to satisfy the 'in writing requirement' in the States. However, it has been argued that in assessing the validity the American Courts have adopted a common-sense approach looking as to whether a contract was written down incorporating the essential terms and subject matter and whether it was signed with intention to authenticate.[86]

Crucially, under the English law, there is no statutory requirement as to what is required of electronic contracts to be considered that they are in writing. Under English law a contract must be in writing, signed by both parties and incorporating all the terms which the parties have expressly agreed.[87] A smart contract is definitely more than capable of fulfilling those requirements, subject to the discussion of signature above. Perhaps however, in the avoidance of doubt a legislative document should spell out the requirements that a smart contract would have to abide by to satisfy the requirement.

VII. Conclusions

This paper examined the enforceability of smart contracts under the English contract law. What may be concluded is that, under the current English law, commercial transactions wrapped in the form of smart contracts should be enforceable as contracts before the courts if they fulfil all of the existing requirements necessary for enforcement of any kind of contract. It seems that

[82] J. Madir, n 10 above, 12.
[83] ibid 12.
[84] US Restatement (Second) Contracts, §131.
[85] Cardozo Blockchain Report n 62 above, 10.
[86] ibid 11.
[87] LP(MP)A 1989, section 2(1).

no changes of English law need to be made to secure enforceability of smart contracts. Smart contracts are to be understood just as emanation of freedom to contracts where smart contract is agreed to be used as an instrument for execution of a promise established under a contract. This would be the case, for example, with using smart contracts to secure that a certain amount of money as a price established under the contract will be transferred to the seller once the good has been delivered to the buyer.

Moreover, in case of types of contracts for whose enforceability is required to be in writing, smart contracts composed wholly of computer code can satisfy statutory in writing requirement. This is because smart contracts are a method of expression that represent words in a durable medium, preventing parties from being bound by an inadvertent utterance.

Essays

Archaeological Data Between Prerogatives of Protection and Requests of Access

Alberto Maria Gambino* and Maria Letizia Bixio**

Abstract

The purpose of this paper is to delineate some of the issues arising from the intersection of copyright and the protection of cultural goods, particularly in the framework of archaeology.

When looking at the work of freelance archaeologists with regards to excavation activities, scientific filing and research, it is interesting to reflect on which, among the data produced, is to be considered 'processed data'. It is in fact not always obvious whether copyright can be applied to such data. Can 'raw data', by reason of its extraneousness to copyright prerogatives, be made public and considered as part of the common heritage of a society?

The following analysis will be aimed at substantiating certain issues of entitlement relating to the dissemination of the archaeological documentation produced during the course of said excavation activities, in instances where public and private interest might overlap.

I. Introduction

The research of an intellectual property scholar – who, to quote Pirandello, is tirelessly *in Search of an Author* – becomes arduous when dealing with a number of questions concerning the protection of cultural goods, particularly in the framework of archaeology.

Which elements of the scientific data produced by archaeologists – and especially by freelance archaeologists, as part of excavation activities, scientific filing and research – are to be considered 'processed data'? In what ways can archaeologists see the 'copyright' on their works (assuming there is any) protected, when the documentation produced is inserted into the archives? Can the 'raw data', by reason of their extraneousness to copyright prerogatives, be made public and considered the common heritage of society?

The following study aims to determine the legitimacy of certain attributions and certain issues of ownership related to the dissemination of the produced archaeological documentation in controversies in which the not always converging public and private interests overlap.

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II. An Analysis of the Archaeological Activity: Actors Involved and Work Stages

In order to better understand the focus of the following analysis, it is useful to start by clarifying what cultural goods are comprised in Art 2, para 2, of decreto legislativo 22 January 2004 no 42 (and subsequent amended versions), titled 'Cultural and Natural Heritage Code pursuant to Art 10 of Law 6 July 2002 no 137'[1] (hereinafter the Code). The text comprises 'movable and immovable things that are of archaeological interest'. Therefore, in case of archaeological discoveries that have the potential to become 'cultural goods',[2] one might wonder how their discoverers should be considered. The 'category' of archaeologists, by reason of their training and professional experience, finds a place in Art 9 *bis* of the Code, within the broader *genus* of 'professionals competent to carry out interventions on cultural heritage'.

Thanks to their specific knowledge of archaeological research and to their command of cataloguing methodologies, they put in place a complex series of activities that qualify precisely as 'knowledge of cultural goods'.

Third parties become aware of the cultural good only at later stages. This is indeed possible thanks to the professional mediation of the archaeologist, which is indispensable from the discovery to the elaboration of the data.

The transition from the raw data to the processed data, up until the creation of the final information provided to third parties, is a combination of stages and notions that are all necessary for a logical development of the archaeologist's activity, who is identified as the 'mediator' of knowledge.

During the activity of an archaeologist, three legally relevant moments, consequential but not coincidental, can be identified: 1) the acquisition of the data on the field; 2) the processing of the data or 'study phase'; 3) the publication of the results.

[1] Until 2004, the relevant comprehensive regulation was legge 1 June 1939 no 1089 on the protection of historical and artistic goods. The latter entrusted the Public Administration with the task of identifying which goods shall be defined 'cultural heritage' as part of public and private property, as well as with the task of placing upon them an historical artistic constraint, in order to ensure the goods preservation. In this latter case, the Public Administration was provided with an extremely broad discretionary power. See T. Alibrandi, P.G. Ferri, *I beni culturali e ambientali* (Milano: Giuffrè, 1985), 17. Art 1 of legge 1 June 1939 no 1089 safeguarded all those goods which have an historical and artistic character. Subsequently, with the enactment of decreto legislativo 29 October 1999 no 490, entitled 'Testo unico delle disposizioni legislative in materia di beni culturali e ambientali', a uniform Regulation for the protection of cultural goods was introduced. Such Regulation did not introduce any innovations in the content, but it was a recollection of already-existing provisions. Recently, the matter was addressed in a new Consolidated Law, enacted with decreto legislativo 22 January 2004 no 42 (the so-called 'Codice dei beni culturali') which came into force on 1 May 2004, and which repealed all previous legislative provisions.

[2] Concerning the notion of 'good', see the commentary by A. Pontrelli, 'sub Art 10', in A.M. Angiuli and V. Caputi Jambrenghi, *Commentario al codice dei beni culturali e del paesaggio*, in R. Villata ed, *Le nuove leggi amministrative* (Torino: Giappichelli, 2005), 61.

Normally, there are several actors at play in the various stages of an archaeological excavation, even if in practice, the same subject performs at least the first two stages. Among the principal actors are: 'the referent of scientific research' (a natural or legal person), that directs and coordinates the scientific activity (eg University, Superintendence, Institutions); the author of the documentation; and the people responsible for the different stages, who do not necessarily coincide with the previous actors.

All the above-mentioned actors are usually connected by a special interlocutor, namely the Archaeological Superintendence. This is a governmental territorial agency coming under the supervision of the Ministry of Cultural Heritage and Activities and Tourism that deals with archaeological heritage preservation activities.

The somewhat blunt wording of Art 88, para 1, of the Code entrusts the Superintendence with the exercise of the powers entitlement on the archaeological dig, the duties of coordination and scientific direction, and makes it a legal representative with respect to all stages of the executive archaeology activities.[3]

After having introduced the parties concerned to acquire a better understanding of their roles, it is now necessary to examine more in detail the work stages of the archaeological activity.

The protagonist of the first stage and author of the documentation is the archaeologist on the field, who carries out both material and intellectual duties.

In particular, in the first stage of the research the archaeologist employs his knowledge to fulfil a series of duties ranging from the choice of the exact location where to start the digging activities (which presupposes a preventive study and research to reconstruct the historical presence in that specific spot), to the drafting of field files on the movable finds discovered, graphic and photographic readings, the drafting of the excavation journal, as well as the final report which also includes the forecast for the conservation and valorisation measures to be adopted in relation to the recovered archaeological discoveries.

Because of the rather objective and technical tasks needed for the data interpretation, such activities would not seem to leave much room for the author's creative freedom. Nevertheless, a copyright component can be found when considering the degree of autonomy an archaeologist can exercise in choosing and undertaking a given intervention plan (preliminary research, drafting of the excavation journal, historical reconstruction).

Furthermore, an additional peculiarity characterising the activity of an

[3] See G. Alpa and V. Mariconda, *Codice civile, Commentari Ipsoa* (Milano: Ipsoa, 2013), 2487. Art 826 of the Civil Code provides that artefacts of historical, archaeological and artistic interest, found in whatever way, belong *ex lege* to the State and are part of its inaccessible cultural heritage. With regards to archaeological artefacts, the law in force affirms that they are part of a series of activities which are necessarily reserved to the State; save where the right to carry them out is entrusted to public or private entities by way of concessions (Arts 88 and 89 of the Code, decreto legislativo 22 January 2004 no 42).

archaeologist strengthens the relevance of the so-called *intuitus personae*: the significant uniqueness and unrepeatability of the process of gathering information. This makes the presence of a specific archaeologist decisive, both during the excavation activity and the production of a detailed scientific documentation of what was recovered.

By contrast, the excavations commissioned by the Superintendence to – for instance – a University follow a different set-up. In these circumstances, the archaeologist (professor or researcher) will generally follow the instructions provided to him and will answer to the commissioning entity, which will give him a set of guidelines, and the means and equipment to implement them. Therefore, in such instances the figure of the archaeologist unequivocally loses some of his autonomy.

Moving on to the second phase, one can observe a submissive handover between the field archaeologist and the archaeologist working as a Superintendence official. The latter will be in charge, in a somewhat impersonal manner, of the translation of the data collected in the cataloguing facilities, and of the drafting of the 'final archaeological report' (not to be confused with the 'final excavation report').

Such stage perhaps better fits into the protection of cultural heritage, which is upon the State full responsibility,[4] and becomes an expression of the public commitment taken by the Ministry of Cultural Heritage in light of Art 17 of the Code. This includes ensuring that these activities take place and the overview of their coordination, with the aim of employing common methodologies of data collection, exchange, access and processing at the national level, along with a network that can integrate the databases of other States, regions and local governments. Hence, the main actor during the excavation is deprived of any editorial freedom and limits himself to deliver the data collected to the Superintendence, in order to enable it to perform its duties.

Although universities and other institutions can have a say in defining the programs concerning the cataloguing methodologies, in general it is the Ministry responsibility to define such activities, even when excavations are entrusted in

[4] With relation to cultural 'goods' or 'objects', such protection (of cultural heritage) was the first function to be recognised over time. It consituttes the inspiring motive of Law 1089/1939. See G. Sciullo et al, *Diritto e gestione dei beni culturali* (Bologna: il Mulino, 2006), 53. See also S. Valentini, 'Le funzioni amministrative nella tutela dei beni culturali', in V. Caputi Jambrenghi ed, *La cultura e i suoi beni giuridici* (Milano: Giuffrè, 1999) 413. In the Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) 1024/2012 OJ L159/1 there is a specific definition: 'Cultural object' means an object which is classified or defined by a Member State, before or after its unlawful removal from the territory of that Member State, as being among the 'national treasures possessing artistic, historic or archaeological value' under national legislation or administrative procedures within the meaning of Art 36 TFEU.

concession. Indeed, the Superintendence, despite not having a direct contact with the cultural good (1st stage), has full decision-making powers on the cataloguing activity (2nd stage) and dictates the timeframe and modalities of work. For instance, the Superintendence, as the owner of the results obtained, has the power to decide which collected data to catalogue or to exclude, whether to mention the name of the archaeologist signing the documentation on the first filing of the cultural goods, which information can be make available to all and which can be obscured.[5]

In the third and final stage (publication), the actors involved can either be the ones mentioned above or unrelated third parties. As a matter of fact, the publication can well constitute a detailed scientific activity, but if it does not necessarily imply an elaboration of the data collected, it can also end up being the mere reproduction of the journal or of the final excavation report.

In this case, from a substantive law viewpoint the inclusion of certain findings in the field documents could lead to assign such contributions a copyright protection on the basis of their minor creative character, which the Italian Copyright legge 22 April 1941 no 633[6] considers the core of the copyright protection as expression of the subjectivity of the author.[7]

However, the publication could also represent the final outcome of the research commissioned to the university, thus the result of the work of one or more archaeologist. In this situation, the research could be regarded as a collective work as defined by Art 7 of the Copyright Law. It could also become an independent work if qualified as the result of a researcher's drafting. This would happen if the researcher is alien to the commissioning entity, if he writes *ex novo* his own scientific study starting from the excavation data (files, journal, reports) retrieved in the archives open to the public, and if he is likely to obtain a moral and economic entitlement to the work.

III. The Archaeological Activity Between Protection and Valorisation: A Systematic Framework

After having briefly outlined the archaeological activity in its subjective and objective connotations, this paper shall focus on framing such activity in the

[5] With reference to the above-mentioned administrative and technical discretion, see among others S. Benini, 'La discrezionalità nei vincoli culturali ed ambientali' *Il Foro Italiano*, III, 326 (1998); A. Rota, *La tutela dei beni culturali tra tecnica e discrezionalità* (Padova: CEDAM, 2002).

[6] Concerning the Italian copyright law see a comment in C. Galli and A.M. Gambino eds, *Codice commentato della proprietà industriale e intellettuale* (Torino: UTET, 2011).

[7] Specifically, the Superintendence activity is limited to the archiving of the excavation results. The author of the documentation (archaeologist) or third parties (scholars and researchers) can request access to the documentation for study purposes, to draft *ex novo* intellectual works that are the result of their creative activity. Such works, which could be qualified as scientific researches, will be susceptible to being published in an independent way. It should be noted that, for reasons of protection and excavation safety, there could be data of the documentation to which access will be denied and which will therefore remain unreleased.

wider context of the measures dealing with cultural goods. As it is well known, the State has the function of protecting the cultural goods besides owning them. In fact, the State shall make sure that the artefacts of artistic and historic interest are safely preserved. Nevertheless, starting from the second half of the twentieth century, in order to fully implement Art 9 of the Constitution,[8] the State duty to protect cultural goods was integrated with the principle of valorisation of cultural goods.[9] The latter is detailed at Art 6 of the Code, as: 'the exercise of the functions and the regulation of the activities aimed at promoting the understanding of cultural heritage' and 'in guaranteeing the best conditions of use and public use of the cultural heritage'. The function of 'valorisation' has enabled and facilitated the full development of culture, which could not have been fully achieved through the activities of mere protection and preservation.[10]

When considering the regulatory changes concerning cultural goods, one can notice a dynamic evolution of the role of the public authority. This became central in the transformation process from 'data' to 'information'. It stems from the notion of 'valorisation', which implies that society is given the full possibility to acknowledge the cultural good.

This transition[11] resulted in the current wording of Art 1 of the Cultural Heritage and Landscape Code, where valorisation and protection are referred to as actual duties of the State:

> 'In application of Art 9 of the Constitution, the Republic shall protect and valorise cultural heritage in order to preserve the memory of the national community and its territory, as well as promoting the development of culture'.[12]

[8] For further information see R. Chiarelli, *Profili costituzionali del patrimonio culturale* (Torino: Giappichelli, 2010), as well as A. Pizzorusso, 'Diritto della cultura e principi costituzionali' *Quaderni costituzionali*, 317 (2000). See also F. Merusi, 'Article 9', in G. Branca ed, *Commentario della Costituzione. Principi fondamentali. Arts 1-12* (Bologna: Zanichelli, 1975), 434.

[9] In the Cultural Heritage Code, the valorization of the good has an ancillary character with respect to the protection of the good, see G. Pastori, 'Le funzioni dello Stato in materia di tutela del patrimonio culturale (art. 4)' 1 *Rivista di diritto e arti online*, 2004.

[10] The role of the public authority underwent a transition from the 'mere guarantor of the physical preservation of a cultural good' to that of 'promoter of the valorisation of the cultural good'. The valorisation is considered as a possible factor for the intellectual development of the society as a whole, as well as an element of its identity. See G. Pitruzzella, 'Art 148', in G. Falcone ed, *Lo Stato autonomista* (Bologna: il Mulino, 1998), 492; see also G. Sciullo, 'Il codice dei beni culturali e del paesaggio: principi dispositivi ed elementi di novità' *Urbanistica e appalti*, 763 (2004). V. Grippo, 'La tutela delle opere d'arte e dei beni culturali', in A. Clemente et al eds, *Trattario di Diritto Civile, Proprietà intellettuale, Mercato e concorrenza* (Milano: Giuffrè 2017), 557-560.

[11] We are witnessing a revolution where an exclusively aesthetic criterion (which included only the most beautiful works among those deserving protection) is replaced by a historicist one (which aims at protecting a larger typology of cultural goods as representative of a given historical period). See M.S. Giannini, 'I beni culturali' *Rivista Trimestrale di diritto pubblico*, 14 (1976).

[12] A similar goal characterises international systems: C. Forrest, *International Law and the Protection of Cultural Heritage* (London-New York: Routledge, 2010); M. Frigo, *La circulation des*

Among the principal valorisation activities are the organisation and provision of technical expertise and financial resources to achieve the above-mentioned knowledge and promotion objectives.[13] In this respect, the whole archaeological activity[14] (particularly the phases of study and publication of findings) can theoretically be included in the duty of valorisation of cultural goods when it is aimed at improving their accessibility and scientific knowledge.[15]

IV. Characterisation of the Relationship Between the Archaeologist and the Public Administration and Limitations to the Acknowledgement of Authorship on the Data

The following attempt to characterize the contract between an archaeologist and the public administration intends to identify some of the peculiar characteristics of this legal relationship, consequently addressing the commitments existing between the two entities.

Considering that the contract between the archaeologist and the public administration can be of different types, the one that seems to better define the relationship between the two is the casual independent work performance contract (Arts 2222 of the Civil code), as it foresees that the archaeologist has an obligation to carry out a certain activity, with no relationship of subordination. On the other hand, given that the actors involved in the commissioning of an excavation are highly qualified, the contractual form between the two parties could also be associated to the 'contract for supply of intellectual services', regulated by Art 2230 of the Civil code.[16]

More precisely, a 'supply of intellectual services' consists in making available a professional's expertise and specific intellectual resources with a view to achieving a useful result for the commissioning entity.[17]

biens culturels: determination de la loi applicable et methodes de reglement des litiges (Leiden: Brill, 2016). For a specific analysis on the importance of protecting 'cultural diversity' see L. Bellucci, 'The Notion of 'Cultural Diversity' in the EU Trade Agreements and Negotiations: New Challenges and Perspectives' *The Italian Law Journal*, 433 (2016).

[13] Although a 'Ministry of Culture' (with the competence of guiding and shaping culture) no longer exists, the kind of information which is transmitted today is far from being neutral, as it may be argued that its quality is often used to 'orientate' culture.

[14] See M. Berducou, 'Introduction à la conservation archaèologique', in N.S. Price et al eds, *Historical and Philosophical Issues in the Conservation of Cultural History* (Los Angeles: Getty Conservation Institute, 1990), 247-259.

[15] About the valorization through the access to the informative data, see G. Sciullo, n 12 above, 763.

[16] See G. Oppo, 'Creazione intellettuale, creazione industriale e diritti di utilizzazione economica' *Rivista di diritto civile*, I, 1-45 (1969).

[17] See V.M. De Sanctis, 'Problemi giuridici in tema di disciplina delle opere letterarie e artistiche create su commissione' *Il diritto d'autore*, 153 (1967). The information-gathering essay accurately explains the two opposite views on the debate concerning the acquisition of rights for works created pursuant to a commissioning agreement The Author clarifies how 'the

The contract for the supply of intellectual services is characterised by the autonomy[18] given to the professional, thus distinguishing it from a subordinated work contract. Nevertheless, in the case of the commission of an excavation, the person in charge often does not have a full organisational and technical autonomy while the commissioning entity does not guarantee complete freedom from its direct supervision.

Such entity puts at the disposal of the archaeologist all the necessary tools and bears all costs for the fulfilment of these activities. In general, the commissioning entity also bears the risks in case there is a preliminary agreement on the remuneration of the actors involved regardless of the outcome of the excavation.[19]

In spite of this, the activities carried out by the professional do not result in a subordinate relation with respect to the commissioning entity, due to the fact that the professional does not follow precise orders. Accordingly, the archaeologist has a wide margin of discretion in choosing how to best organise his activity within the general guidelines and broad indications provided, in light of the results that were commissioned to him.

There are two kinds of obligations in a contract for the supply of intellectual services: those relating to the means and those concerning the result. The contractual services under consideration would seem to have a mixed nature. On the one hand, the study and project phase and the excavation activity would

issue related to copyright does not arise in the case of works created pursuant to a commissioning agreement'. What matters for the commissioning entity is the 'ownership' of the work and not the 'intangible' intellectual property right on such a work. De Sanctis clarifies that 'the potential original entitlement of rights by the commissioning entity can never include the author's personal rights, but only economic exploitation rights'. See also T. Scovazzi, B. Ubertazzi and L. Zagato eds, *Il patrimonio culturale intangibile nelle sue diverse dimensioni* (Milan: Giuffrè 2012). M. Graziadei and B. Pasa, 'Patrimoni culturali, tesori nazionali: il protezionismo degli Stati membri dell'UE nella circolazione dei beni culturali' *Contratto e impresa/Europa*, 121 (2017). In fact, the idea of an original acquisition of rights on the part of the commissioning entity, replacing the latter with the author for what concerns economic exploitation rights, can be only accepted in the context of a dualistic vision of copyright. See also G. Oppo, n 18 above, 1-45. Oppo argues that, by concluding a contract for the creation of an intellectual work, the author has already given its consent for the work to be directed to the public and has consequently already dealt with the 'diritto di inedito' (under Italian Law the 'Diritto all'Inedito' is the discretionary right of an author to decide whether to publish his work or not) on its work.

[18] See F. Santoro Passarelli, 'Opera (Contratto di)', *Novissimo Digesto italiano* (Torino: UTET, 1965) XI, 982; G. Giacobbe and D. Giacobbe, 'Il lavoro autonomo. Contratto d'opera', in P. Schlesinger and Francesco D. Busnelli eds, *Codice civile. Commentario* (Milano: Giuffrè, 2nd ed, 2009), 12.

[19] P. Greco, 'I diritti sulle opere dell'ingegno', in F. Vassalli ed, *Trattato di diritto civile italiano* (1974), XI-XIII, 256. In order for the work of art to belong to the employer it is necessary that the creating activity of the authors be carried out in view of a certain outcome set in advance by the employer. When the very object of a contract is an activity aimed at the acquisition by the employer of the original ownership of certain rights (which according to general principles would normally be owned by the person conducting the creating activity), such rights are to be assigned directly to the employer. This rule is justified by the socio-economic function of an employment-based relationship: the employer hires the employee and pays him because he expects to appropriate the outcome of that work.

fall under an obligation of means (with a predominance of the intellectual component); on the other hand, the obligation of data delivery comes closer to an obligation of result. In both cases, the contractual type stipulates that the commissioning entity shall qualify as the holder of the to the results.

Therefore, the question is whether it shall be the Superintendence or rather the Ministry of Cultural Heritage and Activities and Tourism to acquire the full ownership of the results achieved by the archaeologists, consequently also on the final reporting work (even in the case of a work of intellect).

This gives rise to two main critical issues: first, whether the result of the excavation has a creative character or not;[20] a second concern relates to the limitations that the legal system implements regarding the acquisition of intellectual property rights, at least on the archaeological data.

Regarding the first issue, a distinction can be made between the raw data (which means all the files and technical reports, the transcriptions of the stratigraphic succession that has been identified, images and reliefs) and the processed data (eg the final excavation report together with the schemes that are essential for a better understanding of the information). Such reworked version may involve a certain editorial and content-related originality, which could potentially make the writings eligible for copyright protection.[21]

Moving on to the second issue, a number of substantial restraints can be found in relation to the recognition of the authorial rights to the archaeologists in charge of the excavation mission.

Primarily, certain limitations are expressed at Art 2222 of the Civil Code which regulates excavation contracts. The article clarifies that, the work performed and the results achieved by the archaeologist are the exclusive property of the commissioning entity, since the author of the documentation cannot use those results for any other purposes. Furthermore, these contracts often clarify that the archaeologist is neither allowed to inform third parties (institutions or persons) about the results of the excavation activities, nor to divulge it through publications without the specific consent of the commissioning entity, and in any case by stating that the work was carried out on its behalf.

The described contractual limitation could theoretically be waived if the parties agree to do so; however, some of the provisions of legge 633/1941 on copyright have a definite scope. For instance, Art 5 exempts any texts of the official acts of the State and of the Public Administration, be it Italian or foreign, from the scope of the copyright legislation. In an effort to limit the object of copyright protection, the legislator excluded those forms of expression that seem to be only abstractly protectable. By reason of their particular cultural (or

[20] See M.J. Madison, 'Beyond Creativity: Copyright as Knowledge Law' 12(4) *The Vanderbilt Journal of Entertainment and Technology Law*, 819 (2010): 'creativity is the undisputed 'what' of copyright'.

[21] See R. Franceschelli, 'Il diritto d'autore', in P. Rescigno ed, *Trattato di diritto privato* (Torino: UTET, 2nd ed, 2009), XVIII.

social) function, they are unlikely to have any expressive character and normally consist of mere sources of information (eg judgments, ministerial reports, parliamentary proceedings etc). A further justification for such a provision relies on the fact that the State and the Administration official acts pursue public interests, thus private law principles such as copyright cannot apply. By contrast, Art 11 of the Italian Copyright Law admits *ex lege* the acquisition of copyright. Copyright protection lasts only for 20 years and belongs to the State or Public Administrations that commissioned the creation of works under their name, on their behalf and at their expense. Such right is deemed to be applicable also to collections of official acts (but not to individual acts which are subject to the regime of free use under Art 5).

According to a widespread doctrinal and jurisprudential thesis, the acquisition *ex* Art 11 of legge 633/1941 is comprehensive of all rights to utilise intellectual property (there is a certain similarity with the cases covered by Arts 12-*bis* and *ter*, 38, 45, 88 and 89 of legge 633/1941,[22] namely with all those circumstances in which the work is realized whilst in a subordinate or autonomous work relationship in the event of a commission).

Such a provision relies on the attribution of authorship to those (natural or legal persons) whose personal intellectual effort is reflected in the work. Thus, the public administration which commissioned the work can only be the author of the results achieved to pursue its broader objectives, such as the protection and valorisation of the cultural good.[23]

Therefore, at a closer look, the Ministry legitimately draws to itself the outcomes of an excavation. This is possible as they are considered official acts belonging to the public administration (*ex* Art 5 of the Italian copyright law) thus *in nuce* not susceptible to be granted any authorial protection. Additionally, they are anyway considered a commissioned intellectual work *ex* Art 11 of the Italian Copyright Law, therefore susceptible to be attributed *ex lege* to the State through the legal entity of the Ministry of Cultural Heritage and Activities and Tourism.

Clearly, the archaeologist who wishes that its creative contribution[24] to the

[22] See, in C. Galli and A.M. Gambino, n 6 above: P. Auteri, 'sub Art 12 bis and ter', 2894-2902; D. Mula, 'sub Art 38', 3003-3009; B. Bettelli and A. Lazzareschi, 'sub Art. 45', 3022-3029; B. Tassone, 'sub. Art 88 and 89', 3290-3304.

[23] In this respect, what is most discussed in Doctrine concerns the acknowledgment of a moral right upon the actual authors of the work (according to Messina G. and De Sanctis V.M. such right would still originate within the Authority). By contrast, others affirm (P.G. Marchetti and L.C. Ubertazzi eds, 'Sub Art 11', *Commentario breve al diritto della concorrenza* (Padova: CEDAM, 2016), 1510) that the provision should be interpreted pursuant to secondary law. Accordingly, the rights of economic exploitation on the works created by an employer belong derivatively to the employer or commissioning entity. See also S. Giudici, 'Sub Art 11', in C. Galli and A.M. Gambino, n 6 above, 2884.

[24] Some doubts arise from A. Musso, 'Diritto d'autore sulle opere dell'ingegno letterarie e artistiche', in A. Scialoja and G. Branca eds, *Commentario al Codice Civile* (Bologna-Roma: Zanichelli, 2008), 24, 'an absolute creative character – in spite of the most exasperated romantic theories – is not configurable, on the part of human mind, not even in the most

research is acknowledged can only refer to the contractual agreement. Through the contractual provision requiring the author of the documentation to be cited, they could be granted the acknowledgement of a certain authorship on the work (which could even be the simple mention of his name).[25]

V. Free Access and Public Use

Having analysed the authorial prerogatives and their limitations, this section examines whether there are obligations or legitimate claims of publications of the results of the research, both in the technical-didactic and in more elaborated forms, so to make such documentation available in an open access version.

Decreto legislativo 25 May 2016 no 97 introduced a reorganisation of the regulation on the right of access and the obligation of disclosure, transparency and dissemination of information by public administrations. Inspired by the British Freedom of Information Act, it aimed to provide the public with an open access to such documents. However, the practical implementation of the Decreto has been significantly slowed by bureaucratic and procedural uncertainties.[26]

Thanks to the requirement of 'transferring to the National Archives the documents stored by state administrations' provided by Art 41 of the Code, it is currently accessible the documentation dating back to more than forty years. According to Art 122 of the Code, such documentation shall be freely available to anyone and without the need to justify the request of access.

The consultation for historical purposes of the current archives (created less than 40 years ago) is regulated by Art 124 of the Code, and requires that institutions shall set particular rules concerning their archives, without prejudice to the provisions of legge 7 August 1990 no 241 on the right of access to administrative documentation, based on general guidelines determined by the Ministry. Legge 241/90, modified by legge 4 August 2015 no 15 defined the right of access as the right of data subjects to inspect and take copies of administrative documents. The legal basis of the right relies on the principle of transparency of the administrative activity, which is also contemplated by Arts 97 and 98 of the

celebrated of the masterpieces (…) the requirement of the minimum of creativity implies that 'we certainly cannot demand' brilliant 'achievements to attribute royalties, (but) on the other hand an indiscriminate protection in favor is not even acceptableof every 'creative' coin'. See also M. Bertani, *Diritto d'autore europeo* (Torino: Giappichelli, 2011), 128: the author refers to the test of the non-triviality of the expressive form with respect to the works of the same kind (the so-called criterion of non-triviality).

[25] P. Greco, n 19 above, 257, argues that when a work is created pursuant to an employment agreement having as its object the creative activity, and the work is remunerated as such, the economic rights rest with the employer. The author can only enjoy the moral rights on such work.

[26] M. Ciurcina and P.G. Grossi, 'Beni culturali: brevi note sui dati e sul loro uso pubblico alla luce delle recenti modifiche legislative', in M. Serlorenzi ed, 'Archeofoss. Free, Libre and Open Source Software e Open Format nei processi di ricerca archeologica. Records of the VII Workshop (Rome 2012)' *Archeologia e Calcolatori*, IV, 35-44 (2013).

Constitution, setting out the principle of good administration, and by Art 21 of the Constitution affirming the right to information.

Providing access to administrative documents represents a general principle of the administrative activity, aimed at encouraging the participation of society as a whole and at ensuring the impartiality and transparency of the administrative action.

Recently, the principle of free access to the archives for anyone, without the need to justify the request, was reaffirmed in Circular No 1/2016 of the Directorate-General for Archaeology and within the so-called 'Guidelines for preventive archaeology'. An implementing Decree is expected to be adopted in relation to the latter, which has not been signed yet due to the reform of the public procurement code and of the replacement of legge 12 April 2006 no 163 with the decreto legislativo 18 April 2016 no 50.

The Circular states that the documentation concerning the excavation data shall be immediately published in digital format according to the modalities set out by the Ministry of Cultural Heritage and Activities and Tourism, on a freely accessible information platform. Additionally, the publication of the interpretative summaries shall in principle be carried out both on paper and digital format, within twenty-four months from the conclusion of the field studies.

In the same Circular there are numerous insights in favour of an open access to administrative documents for scientific, historical and statistical purposes. For example, with regard to the final publication of the results of the excavation, it is possible to mandate the public officer responsible for the preliminary study on behalf of the Superintendence to present a motivated proposal to the Superintendence for the assignment of further elaboration, or of specific studies to particular experts in specific fields who did not take part in the digs.

The related studying activities, or the ones consequential to the research conducted on the field, are planned by the Superintendence with the collaboration of the coordinator of the archaeological excavation. If the master plan for the publication of the excavation results or the related time schedule are not respected, it is the Superintendent's responsibility to take the necessary measures to ensure a correct and timely publication of the excavation results, after having consulted the archaeologist responsible for the study. Furthermore, in the case of excavations of particular relevance, the preventive reports and the preliminary excavation reports shall be published, in a geo-referenced form, on the Directorate-General for Archaeology,[27] which could additionally host the final publications.[28]

There is no doubt that the limitations in the managing and circulation of the cultural good should be overcome for the sake of its valorisation. Indeed, it

[27] See https://tinyurl.com/ygydogpe (last visited 30 December 2019).

[28] It should be noted that each regional Superintendence has its own current archive and has decision-making autonomy concerning the publication of reports on the area, and to the citation of the authors of the excavation documentation.

is necessary to ensure the public enjoyment of the cultural good, so that it can manifest its cultural character and perform its function of promotion of culture provided for in Art 9 of the Constitution.

Nevertheless, together with the free use of the documentation, also the access to the data is useful in order to improve the enjoyment of cultural goods. There is no doubt that for an archaeologist a discovery missing the information relating to the discovering context appears deprived of a large part of its potential to disseminate information. Therefore, it is only through the access to the informative data on the cultural good (delivered to and kept by the Superintendence) that is possible to fully perform the activity of valorisation. In this respect, it is unreasonable that the data produced through the archaeological activity, which are usually not replicable unless there exists the continuous possibility to consult them, remain unpublished or inaccessible. In fact, they are of central importance, as they represent the instruments through which the scientific community can pursue the reconstruction of the interpretative process and the formulation of new historical interpretations. For the sake of the objectives mentioned at the beginning of this paper, the access to cultural goods and to their related data serve as a key to ensure that the State's cultural heritage is effectively 'destined to the enjoyment of the society as a whole' (Arts 2 and 4 of the Code).[29]

[29] As laid down in the Paris Convention of 1972, the objective should not be the goods as such, but rather the Cultural Heritage of Humanity, of which such goods constitute a material evidence. See A.L. Tarasco, *Il Patrimonio culturale, concetto, problemi, confini* (Napoli: Editoriale Scientifica, 2019), 34; See also U. Leanza, 'La protezione dei beni culturali e il concetto di patrimonio comune dell'umanità', in G. Marini et al eds, *Scritti in onore di Angelo Falzea* (Milano: Giuffrè, 1991), I; Id, 'Le nuove frontiere della protezione internazionale del patrimonio culturale, materiale ed immateriale', in A. D'Atena ed, *Studi in onore di Pierfrancesco Grossi* (Milano: Giuffrè, 2012), 221.

Essays

Rules on Private Antitrust Enforcement and the Value of the Competition Authority's Decisions: New Limits for Judicial Review?

Laura Lamberti*

Abstract

This paper addresses the issue of the extent of judicial review over the sanctioning measures of the Competition Authority and its possible limitations following the introduction of private antitrust enforcement regulation. The matter is important since it helps to define the position, within the framework of the institutional scenario, of authorities that perform delicate functions in sensitive sectors and operate outside the classic democratic legitimacy circuit. The essay reconstructs the scholarly debate surrounding the sanctioning powers of the Independent Administrative Authorities (IAA) and the evolution in the case law regarding the form of protection guaranteed in their respect. The topic is examined within the more general context of the question of how to properly classify the discretional technical activity of the public administration. Particular attention is given to the decisions of the European Court of Human Rights, which has held that the principle of the fair trial (Art 6 ECHR) applies to the IAAs sanctions and ruled that the full jurisdiction canon must be complied with in the event that the sanctioning procedures do not comply with the necessary guarantees. The paper also analyses certain decisions of the Italian Supreme Court of Cassation on the extent of judicial review that, although adverse, have been transfused into private enforcement antitrust regulation by the decreto legislativo 19 January 2017 no 3. In its conclusions, the essay raises doubts about the compatibility of such a scheme with Art 111 of the Constitution and Art 6 ECHR and suggests an interpretation of the entire regulatory system consistent with the Constitution and the ECHR.

I. Introduction

The creation of a single market and the resulting regulatory instruments to protect competition are at the core of the process of European integration. In the Italian legal system, the fundamental features of public legislation for the protection of competition have been outlined, by legge 10 October 1990 no 287,[1]

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[1] The Competition Authority was established during the so-called 'season of the independent Authorities'. In that period this phenomenon, as defined by A. Predieri, *L'erompere delle Autorità amministrative indipendenti* (Firenze: Passigli Editore, 1997), was the answer to a complex situation that revealed the need of institutions out of politics. Therefore, the North American-based model has been used, but the reasons for their creation-were completely different. Since then the doctrine has never stopped dealing with IAAs, also because of the numerous and complex

which follows the European framework. Such law originally focused on the sanctioning powers attributed to the Italian Competition Authority. Subsequent reforms added multiple different powers to the Authority constituting the current public antitrust enforcement system. Legislative attention was focused exclusively on these aspects.[2] Different from the North American system, private enforcement tools have not received a dedicated regulatory scheme or specific attention from scholarship. The reasons for this are many, but all essentially relate to the belief that private enforcement is not capable of contributing significantly to the success of the antitrust system. At the European level, the gap created by the delay in recognizing that the private enforcement system is complementary in protecting competition was implemented by Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014.[3] This was transposed into the Italian system by the decreto legislativo 19 January 2017 no 3.

This essay looks at the provisions of Art 7 of decreto legislativo no 3/2017, concerning the 'effects of the decisions by the Competition Authority'. This, in implementing the terms under Art 9 of Directive 104/2014, aims to ensure optimal interaction between the private and public enforcement areas, 'in order to ensure the maximum effectiveness of the competition rules', as set out in recital 6. It represents a necessary link between the public and private law dimensions. This is an expected and desirable connection. However, in its formulation, the legislator has gone beyond the connection between public and private judgment, going so far as to define the limits of judicial review of sanction decisions. It is therefore necessary to verify how this provision fits into the controversial issue of the extent of judicial review about antitrust sanctions. In general terms, the question relates to the adequacy of the protection ensured against sanctions imposed by Independent Authorities. This is an aspect extensively debated by the legal doctrine and repeatedly addressed in case law but has recently acquired renewed relevance due to the occurrence of various factors.

First, the decisions of the European Court of Human Rights (ECtHR), which definitively clarified that the sanctions imposed by the IAA must be ascribed to criminal matters. In so doing, the Court affirmed the need to ensure compliance with the guarantees of Art 6 of the European Convention of Human Rights (ECHR), in relation to them.

Second, but in a contradictory sense, some rulings of the Corte di Cassazione on administrative judges' excess of jurisdiction, which have reduced the openings created by legal scholarship and by some trends in administrative case law over the years. This happened in particular in the ruling Corte di Cassazione-Sezioni

compatibility problems that these institutions raise due to their eccentricity *vis-à-vis* the Constitution.

[2] Despite the recognition of the direct applicability to the relationships between private parties as provided for in Arts 2 and 3 of legge 287/1990, such as those in Arts 101 and 102 TFEU.

[3] On certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

unite 20 January 2014 no 1013 the contents of which, although considered by many to be a step backward on the path towards the effectiveness of protection, were transfused into the text of Art 7 of the decreto legislativo no 3/2017, which is dealt with below.

In what follows, I will first address the subject of the IAAs' sanctioning power, focusing on the sanctions imposed by the Competition Authority to establish what role a judge must assume in relation to them. The issue involves the more general topic of the limits on judicial review regarding the decisions of the public administration taken on the basis of technical assessments that entail the application of undetermined legal concepts. Once the theoretical and regulatory framework of reference has been reconstructed, I will verify how it has been applied in the case law. In particular, an attempt will be made to clarify how Art 7 should be interpreted in order to overcome doubts of constitutional legitimacy and not conflict with the obligations deriving from Art 6 of the ECHR.

II. The Sanctioning Power of the Independent Authorities and the Regulation of Judicial Review

In the aftermath of determining the IAAs model, the debate regarding the qualification of their juridical nature has been influenced by the attribution of important sanctioning powers to them. In agreeing on the need to deny their jurisdictional or para-jurisdictional nature, most legal scholarship has categorized them as part of the public administration.[4] On this point, which seemed

[4] Upon the emergence of the IAAs, different theses have been formulated by the doctrine on the topic of their juridical nature. In this context it is useful to recall first of all the position of S. Cassese, 'Poteri indipendenti, Stati, relazioni ultrastatuali' *Il Foro Italiano,* V, 9 (1996) who, by placing the authorities among the powers of constitutional law, recognized their nature as a 'fourth power', or that of V. Caianiello, 'Le Autorità indipendenti tra potere politico e Stato civile' *Rassegna giuridica dell'energia elettrica*, 341 (1997), who, always excluding the possibility of bringing the phenomenon of independent authorities back to the traditional tripartition of powers, and relying on the originality and innovativeness inherent in the concept of neutrality, qualifies the authorities as an 'expression of a new relationship between State and Society' which was incompatible 'with the idea of administration in the traditional sense'. On the contrary, other authors such as G. Amato 'Autorità semi-indipendenti ed autorità di garanzia' *Rivista trimestrale di diritto pubblico*, 645 (1997) found their legitimate basis in the first part of the Constitution. Others derived the quasi-jurisdictional nature of the functions exercised from the independence and the tertiary nature of authorities: C. Malinconico, 'Le funzioni amministrative delle autorità indipendenti', in S. Cassese and C. Franchini eds, *I garanti delle regole* (Bologna: il Mulino, 1996), 46; M. Clarich, *Autorità indipendenti: bilancio e prospettive di un modello* (Bologna: il Mulino, 2005), 110-112 and also 151. The majority of legal scholarship agrees in recognizing the administrative nature of the independent authorities. See, in particular: G. Morbidelli, 'Sul regime amministrativo delle Autorità indipendenti', in A. Predieri ed, *Le Autorità indipendenti nei sistemi istituzionali ed economici* (Firenze, 1997), 145; M. Ramajoli, *Attività amministrativa e disciplina antitrust* (Milano: Giuffrè, 1998); N. Longobardi, *Autorità amministrative indipendenti e sistema giuridico istituzionale* (Torino: Giappichelli, 2004), 101; F. Manganaro, 'La giustizia innanzi all'Autorità garante della concorrenza e del mercato',

definitively clarified, the Corte Costituzionale stepped in with Judgment 31 January 2019 no 13. The Court denied the qualification of the Competition Authority as a *judge* and ruled it unqualified to raise an incidental question of constitutionality.

In general terms, with regard to the administrative sanctioning power, there are two opposing approaches: the first one focuses on the punitive value of the sanction, the other emphasises its quality as an instrument aimed at the fulfilment of public interests. Under the first view, administrative penalties are considered measures of particular specificity, especially in the light of the introduction of the decriminalization law of 1981.[5] The sanctions represent the reaction of the system against behaviour qualified as anti-juridical, and to which corresponds a punitive content that pursues general and special preventive purposes.[6] Moreover, in imposing pecuniary sanctions, the nature of which is exclusively afflictive, the public administration is deprived of any margin of discretion. The public administration verifies the existence of an offense which determines, *ex lege*, the application of the same sanction.[7] According to the second (and to a certain extent antithetical) position, the public administration would exercise not only an authoritative but also a discretionary activity, in relation to its sanctioning power.[8]

available at www.giustamm.it, 2009. The case law has tended to agree, since the well-known judgment Corte di Cassazione 20 May 2002 no 7341, *Corriere giuridico*, 1153 (2002) where it was stated that: 'the legal system does not know a tertium genus between administration and jurisdiction, to which the Constitution reserves respectively, in order to distinguish and regulate its activities, Arts 111 and 97. In the constitutional system there is no independent 'parajurism', apart from the two above, but rather this descriptive term is customarily used to indicate public bodies with powers whose place has given rise to doubts'.

[5] There are two ontological characteristics of the administrative sanction: 'the unfavorable impact with respect to a recipient's interest' and 'the relationship with the violation of a precept by the citizen'. These would allow the legal concept of sanction to be identified as a 'penalty in the technical sense' C.E. Paliero and A. Travi, 'Sanzione amministrativa' *Enciclopedia del Diritto* (Milano: Giuffrè, 1989), XLI, 350. Recently on this theme P. Cerbo 'La depenalizzazione fra giudice penale e amministrazione (e giudice dell'opposizione)' *Diritto Amministrativo*, 55 (2018); M. Delsignore 'Le regole di convivenza della sanzione amministrativa' *Diritto Amministrativo,* 235 (2017).

[6] Furthermore, the sanction in its strictest sense is distinguished from the restorative measure. The first one is directed exclusively to ensure compliance with rules designed to protect the public interest, the second one, instead, to pursue the same interest whose violation the law is responsible for.

[7] In the restorative sanctions the pursuit of the public interest comes into consideration. On the absence of discretion in the pecuniary sanctions about *an* see M.A. Sandulli, *Le sanzioni amministrative pecuniarie* (Napoli: Jovene, 1983), 199. On this point, see also: R. Villata, 'Problemi di tutela giurisdizionale nei confronti delle sanzioni amministrative pecuniarie' *Diritto processuale amministrativo*, 398 (1986); G. Serverini, 'Sanzioni amministrative (processo civile)' *Enciclopedia del diritto* (Milano: Giuffrè, 2002), Agg VI, 1005; and, of course, E. Capaccioli, 'Il procedimento di applicazione delle sanzioni amministrative pecuniarie' *Le Sanzioni amministrative*, *Atti del XXVI Convegno di studi di scienza dell'amministrazione* (Milano: Giuffrè, 1982), 87.

[8] These theses have recently been taken up from F. Goisis 'Discrezionalità e autoritatività nelle sanzioni amministrative pecuniarie, tra tradizionali preoccupazioni di sistema e nuove prospettive di diritto europeo' *Rivista italiana di diritto pubblico comunitario*, 79 (2013). From the same author, however, see also the more recent 'Verso una nuova nozione di sanzione amministrativa in senso stretto: il contributo della Convenzione europea dei diritti dell'uomo'

The sanctioning power exercised by independent administrations is also discussed by the scholarship because of the specific characteristics of the parties exercising it and the type of interests involved. In particular, the neutral or discretional nature of the sanctioning powers exercised by Competition Authority[9] is still controversial, as revealed by the judgment of the Corte Costituzionale dated 31 January 2019 no 13.

The original debate on the legal nature of the independent authorities and, in particular, of the Competition Authority, caused initial caution in the exercise of judicial review by courts.[10] On the opposite side, the lack of a constitutional provision legitimising the IAAs, placed outside the democratic circuit, required a strong judicial review. The absence of constitutional coverage has been considered by scholarship to be offset by the legitimacy deriving from European law, as well as the increase in procedural guarantees,[11] which was accompanied

Rivista italiana di diritto pubblico comunitario, 337 (2014) and 'La full Jurisdiction sulle sanzioni amministrative: continuità della funzione sanzionatoria v. separazione dei poteri' *Diritto processuale amministrativo* (2018), in which the need arises, following the impact of the case law of the European Court of Human Rights, to identify a notion of pecuniary sanction in a strict sense in which the exclusively punitive purpose is exalted.

[9] Among the first authors to highlight and enhance the profile of neutrality, as a distinctive and characterizing feature of the IAAs, see V. Caianiello, 'Il difficile equilibrio della Autorità indipendenti' *Il diritto dell'economia*, 239 (1998). Similarly, see: M. Clarich,'Autorità indipendenti' n 4 above, 85; E.L. Camilli and M. Clarich, 'Poteri quasi giudiziali delle autorità amministrative indipendenti', in M. D'Alberti and A. Pajno eds, *Arbitri dei mercati* (Bologna: il Mulino, 2010), 108: 'The same functions exercised by the Authorities have an accentuated degree of *neutrality* that is equidistant between the various interests at stake and a finalization limited to the mere compliance with the rules and the correct functioning of the market'; G.P. Cirillo and R. Chieppa, *Introduzione,* in G.P. Cirillo and R. Chieppa eds, *Le Autorità amministrative indipendenti* (Padova: CEDAM, 2010), 28, which, illustrating the reasons for the creation of the independent authorities, first indicate 'the attribution of neutral, regulatory functions of all the interests at stake, both public and private, without any political conditioning, without any prevalence of the public interest in the classic comparison of the interests proper to the exercise of administrative discretion. The functions assigned to the independent authorities do not or should not fall within the management activity, but in that of regulatory control and sanction for which neutrality is necessary'. With similar contents, see also 63, 67 and 68. A. Pajno, 'Il giudice delle Autorità amministrative indipendenti' *Diritto processuale amministrativo*, 627 and again 640 (2004), also speaks of the exercise of neutral powers. For the critique of this approach, see for all A. Police, *Tutela della concorrenza e pubblici poteri* (Torino: UTET, 2007), 127, 178 and, in particular, 245 et seq, which, in relation to the *antitrust* function, supports the need to recognize the end of the 'myth of neutrality'.

[10] Thus F.G. Scoca, 'I provvedimenti dell'Autorità e il controllo giurisdizionale', in C. Rabitti Bedogni and P. Barucci eds, *20 anni di Antitrust; L'evoluzione dell'Autorità Garante della Concorrenza e del Mercato* (Torino: UTET, 2010), I, 259. However, the hypothesis that their acts could not be subject to judicial review was immediately abandoned. On this subject, R. Villata, 'Giurisdizione esclusiva e amministrazioni indipendenti' *Diritti interessi e Amministrazioni indipendenti* (AIPDA) *Annuario* (Milano: Giuffrè, 2002), 201.

[11] In regulatory procedures, such guarantees consist in an increase of participation in the collaborative function, through systems of notice and comment, whereas the sanctioning procedures strengthen the right to be heard as a guarantee of defence. M. Clarich, *Autorità indipendenti* n 4 above, expecially in chapter IV; M. Ramajoli, 'Procedimento regolatorio e partecipazione', in E. Bruti Liberati and F. Donati eds, *La regolazione dei servizi di interesse*

by the need for judicial review to ensure the effectiveness of the protection.[12]

As for positive regulation, the lack of general legislation on independent authorities affected a corresponding lack of a unified procedural law regulating challenges to their acts, for long time. This gap was filled by the Code of Administrative Procedure, which complies with the preference the legislator showed in the various institute laws for the exclusive jurisdiction of the administrative judge. Art 133, para 1, letter *l*) of the Code assigns review of the decisions of the independent administrative authorities, including sanctions, to the exclusive jurisdiction of administrative judges;[13] Art 134, para 1, letter *c*) provides for the jurisdiction of merit in relation to fines, including those imposed by the independent administrative authorities, the contestation of which is assigned to the jurisdiction of administrative judges; Art 135 establishes the mandatory functional competence of the *Tribunale Amministrativo Regionale* of Lazio, Rome office.[14]

The reasons for this preference are numerous: first, the controversies involving the IAAs involve an 'inextricable interweaving' of subjective legal situations and the objective uncertainty, in many contexts, of the distinction between subjective rights and 'legitimate interests'. This is the chief motivation for the establishment of exclusive jurisdiction.[15] Second, the growing tendency to identify the administrative

economico generale (Torino: UTET, 2010), 189. On the regulatory powers of the IAAs see V. Cerulli Irelli, 'I poteri normativi delle Autorità Amministrative Indipendenti', in M. D'Alberti and A. Pajno eds, *Arbitri dei mercati. Le Autorità indipendenti e l'economia* (Bologna: il Mulino, 2010), 75; F. Merusi, *Democrazia e Autorità indipendenti. Un romanzo «quasi giallo»* (Bologna: il Mulino, 2000), 83; A. Pajno, 'Il giudice delle autorità amministrative indipendenti' *Diritto processuale amministrativo*, 621 (2004); M. Clarich and L. Zanettini, 'Le garanzie del contraddittorio nei procedimenti sanzionatori dinanzi alle Autorità indipendenti' *Giurisprudenza commerciale*, 358 (2013); P. Lazzara 'La regolazione amministrativa: contenuto e regime' *Diritto Amministrativo*, 337 (2018).

[12] F.G. Scoca 'Giudice amministrativo ed esigenze del mercato' *Diritto amministrativo*, 277 (2008); G. Morbidelli, 'Sul regime amministrativo' n 4 above, 251, who says that 'the reliance on the constitutional system of independent authorities requires them to be subject to full judicial review, in the exercise of their subjection to law, whereas there is a lack of administrative control and political control, and constitutional values are at stake'. Along the same lines R. Caranta, 'Il giudice delle decisioni delle Autorità indipendenti', in S. Cassese and C. Franchini eds, *I garanti delle regole* (Bologna: il Mulino, 1996), 167; R. Villata, 'Giurisdizione esclusiva' n 10 above, 729; A. Police, *Tutela della concorrenza* n 9 above, 157; R. Chieppa, 'Le sanzioni delle Autorità indipendenti: la tutela giurisdizionale nazionale' *Giurisprudenza commerciale*, 342 (2013).

[13] In its original form, the reference was also to the sanctioning measures adopted by Consob and the Banca d'Italia before the intervention of the Constitutional Court, for violation of Art 76 of the Constitution. See section IV.

[14] With specific regard to the rite, then, Art 119, para 1, letter *b*) of the *Codice del processo amministrativo* includes disputes relating to the measures adopted by independent authorities (with the exception of those relating to the service relationship with its employees) among those to which the abbreviated procedure is applied.

[15] See M. Clarich, *Autorità indipendenti* n 4 above, 194. On the point, see also F. Merusi, 'Giustizia amministrativa e autorità amministrative indipendenti' and A. Romano Tassone, 'Situazioni giuridiche soggettive e decisioni delle amministrazioni indipendenti' both in (AIPDA) *Annuario*, n 10 above, 175 and 305.

judge as the 'natural' judge of the independent administrative authorities due to the latter's sensitivity to knowing issues involving the public powers connected to economic events and how they are regulated. To these reasons, we must add the emphasis[16] relating to the type of judicial review that was established with regard to these acts, and, in particular, in relation to those issued by the Competition Authority. The purpose was to prevent judges from going beyond the annulment of the administrative measure, and to establish a form of judicial review that would, if necessary, substitute the technical assessments formed in the course of proceedings and considered more convincing than those established by the administration and codified in the administrative measure.[17]

III. The Problem of the Boundaries of Judicial Review on the Discretionary Technical Assessments and the Evolution of Antitrust Sanctions in Case Law

Concerning the type of protection that the legal system must ensure against IAAs sanctions, it bears remembering that some legal scholars[18] have expressed their favor for a full and effective[19] protection and an intrinsic scrutiny on the discretionary technical choices of the administration. These assessments are related to facts and wholly analysable by the judge. In general terms, the scholarly debate[20] on how to frame the discretionary technical activity of the public

[16] F.G. Scoca, 'I provvedimenti dell'Autorità' n 10 above, 264.

[17] ibid 263. The choice of the functional competence of the TAR Lazio and, within it, the assignment of the knowledge of the events in question to the First of the Three Sections, according to the author, responds to the intention of the legislator to implement the concentration of such events in a single judge for both first and second instance. In this regard, although the positive effect of this option is undeniable as regards the ability to guarantee uniformity in the guidelines and increasingly greater competence in judges dealing with the subject constantly, the risks inherent in a non-physiological order can also be determined.

[18] ibid 259.

[19] On the issue of the effectiveness of judicial protection see G. Montedoro, *Il giudice e l'economia* (Roma: Luiss University Press, 2015), 105, which recognizes the undeniable role that it plays in the legal system because it represents 'the same force of substantive law as it results at the end of the procedural events that must guarantee its implementation' and leads, however, an interesting critical reading on the vision of effectiveness as 'myth of the infallibility of the judge'. The author notes the increasingly widespread tendency to place the administration 'under judicial protection, weakened and deprived of its traditional function' and to invest the judge 'of a saving function - with the consequent dismissal of politics and administration deriving from which disappointing results could only be triggered'.

[20] The bibliography on the subject of technical discretion is extensive. See, for a small sample: V. Bachelet, *L'Attività tecnica della pubblica amministrazione* (Milano: Giuffrè, 1967), now in *Scritti giuridici* (Milano: Giuffrè, 1981), I, 237; F. Ledda, 'Potere, tecnica e sindacato giudiziario sull'amministrazione pubblica' *Diritto processuale amministrativo*, 371 (1983); C. Marzuoli, *Potere amministrativo e valutazioni tecniche* (Milano: Giuffrè, 1985); V. Ottaviano, 'Giudice ordinario e Giudice amministrativo di fronte agli apprezzamenti tecnici dell'amministrazione' *Rivista trimestrale di diritto e processo civile* (1986); F. Salvia, 'Attività amministrativa e discrezionalità tecnica' *Diritto processuale amministrativo*, 685 (1992); D. De Pretis, *Valutazioni*

administration has consistently involved scholars of administrative law,[21] both from a substantive and procedural point of view. It is difficult to share the reconstructions that, on various occasions and based on different issues, have proposed identifying technical discretion with the administrative one, or, in any case, attempting to bring the two closer[22] (and advocating a corresponding assimilation by a related judgment). We must then agree with the thesis that considers technical discretion to be unrelated to administrative discretion, if not for a confusion of terminology that should be rectified. This rectification has not taken place only because of the widespread awareness that the two are unrelated.[23] According to this approach, considering the indeterminate legal

amministrative e discrezionalità tecnica (Padova: CEDAM, 1995); Id, 'I vari usi della nozione di discrezionalità tecnica' *Giornale di diritto amministrativo,* 331 (1998); F.G. Scoca, 'Sul trattamento giurisprudenziale della discrezionalità', in V. Parisio ed, *Potere discrezionale e controllo giudiziario* (Milano: Giuffrè, 1998) 107; Id, 'La discrezionalità nel pensiero di Giannini e nella dottrina successiva' *Rivista Trimestrale di diritto pubblico*, 1045 (2000); F. Volpe, 'Discrezionalità tecnica e presupposti dell'atto amministrativo' *Diritto processuale amministrativo*, 791 (2008); G.C. Spattini, 'Le decisioni tecniche dell'amministrazione e il sindacato giurisdizionale' *Diritto processuale amministrativo*, 133 (2011); G. De Rosa, 'La discrezionalità tecnica: natura e sindacabilità da parte dei giudici amministrativi' *Diritto processuale amministrativo*, 513 (2013). S. Cognetti, 'Il controllo giurisdizionale sulla discrezionalità tecnica: indeterminatezza della norma e opinabilità dell'apprezzamento del fatto da sussumere' *Diritto processuale amministrativo*, 349 (2013); as well as the authors cited in the next note.

[21] Even aware of the ontological difference between technical evaluation and the weighing of interests, this area was historically considered reserved to the administration: F. Cammeo, 'La competenza di legittimità della IV sezione e l'apprezzamento dei fatti valutabili secondo criteri tecnici' *Giurisprudenza italiana* (1902). E. Presutti, 'Discrezionalità pura e discrezionalità tecnica' *Giurisprudenza italiana,* IV (1910); Id, *I limiti del sindacato di legittimità* (Milano: Giuffrè, 1911) due to the accessory role of the technical discretion with respect to the evaluation of the interests from which the reserved character has derived O. Ranelletti, *Principi di diritto amministrativo* (Napoli: L. Pierro, 1912), I, 368. The unquestionability of such judgments is then affirmed even more when the idea of the irrelevance of the distinction between the two categories, and of the attribution of technical discretion to the topic of administrative merit, prevails (P. Virga, 'Appunti sulla c.d. discrezionalità tecnica' *Jus*, 101 (1957); A.M. Sandulli, *Manuale di diritto amministrativo* (Napoli: Jovene, since the 1952 edition and recently 1989, 595). Critics of these theories invoke respect for the principles of effectiveness of protection and the possibility of conducting a non-external and formal review in relation to these technical assessments F. Ledda, 'Potere, tecnica' n 20 above, 371.

[22] The idea of the absolute extraneousness of technical discretion to administrative discretion, due to the lack of any assessment concerning the comparative weighting of interests, was already supported by M.S. Giannini, *Corso di diritto amministrativo* (Milano: Giuffrè, 1967) and lastly Id, *Diritto amministrativo* (Milano: Giuffrè, 1993), II, 55.

[23] M.S. Giannini, *Diritto amministrativo* n 22 above, 56: 'Discretion refers in fact to a power, and implies a judgment or a will together; technical discretion refers to a cognitive moment, and implies only a judgment: what pertains to the volition comes later, and may involve or not involve a separate discretionary assessment'.

On the contradictory nature of the notion of technical discretion, again, F.G. Scoca 'Valutazioni automatiche di titoli scientifici' *Il Foro amministrativo Cds*, 2892 (2011) which comes to affirm that it seems to be difficult 'to drive away from the mind the idea that the conceptual ghost of technical discretion is evoked by the judge when he does not intend to go to the bottom of the investigation of the fact'.

concepts present in the rules of reference, the court must also qualify and specify them, and its judicial review cannot be limited to a mere verification that the assessments made by the administration are consistent or not unreasonable. This is an activity that does not imply an evaluation or comparison of interests, nor does it pertain to administrative merit,[24] which is the only area legitimately reserved to the administration.[25] The lack of any legislative anchor of the reservation to the administration about discretionary technical assessments means it is possible to fully verify technical assessments, even if they are questionable, given that they are related to the facts.[26] This complies with the principle of effectiveness of the protection, which is constitutionally guaranteed. So, with specific regard to the topic at hand, the presence of indeterminate legal concepts in Arts 2 and 3 of legge no 287/1990, which the Antitrust Authority must apply, implies the need to carry out an activity of specification, contextualization, and, therefore, definition of the concepts. This activity based on scientific (technical-economic) knowledge does not involve evaluation and weighing of interests. The complexity of the knowledge involved can, therefore, cause difficulties in identifying an incontrovertible option, since it is possible to qualify the same assumption in different ways that are all theoretically legitimate. It is worth repeating that, all of this leads the question to the field of questionability, but not of opportunity.

However, as laid out below, it is precisely because of the importance given to the questionability of the technical assessments that the case law and the majority of scholars have affirmed a reservation to the administration.[27] This

[24] On the concept of merit in specific relation to the themes in question, see: G. Montedoro, 'Processo economico, sindacato giurisdizionale ed autonomia dell'amministrazione: la questione del merito amministrativo', in Id, *Il giudice e l'economia* n 19 above, 145.

[25] On the type of judicial review exercisable over technical assessments, see: F. Ledda, 'Potere, tecnica' n 20 above, 371 et seq; L. Benvenuti, *La discrezionalità amministrativa* (Padova: CEDAM, 1986); A. Travi, 'Il giudice amministrativo e le questioni tecnico-scientifiche: formule nuove e vecchie soluzioni' *Diritto pubblico*, 440 (2004); S. Cognetti, 'Il controllo' n 20 above, 349.

[26] F.G. Scoca, 'La discrezionalità' n 20 above, 1066: 'every area of technical appreciation, which is reserved to the administration, and cannot therefore be verified in court, involves a lesion (or a compression) of the principle of full and general judicial protection, established in principle by Art 24, and reiterated, with precise reference to the action of public administrations, by Art 113 of the Constitution'. In this sense, even in the necessary variety of reconstructions, see: G. Vacirca, 'Riflessioni sui concetti di legittimità e di merito nel processo amministrativo' *Studi per il Centocinquantenario del Consiglio di Stato* (Roma, 1981), III, 1589; N. Paolantonio, 'Interesse pubblico specifico e apprezzamenti amministrativi' *Diritto amministrativo*, 486 (1996); Id, *Il sindacato di legittimità sul provvedimento amministrativo* (Padova: CEDAM, 2000), 319; L.R. Perfetti, 'Ancora sul sindacato giudiziale sulla discrezionalità tecnica' *Il Foro amministrativo*, 422 (2000); G. Morbidelli, *Sul regime amministrativo* n 4 above, 251; A. Travi, 'Il giudice amministrativo' n 25 above, 439; Id, Sindacato debole e giudice deferente: una giustizia 'amministrativa?' *Giornale di diritto amministrativo*, 304 (2006); A. Travi, 'Giurisdizione e Amministrazione', in F. Manganaro et al eds, *Sindacato giurisdizionale e 'sostituzione' della pubblica amministrazione* (Milano: Giuffrè, 2013), 3.

[27] Recognize a reservation in favor of the administration on the technical assessments: C. Marzuoli, *Potere amministrativo e valutazioni tecniche* (Milano: Giuffrè, 1985), 228 which

rationale is all the more valid when such assessments are carried out by the independent authorities, which are generally recognized as being endowed with the very high technical competence that ontologically identifies them.

On this point, it bears recalling that administrative case law has followed a significant evolutionary path[28] to arrive at its current recognition of a strong, full, and effective judicial review in compliance with what is expressed by that scholarship[29] that favours intrinsic judicial review of the discretionary technical choices of the administration.

The first step was the release of technical assessments from the riverbed of 'administrative merit' in favor of their reclassification within the general category of discretion. Thus, courts could carry out the ordinary scrutiny of legitimacy in terms of excess of power. Numerous scholars were signaling the clear underlying error involved in classifying the issue. Only the decision of the Consiglio di Stato 9 April 1999 no 601, which recognized the undeniable difference between opportunity and questionability, did administrative courts find an opening to the correct reconstruction of the problem. Next came the different question of the extent judicial review might have on choices that do not consist of comparative assessment of interests. In relation to this aspect, thanks to specific prompts coming from the scrutiny of the Competition Authority's acts and from legal scholars, administrative case law has made significant progress towards ensuring the fullness and effectiveness of the protection. In fact, overcoming early attempts, which, by exercising 'weak review', denied the courts' ability to scrutinize the logic, congruity, reasonableness, correct motivation and instruction of administrative measures, they have come to recognize the need to carry out judicial review that,

> 'fully verifying the facts and the evaluation process carried out by the Authority on the basis of the technical rules, which are in turn scrutinized, meets the only limit in the impossibility of replacing the Authority in the

reconnects it to the existence of a public interest; V. Cerulli Irelli, 'Note in tema di discrezionalità amministrativa e sindacato di legittimità' *Diritto processuale amministrativo*, 463 (1984) which links it to absolute subjectivity and unrepeatable judgment; D. De Pretis, *Valutazioni amministrative e discrezionalità tecnica* (Padova: CEDAM, 1995), 312, 339 and also 373, which reconnects it to the existence of two competing factors: the suitability of the administrative organizational structure and the unequivocal indication by the law. For a complete reconstruction of these defined theses of subjective unquestionability (as distinct from the older classifications of objective unquestionability), together with a convincing and reasoned criticism see N. Paolantonio, *Il sindacato di legittimità sul provvedimento amministrativo* (Padova: CEDAM, 2000), 319 et seq. More recently, still in favor of the aforementioned reservation: F. Volpe, 'Discrezionalità tecnica e presupposti dell'atto amministrativo' *Diritto processuale amministrativo*, 791 (2008); G.C. Spattini, 'Le decisioni tecniche dell'amministrazione e il sindacato giurisdizionale' *Diritto processuale amministrativo*, 133 (2011).

[28] For an analysis of the case law in relation to the subject of the judicial review of technical discretion, see: G. Sigismondi, 'Il sindacato sulle valutazioni tecniche nella pratica delle corti' *Rivista trimestrale di diritto pubblico,* 705 (2015).

[29] F.G. Scoca, 'I provvedimenti' n 10 above, 259; Id, 'Giudice amministrativo' n 12 above.

exercise of a power reserved to it alone'.[30]

In analysing the evolution of case law in the area of antitrust sanctions, one notes that the decisions of the Consiglio di Stato, certainly pervasive, have been based, for a long time, on the indeterminate concepts implemented by the Authority. With specific regard to the possibility for the court to adopt a different position from the one of the Authority, the judge has always confirmed this form of respect for the 'role of the Authority'. But the option that the conviction of the court is formed in light of the adversarial arguments and of potential technical advice, is nothing but a possible 'physiological' outcome connected to the fullness of its scrutiny.[31] This leads to the dreaded possibility of the 'replacement of the administration by the court', an issue often debated, and which involves the separation of powers. The greatest difficulty concerns the scenario in which the questionability of the technical criterion, specifically examined, allows several theses to be identified, all of which are theoretically viable. On closer inspection, however, what often happens is different. Far from being verified in relation to the individual concrete case, questionability is generally invoked by the case law as a prejudicial barrier, as an insurmountable limit, on the threshold of which judicial review comes to a halt. This is not acceptable if one believes that the court has the ability to make a comparison with the

> 'alternative technical theses brought to trial by the parties, introduced by any technical expert advice, or elaborated by the judge himself in relation to each specific aspect of the matter'.[32]

This allows it to completely and independently reconstruct the facts and pronounce on them, not only verifying that the thesis at the basis of the Authority's decision is convincing but ascertaining that it is 'the most convincing' among those submitted in the judgment.[33] These conclusions are today proposed

[30] Consiglio di Stato 2 March 2004 no 926, available at www.federalismi.it; Consiglio di Stato 20 February 2008 no 597, available at www.giustizia-amministrativa.it.

[31] F.G. Scoca, 'I provvedimenti' n 10 above, 278.

[32] ibid 278.

Moreover, the adversarial representations exchanged before the court can weigh more than those before the Authority. This includes the fact that the court's dabatable idea has benefited from the participative/defensive contributions of the involved subjects. As we will specify in Section 5, this detail takes on fundamental relevance in relation to the compliance with Art 6 ECHR.

[33] F.G. Scoca, 'Giudice amministrativo' n 12 above, 279. Of the same opinion is E. Follieri, 'L'attività amministrativa e la sua disciplina', in F.G. Scoca ed, *Diritto amministrativo* (Torino: Giappichelli, 2015), 197 who maintains that, 'the scrutiny of the judge cannot be excluded in case of administrative measures applying a debatable technical parameter belonging to the regulation to be applied to the individual case'. Strictly similar to what the administration does: in such cases it does not apply any weighting of interests, ie no substantive assessment, thus limiting its action to interpret the regulation, the judge as well does nothing but ascertain the fact through an assessment of the technical data contemplated by the norm. For these reasons

as a way of complying with Art 6 ECHR by the most reliable scholarship.

As mentioned in the introduction, with regard to the issue of the extent of judicial review on the sanctions of the IAAs, some recent events move in contrasting directions. One refers to the aforementioned case law of the European Court of Human Rights, and to the resulting theories, which require the full jurisdiction exercise by the judge in the review on the sanctions imposed by the IAAs. The other refers to the provision of Art 7 of decreto legislativo no 3/2017 which[34] identified in that margin of questionability (that the ECHR does not allow to be reserved to the administration imposing a sanction) the boundary that the judge must not overcome in order not to incur into a possible excess of jurisdictional power.

IV. Jurisdiction with Regard to Sanctions Imposed by Consob and the *Banca d'Italia*

Before analysing the contents and consequences of the rulings of the European Court of Human Rights which classify the sanctions imposed by the Competition Authority and by Consob as penal sanctions in compliance with Art 6 ECHR, it is useful to recall the relevant ruling of the Constitutional Court, holding that transferring exclusive jurisdiction on disputes concerning sanctions imposed by Consob and the Banca d'Italia to administrative judges is unconstitutional.

This was the umpteenth intervention on a question that has been the subject of continuous revisions by the legislator and the Supreme Court about a discipline that was in turn characterized by the singular and persistent duplicity of the judge competent to review sanctions.[35]

The sanctions on credit and securities were, therefore, the protagonists of a period of intense activity (with continuous amendments to the rules on jurisdiction), whose last act seemed to be the approval of the Code of Administrative Procedure. The Code effects an undeniable rationalization of the system, moving in the direction of identifying the administrative courts[36] as the 'natural judge of

'one cannot affirm (therefore) that the judge would issue a judgment reserved to the administrative power'.

[34] Translating itself into a statute of limitations as stated by the Corte di Cassazione in its ruling 1013/2014, available at www.cortedicassazione.it.

[35] In fact, the general jurisdiction of the ordinary judge in relation to pecuniary administrative sanctions (established in Art 22 and subsequent Arts of the legge 24 November 1981 no 689), was specifically foreseen also in relation to the sanctions imposed by *Consob* and the *Banca d'Italia*, while, in the subsequent laws establishing the *Antitrust* Authority and the regulators of public utility services, the legislator assigned the syndicate on sanctions to the exclusive jurisdiction of the administrative judge.

[36] In fact, once the significant differences that characterized the powers of cognition and decision of the administrative judge over the ordinary judge were exceeded, and emphasizing the close link between the supervisory and sanctioning activities, a meeting had been held with

the independent Authorities and even of the entire economic regulation'.[37]

With reference to the sanctions imposed by Consob, the Constitutional Court has stated that in exercising the delegation, the legislator had failed to take into account 'the case law of the Joint Civil Divisions of the Supreme Court of Cassation, formed specifically for the matter'.[38] The same considerations are at the basis of the decision concerning the sanctions imposed by the Banca d'Italia.[39] In both cases, according to the Constitutional Court, the delegated legislator, which intervened in an innovative way on the division of jurisdiction between ordinary judges and administrative judges, should have taken into account 'the case law of the Constitutional Court and the Higher Courts in ensuring the concentration of protections'.[40]

In the judgments referred to above, the subject matter is less linear than the representation made by the Constitutional Court, both because of the long and unresolved debate on the sanctions (and of the subjective legal positions involved) and because of the different approaches held by the same Supreme Court about penalties imposed by (or at the suggestion of) independent authorities.[41] These profound differences in approach do not correspond to substantive differences between the cases considered. The aforementioned ruling of unconstitutionality was pronounced on the grounds that the delegation exercised its power incorrectly. This may change if the attribution of cognition on the credit and securities

a single judicial plexus of sanctions managed by the Independent Authorities which, despite the necessary distinctions, present undeniable features of analogy.

[37] M. Clarich and A. Pisaneschi, 'Le sanzioni amministrative della Consob nel "balletto" delle giurisdizioni: nota a Corte costituzionale 27 giugno 2012, n. 162', available at www.giustizia-amministrativa.it (2013), which reconstruct precisely the alternation of ordinary and administrative jurisdiction on the subject determined by the succession of regulatory measures and the consequent interpretations of jurisprudence.

[38] Corte Costituzionale 27 June 2012 no 162 on which see A. Police and A. Daidone, 'Il conflitto in tema di giurisdizione sulle sanzioni della Consob ed i limiti della Corte costituzionale come giudice del riparto' *Giurisprudenza Italiana*, 3, 684 (2013). In this regard, the Council recalled that 'the Supreme Court of Cassation has in fact always specified that the jurisdiction to hear objections (Art 196 of decreto legislativo 24 February 1998 no 58) against the sanctions imposed by Consob financial promoters, including those of an interdicting nature, are the responsibility of the ordinary judicial authorities, given that these sanctions, not unlike the pecuniary sanctions, must be applied on the basis of the seriousness of the violation and taking into account any recurrence and therefore on the basis of criteria that they cannot be considered an expression of administrative discretion'.

[39] Corte Costituzionale 15 April 2014. In relation to this judgment, see: A Daidone, '*Repetita non iuvant*: la Corte costituzionale torna sulla giurisdizione esclusiva' *Federalismi.it*, 16 (2014).

[40] Corte Costituzionale 27 June 2012 no 162, n 38 above.

[41] Corte di Cassazione-Sezioni unite 29 November 2007 nos 24816, 24817 and 24818, *Giustizia civile Massimario*, 11 (2007), on the subject of sanctions imposed on ISVAP's proposal, and in general terms on the classification of the antitrust sanctions Corte di Cassazione-Sezioni unite 9 November 2009 no 23667, *Foro amministrativo*, 2515 (2009). See F. Goisis, 'Le sanzioni amministrative pecuniarie delle autorità indipendenti come provvedimenti discrezionali ed autoritativi: conseguenze di sistema ed in punto di tutela giurisdizionale', in M. Allena and S. Cimini eds, *Il potere sanzionatorio delle Autorità amministrative indipendenti – Il diritto dell'economia. Approfondimenti*, 368 (2013).

sanctions is carried out through an intervention of the ordinary legislator. There is no reason not to prefer a concentration of protections in the hands of the same court that ensures the equality of guarantees in trial proceedings. Similarly, there is no reason to presume, as a traditional and outdated view would, that administrative courts provide less effective protection than the ordinary courts with reference to economic events. The administrative courts can well assure the full protection of those who complain about illegitimate sanctions imposed by the independent authorities, provided that their decisions push to verify the conditions for applying the sanction by evaluating that the unlawful case to be sanctioned really does exist.[42]

V. The Principle of a Fair Trial Under Article 6 ECHR and the Sanctions of the IAAs as Criminal Sanctions

A further conditioning factor related to the scrutiny exercised by administrative courts over the IAAs' sanctions is supranational case law, specifically, the rulings of the European Court of Human Rights pursuant to Art 6 of the ECHR. Concerning 'fair trials', para 1, Art 6 establishes that,

> 'in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.

The interpretation of the Court of Strasbourg on this matter have developed over time. After identifying a series of parameters to refer to in order to maintain a *criminal charge*,[43] the Court has repeatedly commented on the specific issue of sanctions imposed by independent authorities. The Court finally concluded that

[42] In this sense, see M. Ramajoli, 'Giurisdizione e sanzioni pecuniarie antitrust dopo la sentenza della Corte costituzionale n. 204 del 2004' *Diritto processuale amministrativo*, 345, (2005) where it is stated that: 'what is lacking in the protection in the sanctioning field is the point of attack, the premise, that is, the possibility of a full review of the application of the sanctions, is defined as a result of the exercise of technical discretion. The problem is not so much to verify the congruity and correctness of the criteria used by the Authority to determine the amount of the sanctions, but rather to actually ascertain the true existence of unlawful conduct that can be sanctioned. Otherwise, it allows the application of a pecuniary sanction, possibly a large one, for conduct deemed unlawful on the basis of a reasoning of economic theory that belongs to the ranks of the 'inaccurate and questionable sciences', through which the Authority would have 'integrated' indeterminate legal concepts'.

[43] Eur. Court H.R., *Engel and Others* v *the Netherlands*, Judgment of 8 June 1976, cases 5100/71, 5101/71, 5102/71, available at www.hudoc.echr.coe.int. In the Engel ruling a principle is established, which later became consolidated, according to which, if a sanction is classified as a penalty in its internal legal system, the Convention automatically applies to it, but non-classification as a penalty does not exclude the application of the Convention. In this circumstance, the existence of the (autonomous) criteria of the punitive character or the severity of the imposed sacrifice must be assessed.

Art 6 of the ECHR applies to the sanctions imposed by the Competition Authority[44] and those imposed by Consob,[45] in line with its decisions concerning the authorities of other countries. Before dwelling on the content of these judgments, it is important to remember that, the case law of Strasbourg progressively expanded the scope of application of Art 6, highlighting its substantial importance.[46] The ECtHR has interpreted the notions of court, criminal prosecution, and civil rights in a completely independent manner with respect to the meanings adopted by them in the legal systems of the acceding States, so as to extend the applicability of the guarantees provided by Art 6 of the ECHR beyond civil and criminal boundaries, therefore reaching the administrative proceedings originally considered alien to it. Thus the case law of Strasbourg determined that the Court could scrutinize the action of a public administration (in light of the parameters of the *fair trial*) every time that its work translates into a *penalty*[47] for the recipient of its measures or affects a good connected to assets profiles, even indirectly.[48] It also clarified that this scrutiny consists in verifying that the rules on the independence of the authority that commits the penalty and its separation from the one that formulates the accusation,[49] the presumption of innocence, the equality of arms and the full fair hearing between the parties[50] have been complied with. Whenever these

[44] Eur. Court H.R., *Menarini* v *Italy*, Judgement of 27 September 2011, case 43509/08, available at www.hudoc.echr.coe.int.

[45] Eur. Court H.R., *Grande Stevens et Autres* v *Italy*, Judgment of 4 March 2014, cases 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10, available at www.hudoc.echr.coe.int.

[46] Così M. Allena, 'Art. 6 CEDU: Nuovi orizzonti per il diritto amministrativo nazionale' *ius-publicum.com*, December 2014.

[47] Eur. Court H.R., *Varuzza* v *Italy*, Judgment of 9 November 1999, case 35260/97, available at www.hudoc.echr.coe.int.

[48] Eur. Court H.R., *Morscher* v *Austria*, Judgment of 14 November 2006, case 60860/00, available at www.hudoc.echr.coe.int; Eur. Court H.R., Judgment of 5 February 2004, case 54039/00, available at www.hudoc.echr.coe.int.

[49] Eur. Court H.R., *Dubus S. A.* v *France*, Judgment of 11 June 2009, case 5242/04, available at www.hudoc.echr.coe.int, in which, in relation to the French banking sanctions, there is a lack of sufficient separation between the *Secrétariat Général* and *the Commission*. About M. Allena, n 46 above, 17, recalls that following this ruling in France a reform of the system was carried out with the creation of the *Authority de control prudentiel* in which there is a clear distinction between the investigative - accusing and deciding body. The thing, notes the author, 'is particularly significant, especially when we consider that, in fact, *the Secrétariat Général* was not endowed with a position of minor separateness compared to that which connotes the officials carrying out instructive tasks in the sanctioning proceedings of the various Independent Italian Authorities: so, the complaints made against the internal organization of the *Banking Commission* could, in large part, be transferred to the latter'.

[50] Eur. Court H.R., *Uldozzotteinek* Szovetsege *and Others* v *Hungary*, Judgment of 5 October 2000, case 32367/96 APEH; Eur. Court H.R., *Mattoccia* v *Italy*, Judgment of 25 July 2000, case 23969/94, available at www.hudoc.echr.coe.int. On the incompatibility with the provisions of the ECHR of the provisions on the irrelevance of the formal defects referred to in art 21-*octies*, para 2, of the legge 241/1990 see E. Follieri, 'Sulla possibile influenza della giurisprudenza della Corte europea di Strasburgo sulla giustizia amministrativa' *Diritto processuale amministrativo*, 3, 770 (2014). In the same sense F. Goisis, 'Un'analisi critica delle tutele

guarantees cannot be said to be ensured in the procedure put in place by the administration, the judges of Strasbourg move to consider the subsequent judicial review operated by the national courts, thus welding the substantial phase to the trial phase.[51] The canons of the fair trial are considered satisfied only in the event that any procedural deficiencies found are filled by adequate procedural guarantees consisting in the existence of an impartial judge, a public hearing, a complete adversarial process between the parties and a judicial review that ensures the exercise of a full jurisdiction.

With regard to sanctions imposed by the independent authorities, compliance with Art 6 of the ECHR entails, first of all, verifying the existence of procedural guarantees for their application.[52] The story that concerned the sanctioning regulation of Consob is emblematic on this point. In addition to being subject to censorship by the ECtHR in relation to Art 6, it was also considered illegitimate by the Consiglio di Stato.[53] This could be found in an *obiter dictum* which denied the possibility of establishing its illegitimacy in relation to Art 6 of the ECHR[54] and noted with regard to primary internal legislation (Arts 1887-

procedimentali e giurisdizionali avverso la potestà sanzionatoria della pubblica amministrazione, alla luce dei principi dell'art. 6 della convenzione europea dei diritti dell'uomo. Il caso delle sanzioni per pratiche commerciali scorrette' *Diritto processuale amministrativo*, 669 (2013).

[51] Eur. Court H.R., *Vitrenko and Others* v *Ukraine*, Judgement of 16 December 2008, case 23510/02, available at www.hudoc.echr.coe.int.

[52] Survey clearly stated, in relation to Consob sanctions in the Eur. Court H.R., *Grande Stevens et Autres* v *Italie*, Judgment of 4 March 2014, cases 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10. On the point cf F. Cintioli, 'Giusto processo, Cedu e sanzioni antitrust' *Diritto processuale amministrativo*, 515 (2015), which, scrutinizing the antitrust proceedings in light of the findings raised by the Court of Strasbourg in the procedure for imposing the Consob sanctions, in the Grande Stevens judgment, found several findings. For a reconstruction and an in-depth critical analysis of the various regulations cf M. Clarich and L. Zanettini, 'Le garanzie del contraddittorio nei procedimenti sanzionatori dinanzi alle Autorità indipendenti' n 11 above, 358. Again with regard to the Consob sanctions, the issue was last addressed by Consiglio di Stato 26 March 2015 no 1596, *Giornale di diritto amministrativo*, 511 (2015).

[53] Consiglio di Stato 26 March 2015 no 1596, n 52 above.

[54] The Consiglio di Stato has ruled that the Consob regulation 15086/2005 governing the procedure for the application of the sanctions referred to in Arts 187-ter and 187-quater of the TUF, cannot be considered directly contrary to Art 6, para 1 ECHR. This is because this provision does not require the sanctions imposed by Consob to be implemented in the procedural phase, in compliance with the guarantees set forth in Art 6. According to the judges of Palazzo Spada, therefore, it is not correct to derive 'the necessity of a transformation in an almost-administrative sense of the administrative procedure (and the necessary application of the guarantees of due process, especially the horizontal contradictory between two parties placed in positions of equality before the deciding authority) from the provisions concerning the fair trial'. In the event that such guarantees were already provided for and there was an 'almost-judicial' connotation of the administrative sanction procedure, this would allow the issue to be considered satisfied. But, in the absence of these guarantees at the procedural level, which, it is underlined, happens in many Member States, 'Art 6, para 1, ECHR postulates that the person affected by the sanction has the concrete possibility of submitting the question concerning the merits of the criminal prosecution against him to an independent and impartial body endowed with the power to exercise a full jurisdiction review. According to the European Court of Human Rights, the full jurisdiction review implies the power of the judge to review the validity, accuracy and correctness

septies and 195 of the TU, as amended by Law 63/2005) that it failed to comply with the adversarial principle and full knowledge of the documents. This decision of the Consiglio di Stato determined the intention to also amend the subsequent regulation[55] that Consob, pending those judgments, had adopted, and in relation to which, again, these principles did not appear to be fully ensured.[56]

The lack of the aforementioned guarantees, which, for the ECtHR also implies that the sanction thus imposed may not immediately operate, can only be compensated by a subsequent full review by the judge. It, therefore, becomes crucial first to clarify when the full jurisdiction requirement is satisfied and, for the purpose of the thorough review, to verify whether or not it has concretely taken place with regard to the sanctioning acts of the Authorities.

VI. The Full Jurisdiction Canon

An analysis of the case law of Strasbourg makes clear what should be meant by full jurisdiction. To say that the lack of procedural guarantees will be compensated in court, the citizen must have access to an independent court which, exercising full jurisdiction over the merits of the matter,[57] can examine it by law point by point, both in relation to the facts and to the issues, without limits, and especially without restrictions on the findings previously carried out by the Authority, over whose decision the court exercises its review.[58]

However, it is necessary to underline that such full review must be carried out in relation to the specific dispute and with regard to the main protection claims brought by the party before the national judge. In other words, it is to be ascertained whether that judge has carried out a full examination of the question or only conducted an external review with respect to the object of the claim raised by the party in the internal proceedings and subsequently challenged before the Court of First Instance. Only with regard to such situations is it possible to reconstruct the position of the Court of Strasbourg regarding compliance with the full jurisdiction canon.

For the above reasons, it is clear that the Menarini judgment, which even

of the administrative choices, thus achieving, in fact, a continuum between the administrative procedure and the judicial procedure'. And this, it is said, is what happens in our system.

[55] Delibera 18750/2013.

[56] The Delibera of 29 May 2015 no 19158 which amended Arts 4-8 of the *Regolamento* on the sanction procedure of Consob came into effect, enhancing the guarantees of advertising and contradictory. On the aforementioned *Regolamento*, then occurred the decision of 24 February 2016 no 19521 in implementation of the reform operated by Decreto legislativo 12 May 2015 no 72 of the implementation of Directive 2013/36 / EU.

[57] Eur. Court H.R., *W.* v *United Kingdom*, Judgment of 8 July 1987, case 9749/82; Eur. Court H.R., *Steininger* v *Austria*, Judgement of 17 April 2012, case 2153/07, available at www.hudoc.echr.coe.int.

[58] Eur. Court H.R., *Putter* v *Bulgaria*, Judgment of 2 December 2010, case 38780/02, available at www.hudoc.echr.coe.int.

the Corte di Cassazione[59] has interpreted as demonstrating the European Court of Human Rights' recognition of the 'sufficiency' of the review normally performed by administrative courts of sanctioning acts of the Competition Authority, can be read differently. In that case, the Court was asked to hear complaints exclusively concerning legitimacy and not complex technical issues, which constitute the condition for recognizing the existence of the case to be sanctioned. As mentioned above, the Strasbourg judges have explicitly clarified that the verification of compliance with the full jurisdiction requirement must be conducted in strict relation to the claims raised by the party.[60] In the event that the party does not challenge any grounds related to the 'intrinsic decision'[61] or concerning the qualification of the indeterminate legal concepts (relevant market, abuse of dominant position) as preconditions for the imposition of the sanction, the judicial review normally exercised by our administrative courts is likely to pass the scrutiny of the ECtHR.

The same Court, however, as noted by several legal scholars,[62] called to decide on the sufficiency of such a type of scrutiny, when specifically disputed, has clearly affirmed that the judge cannot simply refer to the assessments of the administrative authority, since this would imply a denial to independently scrutinize a crucial issue for the decision of the dispute. With specific reference to the questionability of technical discretion, the Court has expressly ruled in favor of the reconstruction, by the judge, of the technical question in a completely independent and also substitutive way with respect to that achieved by the administration because, using the conclusions drawn from the administration, whose acts are contested, represents a violation of the principle

[59] Corte di Cassazione-Sezioni unite 17 February 2012 no 2312, on which see the sticky note by F. Volpe,'Il sindacato sulla discrezionalità tecnica tra vecchio e nuovo rito' *Giustamm.it* (2012); but also the critical notes of B. Sassani, 'Sindacato sulla motivazione e giurisdizione: complice la *traslatio*, le Sezioni Unite riscrivono l'art. 111 della Costituzione' *Diritto processuale amministrativo*, 1583 (2012); M. Allena, 'Il sindacato del giudice amministrativo sulle valutazioni tecniche complesse' *Diritto processuale amministrativo*, 1602 (2012).

[60] Eur. Court H.R., *Sigma Radio television ltd.* v *Cyprus*, Judgement of 21 July 2011, cases 32181/04 and 35122/05, available at www.hudoc.echr.coe.int.

[61] M. Allena, 'Il sindacato del giudice amministrativo sulle valutazioni tecniche complesse' n 58 above: 'if the citizen challenges an administrative choice on the basis of legitimacy, it goes without saying that the jurisdiction of legitimacy will, in principle, be adequate. Conversely, it is quite clear that complaints relating to the intrinsic nature of the decision on complex facts instead require a judge capable of entering into the merits of this administrative choice, so that the canon of the 'full jurisdiction' can be said to be respected. Indeed, if, by mere hypothesis, in the Menarini affair some really technically complex issues had come into question, such as, for example, the determination of the relevant market (as generally known, not syndicated, if not in a 'weak' way by the national administrative judge), the conclusions of the Court of Strasbourg, in light of its previous jurisprudence, would have been, it can be considered, very different'.

[62] M. Allena, 'Art. 6 CEDU' n 46 above, 29; E. Follieri, 'Sulla possibile influenza della giurisprudenza della Corte europea di Strasburgo sulla giustizia amministrativa' n 50 above, 702; F. Goisis, 'La full jurisdiction nel contesto della giustizia amministrativa: concetto funzioni e nodi irrisolti' *Diritto processuale amministrativo*, 561 (2015).

of equality of arms.[63]

The positions reached by the Court of Strasbourg are, in conclusion, quite consistent with what is stated in the legal scholarship[64] in relation to the type of review that the administrative judge must conduct on the technical (even complex and questionable) assessments of the administration in general and of the Competition Authority in particular.

The theory that demands thorough judicial review of the IAAs' acts appear to be perfectly in line with the requests raised by the Court of Strasbourg. The judicial review on the technical assessments is expected not only to check their correctness and/or reasonableness but also to verify that they are the most reliable of the technical theses in the trial.[65]

Analysing the subsequent rulings given by the Consiglio di Stato on the subject of antitrust sanctions reveals that the administrative courts' approach has become increasingly in line with the requirements of the ECtHR.[66] In some cases, a certain inconsistency can also be found in the decisions, between statements of principle (which reaffirm the 'limit' of questionability) and the concrete activity of judicial review. However, this is not surprising if we consider the maximally restrictive approach taken on the subject by the Supreme Court of Cassation.

VII. The Decisions of the Supreme Court of Cassation on the Excess of Jurisdictional Power and Article 7 of the Decreto Legislativo 3/2017

With respect to the ECtHR's approach and the evolution of administrative case law in recent years, the position taken by the Supreme Court of Cassation on excess of jurisdictional power has been in stark contrast. In particular, in the aforementioned judgment of the United Sections January 20, 2014, no 1013, the Corte di Cassazione stated that:

> 'the judicial review of the administrative judge entails the direct verification of the facts set at the basis of the disputed provision and also extends to the technical aspects; but when such technical aspects involve assessments and appraisals introducing an objective margin of questionability,

[63] Eur. Court H.R., *Placì* v *Italy*, Judgment of 21 January 2014, case no 48754/11, on which see L. Prudenzano,' Giusto procedimento amministrativo, discrezionalità tecnica ed effettività della tutela giurisdizionale nella giurisprudenza della Corte europea dei diritti dell'uomo' *Rivista dell'associazione italiana dei costituzionalisti*, 1 (2014).

[64] F.G. Scoca, 'I provvedimenti dell'Autorità e il controllo giurisdizionale' n 10 above, 278.

[65] F.G. Scoca, 'Giudice amministrativo' n 12 above, 279; Id, 'I provvedimenti dell'Autorità e il controllo giurisdizionale' n 10 above, 278.

[66] Consiglio di Stato 4 November 2014 no 5423, *Foro amministrativo*, 11 (2014); Consiglio di Stato 15 May 2015 no 2479, available at *giustizia-amministrativa.it*; Consiglio di Stato 30 June 2016 no 2947, available at *giustizia-amministrativa.it*.

> in addition to a control of reasonableness, logic and consistency of the motivation of the disputed provision, the review is limited to verifying that the same provision has not exceeded the margins of questionability referred to above, since the judge cannot substitute his own appreciation for that of the Guarantor Authority if this has remained within the aforementioned margins'.

This approach hardly appears to be compatible with the full jurisdiction canon required by the case law of the ECtHR. Although it cannot be completely superimposed on any of the categories used in the internal system (scrutiny of legitimacy, merit, intrinsic, substitute) it clearly requires the national judge to fully examine, point by point, the grounds that are actually contested, without the possibility to invoke any technical or administrative room for discretion, which is reserved to the administration. At the same time, the Supreme Court of Cassation clearly limits the forms of judicial review that may be exercised to the spheres of the provision that do not go beyond the margins of questionability of the technical assessments made, in this case, by the Competition Authority. By taking this position, the Court establishes the approach that has been previously illustrated, and which takes the aforementioned margins of questionability as the boundary of the scope reserved for the public administration in compliance with a rigid interpretation of the principle of separation of powers.

It is clear that, after the introduction of Art 7 of the decreto legislativo 19 January 2017 no 3, the problem became even more complex, since this provision, in recognizing the binding nature of definitive antitrust decisions (not challenged or defined with final decisions) in the context of civil proceedings for compensation, expressly states that

> 'the judge's review of the appeal involves the direct verification of the facts underlying the contested decision and also extends to the technical profiles that do not present an objective margin of questionability, whose examination is necessary to judge the legitimacy of the decision'.

This rule causes evident ambiguities deriving, in the first place, from the absolute lack of a corresponding provision in the directive which was being implemented. It is necessary to ask whether the provision relating to the effectiveness of a jurisdictional decision in the context of a possible different judgment could be the appropriate forum for introducing regulations concerning the extent of the judicial review exercisable by the administrative courts. If, indeed, the legislator had wanted to take a position on such a controversial issue, it could (or rather needed to) do so when the Code of Administrative Procedure was issued or, in any case, by means of a general rule on the matter. On the other hand, the nature of the possibility of being questioned is one and the same with the technical assessments that the Competition Authority must carry out to verify the consistency between the conduct and the abstract offense. By

literally interpreting the provision, therefore, technical assessments that are, by their nature, debatable should all be considered unquestionable. In order to avoid the unacceptable conclusion that all matters characterized by technical complexity are categorically excluded from the judge's review, it seems that the intent was to reaffirm that the court cannot take, as the foundation of its decision, a different reconstruction from that of the authority, even more reliable.

Nevertheless, even the above interpretation is subject to debate over its compatibility with the canon of full jurisdiction (which, as mentioned, does not allow for areas reserved to the administration in which the theses it adopts are considered prevalent, even if less convincing), and requires compensation for the shortage of appropriate procedural guarantees in the trial in which it is up to the court to rule on all the controversial grounds.

Recently[67] the idea of a judgment of 'greater reliability' consistent with supranational obligations and in line with the role of the administrative judge always committed to ensuring effective protection seemed to gain traction. This form of judgment is not limited to verifying that the evaluation made by the Authority was not unreliable but is capable of identifying the most reliable thesis among those proposed. This rule not only halts this evolutionary path, but also binds other branches (*ea sunt* the civil claims for damages) to the verification of the existence of the offense carried out exclusively by the authority in a procedural context that does not ensure the required guarantees of Art 6 ECHR. It seems credible, as well as desirable, that in the event that the provision in question is applied in the restrictive sense described above, it will be subject to a review of constitutional legitimacy for infringement of Art 111 of the Constitution or in proceedings before the Court of Strasbourg.

VIII. Conclusions

In the light of the above considerations, it can be observed that the IAAs sanctioning regulation needs to be reformulated so as to strengthen the relevant procedural safeguards in order to comply with the provisions of Art 6 ECHR. Until then, however, the administrative courts are charged with covering such shortcomings: for purposes of attaining perfect compliance with them, it will

[67] As repeatedly pointed out above, the theory that the court must assess not the simple reliability but the 'greater reliability' of the technical assessments underlying the determinations of the Authority was first formulated by F.G. Scoca, 'I provvedimenti dell'Autorità' n 10 above, 278; Id, 'Giudice amministrativo' n 12 above, 279. In this direction: R. Giovagnoli et al, 'Judicial Review of Antitrust Decisions: Q&A' *Italian Antitrust Review*, 144 (2015); F. Patroni Griffi, 'Il sindacato del giudice amministrativo sugli atti delle Autorità indipendenti' *giustizia-amministrativa.it* (2017); R. De Nictolis, 'L'eccesso di potere giurisdizionale (tra ricorso per 'i soli motivi inerenti alla giurisdizione' e ricorso per 'violazione di legge')' *Codice del processo amministrativo* (Milano: Hoepli, 2017), 41; R. Chieppa and R. Giovagnoli, *Manuale di diritto amministrativo* (Milano: Giuffrè, 2018), 334.

have to exercise full and effective review powers, if necessary even through the reassessment of the entire matter and a new review of the relevant legal/economic framework.

This review must take place on the basis of the information brought to bear in the proceedings and the arguments of the parties, point by point, without need to refer to the benchmarks adopted by the relevant authority for its own determination. Once again, it will be necessary to refer to the case law of the Consiglio di Stato, which has allowed administrative law to evolve and adapt to the new safeguard requirements.

There seem to be only two possible theoretical alternatives to the sword of Damocles hanging over antitrust sanctions: the first and preferable is to qualify the sanctioning function of the IAAs as a power free from interest evaluation, exclusively consisting in its technical discretional function, and to admit a full review activity, the purpose of which is to identify the most reliable technical solution among those submitted in the proceedings, without need to refer to the jurisdiction of merit.

The second option, which takes into consideration the discretional profiles of the sanction or, in all cases, the possible relevant margins of questionability, encourages respect for the full jurisdiction through the jurisdiction of merit, but interpreted in such a way that the judge is to be allowed not only to modify the amount of a fine, but, above all, to verify the true correspondence between the sanctioned event and the infringed provision. These two different approaches come to the same conclusion which align our legal system the unavoidable needs of protection, which appear not applied today because of the impact of the provisions of Art 7 of the decreto legislativo no 3/2017.

Essays

Political Conflicts and the Transformation of Legal Orders. Phenomenological Insights on Democratic Contingency and Transgression

Ferdinando G. Menga*

Abstract

By deploying phenomenological categories mainly introduced by the German philosopher Bernhard Waldenfels, in this paper I seek to offer an analysis as to how contingency should be understood in order to adopt an adequate model for a democratic transgression of legal orders. To reach this interpretive goal, I articulate my argument along the following trajectory: Taking a cue from the current influential theory of a democratic agonism developed by Chantal Mouffe, I argue that a conflictual design of politics based on the appropriation of Schmitt's absolutistic depiction of antagonism does not offer an apt account of radical democratic contingency and conflict. Consequently, a more appropriate configuration of a politico-legal transgression is required, such that it can be capable of expressing strong manifestations of conflict and transformative impulses, on the one hand, without collapsing into exorbitant configurations thereof, on the other. In the last section of the paper I submit that such an account of a politico-legal transgression is possible by dint of combining Hannah Arendt's notion of natality and Hans Lindahl's insights on a-legality.

I. Introduction: Phenomenological Motives for Thinking the Transgression of Legal Orders

'*Kein Rechtssystem ist für immer*'[1] – 'no legal order lasts forever': so reads a pivotal utterance expressed, in his essay *Recht und Zeit*, by Gerhard Husserl, one of the most prominent authors in the realm of phenomenological legal studies. Through such a statement, Husserl aims manifestly to deliver the very sense of what one may define the unavoidable historical character inherent in

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[1] G. Husserl, *Recht und Zeit* (Frankfurt am Main: Vittorio Klostermann, 1955), 26. The translation into English of Husserl's passages are mine.

all legal orders. Indeed, he continues:

> 'We do not know which laws regulate the life rhythm of States, nations, supra-national organizations, and all other imaginable political organisms, which deem themselves to be legal orders. One thing we do know, however: their existence does not possess the character of a "for ever" '.[2]

Husserl however, in the same context, adds another element essential for the configuration of any imaginable legal order, ie validity. This is an element which immediately introduces complication into the picture. For if it is certain, on the one hand, that all legal systems are historical, it is as much true, on the other, that no legal order would work at all if it could not generally count on 'laws claiming to possess an everlasting validity'.[3]

Hence, the *scenario* coming out of such a double rhythm made of meta-temporality and historicity is one of a legal system caught up in a constitutive discrepancy between the aspiration to order and stabilize the political space to which it adheres and the concomitant impulse to give expression to transformative instantiations thereof.

To be sure, such a contrastive nature of legal orders mostly expresses itself in an unobtrusive way, such that institutions generally tend to adhere to the pole of stabilization, thereby presenting themselves as smoothly and unproblematically running along the path of their – as it were – normal course.[4] This does not imply, however, that the opposite case may also emerge. Normalization, in fact, can always be put into question by transformative claims, such that what constitutes the unobtrusive and unquestioned functioning of order – thereby articulating its historical trait – becomes obtrusive. This is especially true when political conflicts arise in the midst of polities, thereby bespeaking the experience of a transgression of legal boundaries.

While this description puts *nihil novi sub sole*, as it depicts no more and no less than the typical historical dynamic pertaining to all legal orders, it nonetheless engenders a conceptual interrogation as to how exactly one has to conceive of the relationship between transformation and stability.

In what follows, I will attempt to show that some lines of phenomenological thought may shed light on the matter.

The background in which I want to set my investigation is that of the numerous and remarkably vibrant popular demonstrations and mobilizations

[2] ibid 11.

[3] ibid 27.

[4] For an insightful phenomenological investigation on the character of unobtrusiveness of concrete legal orders see H. Lindahl, *Fault Lines of Globalization. Legal Orders and the Politics of A-Legality* (Oxford: Oxford University Press, 2013), 25, 122; and Id, 'Intentionality, Representation, Recognition: Phenomenology and the Politics of A-Legality', in T. Bedorf and S. Herrmann eds, *Political Phenomenology: Experience, Ontology, Episteme* (Abingdon: Routledge, 2019), para 2.

that have taken place in recent years around the world. Just to name a few which come to mind are instantiations as diverse as:

- the struggles against the authoritarian regimes of the Arab Spring;
- the uprisings across Turkey triggered by the eviction of Instanbul's Taksim Gezi Park sit-in;
- the student protests and riots in Chile, England, Quebec;
- the various Occupy movements in North America and Europe, protesting with their slogan 'We are the 99%' against the global financial institutions; and more broadly speaking, against the hegemony of neo-liberal rule;
- many other alter-globalization organizations striving for an alternative and radically democratic design of emerging global settings;
- the *Indignados* encampments in Spain with their claim for '*Democrácia real ya* (real democracy now)' which gave rise to the *Podemos* movement;
- the *Aganaktismenoi* protest movement in Greece;

and finally:

- the Italian citizens' Five Star Movement which, animated by an anti-establishment protest and the project of eradication of the oligarchic party system through absolute horizontal democratic procedures, recently won the elections and is now running the country.

To be sure, all these political endeavors, if compared, show heterogeneous structures, particular goals and outcomes. Nonetheless, they provide evidence for the same renewed interest in and demand for radical democratic forms of expression within political collectives and, subsequently, for trajectories of critique and transgression within the extant politico-legal configurations.

In effect, along with the feature of an aspiration for a revival of constituent power as the quintessence of the historical trait underlying legal orders, these recent and quite spread-out popular uprisings display concomitantly three characters intrinsic to all attempts to engage in radical democracy; those of alteration, contingency and conflict. All seminal forms of democratic insurgence, in fact, by questioning and demanding a change of extant political rule (alteration), inevitably revive the, in principle, open determination (contingency) of any democratic order, thereby implying conflict as their fundamental feature.[5]

This idea notably constitutes the conceptual mainstay of several contemporary perspectives on agonistic democracy and revolves around the firm conviction that political conflict is not to be understood as what democratic space must eschew as its disturbing or disquieting element, but rather as what a radical democratic project must acknowledge and welcome as its driving force, because only conflict reminds democratic orders of their contingent configuration and,

[5] Cf A. Keenan, *Democracy in Question. Democratic Openness in a Time of Political Closure* (Stanford: Stanford University Press, 2003). In a more specifically globalized setting, this point is made clear by H. Lindahl, *Authority and the Globalisation of Inclusion and Exclusion* (Cambridge: Cambridge University Press, 2018), 391.

therefore, of their alterability.[6]

Accordingly, conflict – by being comprehended by agonistic approaches as the very *topos* for questioning and challenging the extant politico-legal order – marks immediately both the appropriate space for the articulation and re-articulation of democratic transgression and, co-extensively, the claim for democratic justice. Democratic justice is implied, here, not only in terms of an always possible extension of political participation entailed in the instantiations of conflict, but also in the fact that insurgences of conflict may enable possible radical renegotiations and reconfigurations of the very traits that shape politico-legal collectivities.

However, although conflict may appear productive in disclosing the very condition for a genuine articulation of a democratic project, it also entails the source of an opposite outcome. This outcome emerges as soon as the elements that compose the contingency/conflict/alteration connection, instead of being comprised within the appropriate form of a radical expression accordable with a democratic dynamic, experience a hyperbolic enhancement which bespeaks an absolutistic configuration, unbearable for any democratic design. Importantly, it is exactly when absolutistic drives for transformation take the upper hand that legal orders experience their inability to conciliate impulses of transgression with the concomitant need for stability.

The German phenomenologist Bernhard Waldenfels has devoted explicit attention to this pivotal distinction between radicality and absoluteness when framing the space for an appropriate understanding of contingency and alteration.[7] A radical form of contingency, he argues, does imply the articulation of an otherwise from the extant order, which, however, does not entail only the experience of break or alteration pushing outside order, but also a minimal form of adherence within order.[8] For, were this experience of break totally to transcend order's reach, it would not even have the possibility of emerging and consequently of being managed as such. In short, if contingency means transgression of an extant order, then a minimal form of its registration within order itself must be given for this transgression effectively to be perceived (and signified) as such.[9] As one can easily grasp, it is exactly this minimal adherence to order which makes a radical articulation of contingency and alteration still adjustable to democratic

[6] For a comprehensive analysis and discussion of the contemporary theories of agonistic democracy – with particular focus on the discourses by Connolly, Tully, Mouffe and Honig – see, at least, the remarkable volumes by M. Wenman, *Agonistic Democracy. Constituent Power in the Era of Globalization* (Cambridge/New York: Cambridge University Press, 2013), esp part II. Important remarks can be drawn also by A. Norval, *Aversive Democracy. Inheritance and Originality in the Democratic Tradition* (Cambridge: Cambridge University Press, 2007); O. Marchart, *Thinking Antagonism. Political Ontology after Laclau* (Edinburgh: Edinburgh University Press, 2018).

[7] Cf B. Waldenfels, *Topographie des Fremden* (Frankfurt am Main: Suhrkamp, 1997), 36.

[8] Cf B. Waldenfels, *Bruchlinien der Erfahrung* (Frankfurt am Main: Suhrkamp, 2002), 265.

[9] ibid 268-269.

designs. The form of an absolute contingency, instead, corresponds by no means to the dynamic of an otherwise but rather to that of total otherness.[10] This implies an irreducible externality from order which, far from providing order with the space for experiencing alterity, deprives order from the very access to experience as such. This form of total contingency, therefore, instead of enabling experimentation with radical novelty or transgression, simply approximates the form of an alteration which entails the paralysis or even annihilation of the very subject – be it political or otherwise – supposed to experience transgression.[11] Crucially, the consequence of such an excessive confrontation or totalistic transgression is that it makes any kind of accommodation with the democratic life of an enduring collective subject impossible.[12]

Just as interesting as this pivotal phenomenological distinction is the fact that Waldenfels notes a certain tendency which operates in many political-philosophical theories, in mingling one configuration of contingency with the other.[13] It is as if, in such theories, the absolute version of contingency would precisely and more or less unwittingly, come out as the perverse result of the very aspiration to emphasize its radical form, and this in light of the significance of the political implications which contingency embodies, namely the demand for democratic renewal, the reactivating of constituent power or revolutionary change, the effective realization of strands of political critique.

Subsequently, by means of a sort of invitation to a genealogical-deconstructive reading, Waldenfels solicits one to detect a disquieting ambivalence emerging within the *corpus* of a democratic discourse when these two configurations of

[10] B. Waldenfels, *Idiome des Denkens* (Frankfurt am Main: Suhrkamp, 2005), 215.

[11] Cf B. Waldenfels, *Bruchlinien* n 8 above, 63.

[12] Holding on this phenomenological reading, I view Mark Wenman's bi-partition of the manifestations of democratic transformation between 'augmentation' and 'revolution' (M. Wenman, n 6 above, 9, 65) as problematic. Indeed, whereas I concur with the fact that 'augmentation' might correspond to a milder (or less radical) form of democratic transformation, I contest that 'revolution' as 'absolute initiative' and 'fundamental transformation' that reactivates 'constituent power' (ibid 11) would articulate the very form of radical democratic change. I believe, instead, that the kind of radicality that Wenman ascribes here to the latter form of radical politics corresponds exactly to the logic of absoluteness, from which Waldenfels so vehemently warns. Unlike Wenman, I maintain that a genuine form of radical democratic change should to a greater extent be detected in the logic of a boundaries transgression or deviation. This logic, abandoning the mere opposition between a too weak form of change – as 'augmentation' – and a too hyperbolically absolutized form of break – as 'revolution' –, is best able to capture the possibility of depicting transformation in terms of a radical democratic experience. On the one hand, in fact, transgression, as an effective experience of othering, means experimenting with change which goes beyond the mere extension or expansion of the extant order – a transgressed order, in other words, is not simply bigger but it becomes other or otherwise. On the other hand, transgression, as an experience which still presupposes a determinate endurance of the exceeded order, implies less than a totalistic rip. For a recent politico-legal perspective which, I believe, goes in this direction of order's alteration as order's transgression, see Hans Lindahl's outstanding insights on 'a-legality' (cf H. Lindahl, n 4 above). I will deepen this topic in the last section of this paper.

[13] Cf B. Waldenfels, *Topographie* n 7 above, 28, 45; Id, n 10 above, 221; Id, *Hyperphänomene. Modi Hyperbolischer Erfahrung* (Berlin: Suhrkamp, 2012), 308.

contingency – radical and absolute – operate entangled and undistinguished.[14]

It is not the task of this paper extensively to follow Waldenfels's indication. Rather, the aim of the following pages is to explore the aforementioned relation between radicality and absoluteness, by means of an analysis of a single representative example.

To that end I would choose to devote my investigation to Chantal Mouffe's influential theory of an agonistic democracy, for I believe that the reach of the aforementioned ambivalence can be traced in her theory in an extremely significant way. More precisely, harking back to Waldenfels's paradigmatic distinction, I will attempt to show how her theory can be viewed as the site of a remarkable polarization between two simultaneously opposite inclinations. On the one hand, Mouffe's theory can be considered as the space articulating a fruitful and promising project of democratic contingency and democratic transgression of politico-legal boundaries; on the other, as the place in which the spectres of an absolutistic form of contingency cast their shades, thereby running counter to an effective realization of a radical democratic project.

In order to accomplish my task, this paper will fall into three extremely condensed sections. In the first section, I will vigorously defend Mouffe's depiction of conflict as democratic agonism and her insistence on the fact that configurations of radical democratic strives do not imply forms of absolute contingency as those embraced by some currently influential theorists in the field of political activism (such as Hardt and Negri). In the second section, however, I will part ways with Mouffe, arguing that her account of conflict falls prey, nonetheless, to the ambivalence noted above, as it attempts to connect two irreconcilable poles, namely a radical design of contingency proper to democracy, on the one hand, and the Schmittian absolutistic configuration of an antagonistic politics on the other. Subsequently, the closing section will attempt to find a possible way out of this predicament by advocating an agonism freed from the bonds of antagonism. Such a depiction of agonism, I will argue, is best able to accommodate promising and vibrant forms of democratic challenge without having to collapse into anti-democratic degenerations. As I will attempt to show, such a perspective can find its political inspiration in Hannah Arendt's theory of plurality and its legal orientation in Hans Lindahl's phenomenology of a-legality.

II. The Fruitful Elements of Mouffe's Theory of Agonistic Politics

The first section concentrates on what is to be capitalized by drawing on Mouffe's perspective. Yet, before delving into her theory, let me start by presenting the general framework in which she positions her analysis.

[14] I have made a first attempt to put in practice such a deconstructing invitation in another paper devoted to Arendt's thought. Cf F.G. Menga, 'The Seduction of Radical Democracy. Deconstructing Hannah Arendt's Political Discourse' 21(3) *Constellations*, 313-326 (2014).

Mouffe adopts a hermeneutical strategy whereby she detects two major conflicting approaches within the structural range of positions in the current debate on radical democracy. These two approaches, as she puts it, by drawing on two respective divergent 'philosophical frameworks', necessarily result in the opposing form of two incompatible political 'proposals'.[15] As a result of such a polarized scheme, one finds, at the one extreme, the approach of those theorists – from whom Mouffe distances herself – envisaging the realization of a radical democratic project only in terms of an exit from the modern political-philosophical itinerary. At the antipodes, one detects the approach of those – in whose trajectory Mouffe also inscribes her philosophical stance – who, far from acclaiming an exit of the sort, advocate instead the very possibility of radical democracy exactly by insisting on the modern paradigm, more precisely on a kind of re-discovery and re-actualization of its political constitutive premises.[16]

The first approach, which counts on high support within numerous groups of political activists,[17] is represented, as one can easily appreciate, by the position of those whom we may call 'absolutist democrats', such as Michael Hardt and Antonio Negri.[18] These authors view the possibility of enacting a real democratic project – 'absolute democracy'[19] in their terminology – exclusively under the condition of a radical transgression of (and overcoming) the modern political paradigm and its respective institutions. According to them, such a paradigm, in fact, far from 'establishing democracy'[20] as the effective realization of societal self-organization and self-governing, which is to be conceived of as a multitude 'act(ing) in common'[21] in its horizontal, immanent, multiple and creative

[15] Ch. Mouffe, *Agonistics. Thinking the World Politically* (London/New York: Verso, 2013), 65.

[16] In quite a similar vein, Kioupkiolis and Katsambekis also define this opposition in the debate in terms of 'competing approaches' (A. Kioupkiolis and G. Katsambekis, 'Radical Democracy and Collective Movements Today: Responding to the Challenge of *Kairos*', in Id eds, *Radical Democracy and Collective Movements Today. The Biopolitics of the Multitude Versus the Hegemony of the People* (Farnham: Ashgate, 2014), 5.

[17] Cf ibid 1.

[18] Cf by M. Hardt and A. Negri, *Empire* (Cambridge: Harvard University Press, 2000); Id, *Multitude. War and Democracy in the Age of Empire* (New York: Penguin Books, 2004); Id, *Commonwealth* (Cambridge: Harvard University Press, 2009); and Id, *Declaration* (New York: Argo Navis, 2012). In quite a similar (though not identical) line, see – just to name a few – also: P. Virno, *A Grammar of the Multitude* (Los Angeles: Semiotext(e), 2004); R. Day, *Gramsci is Dead. Anarchist Currents in the Newest Social Movements* (London: Pluto Press, 2005); J. Holloway, *Change the World Without Taking Power* (London: Pluto Press, 2005); I. Lorey, 'On Democracy and Occupation. Horizontality and the Need for New Forms of Verticality', in P. Gielen ed, *Instituting Art in a Flat World* (Amsterdam: Valiz, 2013), 78-99; S. Newmann, *The Politics of Postanarchism* (Edinburgh: Edinburgh University Press, 2011). For an excellent political-philosophical presentation and discussion of issues and problems related to these (and other) influential theories for recent political activism see the volume by A. Kioupkiolis and G. Katsambekis eds, n 16 above.

[19] M. Hardt and A. Negri, *Empire* n 18 above, 410; Id, *Multitude* n 18 above, 93, 242, 351, 353.

[20] M. Hardt and A. Negri, *Multitude* n 18 above, 353.

[21] ibid 356.

articulation,[22] is to be considered as the main factor responsible for 'blocking (any) democratic expression'.[23] The reason for this outcome is that it relies on hierarchical-based and society-transcending devices such as the 'state (…) considered (as) the primary locus of sovereignty (and) authority'[24] and the correlative concept of a unitary will of the people necessarily mediated through representative mechanisms.[25] Following this approach, it appears as no surprise that these theorists view the very accomplishment of democracy by means of a 'decisive break'[26] or 'profound rupture with modernity'[27] and, therefore, through the undertaking of a sheer 'altermodern' endeavour,[28] which displays the political traits of an '*exodus*'[29] from the modern institutional design. As Mouffe describes it, we are dealing with a ' "withdrawal" from existing institutions so as to foster the self-organization of the Multitude'.[30]

Opposed to this approach, I hold that Mouffe raises a major point that should be vigorously defended. It is her insistence on the fact that a radical democratic depiction of conflict demands precisely eschewing such an '*exodus*' from the modern institutional paradigm,[31] as insistently advocated by the aforementioned currently influential theorists in the field of political activism.[32] Crucially, she expressively counters all recent activist perspectives because, in her view, they advocate an exasperated form of political contingency in terms of

[22] Cf ibid 348-358; M. Hardt and A. Negri, *Declaration* n 18 above, 5.

[23] M. Hardt and A. Negri, *Multitude* n 18 above, 353.

[24] ibid.

[25] Cf M. Hardt and A. Negri, *Empire* n 18 above, 103; Id, *Multitude* n 18 above, esp ch 3; as well as Id, *Commonwealth* n 18 above, 169. Expressively inspired by Hardt's and Negri's theory, Lorey offers quite an explicative and condensed illustration of their critical stance towards the modern political discourse and institution's design: 'Discourses of legal and state theory on the "sovereignty of the people" resemble one another in the thrust of their arguments: constituent power is only imaginable as uniforming and unifying the many into one "people", a people that presumably cannot be assembled in its multitude and heterogeneity and must therefore be represented. The "will" and the representatively conveyed agency that are associated with the constructions of the one "people" conform to the logic of juridical sovereignty. In the occidental tradition of democracy, there obviously has to be a nexus, no matter how it is weighted, between the people, law, sovereignty and representation, which has to construct the multitude as a threat in crucial places and ward it off. A constituent power of the many, not tamed into a 'people', beyond sovereignty, law, and representation, is thus excluded from the realm of the imaginable, because it is associated with non-governability, disorder and chaos' (I. Lorey, n 18 above, 80-81).

[26] M. Hardt and A. Negri, *Commonwealth* n 18 above, 103.

[27] ibid 114.

[28] Cf ibid 101-118.

[29] For the theme of '*exodus*' see M. Hardt and A. Negri, *Multitude* n 18 above, 333, 341-342, and throughout Id, *Commonwealth* n 18 above. Under the perspective of a 'presentist and horizontal democrary' see also I. Lorey, n 18 above, 84, 90, 96-98.

[30] Ch. Mouffe, *Agonistics* n 15 above, 71. In the same vein see also Ch. Mouffe, 'Institutions as Sites of Agonistic Intervention', in P. Gielen ed, *Institutional Attitudes*, 65-66.

[31] Cf Ch. Mouffe, *Agonistics* n 15 above, 66, 109.

[32] In a slightly distinct way, this mainstay is still reaffirmed in M. Hardt et A. Negri eds, *Assembly* (New York: Oxford University Press, 2017).

an explicit fostering of event, multitudinary commonality, diffuse presentism, 'immanentist ontology'[33] and immediate self-rule.[34] Her critique is that such forms slip into an absolutized politics and unwittingly restage a form of political foundationalism in terms of a 'tak(ing) for granted the pre-given unit of a "we" ' (such as the one echoing in the call 'We are 99%').[35] It is not by chance that Mouffe shows quite striking carefulness in stressing the fact that these forms of democratic project, by presenting themselves through such features, may present themselves as 'absolute'[36] but not as radical. On the contrary, for Mouffe, securing the possibility of radical democratic conflict requires looking more closely at what the modern democratic discourse already has on offer, namely, following Lefort's insights,[37] the genuine discovery of contingency and consequently, the express acceptance of plurality and conflict as its undeniable co-implication.[38]

The framework of radical conflict resulting from this stance is what she calls 'democratic agonism', ie a conflict between adversaries who, no matter how conflicting and aware of the impossibility to reach a rational resolution to their conflict, nevertheless do not slip into sheer antagonism but rather acknowledge the legitimacy of their opposing party. Mouffe writes the following:

> 'While antagonism is a we/they relation in which two sides are enemies who do not share any common ground, agonism is a we/they relation where the conflicting parties, although acknowledging that there is no rational solution to their conflict, nevertheless recognize the legitimacy of their opponents. They are "adversaries", not enemies'.[39]

III. Criticizing Mouffe's Appraisal of Democratic Conflicts

The critical point which I wish to raise, however, is that Mouffe does not stop at this stage of analysis; rather, she takes a further problematic step. In fact, in order to distance herself from the deliberative approaches which, in her view, endorse a too weak form of conflict (a conflict already imposed onto the horizon of an intersubjective agreement),[40] she deploys the strategy of radicalizing and emphasizing conflict as the ontological (and ineradicable) trait of all political space. From this perspective, then, it is relatively easy to comprehend the reason why Mouffe cannot regard agonism as the primary form of conflict any longer, but

[33] Ch. Mouffe, *For a Left Populism* (London: Verso Books 2018), 55.
[34] Cf Ch. Mouffe, *Agonistics* n 15 above, 78, 109.
[35] ibid 117.
[36] ibid 78.
[37] Cf C. Lefort, *Democracy and Political Theory* (London: Verso Books, 1988).
[38] Cf Ch. Mouffe, *The Democratic Paradox* (London: Verso Books, 2000), 1, 18; Id, *For a Left Populism* n 33 above, 42.
[39] Ch. Mouffe, *On the Political* (London: Verso Books, 2005), 20.
[40] Cf Ch. Mouffe, *Agonistics* n 15 above, 10, 22-31, 83-98.

rather only as the result of a sublimation process,[41] tapping from a deeper or more radical form of conflict. Mouffe, notably, drawing on Carl Schmitt's political theory, defines such a form of ineradicable conflict in terms of an antagonism – a friend/enemy divide – lying at the basis of democratic life.[42] As she puts it:

> 'I submit that Schmitt's emphasis on the ever present possibility of the friend/enemy distinction and the conflictual nature of politics constitutes the necessary starting point for envisaging the aims of democratic politics. Only by acknowledging "the political" in its antagonistic dimension can we pose the central question for democratic politics'.[43]

Exactly at this point, I part ways with Mouffe. Drawing on the aforementioned distinction between a radical and absolute design of contingency and conflict, I argue, in fact, that one cannot adequately unfold the kind of conflict required by the contingency proper to democracy by following her strategy of anchoring the configuration of agonistic conflict to Schmitt's design of antagonism among enemies. The point I wish to raise is that Schmitt's theory only accommodates an absolutistic configuration of conflict, thereby remaining irreducibly inadmissible for any radically contingency-based and jointly democratic understanding thereof. As a consequence, by keeping these two paradigmatically opposite forms of conflict connected, Mouffe, far from deepening the articulation of democratic conflict, inevitably falls prey to accentuating exactly the above illustrated ambivalence, by delivering a political theory climaxing into two irreconcilable poles, one adhering to the Schmittian absolutistic design of politics, the other adhering to the condition of radical contingency proper to democracy, in which, however, the proper form of conflict as a sublimation of antagonism remains necessarily obscure. It is my conviction, in fact, that Mouffe never clearly explains how the alleged transfiguration from basic antagonism into agonism is made possible; this is because such a transformation is impossible.

My critique of Mouffe's theory, however, is not goal in itself. It is instead intended to show how an antagonistic-based model of agonistic conflict jeopardizes the very delineation of an ethic of transformative democratic conflict or, better, an ethic of a democratic transgression of politico-legal boundaries. The point I wish to defend here is that Mouffe, by placing exclusive weight to the moment of antagonism for the purpose of endorsing the ineradicability of conflict, not only transgresses the effective articulation of democratic conflict as such, but also misses the potentialities inherent in agonism itself. In fact, agonism, once freed both from the ballast of antagonism and being relegated to the mere conservative role of taming or sublimating political inimicalities, is best able to take up very

[41] Cf Ch. Mouffe, *The Democratic Paradox* n 38 above, 107; Id, *Agonistics* n 15 above 9.

[42] Cf Ch. Mouffe, *The Democratic Paradox* n 38 above, 22; Id, *On the Political* n 39 above, 13, 17.

[43] Ch. Mouffe, *On the Political* n 39 above, 13.

promising and vibrant forms for democratic life – forms which can thoroughly express enhanced articulations of conflict without having to decay into anti-democratic degeneration.

As I will shortly indicate, a good candidate for outlining such a form of heightened agonism can be traced in all its political weight and normative concreteness by combining two trajectories of political alteration, one inspired by Hannah Arendt's notion of plurality and natality, the other drawing on Hans Lindahl's phenomenological insights on the dynamic of a-legality.

IV. Arendt's Natality and Lindahl's A-Legality: Conceptualizing a Democratic Transgression of Legal Orders

To begin with, I assume that Mouffe's model as it stands – contemplating, on the one hand, a democracy-deficient antagonism on stand-by for its democratic transfiguration and, on the other, an agonism that has already been rendered appropriate for democracy – condemns one to a perverse alternative. Polities are either exposed to violence or delivered over to a conservative position incapable of really perceiving, let alone embracing, transformative politics. In fact, if we endorse Mouffe's characterization of agonism, that is, if we consider that democratic agonism takes place only once antagonistic conflict has been sublimated into conflicts which will not really endanger the political association, then we are inevitably caught up in one of the two following situations: either we have to assume, as Keith Breen brilliantly suggests, 'an overly optimistic view of agonistic conflicts',[44] in which, ultimately, 'agonistic democracy appears as a partisan politics with no real partisans'.[45] However, this would serve to advocate a conservative position which 'spurns transformative politics'.[46] Alternatively, if we really want to endorse a truly conflictual and transformative position, where contestations and challenges deeply question the extant politico-legal order, then the only other device we dispose of in Mouffe's theory is antagonism, which implies sheer enmity.

Consequently, Mouffe's strictly dichotomous model only seems able to account either for situations in which conflicts are already unproblematically taking place within the democratic sphere or for situations in which they are granted no possible access therein. We are dealing, in other words, either with conflicts which are already sublimated and, subsequently, not really conflictual, or with conflicts which are not even allowed to enter the democratic public realm, since they are, strictly speaking, conflicts which cannot be dealt with democratically.

[44] K. Breen, 'Agonism, Antagonism and the Necessity of Care', in A. Schaap ed, *Law and Agonistic Politics* (Farnham: Ashgate, 2008), 139.

[45] ibid.

[46] ibid. Although in slightly different terms, Wenman too detects and sharply criticizes the remarkable 'conservative' trait entailed in Mouffe's 'agonistic matrix' (cf M. Wenman, n 6 above, 197, quotations at 215 and 211).

In one way or the other, what Mouffe's conflict paradigm fails to address is the topical place where transformative conflicts and genuine instantiations of critique really take place: not inside and not outside but on the border – on the threshold – of the public sphere and legal order.

I submit that this is exactly what Arendt's model of plurality enables one to conceive of, especially if one capitalizes on her notion of natality.

Arendt's characterization of plurality, in effect, if one follows what she expressively maintains of it, asserts the irreducible and originary contingent dynamic of inter-action between equal and distinct individuals which cannot give rise to any final unitary formation of common space or collective order, but only to realms of commonality displaying traits of conjunction and disjunction and, therefore, of accord and conflict.

Importantly, Arendt, although stressing the undeniable aspect of equality and conjunction within the common sphere, otherwise condemned to a too fragmented configuration, vehemently insists on the primacy of distinction as the very source for dynamism and participation within plurality. Such a primacy is best explained by the emphasis she puts on the notion of natality as a notion which, by breaking the logic of generalization, displays the very constitutive character of inequality of singular beings within plurality, along with their capability to act as beginning and therefore of inserting strands of innovation and conflict within the common space.[47] In other words, natality, by embodying the trait of singularity and divergence within plurality, precisely represents the element which may constitute the unprecedented claim, the transformative demand, the possible critical impulse for any established public space. As it is, such an element does not already have its place inside the order, for in this case, it would represent no real challenge or disturbance, nor is it irreducibly outside the order, for it would either remain absolutely unperceived or be immediately rejected, but rather it is placed exactly at the boundaries of the public realm and in the process of pushing to cross the threshold through its iterated and renewed demands for shared recognition.

Now, it is of crucial importance to point out how exactly such an articulation of political conflict, as revolving around the notion of natality, when confronted with Mouffe's model, entails something more than the mere condition of an already sublimated agonistic contestation, which leads to no real conflict and something less than a democratically untreatable sheer antagonistic challenge, which shows the traits of an unbearable conflict. It articulates, instead, what I would like to call a liminal conflictual dimension, namely a dimension of conflict which cannot be simply understood in terms of an altering demand to be placed

[47] Viewed in such a perspective, it comes as no surprise that Arendt, in some passages, highlights exactly the capacity to act as 'the most dangerous of all human abilities and possibilities' (H. Arendt, *Between Past and Future* (New York: Penguin Books, 1977), 53). Concerning this point, see also H. Arendt, *The Human Condition* (Chicago: The University of Chicago Press, 1958), 177-178 and H. Arendt, *The Life of the Mind. Two: Willing* (San Diego/New York/London: A Harvest Book, 1978), 217.

exclusively inside or outside the order.

A more comprehensive understanding of such a peculiar topography implicated in this liminal dimension of transformative conflicts leads us directly to the extremely useful recent legal-phenomenological analysis developed by Hans Lindahl.[48] According to Lindahl, in effect, any genuine altering endeavor is to be conceived as one that, instead of finding its proper place either within or without order, derives from a normative claim of a behavior which simultaneously registers inside and outside the legal order. It registers inside since any altering behavior cannot be treated other than through the legal/illegal divide of any extant order; yet it registers outside, in that such a behavior, by questioning both poles of the distinction between the legal and illegal, opens up possibilities of the legal order which order could realize while it also intimates possibilities that lie beyond its scope of transformation. In order properly to seize and articulate such a liminal and conflictive dimension, which cannot be thoroughly embraced by the legal/illegal connotation, Lindahl fittingly deploys the notion of 'a-legality', which he circumscribes, in the context of a comprehensive definition, as follows:

> 'Legal orders structure the real as either legal or illegal. I dub "strange" behavior or situations the domain of a-legality, where the "a" of a-legality does not refer to legal disorder, which is intelligible in the form of illegality, hence as a negative determination of legality. Instead, it refers to another legal order that organizes the legal/illegal distinction differently, hence structures reality in a way that is unintelligible for the order it questions. A-legality refers to an emergent normative order that is strange by dint of challenging how a given legal order draws the spatial, temporal, subjective, and material boundaries through which it configures what counts as (il)legal behavior'.[49]

Restricting our attention to how Lindahl, in this extremely rich passage, considers a challenging behavior, which is deemed as 'strange', hence, as neither legal nor illegal, by the legal order it questions, the realm of the 'a-legal' circumscribes eminently that peculiar *topos* in which a transformative demand shows itself as not yet part of the extant (politico-legal) order and which, however, could be part of it by having already set in motion, with its normative

[48] Cf H. Lindahl, *Fault Lines of Globalization* n 4 above, ch 1.2-1.4, 5.3. For a comprehensive discussion of Lindahl's work see the symposium in the (open access) journal 16(2) *Etica & Politica/Ethics & Politics* 919-1015 (2014), edited and introduced by Ferdinando G. Menga with contributions by Emilios Christodoulidis, Fabio Ciaramelli, Martin Loughlin, Sofia Näsström, Stefan Rummens, Neil Walker, and a reply to critics by the author. Lindahl also devotes a specific insight on agonism and a-legality in H. Lindahl, 'The Opening: A-Legality and Political Agonism', in A. Schaap ed, *Law and Agonistic Politics* n 44 above, 57-70, and more recently in his volume: H. Lindahl, *Authority* n 5 above, ch 6 and 7.

[49] H. Lindahl, 'Inside and Outside Global Law (Julius Stone Address)' 41(1) *Sydney Law Review*, 1-34, 8-9 (2019).

pressure,[50] the open and altering process of collective recognition as responsive to it. It is what Lindahl precisely defines as 'the capacity of behavior to draw (politico-legal) boundaries otherwise'.[51]

Crucial for my discourse here, is to note that Lindahl, precisely in shaping the dynamic of this otherwise, does not omit to clarify that order's strands of alteration, for vigorous as they may be, cannot imply the articulation of a-legality in terms of an absolute alternative but only as a radically contingent modification 'which calls the boundaries (…) drawn by a legal collective (…) into question'.[52]

One would be wrong, however, to conclude that Lindahl's standpoint here necessarily suggests a framing of order only capable of dealing with mild or expanding forms of alteration, thereby eschewing strong instances of challenge and critique. On the contrary, Lindahl is quite attentive to delivering a spectrum of a-legality which is perfectly able to expand from 'weak' up to 'strong' dimensions of questioning of legal boundaries (from civil disobedience up to demands for secession).[53] What Lindahl's phenomenological thrust implies, therefore, far from being the mere exclusion of vigorous forms of transformation, is the cautious warning that alteration, inasmuch as it wants to emerge as a genuine transformative political experience, for radical and intense it may be, will not slip too easily into the seduction of absolutism and related claims of a total otherness and externality from order. Rather, such an alteration must register, however minimally, inside the realm of possible experienceability of order; and this in form of (so Lindahl) 'another possible ordering of behaviour which interferes with the realm of (extant) practical possibility(ies)'.[54]

[50] Not by chance I underscore, here, Lindahl's configuration of any transformative and altering endeavor as expressively anchored to a normative and consequently concrete demand. This anchoring, in fact, displays an extremely relevant adjunctive advantage; the possibility of realizing a perspective of agonistic conflict perfectly capable of integrating the aspects of 'lived social reality' and 'existential depth' otherwise so remarkably lacking, as Lois McNay has it, in Mouffe's political theory (cf L. McNay, *The Misguided Search for the Political. Social Weightlessness in Radical Democratic Theory* (Cambridge: Polity Press, 2014) ch 2, quotations at 82). In effect, I concur with McNay when she sharply reproaches Mouffe for falling prey to an excessively strong influence exerted on her by the post-structuralist and 'post-foundational political thinking' (ibid 93) – an influence which, based on sheer 'anti-essentialist' (ibid 82) premises, inevitably leads her agonistic design 'to reduce social experience to little more than a place-holder for linguistic indeterminacy' (ibid) and, concomitantly, to display a 'socially weightless paradigm closed off from the very practices that are supposed to give it its radical political impact' (ibid 79).

[51] H. Lindahl, *Fault Lines of Globalization* n 4 above, 37.

[52] ibid 158.

[53] Cf ibid 174.

[54] ibid 158. In light of this phenomenological delineation based on the articulation of a-legality, it appears now much more clear the extent to which, in my view, Wenman's distinction between 'augmentation' and 'revolution' does not really capture the very range of democratic transformative politics. A-legality, indeed, on the one hand, as a transformative othering (or transgression) of politico-legal order, implies much more than a mere augmentation thereof, and, on the other, as a transgression which nevertheless registers within extant legal order, implies something less than revolution. Adjunctively, a-legality permits one also to consider revolution for what it really is; not the real articulation of 'radical innovation' (M. Wenman, n 6 above, 68) in

At this point, a more attentive phenomenological analysis of Lindahl's distinction between weak and strong forms of a-legality would be in place. For reason of space, I cannot address such a discussion in detail. Yet, let me only indicate briefly the fact that Lindahl's theory too, in my opinion, is not free, here and there, from certain self-deconstructive motives or traits of incoherence. These motives are to be traced, exactly, between his explicit defense of a radical and not absolute configuration of contingency as related to a democratic dynamic of politico-legal orders, on the one hand, and the, at times, too strong depiction of a-legality forms, which instead nearly suggest the articulation of absoluteness, on the other. The critical point here should be to discuss in which terms, for instance, the alleged extremely enhanced forms of a-legality, as those implied in secession demands, still remain such when they finally find a way to be treated in their a-legal impetus by the same extant order which initially marked them as simply inadmissible; or whether these forms do not better need to be viewed as radical and no longer as absolute as soon as the extant order finds itself able to treat them. According to Lindahl such a feasible conduct of legal order implies what he defines as an 'ex-ceptional' or 'extra-ordinary' move of an 'holding back' in order to 'hold out'[55] or, more recently, as a 'restrained collective self-assertion'.[56] In short, here my suggestion would be to not stop at the sole distinction between 'weak' and 'strong' forms of a-legality but rather phenomenologically to broaden the spectrum of the distinction, thereby differentiating within the realm itself of strong forms of a-legality between those amenable to a democratic treatment and those resistant to such a treatment. By means of such a further differentiation it becomes possible, in my opinion, to expand the range of democratic contingency and conflictuality and, therefore, of order's democratic range of hospitality to alterity, without having to surrender too soon to the issue of order's menace and, subsequently, to conservative practices of its protection.[57]

However, leaving this phenomenological caveat aside, from this analysis inspired by Arendt's notion of natality and Lindahl's dynamic of a-legality can we now conclude the following: It is only by making recourse to such liminally articulating dimensions of agonism free from the paradigmatic ballast of antagonism that an appropriate view of a radically plural democratic space can emerge. Such a configuration of conflict is crucial, as it is able to accommodate

democratic terms, but rather an exorbitant and unbearable experience for democratic life as such.

[55] Cf H. Lindahl, *Fault Lines of Globalization* n 4 above, ch 7.5.

[56] H. Lindahl, *Authority* n 5 above, 287.

[57] Notwithstanding my critical remark, I cannot omit to register how Lindahl too considers times and again the problematic aspects of such a divide. On this issue cf H. Lindahl, 'Discretion and Public Policy: Timing the Unity and Divergence of Legal Orders', in S. Prechal and B. Van Roermund eds, *The Coherence of EU Law. The Search for Unity in Divergent Concepts* (Oxford: Oxford University Press, 2008), 291-313 and H. Lindahl, *Authority* n 5 above, 298-300. Especially in this latter work, Lindahl, sensitive to the problem I have raised, frames the issue of legal orders' transformability exactly in terms of a collective recognition of the 'other (in ourselves) [both] as one of us as other than us' (ibid 287).

true and proper transformative politics, on the one hand and protect a minimal condition of democratic articulation, on the other.

Exactly along the line of a thus conceived porous politico-legal boundary democratic orders may both genuinely display their historical transformative character and eschew the too simplistic critique of a falling prey to relativism.

Essays

The Italian Path to Reform: Italy's Adversarial Model of Criminal Procedure

Renzo Orlandi*

Abstract

This paper illustrates the tortuous path that many years ago (October 1989) led to the entry into force of a new Code of Criminal Procedure in Italy. The idea that this reform was inspired by adversary experiences gained in the Anglo-American legal systems is widespread. The opinion finds only partial confirmation in the events that have conditioned the preparation of the 'first code of republican Italy'. Considerable weight on the contents of the procedural reform – have actually been the decisions of the Italian Constitutional Court, the heated doctrinal debates already started since the 1960s of the last century and the culture of comparison, not only with the Anglo-American legal systems. The author explains shortly the difficulties encountered in drafting the procedural reform and in its implementation over the course of thirty years.

I. Introduction

The 1988 Italian procedural law reform, that led to the approval of the new Code of Criminal Procedure, is often presented as a transition from an inquisitorial model to an accusatory one. There is some truth in this statement. It would be wrong, however, to think that this reform has created an adversary system that mimics common law models. It is true that with the 1988 Code, Italy abandoned the so-called mixed system, modeled on the French *Code d'Instruction Criminelle* (1808) and which had characterized the previous codifications starting from 1861, when the national unity was achieved. Such a system – the one called mixed – combined both inquisitorial and accusatorial aspects; however, with the result of making the former prevail. In practice, indeed, the findings of the pretrial phase (conducted by the investigating judge with inquisitorial methods) heavily influenced the subsequent trial, although formally inspired by accusatorial principles (public hearings, orality of the trial, wider recognition of the defense rights).[1]

In reality, the road that led to the 1988 reform is less linear than it appears to those who merely observed its 'last mile', during which efforts to imitate the English or American criminal procedure may have seemed preponderant. To correct this erroneous conviction, it is worth recalling here, with brief hints, from

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[1] Eg, E. Grande, 'Italian Criminal Justice: Borrowing and Resistance' 48 *American Journal of Comparative Law*, 227 (2000).

what doctrinal ideas and from which social-political reality (from post-war republican Italy to a progressive integration into the European Union) the reform of the Italian criminal trial arose. This will help to explain the difficulties that the reform has encountered in its already thirty-year-old application.

The original impulse came from the change of political regime after World War II and from the regained democracy regime, ratified with the entry into force of the Constitution in 1948. At that time, it was necessary to overcome the approach of fascist codifications, which in criminal policy showed its most authoritarian and liberticidal traits. In the political vision of fascism, the individual was conceived as a subject subordinated to the state, so that his/her rights were at the mercy of public powers. The Italian Republican Constitution reverses this approach, recognizing inviolable individual rights as prerogatives that pre-date the state itself. These are rights that the state must protect and respect (under Art 2 of the Constitution). Initially (in the second half of the 1940s and in the fifties of the last century) inspiration for this change of approach was sought in the pre-fascist past of liberal Italy. The Code of Criminal Procedure of 1913 was in fact devoid of those authoritarian and illiberal emphases that would come to characterize the fascist Code of Criminal Procedure that was enacted in 1930. A first attempt was therefore made to correct the fascist code by bringing back into force some legal protections already pioneered by the Code of Criminal Procedural (1913).[2]

However, this was not the only approach, as some tried instead to look for a different solution for the Code of Criminal Procedure reform. At the beginning of the 1960s, a group of young scholars, lawyers and magistrates, under the direction of an old, authoritative academic and renowned lawyer, Francesco Carnelutti, developed a draft of a new Code of Criminal Procedure. The proposal was limited to the procedure concerning trials of first instance but it introduced an epoch-making novelty for Italy: a strict separation between the pretrial and the trial phases.[3]

No reforms of the appellate process were contemplated nor were any changes planned to the organization of the office of the public prosecutor offices or to the judiciary.

The proponents intended to overcome the mixed model, of Napoleonic origin, which – as mentioned before – had characterized all previous Italian procedural codifications (not only the fascist one). The division of the process in the two phases of the *preliminary investigation* (characterized in an inquisitorial sense) and of the *trial* (inspired by the values of the accusatory system) had to be overcome.

According to this proposal, the information acquired by the police and

[2] For a reconstruction of the recent history of the Italian criminal procedure see E. Amodio, 'Verso una storia della giustizia penale in età moderna e contemporanea' *Criminalia 2010 – Annuario di scienze penalistiche*, 11 (2011) and R. Orlandi, 'Diritti individuali e processo penale nell'Italia repubblicana', in D. Negri and M. Pifferi eds, *Diritti individuali e processo penale nell'Italia repubblicana* (Milano: Giuffrè, 2011), 3.

[3] See F. Carnelutti, *Verso la riforma del processo penale* (Napoli: Morano, 1962), 18.

prosecutors in the preliminary phase had to be used exclusively to draft the accusation and prepare the summons of witnesses and experts meant to present their testimony in a public trial before an impartial judge. Given the emphasis on live testimony, this project seems, at first glance, to replicate the Common Law procedural model. In reality, however, Carnelutti, who knew little about the English and American systems, was inspired by Italian civil procedure regulations. He had long been a Professor of Civil Procedure in several major Italian Universities and had devoted himself to the criminal procedure only in the terminal phase of his academic career, and during his practice as a defense lawyer in some famous cases of the 1950s.

For a long time, the 'Carnelutti project' remained only a proposal, receiving scant attention from the State or from the ministerial commissions established in the 1960s and 1970s to adapt the Code of Criminal Procedure to the new Constitution. Even back then, however, it remained a constant source of inspiration for many authors who were engaged with ongoing reform proposals.[4]

The main novelty of the 'Carnelutti project' was eventually enhanced by the 1988 reform, which embraced the idea that evidence should be presented live at trial, excluding much of the written case file police and prosecutors had developed during the preliminary phases of the criminal investigation.

II. The 1988 Procedural Reform

The original imprint of the new Italian Code of Criminal Procedure (inspired more by Italian civil procedure rather than by the American model) may be grasped above all in the attempt to achieve equality between prosecution and defense. This despite the awareness of the profound differences that in the Italian legal system continued and still continues to exist between the public prosecutor and the accused. This attempt, incidentally, also reveals the naive and unrealistic character of the reform.

Other influences on the 1988 reform also make it difficult to assimilate the new code to the traditions of the Common Law. For example, in drafting the procedural reforms, legal scholars and Parliamentarians had to take into account the copious jurisprudence of the Italian Constitutional Court from the 1960s and 1970s by which that body repeatedly intervened to protect fundamental rights, such as personal autonomy, privacy of correspondence and other communications, as well as defense rights and the presumption of innocence in

[4] Of particular importance is the elaboration of this proposal by Franco Cordero in a series of writings and interventions: see, above all, F. Cordero, 'Scrittura e oralità', in Id, *Tre studi sulle prove penale* (Milano: Giuffrè, 1963), 175-240; Id, 'Linee di un processo accusatorio', in Id et al, *Criteri direttivi per una riforma del processo penale* (Milano: Giuffrè, 1965), 61-88. See also P. Ferrua, *Oralità del giudizio e letture di deposizioni testimoniali* (Milano: Giuffrè, 1981). For an overview of the effects that the 'Carnelutti project' and on the 1988 procedural reform has had on Italian doctrine, refer to R. Orlandi, n 2 above.

ways that are peculiar to neither the common law nor the civil tradition.

Moreover, reforms included few changes to the judiciary or to the tasks assigned to judges and to prosecutors (who remain members of the judiciary, not the executive branch of Government). In contrast to most Common Law jurisdictions, the principle of compulsory prosecution was kept in place, since it derives from our Constitution (Art 112), whose rejection of prosecutorial discretion is designed primarily to protect prosecutors from political interference. The jury, an essential component of Common Law models, was not introduced. It is true that our *Corti d'Assise*, which adjudicate the most serious charges, assign fact-finding to panels that include lay judges; but lay judges in Italy have different powers than Common Law jurors. In fact, Italian jurors have the same decision-making prerogatives as judges do. They do not issue the verdict, but they weigh in on sentencing, following the German model of *Schöffengerichte*.

Anyone who insists that the 1988 Italian procedural reform has drawn inspiration from the experience of Common Law often refers only to a specific procedure: The application of the penalty at the request of the parties, which somewhat resembles common law plea bargaining.[5] Here too, however, I would avoid hasty conclusions. The Italian 'plea bargain' is not really a novelty of the Code passed in 1988. It existed, in an embryonic form, in a law of 1981 (Art 77 of legge 24 November 1981 no 689) which decriminalized many former offenses and sought to reduce the scope of custodial sanctions, replacing shorter prison terms with fines or probation. One of the pre-conditions for the new procedure – like that of its older variant – is that the prosecutor and the accused must agree on the penalty. Despite modern comparisons to Common Law plea bargaining, the new provision more closely resembles a Civil Law procedural mechanism called 'oblation', which permits prosecutors to close out prosecutions for minor, non-jailable offenses.[6] The 1988 reform limited itself to considerably extending the scope of plea bargaining, which now applies to crimes punishable by up to two years' imprisonment. All this occurred in a regulatory context in which prosecutors remain subject to the principle of compulsory prosecution, which prohibits prosecutors from renegotiating either the charge of the legal construction placed on a fact (practices that are called charge-bargaining and fact-bargaining in the United States).[7]

[5] See E. Grande, n 1 above, 251.

[6] Art 162 of Italy's Code of Criminal Procedure provides: 'With regard to contraventions, for which the law only authorizes only fines as a penalty, the offender is allowed to pay, before the opening of the trial or before the decree of conviction, a sum corresponding to a third of the maximum sentence established by the law for the offense committed, in addition to the costs of the proceedings. The payment extinguishes the crime'. Access to obligation was extended to punishable offenses with alternative punishment (custodial or pecuniary), if the judge chooses to opt for a fine (Art 162-*bis* Code of Criminal Procedure, first introduced in 1981), and to offenses prosecuted by the filing of a criminal complaint, if the defendant has fully compensated the victim (Art 162-*ter*, introduced in 2017).

[7] It would be questionable and, I believe, wrong, to consider Italian plea bargaining practices

It should also be borne in mind that the legal debate and with it the regulatory evolution in Italy are affected by other European legal experiences, first of all German ones, especially with regard to the criminal sector. Indeed, Germany has a recent history very similar to the Italian one: It was unified in 1871, ten years after Italy (1861), and again like Italy gathering together several former autonomous States; it knew the totalitarian experience of Nazism, while Italy was in the hands of the fascist regime; it emerged from this traumatic experience with a democratic Constitution not dissimilar to the Italian one in inspiration and substance, and the German Basic Law was enacted in 1949, that is to say one year from the entry into force of the Italian Constitution (1948). It is therefore not surprising that these two Countries have influenced each other for more than a century. This also because of the intense contacts between Italian and German scholars who have developed in all areas of law since the end of the 19th century.

Some choices made Italy's 1988 Code of Criminal Procedure reform[8] may in fact be found in the German procedural law. For example, Germany's removal of the investigative judge (*Untersuchungsrichter*) dates back to 1975, when reforms replaced the investigative judge with the prosecutor as the official in charge of the preliminary investigation. The same can be said of the so-called *incidente probatorio,* which permits the pretrial acquisition of evidence that may not survive until trial. This reform can be traced to the analogous *richterliche Nothandlung* regulated in § 165 StPO. German influence also accounts for the victim's right to oppose the prosecutor's request to dismiss charges, now provided for by our Art 410, in imitation of § 172 StPO (*Klageerzwingungsverfahren*). German criminal procedure is certainly characterized by a more pronounced inquisitorial trait, since, even now, the *Ermittlungsrichter* (preliminary investigation judge) can *ex officio* acquire evidence that may otherwise be lost, while, in Italy, the pre-trial judge can intervene only at the request of the public prosecutor or of the defendant. However, this does not challenge my conclusion that, if I had to identify among foreign legal systems the criminal process system that is closer to the

as indicators that Italy has adopted the Common Law procedural model. Almost all the legal systems of continental Europe have adopted some means of terminating criminal proceedings early, when the accused voluntarily gives up his right to fight the case against him. This happened, eg, in France, thanks to the reform in 2004 which regulated the *Comparation sur Reconnaissance Préalable de Culpabilité* and in Germany, which in 2009 introduced the negotiations between the defendant, the public prosecutor and the judge on the commensurate sentence (so-called *Absprachen*). I believe that this openness to negotiated adjudication is a byproduct of increasing procedural guarantees for defense rights, not an imitation of Common Law procedure (though plea bargaining, in the US, also increased with the advent of greater procedural and evidentiary protections at trial). In other words, the expansion of defense rights lays the groundwork for a negotiated waiver of these rights in exchange for some advantage. For more details and information on this phenomenon, see R. Orlandi, 'Plea bargaining in den kontinentaleuropäischen Ländern' *Österreichische Juristische Zeitschrift*, 404 (2009). It should also be noted that the Italian plea bargaining does not imply the defendant's declaration of guilt.

[8] The text of the new Code of Criminal Procedure, in *Gazzetta Ufficiale* 24 October 1988, entered into force exactly one year later, on 24 October 1989.

Italian one, I find the closest to be the German one (and certainly not in the American or English systems).

The political and social climate in which the Italian reform matured was in fact decidedly hostile to magistrates, due, among other things, to a resounding case of miscarriages of justice in the mid-1980s (Tortora case), which had long polemical repercussions in the media.[9]

The fallout over the Tortora scandal culminated, in 1987, in a popular referendum convened to repeal Italian legislation on civil liability of magistrates for injuries they inflicted on individuals in the exercise of their official functions, as the public viewed the law as excessively lenient.

It can be said that the reform of the Code of Criminal Procedure – which was being worked on for more than twenty years – would likely have never come into force if it had not been for this significant decline in the popularity of the Italian criminal justice system. The intrinsic weakness of the reform, however, resides precisely in its origin as an effort to limit the investigative power of prosecutors.

III. The Counter-Reformation of 1992

Perceived as an act of mistrust towards the judiciary, the 1988 reform that came into force in October 1989 was immediately criticized above all by prosecutors. A committee of public prosecutors spontaneously organized itself, with the explicit intention of rethinking an approach that devalued the investigative work of the public prosecutor. The main target of the committee and of its criticism were the exclusionary rules of the code that prohibited the direct use for the conviction at trial of information collected during the investigation by the police and the public prosecutor. Numerous questions of constitutional legitimacy were proposed emphasizing the unreasonableness of these prohibitions.

Addressing these concerns, in three judgments published between February and May 1992, the Constitutional Court hit the heart of the reform that had just come into force, leading to a sharp reversion to the inquisitorial system and its reliance on written reports that the prosecutor compiled during the preliminary investigation.[10] As a result of these judgments, almost all records of pretrial

[9] Enzo Tortora was a very popular TV presenter. In June 1983 he was arrested for allegedly dealing drugs on behalf of the Camorra in the artistic environment he attended. He was accused by two Camorrists who became collaborators with Neapolitan magistrates. Tortora was sentenced in the first instance (September 1985), but managed to prove his innocence in the appeal proceedings (September 1986). Due to the notoriety of the character, the case became the occasion for a long political battle, culminating in the 1987 referendum, called to repeal a law that excessively protected judges and prosecutors for errors committed in the exercise of their functions. It is in this climate of strong delegitimization of the criminal magistracy that the reform of the Code of Criminal Procedure is completed, in October 1988.

[10] Corte costituzionale 31 January 1992 no 24; Corte costituzionale 3 June 1992 no 254; Corte costituzionale 3 June 1992 no 255. All decisions of the Italian Constitutional Court are available at www.giurcost.org or www.cortecostituzionale.it.

investigative acts (mainly statements made to the police or prosecutor by defendants or witnesses) could easily be admitted at trial, displacing the live testimony which the reforms were designed to elicit. turn into evidence at trial. Written testimony prevailed again over the oral examination of witnesses by the parties before the Court. The right of the accused to challenge the indictment through cross-examination was effectively sacrificed. Consequently, the judicial collaborations of defendants who, in exchange for accusations against co-defendants, received favorable treatment from prosecutors and judges were encouraged. The defense was therefore marginalized. The equilibrium between accusation and defense was compromised, in the sense of a supremacy of the prosecution. The criminal trial thus regained its inquisitorial character.

Two powerful factors, capable of shaking up public opinion and so as to make the public receptive to greater grants of power to prosecutors helped to legitimate this reversion to inquisitorial norms.

The first of these factors was – in February 1992 – the start of an investigation for a case of political corruption: an investigation that extended to the point of discrediting and bringing down all the governing parties, practically marking the end of the political cycle that had started a quarter of century earlier.

The second factor was the popular reaction to two serious mafia massacres (which took place in Sicily between May and July 1992), in which the Sicilian Mafia killed two very well-known prosecutors who had long been involved in the fight against organized crime.

These events rehabilitated the image of prosecutors in the eyes of the public. The latter began to look favorably on reforms designed to help prosecutors fight public corruption and organized crime, welcoming as unavoidable the aforementioned judgments of the Constitutional Court and the legislative reform that, also in 1992 (decreto legge 8 June 1992 no 306, converted into legge 7 August 1992 no 356), confirmed their holdings, consolidating the inquisitorial overruling by incorporating it into legislation.[11]

The figure of the public prosecutor came out enormously strengthened by this counter-reform. The real center of the criminal proceeding became once more the phase preliminary to the trial, as it already had been under the 1930 Code, with the difference that evidence was now gathered by the police and the public prosecutor, while in the previous epoch this task was allocated to a judge (the investigative judge), inclined to act with greater impartiality than one can expect from a public prosecutor.

[11] In particular, has been reformed the text of Art 500 Code of Criminal Procedure, that is, of the rule that regulated the use of statements collected in the pre-trial phase, when the witness made different statements to the trial judge. In the original version of the Code (1988) the statements made to the police or the public prosecutor could only be used to deny the witness who contradicted himself before the trial judge. After the 1992 reform, those statements could also be used as evidence for the guilt judgment. In this way the separation between pre-trial and trial on which the 1988 procedural reform had been built fell.

At the same time, the figure of the defense lawyer suffered a mortifying marginalization in the dynamics of criminal trial. The already mentioned imbalance between accusation and defense produced a growing hostility by defense lawyers towards the judiciary.

The high level of conflict manifested in that period among the main actors of the criminal justice system caused diffidence and difficulties of mutual understanding that still persist. Towards the end of 1999, however, a constitutional reform aimed at affirming the principles of due process helped to partially ease the tensions between lawyers and judges. The growing importance, also for internal procedural law, of the European Convention on Human Rights and the corresponding jurisprudence of the Court of Strasbourg also led the Italian legislator to incorporate the principles of fair trial contained in Art 6 of the European Convention on Human Rights into the Italian Constitution.

In order to affirm these principles, it was necessary to modify the Italian Constitution, with a reform that had the effect of eliminating/amending the legal basis on which the Constitutional Court had founded the mentioned inquisitorial overruling in 1992.

It is thus worthwhile to briefly dwell on the main aspects of this reform in order to grasp more precisely its importance for the purposes of my presentation.

IV. The So-Called Constitutional Reform of the 'Due Process'

The reformed version of Art 111 Constitution acknowledges first of all the principles of due process already affirmed in the European Convention on Human Rights:[12] the right of the accused to be kept informed of the nature and the reasons for the accusation against him; the right to dispose of the necessary time and conditions to prepare her/his defense. These were rights already sufficiently safeguarded by the Italian criminal procedural law.

Other rights affirmed in the new text of Art 111 were instead previously barely guaranteed or had been even sacrificed by the regulatory situation that had been defined after the 1992 inquisitorial overruling. In particular, the accused have the same right to question their own witnesses that prosecutors have to elicit evidence from their own. This right is reinforced by the affirmation of a principle, undoubtedly coherent with the culture of the adversary process, according to which evidence only counts as such when it is presented through live testimony at trial, in front of the parties. This implies that no one can be convicted on the basis of evidence in whose acquisition and presentation they have not been allowed to participate actively. Nor may convictions be grounded in statements made by subjects who have 'always voluntarily avoided answering questions of

[12] Legge costituzionale 23 November 1999 no 2. The impact of this constitutional reform on the criminal trial is well described by P. Ferrua, *Il giusto processo* (Bologna: Zanichelli, 2012).

defendant or his or her lawyer'.[13] This last prohibition should be read as a reaction to the inquisitorial practices that had characterized numerous trials in Italy in the 1990s.

In particular, such practices were favored by the singularly wide scope that Italian criminal procedure afforded to the right to silence. Co-defendants could also benefit from this right with regard to statements by which they incriminated other defendants. After implicating co-defendants during the pretrial investigation, a defendant could simply refuse to submit to further questioning, thus paving the way for their statements to be read into the record at trial. In other words, relying on the right to silence, co-defendants willing to collaborate with the public prosecutor deprived the defendant of the right to cross-examine their accusers. The constitutional revision of Art 111 was designed (1999) to put an end to these practices. This was its main contribution to defense rights.

Thanks to this reform, the Italian criminal justice system has assumed an adversary coloring, modeled however on the principles of the European Convention on Human Rights, rather than on the imitations of Common Law experiences.

Art 111 specifies the situations where the adversarial principle in the formation of the proof can now be waived.

Criminal evidence can be acquired without the active participation of the defendant and his/her lawyer if:

- the defendant allows its use even in *malam partem*, that means also against himself (perhaps in exchange for a penalty discount);[14]

- the acquisition of the evidence may not be replicated before the Court (ie if there is an 'ascertained impossibility of an objective nature', according to Art 111 para 5), as when the testimony cannot be taken before the trial judge, because the witness is dead or cannot be found; a witness is subjected to illicit pressures before being examined in Court ('proven unlawful conduct'): for example, the witness suffers threats or offers of money to retract statements against a defendant.

V. A Nod to the Evolution of Italian Criminal Justice in the Last Two Decades. The European Impetus to Reform Criminal Procedure

The era followed by the revision of Art 111 Constitution can be defined as that of a 'securitarian obsession' that coincided with a progressive opening of

[13] Art 111, para 4, Constitution. The theme is extensively treated by S. Lonati, *Il diritto dell'accusato a "interrogare o far interrogare" le fonti di prova a carico* (Torino: Giappichelli, 2008).

[14] This exception justifies, on the constitutional level, the reductions of punishment applied with special proceedings like *giudizio abbreviato* (shortened judgment: Arts 438-443); *patteggiamento* (Italian plea bargain: Arts 444-448 Code of Criminal Procedure); *decreto penale di condanna* (proceedings by decree: Arts 459-464 Code of Criminal Procedure); *sospensione del processo con messa alla prova* (suspension of proceedings pending probation: Arts 464-*bis* - 464-*novies* Code of Criminal Procedure).

the internal criminal justice system to the jurisprudence of the European Court of Human Rights. This ushered in a new season at the dawn of the new century.

The tragedy of 11 September induced almost all Western States to adopt special laws to face international terrorism. Investigative techniques that meet new challenges had to be studied and adopted. The stakes were so high that it seemed necessary to prepare exceptional means to head off terrorist attacks before they occurred instead of waiting to punish it after the fact. The resulting emphasis on anticipating threats and managing risks favored greater autonomy and a more proactive approach to police and intelligence operations, reducing the prosecutorial and judicial oversight.[15] Public safety seemed to demand new sacrifices and a new framework for judicial cooperation and oversight. No politician is insensitive to the electoral appeal of new initiatives aimed at increasing the electorate's sense of security. The argument also applies to the criminal policies promoted by the European Union. For example, I believe that – without the shock of 11 September – the legislation on the European arrest warrant would never have been launched (2002). The same is true of other rules facilitating cooperation between EU police and judiciary, which are designed to assist in the fight against transnational crime.

The pursuit of security – degenerated into a virtual obsession due to the impact of social media, which encouraged a greater level of public hysteria about national security than publicity about transnational crime has in the past been able to generate. Concern with security fuels changes to Italian criminal law.[16] In particular, substantive criminal law is revised in ways that move criminal liability back to ever earlier preparatory stages of inchoate offenses, while criminal procedure relies ever more on preventive and precautionary measures to neutralize threats.

This tendency is particularly evident in Italy, where a special preventive procedure (now regulated by decreto legislativo 6 September 2011 no 159) has been in use for years. This procedure is entrusted to prosecutors and judges, who implement it (1) through control orders limiting the freedom of movement of dangerous persons and (2) by confiscating to confiscate assets derived from certain crimes that are considered especially dangerous for the society (including organized crime, terrorism, drug trafficking, corruption).

The result is a greater emphasis on crime prevention and risk management rather than crime-fighting. This reduces legal protections for suspects, as traditional

[15] The Italian criminal system, as well as other contemporary legal systems, is developing powerful prevention apparatus to face the most dangerous forms of crime (mafia, terrorism, corruption). Preventive measures can be taken before the crime is committed outside the criminal trial. See, in this regard, R. Orlandi, 'Il sistema di prevenzione fra esigenze di politica criminale e diritti fondamentali', in A. De Caro ed, *La giustizia penale preventiva* (Milano: Giuffrè, 2016), 5.

[16] The literature on the phenomenon of the progressive expansion of criminal law towards the advanced protection of legal assets is very wide. For an updated presentation of the problem, see M. Donini and L. Foffani eds, *La materia penale tra diritto nazionale ed europeo* (Torino: Giappichelli, 2018).

safeguards apply only to formal criminal proceedings, since protections for individual rights have traditionally been confined[17] to criminal investigations rather than preventive operations. Abundant examples of this new emphasis on risk management and prevention may be found in pieces of legislation (not just Italian) concerning illegal immigration, job security, road traffic, environmental pollution, domestic violence and gender relationships. In the current political-social context, liberties at risk for reasons of public interest are mainly those threatened by State agencies that pursue social control through administrative interventions that lack the procedural protections attendant on formal criminal charges. In addition to the above-mentioned procedures, special preventive measures include controls on illegal immigration, as regulated by decreto legislativo 15 July 1998 no 286, repeatedly amended by emergency legislative measures, the most recent of which dates back to October 2018.

On closer inspection, a securitarian criminal law threatens individual rights in much the same way as other traditional forms of criminal law do. The European Court of Human Rights plays a very important role in protecting these rights, as it has plenty of experience in not being deceived by 'label scams' when it comes to defending the rights of persons threatened by acts of the public authority. Guarantees for the rule of law and basic safeguards of criminal procedural cannot be circumvented simply by designating coercive or restrictive measures as administrative rather than criminal.

The European Court of Human Rights has over time developed a careful approach to the 'substance' of fundamental rights, and one that serves as a counterweight to illiberal tendencies.[18] The fact that the Court looks at the concrete action of public authority attributes to its decisions a character of individualization (typically judicial), that is to say, adherence to the alleged violation of the law in the particular case, unknown to the jurisprudence of our Constitutional Court, whose judgments are an expression of the (political) power of control over the activity of the legislator.

I therefore think that judicial efforts to adapt Italian case law to European jurisprudence[19] should be welcomed, and the same goes for the 'almost constitutional' *status* of the norms enacted by the European Convention on Human Rights and of the principles they enshrine.[20] In other words, the jurisprudence

[17] See W. Hassemer, 'Sicherheit durch Strafrecht' *Strafverteidiger*, 322 (2006).

[18] From over forty years (since Eur. Court H.R., *Engel and Others* v *the Netherlands*, Judgment of 8 June 1976) the European Court of Human Rights also attributes criminal nature to sanctions classified as administrative or disciplinary by the national States, if their size is markedly afflictive.

[19] A defendant can challenge his conviction and reopen proceedings against him if his conviction stems from the violation of a right guaranteed by the European Convention on Human Rights, provided that the right is cognizable by the European Court of Human Rights (Art 630 Italian Code of Criminal Procedure, as modified by the ruling of Corte costituzionale 4 April 2011 no 113).

[20] Corte costituzionale 24 October 2007 no 348 and Corte costituzionale 24 October 2007

of the European Court of Human Rights contributes to completing the protection of individual rights, through the control also of the judgments (not only of the laws) unconstitutional.

Another characteristic feature of current Italian criminal justice – as previously mentioned – is its transnational vocation, especially within the European Union. Many of reforms to Italian criminal law and procedure are designed to facilitate cooperation between European judicial authorities, who can now speak directly with each other, without the need for discretionary intervention by political-governmental authorities.

Thus many Italian reforms have been undertaken with the aim of 'harmonizing' the criminal and procedural systems both by the Council of Europe and by the European Union, imposing minimum standards for individual guarantees and the protection of fundamental rights, with the aim of facilitating international cooperation to prevent and suppress transnational crime.

The main ones worth mentioning here are:

- The Budapest Convention on Cybercrime of 23 November 2001, undertaken both to sanction, in a generally uniform manner, the conduct of private individuals in the use of information technology, and to limit the investigative prerogatives of public security agencies and their right to monitor computers and information systems;[21]

- The already mentioned Council Framework Decision on the European arrest warrant of 13 June 2002, which allows the extradition of persons arrested or convicted of serious crimes with simplified procedures compared to those provided for in extradition agreements;[22]

- The Council decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime. The decision provides for closer coordination of genetic investigations and for the establishment of DNA databases to collect and preserve genetic profiles that could be useful to police and judiciaries of other European States;[23]

- The Council of Europe Convention, on preventing and combating violence against women and domestic violence (The Istanbul Convention of 11 May 2011);[24]

- European Parliament and Council Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of

no 349 treat rights protected by the European Convention as so-called 'interposed norms', meaning that they are relevant to interpreting rights protected by the Italian constitution and can be used to assess the constitutionality (under the Italian Constitution) of provisions in the Italian Code of Criminal Procedure. It should also be noted that, as of 1 December 2009, the norms of the European Convention on Human Rights have become an integral part of the law of the European Union, thanks to their incorporation into Art 6 TFEU (as recognized by the same Constitutional Court in decision no 138/2010).

[21] Available at https://tinyurl.com/hj27afn (last visited 30 December 2019).

[22] Available at https://tinyurl.com/y3ug6x2c (last visited 30 December 2019).

[23] Available at https://tinyurl.com/y3b4qbug (last visited 30 December 2019).

[24] Available at https://tinyurl.com/y2rzulr8 (last visited 30 December 2019).

crime, and replacing Council Framework Decision 2001/220/JHA;[25]

- European Parliament and Council Directive 2014/41/EU of 3 April 2014, regarding the European Investigation Order in criminal matters, by which courts of EU Member States must accord validity to investigative acts carried out in other EU Countries;[26]

- Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.[27] The directive also obligates member States to enact common rules governing the seizure and confiscation of assets deriving from a crime, and to facilitate the execution of the coercive or confiscation measure even outside the state territory;

- Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016, on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. This directive is part of a concerted effort to enforce minimum procedural protections for defendants in the legal systems of all member States.[28]

The European Public Prosecutor's Office plays a similar harmonizing role in implementing laws designed to address crimes against the Union's financial interests.[29] An investigative body intended to become operational after October 2020 and composed by national representatives from each Member State of the European Union, the European Public Prosecutor's Office will be able to initiate its own criminal prosecutions for financial crimes against the European Union he task of prosecuting the crimes that harm the financial interests of the Union, as part of a first attempt to create a European federal criminal justice system. Italian procedural reforms must thus be seen as part of a wider European effort to overcome national differences and to pursue supra-national interests at the European level.

VI. Conclusions

The recent history of Italian criminal procedure belies easy analogies or kinship with common law accusatory models. The procedural reform implemented towards the end of the 1980s of the last Century was the fruit of a long evolution that relied only partially on the rather distant adversary models of Common Law systems.

This reform – undoubtedly characterized by accusatorial features that accompanied the expanded procedural rights accorded to the accused – was

[25] Available at https://tinyurl.com/y6qcw2wn (last visited 30 December 2019).
[26] Available at https://tinyurl.com/y32faktm (last visited 30 December 2019).
[27] Available at https://tinyurl.com/y4plts20 (last visited 30 December 2019).
[28] Available at https://tinyurl.com/y2dahsr4 (last visited 30 December 2019).
[29] European Parliament and Council Directive (EU) 2017/1371 of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, available at https://tinyurl.com/yxqakep6 (last visited 30 December 2019).

realized by profiting from a political-institutional constellation peculiar to the second half of the 1980s: the sudden decrease in the prestige of judicial authorities in the eyes of the public opinion, as a result of a sensational miscarriage of justice, made it possible for political authorities to overcome decades of resistance to reforming the criminal process.[30]

Shortly after the entry into force of the reformed code, a series of episodes of political corruption and terrorist attacks altered public opinion sufficiently to rehabilitate the image of prosecutors, thus favoring – towards the beginning of the 1990s – an inquisitorial counter-reform of our legal system.

The imbalance between prosecution and defense derived from this shift has accentuated the conflict between public prosecutors and criminal defense lawyers.

Only the Constitutional reform of 1999, raising some typical features of the adversarial system to the rank of constitutional principles, helped to loosen the tension between the main actors of the criminal justice system. These included the right of the accused to confront the prosecution witness (right to confrontation), the right to form of the penal evidence in the contradiction between the parties, the condition of trendy equality between prosecution and defense.

The start of the new century brings with it new challenges related to the emergence of transnational crime, deflecting law enforcement policies of the European states, including Italy, in two radically different directions.

First, law enforcement agencies emphasize the anticipation and prevention of serious offenses over the prosecution of crime after the fact, through efforts to control dangerous people and to confiscate their assets. This favors the evolution of a preventive criminal justice, implemented with inquisitorial techniques before the crime is committed, without the procedural safeguards attendant on criminal investigations for completed criminal offenses.

Second, the transnational character of numerous offenses (international terrorism, criminal association by organized crime, drug trafficking, human trafficking, money laundering, international corruption, pedo-pornographic organizations, etc) has intensified judicial cooperation between EU Member States. This has been made possible by a series of regulations that allow State judicial authorities to communicate directly with each other, bypassing more cumbersome intergovernmental channels.

The European Union, the Court of Justice of the European Union and the European Court of Human Rights are contributing, each in its own role, to the slow and gradual emergence of criminal procedure systems which, while respecting the different state sovereignties, guarantee minimum procedural safeguards necessary to make reinforced judicial cooperation reasonable and therefore legitimate.

Today, the most significant *impetus* to criminal and procedural reform come from the European institutions and from the delicate interactions that are

[30] E. Grande, n 1 above.

established between them and the judicial and law enforcement authorities of the single States.

The nationalist wind that is now blowing in many States of the European Union, including Italy, has, in Italy, not yet reached the point of casting doubt on the viability of European safeguards for fundamental rights. Nonetheless, we are witnessing a vigorous resumption of security-oriented policies, particularly against waves of migrants from the Middle East and Africa, who are perceived as sufficiently dangerous to warrant both preventive and repressive measures designed to abate this 'threat' to national security.[31]

Lastly, the European push for greater defense rights is being called into question by an anti-corruption campaign propelled forward by a large sector of the current parliamentary majority, who are seeking to enact a new law that weakens defense rights and that is designed, instead to strengthen the powers of prosecutors.[32]

All this in a social-political climate where legislators are very careful to pander to moral panics that mobilize public opinion, which is continually whipped up by media campaigns that warn of social dangers which are often over-blown with respect to the frequency of their occurrence, while giving scant attention to the rights of the accused, continually alarmed by media campaigns that signal social dangers, which are often over-emphasized with respect to the frequency of their occurrence.

The new governing coalition has announced plans for further reforms to the Code of Criminal Procedure. These should address the problem that has long affected the administration of Italian criminal justice: the pathological and unsustainable duration of trials. This is likely to prove the umpteenth opportunity to sacrifice individual rights on the altar of procedural efficiency.

[31] The decreto legge 4 October 2018 no 113, converted into legge 1 December 2018 no 132, effectively compels many thousands of immigrants to live in hiding, making their condition even more precarious and paradoxically accentuating the danger of their stay in Italy.

[32] The legge 9 January 2019 no 3 (on the subject of combating corruption) facilitates the investigative activity aimed at ascertaining the most serious crimes of corruption through the provision of a particular case of non-punishment for those willing to cooperate with the public prosecutor. It also simplifies the techniques of interception of communications (also through the use of computer malware), assimilating the crimes of corruption to the crimes of organized crime (mafia, terrorism) and makes it possible to use agents under cover, which Italian procedural legislation allows only for particular crimes (drugs and arms trafficking, terrorism). The aforementioned legge no 3 of 2019 has also amended the rules of limitation (with regard to all crimes) in a way that is clearly unfavorable to the defense. The limitation period is intended to remain suspended after the first instance sentence, so that the judicial authority has all the time it needs to close the process in the following phases (appeal and appeal by cassation).

Essays

Unfair Terms Control in Business-to-Business Contracts

Francesco Paolo Patti*

Abstract

The aim of the paper is to outline the regulation of one-sided (or onerous) standard terms in business-to-business contracts according to Italian law, in the light of the specific legislative rules and existent case law. Differently than other European legal systems, Italian law does not provide for a substantive control of unfair standard terms in business-to-business contracts. After the implementation of the European Directive no 93/13, the scope of the substantive judicial review covers only unfair terms in business-to-consumer contracts. Italian scholars often discussed the extension of the scope of application of consumer law to business-to-business contracts, but the legislature never addressed the issue.

The Italian Civil Code of 1942 represented a forerunner in providing rules for the incorporation of standard terms in contracts, that are applicable to every kind of contractual relationship between businesses. At the present stage, such rules do not protect adhering parties in an effective way and give rise to many disputes. In some cases, the need of protection of weaker businesses induced Italian courts to develop judge-made law based on open-ended clauses, such as good faith. In other cases, Italian judges adopted the parameter of the worthiness of protection or the *causa* doctrine, to affirm the invalidity of harsh contractual terms. Further limitations of contractual freedom are the so-called 'abuse of economic dependence' and rules devoted to certain contractual terms, which are often standardized in business-to-business contracts (exclusions or limitations of liability and time constraints for the exercise of a right). After sketching the comparative law background with reference to German and French law, the article offers a comprehensive account of the aforementioned elements. The examination leads the author to affirm that Italian law entails an indirect control of unfair terms in business-to-business contracts. In the final part, its relevance in the international context is evaluated.

I. Introduction

In their renowned work, 'Introduction to Comparative Law', Konrad Zweigert and Hein Kötz point out that

> '(t)he special interest of the law in Italy is that the problem of standard terms of businesses has been specifically addressed by the Codice civile as compared with other European civil codes: the rules which seemed modern in 1942 are no longer adequate, largely because they permit only 'covert' and

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'camouflaged' rather than open control of standard terms'.[1]

The rather severe analysis provided by the German authors is undeniably correct. The Italian rules on judicial review (applicable also to B2B contracts) seemed modern when the Code was enacted, but after a few decades, when in the 1970s other legal systems in Europe began to enact specific regulations concerning the judicial control of standard terms, the Italian legal system was immediately left behind.[2]

Since it came into force in 1942, the Italian Civil Code has provided a rule on the incorporation of standard terms into a contract in Art 1341. The second provision devoted to standard terms, Art 1342, states that in cases of conflict between words added by the parties and the preformulated text, the former prevails. Finally, with respect to the construction of contracts, Art 1370 provides a classic *contra proferentem* rule, according to which, where there is a doubt, clauses in standard terms or form contracts must be construed in favour of the party on whom they are imposed. The aforementioned rules apply both to consumers and businesses.

Notwithstanding the critics and the requests for a legislative intervention, which first emerged in scholarship by the end of the 1960s,[3] the Italian legislature – until now – has never adopted a general set of rules on the substantive judicial review of B2B contracts. The most important innovation in the field of standard terms was the implementation of Directive no 93/13 on unfair terms in consumer contracts.[4] The implementation of the rules affected only B2C relationships,[5]

[1] H. Kötz and K. Zweigert, *An Introduction to Comparative Law* (translation by T. Weir, Oxford: Oxford University Press, 3rd ed, 1998), 339-340. See also O. Lando, 'Unfair Contract Clauses and a European Uniform Commercial Code', in M. Cappelletti ed, *New Perspectives for a Common Law of Europe* (Leyden/London: Sijtoff et al, 1978), 267, 270, who writes that the Italian rules 'cannot help an adhering party against a stipulator who can dictate the terms of the contract'; N. Jansen, 'Unfair Contract Terms', in N. Jansen and R. Zimmermann eds, *Commentaries on European Contract Laws* (Oxford: Oxford University Press, 2018), 919, 922: 'Yet, when the first legislation in Europe on standard contract terms was introduced with Art 1341 and 1342 Italian *Codice civile* of 1942, those rules still did not provide for a mechanism of judicial review'.

[2] See for a comparative assessment, as provided in the abovementioned years, E.H. Hondius, 'Unfair Contract Terms: New Control Systems' 26 *American Journal of Comparative Law*, 525 (1978); O. Lando, n 1 above, 267.

[3] Cf S. Rodotà, 'Condizioni generali di contratto, buona fede e poteri del giudice' *Condizioni generali di contratto e tutela del contraente debole: atti della Tavola rotonda tenuta presso l'Istituto di diritto privato dell'Università di Catania: 17-18 maggio 1969* (Milano: Giuffrè, 1970), 84; E. Roppo, *Contratti standard. Autonomia e controlli nella disciplina delle attività negoziali di impresa* (Milano: Giuffrè 1975), 272; C.M. Mazzoni, *Contratti di massa e controlli nel diritto privato* (Napoli: Jovene, 1975), 207-218.

[4] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95, 29-34.

[5] The Directive was implemented through the legge 6 February 1996 no 52. The new provisions on unfair terms in consumer contracts were inserted into the Italian Civil Code in

but the European legislative intervention once again raised a debate concerning the need for judicial review of B2B contracts. Interestingly, the question was submitted to the Italian Constitutional Court. The absence of a protection mechanism for small and medium enterprises could be considered unreasonable in light of Art 3 of the Italian Constitution since legal subjects, no matter whether natural persons or legal entities, may face the same 'take it or leave it' situations as consumers do. The Constitutional Court firmly rejected the assertion and referred in its decision to the political aims pursued by the European Union, which were considered non-extendable to B2B relationships.[6]

Nevertheless, it would be wrong to say that the subject is not of interest for Italian scholars or that under Italian law B2B contracts do not undergo any substantive judicial control. On the one side, Italian scholars are accustomed to adopting the category of 'asymmetric contracts' to describe B2B relationships in which one party has more contractual power than the other, and they have affirmed that courts are already empowered to undertake a substantive control of contractual terms.[7] On the other side, in certain cases (an 'indirect')[8] judicial control is granted on the basis of open-ended clauses or particular rules. In fact, in some cases courts have applied the doctrine of abuse of rights (*abuso del diritto*), based on the principle of good faith, to preformulated terms that grant businesses the right to withdraw *ad nutum* from a contract. Other judgments have declared the legitimacy of a substantive review, referring to the general

Art 1469-*bis* et seq. With the decreto legislativo 6 September 2005 no 206, the same provisions were then transposed in the Italian Consumer Code in Arts 33-36.

[6] Corte costituzionale 22 November 2002 no 469, *Foro italiano*, I, 332 (2003), with comments by A. Palmieri and A. Plaia. See also A. Genovese, 'La crisi della disciplina del contratto *standard*' *Contratto e impresa*, 1156, 1169 (2019), demanding a further intervention of the Constitutional Court.

[7] V. Roppo, 'From Consumer Contracts to Asymmetric Contracts: a Trend in European Contract Law?' 5 *European Review of Contract Law*, 304-349 (2009); A.M. Benedetti, 'Contratto asimmetrico' *Enciclopedia del diritto* (Milano: Giuffrè 2012), Annali V, 370-392. *Contra* G. D'Amico, 'Giustizia contrattuale e contratti asimmetrici' *Europa e diritto privato*, 1, 30-38 (2019). A different approach has been adopted by a group of scholars, who tried to elaborate a general regime for the so-called 'third contract' (*terzo contratto*): see especially the essays collected in G. Gitti and G. Villa eds, *Il terzo contratto* (Bologna: il Mulino, 2008), whereas the label *'terzo contratto*' was coined by R. Pardolesi, 'Prefazione', in G. Colangelo ed, *L'abuso di dipendenza economica tra disciplina della concorrenza e diritto dei contratti. Un'analisi economica e comparata* (Torino: Giappichelli, 2004), XI, XIII, referring to a 'grey area' in between B2C contracts and B2B contracts of sophisticated contracting parties. The paradigm is based on particular regulations concerning B2B relationships in which parties have an unequal bargaining power. One of the main examples of such regulations is the 'abuse of economic dependence' provided by Art 9 legge 19 June 1998 no 192 (see below IV.3). The research group had the aim to identify principles underlying the different regulations in order to reconstruct a system of rules applicable to 'unequal' or 'asymmetric' B2B relationships (cf G. Amadio, 'Il terzo contratto. Il problema', in G. Gitti and G. Villa eds, ibid 9, 16-21).

[8] Such a terminology was first adopted by U. Morello, 'Condizioni generali di contratto' *Digesto delle discipline privatistiche, sezione civile* (Torino: UTET, 1988), III, 334, 344, who refers to rules that are not based on an '*ad hoc* general clause', namely a general clause provided for the control of standard terms.

clause on the 'worthiness' (*meritevolezza*) of a contract (Art 1322 Italian Civil Code) and to the notion of *causa contractus*. In addition, attention must be devoted to special rules which are outside of the Italian Civil Code. The notion of 'abuse of economic dependence' (*abuso di dipendenza economica*), as outlined in Art 9 legge 19 June 1998 no 192, can to some extent encompass also the phenomenon of unfair terms in B2B contracts. Finally, Art 1229 Italian Civil Code limits contractual freedom in the field of limitations or exclusions of liability.

As a final introductory remark, it must be pointed out that the Italian legal system does not provide comprehensive rules on the control of price-related terms. Consumer law is acquainted with the exclusion of any judicial assessment of 'core terms' as provided by Art 4, para 2, of the Unfair Terms Directive,[9] whereas general contract law establishes only some rules on *laesio enormis*, which implicate an unfair exploitation of one contracting party and the corresponding existence of a gross advantage being enjoyed by the opposing party.[10] Other provisions deal with usury, especially in loan contracts.[11]

II. The Comparative Law Background

Among European States, there are different conceptions of the review of unfair terms. French jurists usually refer to such rules as an instrument to protect weaker parties, whereas in the German legal system the problem of standard terms' control is connected to the need of limiting the power of professional suppliers and trade organizations drafting their terms unilaterally.[12] This explains why German law traditionally does not distinguish whether the other party is a consumer or not, as the relevant issue was supposed to be the drafting of the contract in a standardized form.

In recent years, the essential structure of unfair terms regulations in B2B contracts have been deeply discussed by the German and the French doctrine. This was mainly due to the willingness of creating an attractive set of rules for businesses in order to make German and French law more competitive within

[9] See generally M. Farneti, *La vessatorietà delle clausole "principali" nei contratti del consumatore* (Padova: CEDAM, 2009); M. Dellacasa, 'Judicial review of "core terms" in consumer contracts: defining the limits' 11 *European Review of Contract Law*, 152, 158 (2015).

[10] See Art 1448 Italian Civil Code, which remarkably refers to a fixed fifty percent criterion for establishing a relevant disproportionate bargain. On the historical background and for a comparative assessment, see S. Lohsse, 'Excessive Benefit or Unfair Advantage', in N. Jansen and R. Zimmermann eds, n 1 above, 701, 702-704; H. Kötz, 'Comparative Contract Law', in M. Reimann and R. Zimmermann eds, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2nd ed, 2019), 902, 917.

[11] See, for a general overview, M. Graziadei, 'Control of Price Related Terms in Standard Form Contracts: The Italian Experience' *Annuario di diritto comparato e di studi legislativi*, special edition, 193 (2018).

[12] N. Jansen, n 1 above, 923.

the market of legal rules.[13] Certainty and respect of contractual freedom are usually considered the more relevant factors to assess when there is the need to choose the law applicable to an international contract. Not surprisingly, the English Unfair Contract Terms Act 1977 ('UCTA') grants a significant amount of freedom to determine the content of standard terms in international contracts.[14] German and French law both prescribe a general substantive control of unfair terms, but their inherent features differ one from each other.

1. Extended Scope of Application in the German Legal System

In German law, since the entry into force of the *AGB-Gesetz* in 1976, the substantive control of standard terms has been extended to B2B contracts.[15] Already in the preceding decades the German federal court considered standard terms ineffective in referring to the general clause of good faith (§ 242 BGB).[16] German judges have always been willing to protect small and medium-sized businesses against businesses that exercised a monopolistic power. In Germany, the former make up more than ninety percent of the total businesses and provide a fundamental contribution to the German economy. It is often stated that the so-called '*Mittelstand*' (in economic jargon, small and medium businesses) are the engine of the country. It goes without saying that the propensity to protect small and medium-sized businesses is sometimes defined as a genuine choice of economic policy.[17]

Rules on unfair terms, which merged into the BGB in 2002, entail two

[13] See especially S. Vogenauer, 'Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence' 21 *European Review of Private Law*, 13, 64-67 (2013).

[14] See section 26 UCTA 'International supply contracts': '(1) The limits imposed by this Act on the extent to which a person may exclude or restrict liability by reference to a contract term do not apply to liability arising under such a contract as is described in subsection (2) below (…) (3) Subject to subsection (4), that description of contract is one whose characteristics are the following – (a) either it is a contract of sale of goods or it is one under or in pursuance of which the possession or ownership of goods passes; and (b) it is made by parties whose places of business (or, if they have none, habitual residences) are in the territories of different States (the Channel Islands and the Isle of Man being treated for this purpose as different States from the United Kingdom)'.

[15] See O. Sandrock, 'The Standard Terms Act 1976 of West Germany' 26 *American Journal of Comparative Law*, 551 (1978). From a comparative law perspective, see also V. Rizzo, *Le «clausole abusive» nell'esperienza tedesca, francese, italiana e nella prospettiva comunitaria* (Napoli: Edizioni Scientifiche Italiane, 1994); E. Ferrante and R. Koch, 'Le condizioni generali di contratto: collocazione e limiti del controllo di vessatorietà nella prospettiva italo-tedesca' *Contratto e impresa Europa*, 695 (2011).

[16] See, on the historical background, P. Hellwege, *Allgemeine Geschäftsbedingungen, einseitig gestellte Vertragsbedingungen und die allgemeine Rechtsgeschäftslehre* (Tübingen: Mohr Siebeck, 2010), 349-355.

[17] See A. De Franceschi, 'Una proficua *Wahlverwandtschaft*: *Schuldrechtsmodernisierung* e diritto privato europeo', in P. Sirena ed, *Dal 'fitness check' alla riforma del codice civile* (Torino: Giappichelli, 2019), 351, 369.

levels of protection, depending on whether the adhering party is a business or a consumer. In B2B contracts only the general rule laid down in § 307, para 1, BGB would be relevant in prescribing that standard terms that, contrary to good faith, cause a disproportionate disadvantage to the adhering party are ineffective. In fact, according to § 310 BGB, which places the so-called '*Differenzierungsgebot*', the list of clauses included in §§ 308 (*Klauselverbote mit Wertungsmöglichkeit*) and 309 (*Klauselverbote ohne Wertu-ngsmöglichkeit*) BGB do not apply to B2B contracts. The same provision also states that in assessing the abusive nature of standard terms in B2B contracts, account must be given to trade uses and customs.

Despite the clear regulatory framework, in assessing the unfair nature of a standard term also for B2B contracts the German federal court refers to the lists of §§ 308 and 309 BGB (provided for consumers).[18] It follows that any derogation from the default rules could potentially lead to the abusive nature of the clause. Other critical aspects concern the excessively strict criteria used to assess the existence of an individual negotiation and the insufficient consideration of trade usage and customs.[19] Many practitioners consider the equal treatment of business and consumer adhering parties unsustainable, especially with regard to the assessment of exemption or limitation of liability clauses.[20] It is argued that the limitation of contractual freedom is excessive, since it significantly affects the risk distribution chosen by the contracting parties and places the German legal system in an isolated position in the European context.[21] In light of the described case law, some scholars doubt that the rules contained in the BGB could represent a reference point for the harmonization of European law.[22]

2. Recent Reforms in the French Legal System

Unlike German law, the generalized control of contractual clauses in B2B contracts does not belong to the French tradition.[23] Only in recent years, due to

[18] See L. Leuschner, 'AGB-Kontrolle im unternehmerischen Verkehr – Zu den Grundlagen einer Reformdebatte' *Juristenzeitung*, 876 (2010), claiming that the German federal court evaluates B2B contracts 'an denselben strengen Maßstäben, die auch für Verbraucherverträge gelten' (according to the same strict parameters adopted for B2C contracts); T. Pfeiffer, 'Entwicklungen und aktuelle Fragestellungen des AGB-Rechts' *Neue Juristische Wochenschrift*, 913, 917 (2017).

[19] Cf B. Gsell, 'Deutsche Erfahrungen mit der begrenzten Erstreckung der Klauselkontrolle auf den unternehmerischen Verkehr', in J. Kindl et al eds, *Standartisierte Verträge zwischen Privatautonomie und rechtlicher Kontrolle* (Baden-Baden: Nomos, 2017), 244.

[20] See L. Leuschner, 'Grenzen der Vertragsfreiheit im Rechtsvergleich. Eine rechtsvergleichende Untersuchung der Grenzen der Vertragsfreiheit am Beispiel haftungsbeschränkender Vertragsklauseln im deutschen, französischen, englischen, österreichischen und schweizerischen Recht' *Zeitschrift für Europäisches Privatrecht*, 335 (2017).

[21] R. Schulze and T. Arroyo Vendrell, 'Standartisierte Verträge zwischen Privatautonomie und rechtlicher Kontrolle – eine Einführung', in J. Kindl et al eds, n 19 above, 20.

[22] M. Lehmann and J. Ungerer, 'Save the 'Mittelstand': How German Courts Protect Small and Medium-Sized Enterprises from Unfair Terms' 25 *European Review of Private Law*, 313 (2017).

[23] Cf J. Ghestin, *Rapport introductif*, in C. Jamin and D. Mazeaud eds, *Le clauses abusives*

the need to ensure balance between the contracting parties, control systems begun to be discussed.[24] The first debates intervened after the *Chronopost* case, in which the Court of cassation declared an exemption clause '*non-écrite*' due to the fact that it

> '*contredit la portée de l'obligation essentielle souscrite par le debiteur*' (contradicts the scope of the essential obligation subscribed by the debtor).[25]

The judgment was followed by *loi* 4 August 2008 no 776, with the aim of providing a tool to protect businesses against abuses in the distribution sector, according to which it constitutes an illegal conduct

> '*De soumettre ou de tenter de soumettre un partenaire commercial à des obligations créant un déséquilibre significatif dans les droits et obligations des parties*' (to subject or attempt to subject a trading partner to obligations that create a significant imbalance in the rights and obligations of the parties) (Art L 442-6, para 2, Code de commerce).[26]

Finally, with heavily criticized dispositions,[27] the *ordonnance* of 2016[28] introduced in the French Civil Code the legal concept 'contrat d'adhésion', described as a contract

> '*qui comporte un ensemble de clauses non négociables, déterminées à l'avance par l'une des parties*' (that contains a set of non-negotiable terms, determined in advance by one of the parties) (Art 1110 *Code civil*).[29]

entre professionnels (Paris: Economica, 1998), 3-9.

[24] See F. Limbach, *Le consentement contractuel à l'épreuve des conditions générales. De l'utilité du concept de déclaration de volonté* (Paris: LGDJ, 2004), 41-50.

[25] Cour de cassation-chambre commerciale 22 October 1996 no 93-18632, *Recueil Dalloz*, 121 (1997), with a case note of A. Seriaux. See generally D. Mazeaud, 'La protection par le droit commun', in C. Jamin and D. Mazeaud eds, n 23 above, 44-46.

[26] On the differences between the parameters to assess the unfairness of a clause in B2C and B2B contracts, see Cour de cassation-chambre commerciale 25 January 2017 no 15-23547 (on the decision, cf J.B. Seube, 'Comment savoir si une clause crée un déséquilibre significatif?' *Defrénois*, 18, 35 (2017)).

[27] See O. Deshayes et al, *Réforme du droit des contrats, du régime général et de la preuve des obligations* (Paris: LexisNexis, 2nd ed, 2018), 341: 'L'article 1171 est probablement le texte qui a suscité les plus vives polémiques et les plus sévères condamnations lors des consultations publiques' (Art 1171 is probably the provision that provoked the most heated controversy and the most severe condemnations during public consultations).

[28] *Ordonnance no 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*. The *ordonnance* was ratified by the *Loi* 20 April 2018 no 287. See O. Deshayes et al, 'Ratification de l'ordonnance portant réforme du droit des contrats, du régime général et de la preuve des obligations' *Semaine juridique - Edition générale (JCP G)*, 885 (2018).

[29] Art 1110 *Code civil* distinguishes between the aforementioned *contrat d'adhésion* and the *contrat de gré à gré*, namely '*celui dont les stipulations sont librement négociées entre les*

The latter article states that

> '*Dans un contrat d'adhésion, toute clause non négociable, déterminée à l'avance par l'une des parties, qui crée un déséquilibre significatif entre les droits et obligations des parties au contrat est réputée non écrite*' (any non-negotiated clause, determined in advance by one of the parties, that creates a significant imbalance between the rights and obligations of the contracting parties is deemed not written) (Art 1171 Code civil).[30]

The new provision modifies the relationship between judge and contract, providing for a generalized substantive control, similar to that established in favor of consumers.[31] In this regard, it has been argued that the *Code civil* embraced a modern 'philosophy' of contract law, which ensures the force of law and the related inviolability of the agreements only in cases where the contractual terms have been negotiated.[32] Otherwise, where the terms have been prepared by a party for a multitude of contractual relationships, the need for substantive control exists.

III. Rules on Standard Conditions and Form Contracts

The first set of rules of Italian law that must be analyzed is the one devoted to the 'formal' control of standard conditions and form contracts. Such rules do not provide a strong protection in favor of the adhering party, but are often applied by Italian judges. Several questions related to the interpretation of the relevant provisions were tackled in the case law. A review of the orientations of the Court of Cassation on the most important aspects of the regulation is therefore undeniable in order to assess Italian law's state of art in the field of judicial review of B2B contracts.

1. Regulatory Framework

parties'. See D. Mazeaud, 'Imaginer la réforme' *Revue des contrats*, 610 (2016). See also E. Minervini, 'Contratti per adesione e clausole abusive nel codice civile francese riformato', in D. Di Sabato ed, *La riforma del* code civil*: una prospettiva italo-francese* (Napoli: Edizioni Scientifiche Italiane, 2018), 151.

[30] According to Art 1171 *Code civil* '*L'appréciation du déséquilibre significatif ne porte ni sur l'objet principal du contrat ni sur l'adéquation du prix à la prestation*' (The assessment of the significant imbalance does not relate to the subject matter of the contract nor to the adequacy of the price).

[31] On the relationship between Art 1171 *Code civil* and Art L 212-1 *Code de la consommation*, see M. Mekki, 'Réforme des contrats et des obligations: clauses abusives dans les contrats d'adhésion' *Semaine juridique - Edition générale (JCP G)* 1190 (2016); O. Deshayes et al, n 27 above, 342-353; J.S. Borghetti, 'Le nouveau droit français des contrats, entre continuité et europeanisation' *Annuario del contratto 2016* (Torino: Giappichelli, 2017), 3, 22-23.

[32] Cf T. Revet, 'Le projet de réforme et les contrats structurellement déséquilibrés' *Recueil Dalloz*, 1217 (2015); Id, 'Une philosophie générale?' *Revue des contrats*, Hors-série, 5 (2016).

The Italian Civil Code draws a distinction between the more general problem of incorporation of standard conditions (Art 1341, para 1) and the specific problem regarding the incorporation and validity of 'one-sided' or 'onerous' clauses (Arts 1341, para 2 and 1342, para 2).[33] The latter are valid only if there is explicit approval in writing, whereas the general rule for incorporation is that the terms are known or might have been known by using ordinary diligence.[34] The separate treatment of 'one-sided clauses' or 'onerous clauses' has deprived the general problem regarding incorporation of any practical importance.[35] Issues related to incorporation usually arise only for clauses that are not one-sided.[36] The latter are subdivided in two groups by Art 1341, para 2, Italian Civil Code, and it is understood that the list cannot be extended by analogy.[37]

Art 1342 Italian Civil Code sets outs the treatment of clauses that are added to a form contract for the purpose of uniformly regulating multiple contractual relationships, typically with different contracting parties.[38] By stating in the first para that any added clauses prevail over the originally formulated clauses, the article prescribes a rule of contractual interpretation. The second para simply clarifies the scope of application of Art 1341, para 2, Italian Civil Code. It makes clear that the rule on onerous conditions applies also in cases in which the form contract is signed.

The *contra proferentem* rule stated in Art 1370 Italian Civil Code[39] has a

[33] Art 1341 Italian Civil Code 'General conditions of contract': '(1) General conditions, prepared by one of the parties, are binding on the other party if known by the latter at the time when the contract was concluded or if she or he might have known thereof by using ordinary diligence. (2) At any rate, the conditions do not produce effects, unless specifically approved in writing, when, in favour of the party who has predisposed [drafted] them, they provide limitations of liability, the faculty to withdraw from the contract or to suspend the execution thereof, or burden the other party with time constraints for the exercise of a right or limitations to such party's power to raise defenses, restrictions on freedom of contract with third persons, tacit extension or renewal of the contract, clauses providing for arbitration or derogations from the usual venue or jurisdiction of the courts'.

[34] See G. Gorla, 'Standard Conditions and Form Contracts in Italian Law' 11 *American Journal of Comparative Law*, 1, 3 (1962), who recalls the fact that the quoted provisions of the 1942 Code are novel and were not provided by the Civil Code of 1865 nor by the Commercial Code of 1882.

[35] ibid 5. See also R. Sacco and G. De Nova, *Il contratto* (Torino: UTET, 4th ed, 2016), 348.

[36] But see Section III.3 below, on clauses that are not legible.

[37] See Corte di Cassazione ordinanza 25 August 2017 no 20397, *Vita notarile*, 272 (2018). But see Section III.5 below.

[38] Art 1342 Italian Civil Code 'Contracts made by means of forms or formularies': '(1) In contracts made by subscribing to forms prepared for the purpose of regulating in a uniform manner certain contractual relationships, the clauses added to such forms prevail over the original formulated clauses, even if incompatible, and even though the latter have not been stricken out. (2) In addition, the provision of the second para of the preceding article is applicable'.

[39] Art 1370 Italian Civil Code 'Construction against the author of a clause': 'The clauses inserted in general conditions of contract or in model or form contracts predisposed (drafted) by one of the contracting parties are construed, in cases of doubt, in favour of the other'. See generally A. Genovese, *L'interpretazione del contratto* standard (Milano: Giuffrè, 2008), 24-25.

subsidiary nature.[40] In principle, the general conditions must be construed according to the rules on construction of contracts contained in Arts 1362 ff Italian Civil Code. Usually, the first criterion indicated in the aforementioned set of rules, which refers to the 'common will' of the parties, is not considered applicable because the adherent party does not truly express a will.[41] The meaning of the general conditions has to be revealed through objective criteria, having reference primarily to the understanding of the majority of the users of the term under scrutiny. At any rate, Art 1370 applies only if there is 'a doubt' concerning the meaning of the words used. This is an infrequent event.[42]

2. Definition of Standard Conditions and Form Contracts

Initially, there is the need to point out the distinction between standard conditions (Art 1341 Italian Civil Code) and form contracts (Art 1342 Italian Civil Code) in order to clarify the scope of application of the review in terms of compliance with required formalities. The first expression refers to the terms prepared by one of the contracting parties and adopted in order to regulate an undetermined series of relationships, whereas the second one concerns forms prepared by third parties, even though the forms are not used by one of the parties as her standard conditions.[43]

In more detail, Art 1341 Italian Civil Code refers to blocks of standard conditions, used – as said – to regulate a series of relationships.[44] This means that the rule applies if the contracting party that uses the standard conditions exercises an activity that implicates the formation of multiple relationships.[45] If the choice to adopt the standard conditions is taken on the basis of a negotiation conducted by the contracting parties, Art 1341 Italian Civil Code is inapplicable.[46] A

[40] L. Bigliazzi Geri, 'L'interpretazione del contratto', in F.D. Busnelli ed, *Il codice civile. Commentario* (Milano: Giuffrè, 2nd ed, 2013), 366, who points out that, in matters of construction, Art 1370 Italian Civil Code prevails only over Art 1367 Italian Civil Code, which states that, in cases of doubt, an interpretation which renders the terms of the contract effective is to be preferred over one which would not.

[41] S. Patti and G. Patti, 'Responsabilità precontrattuale e contratti standard', in P. Schlesinger ed, *Il codice civile. Commentario* (Milano: Giuffrè, 1993), 364-365.

[42] L. Bigliazzi Geri, n 40 above, 366-367.

[43] G. Gorla, n 34 above, 11.

[44] Corte di Cassazione 19 March 2018 no 6753, 'Contratto in genere' *Repertorio del Foro italiano*, 44 (2018); Corte di Cassazione 15 April 2015 no 7605, *Massimario Giustizia Civile*, 2015; Corte di Cassazione ordinanza 7 December 2012 no 22047, *Foro italiano*, I, 892 (2013); Corte di Cassazione ordinanza 7 December 2011 no 26333, 'Contratto in genere' *Repertorio del Foro italiano*, 376 (2011). See for further references M. Maggiolo, *Il contratto predisposto* (Padova: CEDAM, 1996), 93-96.

[45] Corte di Cassazione 23 May 2006 no 12153, *Il Foro italiano*, I, 1896 (2007). For B2C contracts, the substantive control mechanism provided by Arts 33-36 Italian Consumer Code requires only that the business has drafted the term.

[46] Corte di Cassazione 10 August 2016 no 16889, 'Locazione' *Repertorio del Foro italiano*, 39 (2016); Corte di Cassazione 17 March 2009 no 6443, 'Contratti pubblici' *Repertorio del Foro italiano*, 637 (2009).

negotiation surely exists in cases in which material modifications have been introduced into the standard conditions or the form contract. The onus of proving the nature as standard conditions is on the party who wants to have a term declared as non-effective.[47] Such a claim has a 'constitutive nature', and, therefore, the judge can affirm on its own motion the absence of proof.

According to the Court of Cassation, if the standard conditions are contained in a deed drafted by a public official (eg, a notary), Art 1341 Italian Civil Code is not applicable.[48] Therefore, also where the deed contains onerous clauses, approval in writing is not required. The case law is based on the idea that the form requirements set by the provision on standard conditions is substituted by the notarial form. Some authors have criticized the solution, arguing that a deed does not ensure that the weaker party has been able to influence the content of the contractual provisions through a negotiation.[49]

Art 1342 Italian Civil Code applies also if the form prepared by a third party was adopted only once by the contracting party.[50] Due to the 'objective' standard nature of such a form, the need for protection exists as with standard conditions prepared by one of the contracting parties. In addition, premising the application of Art 1342 on the contracting party having used the form contract on multiple occasions would make the provision redundant, because Art 1341, para 1, Italian Civil Code would apply directly to standard form conditions (although printed in form contracts).[51] Art 1342 Italian Civil Code does not apply if the form is chosen not by one of the contracting parties, but by brokers who submit a text to the parties which encompasses particular clauses.

The aforementioned rules are not applicable in cases in which the parties adopt a model contract (a so-called '*contratto-tipo*') drafted by associations who represent different categories of contracting parties.[52] A prominent example in Italian case law is found in collective labor agreements.[53] It is arguable that the

[47] Corte di Cassazione 14 March 2014 no 5952, *Assicurazioni*, 307 (2014); Corte di Cassazione 30 September 2005 no 19212, 'Contratto in genere' *Repertorio del Foro italiano*, 411 (2005).

[48] Corte di Cassazione 20 June 2017 no 15237, 'Contratto in genere' *Repertorio del Foro italiano*, 305 (2017); Corte di Cassazione 21 September 2004 no 18917, 'Contratto in genere' *Repertorio del Foro italiano*, 367 (2005); Corte di Cassazione 21 January 2000 no 675, *Foro italiano*, I, 1153 (2000); Corte di Cassazione 23 April 1998 no 4188, 'Contratto in genere' *Repertorio del Foro italiano*, 325 (1998); Corte di Cassazione 27 April 1998 no 4269, 'Contratto in genere' *Repertorio del Foro italiano*, 326 (1998); Corte di Cassazione-Sezioni unite 10 January 1992 no 193, *Vita notarile*, 761 (1992).

[49] See E. Bargelli, 'Condizioni generali di contratto – sub Art. 1341', in E. Gabrielli ed, *Commentario del codice civile* (Torino: UTET, 2011), 555.

[50] S. Patti and G. Patti, n 41 above, 467.

[51] ibid.

[52] See on the different classifications of 'contratti-tipo', E. Battelli, *Contratti-tipo. Modelli negoziali per la regolazione del mercato: natura, effetti e limiti* (Napoli: Jovene, 2017), 55-60.

[53] Corte di Cassazione-Sezione lavoro 28 October 2008 no 25888, 'Lavoro (contratto)' *Repertorio del Foro italiano*, 22 (2008); Corte di Cassazione-Sezione lavoro 6 August 2003 no 11875, *Notiziario giurisprudenza lavoro*, 8 (2004).

same applies when the parties are members of the trade association which has prepared the contractual terms.[54]

3. Incorporation of Standard Conditions

Art 1341, para 1, Italian Civil Code states that general conditions are binding if known by the other party at the time when the contract was concluded or if she might have known of them by using ordinary diligence. The onus of proof concerning the knowledge or the possibility of knowing the content of the general conditions lies with the contracting party who wants to take advantage of them.[55] With respect to the 'possibility of knowing' the general conditions, the law prescribes ordinary diligence as a parameter that the judge has to apply in the individual case. The reference is to the general rule on diligence provided by Art 1176 Italian Civil Code. Some authors refer to the characteristic position that the adherent party has with regard to the individual contract and to the possibility that she exercises a professional activity.[56] Other authors, and the prevailing orientation of the Court of Cassation, affirm that one has to refer to the general behavior of adherent parties in the context of the type of transaction which is at issue.[57]

Issues related to transparency fall within the scope of the provision. So if it is not legible[58] or if its meaning is obscure, the term is not considered part of the contract.[59] In addition, Art 1341, para 1, Italian Civil Code indicates 'the time when the contract was concluded' as the relevant moment in time. This means that the general conditions are not part of the contract if they are printed on the invoice and dispatched after the conclusion of the contract.[60] The rule is applicable if the standard conditions are printed on the individual contract or on a supplementary sheet to which the former refers.[61]

A disputed problem in legal writings relates to the consequences of an infringement of the requirement set by Art 1341, para 1, Italian Civil Code. It is

[54] G. Gorla, n 34 above, 16.

[55] Corte di Cassazione 14 March 2014 no 5952, *Assicurazioni*, 307 (2014).

[56] R. Scognamiglio, *Dei contratti in generale*, in A. Scialoja and G. Branca eds, *Commentario del codice civile* (Roma-Bologna: Il Foro italiano-Zanichelli, 1970), 263.

[57] C.M. Bianca, 'Condizioni generali di contratto' *Enciclopedia giuridica* (Roma: Treccani, 1991), 2; U. Morello, n 8 above, 337; S. Patti and G. Patti, n 41 above, 339. In the case law, see Corte di Cassazione 26 February 2004 no 3863, *Foro italiano*, I, 2133 (2004) with a comment by A.L. Bitetto, concerning a parking contract.

[58] See E. Minervini, 'Clausola vessatoria illeggibile – Clausola vessatoria illeggibile contenuta in un modulo o formulario' *Giurisprudenza italiana*, 790 (2019).

[59] C.M. Bianca, n 57 above, 2. For further developments, see E. Ferrante, 'Il consenso contrattuale e le sue gradazioni: l'esempio dell'interpretazione contro l'autore della clausola', in P. Sirena and A. Zoppini eds, *I poteri privati e il diritto della regolazione – A quarant'anni da "Le autorità private" di C.M. Bianca* (Roma: Roma Tre-Press, 2018), 367-407.

[60] See also G. Gorla, n 34 above, 17.

[61] E. Bargelli, n 49 above, 553-554. See also Corte di Cassazione ordinanza 12 February 2018 no 3307, *Giurisprudenza italiana*, 787 (2019), which clarifies that the rule on incorporation applies also to form contracts, subject to Art 1342 Italian Civil Code.

not necessary to detail the different theories developed on this matter. According to the prevailing view, the literal meaning of the words used by the provision indicates that clauses – which are not known or not knowable with ordinary diligence – do not become part of the contract.[62] In this sense, the Italian rule is conceptualized as a tool capable of resolving the problem of 'incorporation' of clauses in the contract (according to German terminology, *Einbeziehung in den Vertrag*). Consequently, both contracting parties theoretically may object that an unknown or an unknowable clause is not part of the contract. The gaps that arise in the contract are filled through default rules.[63]

4. The Specific Approval in Writing

As it has been stated, the control provided by the Italian Civil Code in Art 1341, para 2, is the requirement of express written approval of one-sided clauses. From the Civil Code's time of enactment, the Italian courts have always required a 'dual signature', one for the contract as a whole and one for any one-sided clauses.[64] This means that one-sided clauses need not be individually approved by a signature (ie a signature for every one-sided clause). Rather, the provision requires only a second, separate acceptance with a declaration expressed after the first signature which makes mentions of the one-sided clauses.[65] Thus, the first signature has the function of proving the existence of an agreement and identifying the contracting party, whereas the second signature should induce the latter to focus on clauses which are particularly onerous and may limit contractual freedom. In theory, the requirement should induce the adherent party to reflect on the content of the terms and take precautions in the event of one-sided clauses. The reality is that often the adherent party faces a 'take it-or-leave it' situation and cannot influence the contents of the contract. In Italian legal scholarship it is, therefore, stated that the control mechanism in terms of contractual form is insufficient to protect the interests of weaker contracting parties.[66]

There is a huge amount of jurisprudence of the Court of Cassation dealing with the issue. Judge-made law has forged the requirements of 'separateness' and 'specificity' of the approval. The Court of Cassation has declared[67] that at the bottom of the contract, where the second signature appears, reference to the one-sided clauses may be made by specifying the article or section number that

[62] S. Patti and G. Patti, n 41 above, 345.

[63] See especially G. De Nova, 'Nullità relativa, nullità parziale e clausole vessatorie non specificamente approvate per iscritto' *Rivista di diritto civile*, II, 486 (1976); G.B. Ferri, 'Nullità parziale e clausole vessatorie' *Rivista di diritto commerciale*, I, 11 (1977).

[64] S. Patti and G. Patti, n 41 above, 352-355.

[65] A. Genovese, 'Condizioni generali di contratto' *Enciclopedia del diritto* (Milano: Giuffrè 1961), VIII, 805-806; R. Sacco and G. De Nova, n 35 above, 360.

[66] C.M. Bianca, 'Condizioni generali' n 57 above, 5.

[67] Corte di Cassazione 9 July 2018 no 17939, 'Contratto in genere' *Repertorio del Foro italiano*, 12 (2018).

the term has in the contract. However, it is not permissible to refer to a group of terms within which only some of them are one-sided. The latter manner of reference is valid only if there is a brief indication of the content of every term. In addition, in some cases, Italian judges have affirmed that the requirements of 'separateness' and 'specificity' set by Art 1341, para 2, Italian Civil Code are fulfilled only in cases where the manner of referring to one-sided clauses can be expected to raise the attention of the adherent party to clauses that can disadvantage her.[68]

An additional problem concerns online contracts containing one-sided clauses. According to the prevailing opinion, the second signature must be provided through the same technological procedure as the first one.[69] The idea is that satisfaction of the requirement means having to use a form designed to prompt a further assessment of the onerous clauses. In this way, even without a handwritten signature, the 'separateness' and 'specificity' of the approval would be established.

There are still ongoing discussions in respect of the treatment of one-sided clauses not expressly approved in writing. It would go beyond the scope of the present contribution to list all the different opinions. For our purposes, it should be noted that some scholars refer to an absolute nullity, others speak of a relative nullity that can be declared only in the interest of the adherent party, and a third group of scholars affirm that the issue should be treated as a matter of non-incorporation of the clause into the contract.[70] Recently, the Court of Cassation has clearly endorsed the understanding according to which the absence of express, written approval results in the relative nullity of the one-sided clause.[71] This means that only the party who is protected by the law, namely the adherent party, can take advantage of the nullity of the term. If a judge declares a term null and void, the contract continues to be binding as to the rest, and the term not expressly approved is 'substituted' by default rules. The solution is very similar to the one adopted for consumer contracts by the Italian Consumer Code at Art

[68] Corte di Cassazione 12 October 2016 no 20606, 'Contratto in genere' *Repertorio del Foro italiano*, 340 (2016); Corte di Cassazione 27 February 2012 no 2970, *Rivista del notariato*, 444 (2012).

[69] See F. Ricci, 'Le clausole vessatorie nei contratti online' *Contratto e impresa Europa*, 651, 687-689 (2014); E. Battelli, 'Riflessioni sui procedimenti di formazione dei contratti telematici e sulla sottoscrizione on line delle clausole vessatorie' *Rassegna di diritto civile*, 1035 (2014); G. Cerdonio Chiaromonte, 'Specifica approvazione per iscritto delle clausole vessatorie e contrattazione *on line*' *Nuova giurisprudenza civile commentata*, 404 (2018).

[70] The relevant references are provided by L. Buonanno, 'Linguaggio della norma ed interpretazione delle categorie nella patologia degli atti negoziali' *Contratto e impresa*, 444, 458-469 (2018).

[71] Corte di Cassazione 21 August 2017 no 20205, 'Contratto in genere' *Repertorio del Foro italiano*, 304 (2017); Corte di Cassazione ordinanza 4 June 2014 no 12591, available at www.dejure.it; Corte di Cassazione 20 August 2012 no 14570, 'Contratto in genere' *Repertorio del Foro italiano*, 462 (2012). A different opinion was expressed in the past by Corte di Cassazione 15 February 1995 no 1606, 'Contratto in genere' *Repertorio del Foro italiano*, 292 (1995), which refers to an 'absolute' nullity.

36. According to para 1 of the latter provision, in consumer contracts unfair terms are void while the rest of the contract remains valid. In addition, para 3 of Art 36 Italian Consumer Code states that nullity operates only for the benefit of the consumer and may be ascertained by the court on its own motion. The attempt – and desire – to harmonize the two different regimes for standard contracts appears clear. Nevertheless, the interpretation of the Court of Cassation seems to contradict the literal meaning of the words used in Art 1341, para 2, Italian Civil Code, where it is stated that terms not expressly approved in writing will not produce effects as occurs under the preceding para of the article.[72]

5. The List of 'One-Sided' or 'Onerous' Clauses

One of the associated problems concerns the correct identification of those clauses that fall under the provision of the second para of Art 1341 Italian Civil Code. As it has already been mentioned, interpretation by way of analogy is not permissible. Nevertheless, in some cases, having regard to the *ratio legis* of the specific clause, it is possible to provide an 'extensive interpretation'.[73] The difference between analogy and extensive interpretation is not easy to sketch.[74] Italian courts apply Art 1341, para 2, Italian Civil Code when it is possible to subsume a term of the contract under one of the clauses set out in the enumeration. There has been considerable litigation related to clauses which as matter of interpretation may be covered by Art 1341, para 2, Italian Civil Code. It must be pointed out that, in determining whether the second para of Art 1341 Italian Civil Code applies, courts only consider the nature and reach of a clause (as a question of law). They do not investigate whether the party burdened with the clause is in a weak position.[75]

It is difficult to provide a thorough inventory of those clauses that have been deemed as onerous, in part because the task of evaluating the character of the clauses is remitted to the lower courts (the first two instances, tribunals and courts of appeal), and their decisions are not as readily available as those of the Court of Cassation. No doubts arise for clauses that correspond to the wording used in the enumeration contained in the aforementioned provision, which takes into consideration clauses that: provide for limitations of liability; give the power to withdraw from the contract or suspend its execution; burden the other party with time constraints on the exercise of a right or limit such party's power to raise defenses; create restrictions on freedom of contract with third persons; entail a tacit extension or renewal of the contract; or provide for arbitration or derogations from the usual venue or jurisdiction of the courts. Pursuant to Art 1341, para 2, Italian Civil Code, the Court of Cassation has held as one-sided: clauses granting

[72] See S. Patti and G. Patti, n 41 above, 356-361.
[73] See especially G. Gorla, n 34 above, 10; U. Morello, n 8 above, 339.
[74] See E. Bargelli, n 49 above, 559.
[75] G. Gorla, n 34 above, 11; R. Sacco and G. De Nova, n 35 above, 360.

withdrawal rights;[76] clauses limiting the power to raise defenses (eg, the '*solve et repete*' clause);[77] extension or renewal clauses;[78] clauses limiting the freedom of contract with third persons; and arbitration[79] and jurisdiction clauses.[80]

In the absence of a direct reference in the list of Art 1341 Italian Civil Code, express approval in writing is required for clauses imposing a risk of impossibility of performance on the other party such that the latter has to pay even if she does not receive the intended counter-performance, for clauses which make the offer of a customer irrevocable at the moment when an order is signed,[81] and for clauses that exclude guarantees of the seller within a contract of sale.[82] Additionally, clauses that oblige one of the parties to sell only products of the drafter[83] or to apply a minimum price[84] are considered one-sided.

On the other hand, the control mechanism does not affect penalty and forfeiture clauses,[85] agreed rights of termination in the case of a so-called '*clausola risolutiva espressa*',[86] or clauses providing for the determination of the subject

[76] Corte di Cassazione 13 July 1991 no 7805, 'Contratto in genere' *Repertorio del Foro italiano*, 258 (1991); Tribunale di Milano 19 July 2001, *Danno e responsabilità*, 85 (2003). Conversely, the exclusion of a withdrawal right is not considered a one-sided clause: see Corte di Cassazione 4 June 2013 no 14038, 'Contratto in genere' *Repertorio del Foro italiano*, 344 (2013).

[77] Tribunale di Cagliari 13 November 2007, *Rivista giuridica sarda*, 445 (2009). See also F. Addis, 'Clausola limitativa della proponibilità di eccezioni', in M. Confortini ed, *Clausole negoziali. Profili teorici e applicativi di clausole tipiche e atipiche* (Torino: UTET, 2017), 773, 787-789. It must be observed that, in individual contracts, clauses that limit the power to raise defenses are regulated by Art 1462 Italian Civil Code. Under the latter provision, clauses that prevent a party from raising an exception connected to the nullity, to the avoidance or to the rescission (in a case of *laesio enormis*) of the contract are void. In addition, even if the clause is valid, the judge can suspend a judgment if grave reasons exist.

[78] Corte di Cassazione 12 October 2015 no 20401, *Nuova giurisprudenza civile commentata*, 237 (2016).

[79] Tribunale di Torino 23 January 1986, 'Arbitrato' *Repertorio del Foro italiano*, 43 (1986). Nevertheless, a clause that refers to an informal arbitration proceeding has not been held as onerous: see Tribunale di Pisa 16 December 1996, *Rivista dell'arbitrato*, 265 (1998); Tribunale di Venezia 19 February 1992, *Giurisprudenza italiana*, I, 2, 1188 (1994).

[80] Corte di Cassazione 12 February 2018 no 3307, *Nuova giurisprudenza civile commentata*, I, 1234 (2008).

[81] According to Art 1328 Italian Civil Code, an offer to conclude a contract is revocable. See on the latter provision A.M. Benedetti and F.P. Patti, 'La revoca della proposta: atto finale? La regola migliore, tra storia e comparazione' *Rivista di diritto civile*, 1293-1335 (2017).

[82] Corte di Cassazione 23 December 1993 no 12759, 'Contratto in genere' *Repertorio del Foro italiano*, 296 (1993). With respect to more recent developments, see G. De Cristofaro, 'Autonomia privata e pattuizioni di esclusione totale della garanzia per vizi nei contratti di compravendita - Note a margine di due recenti pronunce della Corte di Cassazione' *Rivista di diritto civile*, 219 (2018).

[83] Corte di Cassazione 29 March 1977 no 1214, *Giurisprudenza italiana*, I, 1, 1284 (1977).

[84] Corte di Cassazione 23 May 1994 no 5024, *Foro italiano*, I, 2528 (1995).

[85] Corte di Cassazione 18 March 2010 no 6558, 'Contratto in genere' *Repertorio del Foro italiano* 441 (2010); Corte di Cassazione 23 December 2004 no 23965, 'Contratto in genere' *Repertorio del Foro italiano*, 481 (2004); Corte di Cassazione 26 June 2002 no 9295, 'Contratto in genere' *Repertorio del Foro italiano*, 419 (2002).

[86] Corte di Cassazione ordinanza 5 July 2018 no 17603, 'Contratto in genere' *Repertorio del Foro italiano*, 105 (2018); Corte di Cassazione 11 November 2016 no 23065, 'Contratto in

matter of the contract (which often present similarities with limitations of liability clauses).[87] The exclusion of the control as regards form for penalty clauses is justified by the presence of a mandatory provision in Art 1384 Italian Civil Code, according to which the judge can reduce (also on his or her own motion) the amount of the penalty.[88] For agreed rights of termination, the possibility to sanction the abusive behaviour of the right-holder was addressed by some judgments through the general principle of good faith.[89] Clauses that grant to one of the contracting parties the power to unilaterally modify the contents of the contract also do not fall under the list contained in Art 1341, para 1, Italian Civil Code.[90] The same was stated by the Court of Cassation in respect of a clause, contained in a tenancy contract, that imposed on the tenant costs that would have otherwise fallen to the landlord[91] and in respect of a clause that extended the liability of a carrier also for losses due to theft. [92] Further, a clause fixing a precise duration for a long-term contract was not held as one-sided.[93]

6. The Problem of 'Bilateral' or 'Reciprocal' Clauses

With the expressions 'bilateral' or 'reciprocal' clauses, Italian scholarship refers to clauses that are drafted by one of the contracting parties but that in abstract terms could provide a favourable or negative outcome for both contracting parties.[94] In the past, some authors expressed the opinion that such clauses could not be considered onerous because of the equal treatment that they assure to contracting parties. Such a view has been rejected by the majority of scholars and as considered by the Court of Cassation.[95] First, notwithstanding the bilateral character of the clause, it is not possible to exclude that the drafter inserted such clause only in order to take advantage of the other party.[96] Second, the latter

genere' *Repertorio del Foro italiano*, 438 (2016); Corte di Cassazione 28 June 2010 no 15365, 'Contratto in genere' *Repertorio del Foro italiano*, 509 (2010).

[87] See below III.3.

[88] See for details F.P. Patti, 'Penalty Clauses in Italian Law' 25 *European Review of Private Law*, 309, 317-322 (2015).

[89] See below III.2.

[90] Corte di Cassazione 29 February 2008 no 5513, *'Contratto in genere' Repertorio del Foro italiano*, 387 (2008), which clarifies that the abovementioned clause does not result in a limitation of liability.

[91] Corte di Cassazione 12 July 2007 no 15592, *Giurisprudenza italiana*, 693 (2008).

[92] Corte di Cassazione 27 April 2006 no 9646, 'Contratto in genere' *Repertorio del Foro italiano*, 408 (2006).

[93] Corte di Cassazione 3 September 2015 no 17579, 'Contratto in genere' *Repertorio del Foro italiano*, 329 (2015).

[94] See V. Cusumano, 'Le condizioni generali di contratto: vessatorietà e bilateralità' *Nuova giurisprudenza civile commentata*, 239 (2016).

[95] Corte di Cassazione 1 March 2016 no 4047, 'Contratto in genere' *Repertorio del Foro italiano*, 348 (2016); Corte di Cassazione 2 February 2016 no 1911, *Foro italiano*, I, 1279 (2016); Corte di Cassazione 12 October 2015 no 20401, n 78 above; Corte di Cassazione 24 June 2004 no 11734, 'Contratto in genere' *Repertorio del Foro italiano*, 371 (2004).

[96] G. Gorla, n 34 above, 10 refers to an 'irrebuttable presumption that they favor the drafter'.

does not have the possibility to influence the contents of the contract. The absence of negotiations preempts the adherent party from evaluating the effects that the clause may have on the contractual relationship. Recently, this problem arose in a case decided by the Court of Cassation, which has clarified once again that the control mechanism at issue applies also to reciprocal clauses.[97]

7. Clauses Added to a Form Contract

A special rule is provided by Art 1342 Italian Civil Code for contracts made by signing forms prepared for the purpose of regulating certain contractual relationships in a uniform manner. Clauses added to such forms prevail over the original formulated clauses, even if incompatible, and even though the latter have not been stricken out. The rule applies regardless whether the added clauses are handwritten or typed.[98] The assessment of incompatibility is done by the court. Such an incompatibility does not exist if the added writing is merely aimed at supplementing or clarifying the contents of the contract.[99]

IV. Principles and Open-Ended Clauses

In recent years, landmark decisions of the Court of Cassation begun to refer to general principles and open-ended clauses, in cases in which one of the contracting party's behavior – although based on terms of the contract – was considered manifestly contrary to the requirement of good faith. In addition, the Italian Supreme Court provided a substantive control of certain terms able to frustrate the typical purpose of the envisaged contract. Legal doctrine has often criticized such interventions, as they are a potential source of uncertainty in Italian contract law. The decisions are often an attempt to accommodate contractual freedom to constitutional values.[100]

1. Good Faith. Prohibition of Abuse of Rights

An important development in Italian case law concerns the general clause of good faith.[101] A landmark Court of Cassation decision of 2009 expressly referred

[97] See especially the wording of Corte di Cassazione 12 October 2015 no 20401 n 78 above.

[98] Corte di Cassazione 13 October 2009 no 21681, 'Contratto in genere' *Repertorio del Foro italiano*, 309 (2009).

[99] R. Sacco and G. De Nova, n 35 above, 364.

[100] See especially P. Perlingieri, ' "Controllo" e "conformazione" degli atti di autonomia negoziale' *Rassegna di diritto civile*, 204 (2017); Id, 'Legal Principles and Values' 3 *The Italian Law Journal*, 125, 127-129 (2017).

[101] For a general overview, see L. Antoniolli, 'Good Faith and Fair Dealing', in L. Antoniolli and A. Veneziano eds, *Principles of European Contract Law and Italian Law. A commentary* (Alphen aan den Rijn: Kluver Law International, 2005), 49, 52-53. The relevant provisions in the Italian Civil Code are: Art 1175 Italian Civil Code 'Fair behaviour', 'The debtor and the

to the doctrine on the prohibition of abuse of rights, usually referred to good faith.[102] The subject matter of the case was a right of withdrawal in a long-lasting contract between a car manufacturer and a car dealer. The judges stated that, independent of the contents of the term that granted to the car manufacturer the right to withdraw *ad nutum*, the exercise of the right has to be compliant with the duty of good faith. This decision gave rise to a new development focused on withdrawal rights provided in long-term B2B relationships.[103] The control mechanism looks more at the behavior of the contracting party than at the content of the clause. Nevertheless, such case law – even if rather limited – represents a way of protecting the interests of weaker parties in B2B relationships in the absence of a generalized unfair terms control mechanism.

A relevant distinction that affects Italian contract law is the difference between rules on conduct/liability and rules on the validity of contracts.[104] If there is a breach of a rule of conduct, the legal consequence is usually only the obligation to pay damages, whereas the unlawful behavior does not affect the validity of the contract. Good faith is considered a rule of conduct, and therefore its violation, even in a pre-contractual stage, does not in principle affect the validity of the contract.[105] Nevertheless, as stated above, there are some judgments which can impact the exercise of rights based on contractual terms in B2B relationships. The most prominent example is the already mentioned case of a term granting a withdrawal right *ad nutum* in a long-term contract. The Italian Court of Cassation has affirmed that the exercise of a right can be deemed abusive[106] and, therefore, unable to produce its intended effect.[107] Technically speaking, the validity of a contractual term that granted the right to withdraw

creditor shall behave according to rules of fairness.' And: Art 1375 Italian Civil Code 'Performance in good faith', 'The contract shall be performed according to good faith.'

[102] Corte di Cassazione 18 September 2009 no 20106, *Foro italiano*, I, 85 (2010) with a comment of A. Palmieri and R. Pardolesi. See also the case notes contained in S. Pagliantini ed, *Abuso del diritto e buona fede nei contratti* (Torino: Giappichelli, 2010).

[103] On this issue, see especially V. Brizzolari and C. Cersosimo, 'Organizzazione dei rapporti commerciali tra imprese e "contratti relazionali"', in P. Sirena and A. Zoppini eds, n 59 above, 433, 450-456.

[104] See generally G. D'Amico, *Regole di validità e principio di correttezza nella formazione del contratto* (Napoli: Edizioni Scientifiche Italiane, 1996), 17-25, 99-105; C. Cicero, 'Regole di validità e di responsabilità' *Digesto delle discipline privatistiche, sezione civile* (Torino: UTET 2014), Agg IX, 539. For a critical overview, see G. Perlingieri, *L'inesistenza della distinzione tra regole di comportamento e di validità nel diritto italo-europeo* (Napoli: Edizioni Scientifiche Italiane, 2013).

[105] See T. Febbrajo, 'Good Faith and Pre-Contractual Liability in Italy: Recent Developments in the Interpretation of Article 1337 of the Italian Civil Code' 2 *The Italian Law Journal*, 291, 305 (2016).

[106] On the concept of 'abuso del diritto' and its applications in recent Italian case law, see generally N. Lipari, 'On Abuse of Rights and Judicial Creativity' 3 *The Italian Law Journal*, 55, 67 (2017). See also L. Balestra, 'Rilevanza, utilità (e abuso) dell'abuso del diritto' *Rivista di diritto civile*, 541 (2017).

[107] Corte di Cassazione 18 September 2009 no 20106 n 102 above.

was not at issue in that case. Nevertheless, the judgment represents a recognition of the possibility to evaluate the exercise of a right established by a contractual term. Subsequently, the Italian Court of Cassation adopted a similar approach with regards to an explicit dissolution clause (*clausola risolutiva espressa*).[108] In theory, and as regulated by Art 1456 Italian Civil Code, it is through such clauses that contracting parties identify those breaches that allow for an out-of-court termination of the contract. Thus, the explicit dissolution clause eliminates the possibility of evaluating the fundamental character of the breach (see Art 1455 Italian Civil Code) which is set as a ground for the judicial termination of the contract. According to the aforementioned judgment, if the behavior of the creditor is contrary to good faith, the exercise of a right to terminate the contract does not produce effects.[109] This happens, inter alia, in cases in which the breach of contract is of minor importance and does not infringe the interests of the creditor.[110] Even if there is not a considerable amount of case law dealing with such issues, it is possible to affirm that also in B2B relationships in Italian law there is a certain tendency to evaluate the behavior of contracting parties according to good faith.

2. Worthiness and *Causa Contractus*

In recent case law, Italian judges have begun to apply the provisions on the worthiness of the interests[111] and on *causa contractus* to declare the nullity of contractual terms. The terminology used by the courts is not always consistent. Sometimes the tests developed by the judges refer to an abusive advantage of one of the parties, other times to a significant imbalance or to a non-correspondence with the aims which that type of contract should have.[112] For our purposes, it should be observed that the envisioned judicial review also affects B2B relationships, mainly in the fields of insurance and banking contracts.

Thus, it is necessary to consider judgments dealing with what are known as 'claims-made' clauses in insurance contracts. Important rulings of the Italian Court of Cassation have affirmed the possibility of challenging the validity of

[108] Corte di Cassazione 23 November 2015 no 23868, *I Contratti*, 659 (2016), with a critical comment by F. Piraino. But see Corte di Cassazione 27 October 2016 no 21740, in C. Granelli ed, *I nuovi orientamenti della cassazione civile* (Milano: Giuffrè, 2017), 357-361.

[109] Corte di Cassazione 23 November 2015 no 23868, ibid.

[110] See for more examples F.P. Patti, 'Due questioni in tema di clausola risolutiva espressa' *I Contratti*, 695, 700-701 (2017).

[111] Art 1322 Italian Civil Code 'Party autonomy': (1) The parties can freely determine the contents of the contract within the limits set by the law. (2) The parties may also enter into contracts that do not belong to the types having a particular regulation (in the Civil Code), provided they are intended to achieve interests worthy of protection under the law. See on the relationship of the provision with constitutional values, F. Criscuolo, 'Constitutional Axiology and Party Autonomy' 3 *The Italian Law Journal*, 357 (2017).

[112] See generally A.M. Garofalo, 'Meritevolezza degli interessi e correzione del contratto' *Nuova giurisprudenza civile commentata*, 1212 (2017).

such clauses in B2B contracts according to the general requirement of 'worthiness of the contract', as provided by Art 1322 Italian Civil Code.[113] It is widely acknowledged that claims-made policies are beneficial for the insurance industry. For instance, if one underwrites professional liability policies on an occurrence basis, it is difficult for insurers to ascertain their potential exposure. An occurrence-based policy can require indemnification of an insured party for multiple years after the policy has expired, whereas once a claims-made policy expires, the insurer can expect no further claims for that policy period. Nevertheless, the legitimacy of such clauses is questionable.

The Italian Civil Code adopts, as a default rule, the loss-occurrence model (Art 1917 Italian Civil Code). Moreover, claims-made policies could be detrimental for professionals for different reasons. As an example, if the misconduct that gives rise to the professional liability occurs during the policy period but the claim is not going to be filed in that period, it can be difficult to obtain a new claims-made policy if in the pre-contractual phase for the new insurance policy the contracting party complies with the duty of disclosing circumstances that may result in a prospective claim although not yet made.[114] In addition, professionals need to maintain insurance for new claims from year-to-year and must be able to obtain coverage for potential claims about which they acquire knowledge in the current year.[115] The main rulings in Italian case law are two decisions of the Joint Chambers (*Sezioni unite*) of the Italian Court of Cassation. With the first one,[116] the Italian judges stated that so-called 'mixed' claims-made policies[117] should be declared invalid because the underlying interests sought by the contract do not deserve protection under the applicable law and that such assessment must be carried out, pursuant to Art 1322, para 2, Italian Civil Code, by the lower courts (tribunals and courts of appeal). Yet this adoption of Art 1322, para 2, Italian Civil Code was quickly abandoned by a subsequent judgment of the Joint Chambers.[118] According to the new ruling, the behavior of the insurance company, inserting claims-made terms in the contract, could amount to a case of pre-contractual liability. In addition, in cases in which the term is capable of subverting the function that the insurance contract should

[113] See generally S. Landini, 'The Worthiness of Claims Made Clauses in Liability Insurance Contracts' 2 *The Italian Law Journal*, 509 (2016); F. Delfini, 'Claims-Made Insurance Policies in Italy: The Domestic Story and Suggestions from the UK, Canada and Australia' 4 *The Italian Law Journal*, 118 (2018).

[114] F. Delfini, n 113 above, 119.

[115] ibid.

[116] Corte di Cassazione-Sezione unite 6 May 2016 no 9140, *Foro italiano*, I, 2014 (2016) with a comment by R. Pardolesi.

[117] 'Mixed' claims-made policies provide coverage only if: (a) the claim is made during the policy period and also (b) the event – eg, the professional's misconduct – occurred in a limited previous period.

[118] Corte di Cassazione-Sezioni unite 24 September 2018 no 22437, *Foro italiano*, I, 3512 (2018) with a comment by A. Palmieri and R. Pardolesi.

fulfil, a substantive review of the clause is possible on application of the '*causa concreta*' doctrine.[119] It is interesting to observe that in a recent comment, such an interpretation was seen as consistent with the new provision of the French Civil Code, contained in Art 1170 ('*Toute clause qui prive de sa substance l'obligation essentielle du débiteur est réputée non écrite*').[120]

The aforementioned judgments still appear isolated, and it is difficult to assess whether the proposed interpretations will bring substantive changes in the way in which B2B contractual relationships are treated. Nevertheless, they show a given willingness of Italian courts to limit contractual freedom where the effects of the contract appear irrational relative to the social and typical function that the specific contract should fulfil.

3. Abuse of Economic Dependence

Art 9, para 3, legge no 192 of 1998 states that a pact through which an abuse of economic dependence is realized is null. The essence of the abuse of economic dependence is described in paras 1 and 2 of the aforementioned provision.[121] The scope of application of legge no 192 of 1998 is textually limited to subcontracting agreements regarding manufacturing activities (Art 1).[122] But in recent years, following the suggestions of some scholars,[123] Italian courts have begun to consider the abuse of economic dependence as a general clause, applicable also to contracts which are not subcontracting agreements for manufacturing activities.[124] On

[119] For references to previous judgments that apply the doctrine of 'causa concreta' and for some critical remarks, see C.M. Bianca, 'Causa concreta del contratto e diritto effettivo' *Rivista di diritto civile*, 251 (2014); V. Roppo, 'Causa concreta: una storia di successo? Dialogo (non reticente, né compiacente) con la giurisprudenza di legittimità e di merito' *Rivista di diritto civile*, 957 (2013); M. Martino, 'La causa in concreto nella giurisprudenza: recenti itinerari di un nuovo *idolum fori*' *Corriere giuridico*, 1441 (2013); D. Achille, 'La funzione ermeneutica della causa concreta del contratto' *Rivista trimestrale di diritto e procedura civile*, 37 (2017).

[120] A.M. Garofalo, 'La causa: una "storia di successo"? (a proposito delle opere di Vincenzo Roppo sulla causa del contratto)' *juscivile.it*, 163, 212-213 (2018). See also Section II.2. above.

[121] Art 9 legge no 192 of 1998 'Abuse of economic dependence': '(1) The abuse by one or more businesses of the state of economic dependence in which, in its or in their regard, a client or supplier business is situated, is prohibited. The economic situation in which a business is able to determine, in commercial relations with another business, an excessive imbalance of rights and obligations is considered an economic dependency. The economic dependence is assessed also taking into account the real possibility for the party who has suffered the abuse to find satisfactory alternatives on the market. (2) The abuse can also consist in the refusal to sell or in the refusal to buy, in the imposition of unjustifiably burdensome or discriminatory contractual conditions, in the arbitrary interruption of commercial relations in progress. (3) The pact through which the abuse of economic dependence is realized is null'.

[122] See generally M. Maugeri, 'Subfornitura' *Enciclopedia del diritto* (Milano: Giuffrè, 2015), Annali VIII, 775; R. Leccese, 'Subfornitura' *Digesto delle discipline privatistiche, sezione commerciale* (Torino: UTET, 2008), 744.

[123] See F. Macario, 'Genesi, evoluzione e consolidamento di una nuova clausola generale: il divieto di abuso di dipendenza economica' *Giustizia civile*, 509 (2016).

[124] See Corte di Cassazione 23 July 2014 no 16787, *I Contratti*, 241 (2015); Corte d'Appello di Milano 15 July 2015, *Giurisrpudenza italiana*, 2665 (2015); Tribunale di Vercelli 14 November

the basis of the proposed enlargement of the scope of application of Art 9 legge no 192 of 1998, some authors argue that there exists a general ground for undertaking a substantive control of contractual terms in B2B relationships in Italian law.[125]

Through Art 9 legge no 192 of 1998 it is possible to declare the nullity of a contractual clause that constitutes an abuse of economic dependence (para 3). Certainly, the abuse of economic dependence entails a substantive judicial review of clauses in B2B relationships. The abuse could also concern the price applied by the business which has more contractual power.[126]

At any rate, there is a fundamental difference between the abuse of economic dependence and a provision that provides for a substantive control of standard terms in B2B transactions, namely because of the elements that must be fulfilled in order to establish such an abuse. The special rules apply only where a given 'dominance' of a business over another business is recognizable.[127] The dominance is expressed by the fact that the 'strong' business can impose unfair terms on the 'weak' business because the latter does not have other alternatives on the market.[128] Thus, the provision does not aim to solve the problem of information asymmetry, as occurs in the context of standard terms control,[129] but instead looks to prevent the extreme limitation of contractual freedom of one of the parties as a result of the economic power exercised by a stronger party (ie, a stronger business).[130]

2014, *Foro italiano*, I, 3344 (2015) stating that Art 9 legge 19 June 1998 no 192 is applicable to every kind of relationship between businesses; Tribunale di Massa 15 May 2014, *Nuova giurisprudenza civile commentata*, I, 218 (2015) with a comment by V. Bachelet; Tribunale di Torino 21 novembre 2013, *Foro italiano*, I, 610 (2014).

[125] See especially Ph. Fabbio, *L'abuso di dipendenza economica* (Milano: Giuffrè, 2006), 305-321, 412-414; Id, 'Osservazioni sull'ambito d'applicazione del divieto di abuso di dipendenza economica e sul controllo contenutistico delle condizioni generali di contratto tra imprese' *Nuova giurisprudenza civile commentata*, I, 902 (2007); F. Di Marzio, 'Abuso di dipendenza economica e clausole abusive' *Rivista di diritto commerciale*, I, 789 (2006).

[126] See Tribunale di Massa 15 May 2014, n 124 above.

[127] See M. Maugeri, *Abuso di dipendenza economica e autonomia privata* (Milano: Giuffrè, 2003), 145-155; F. Di Marzio, n 125 above, 823; M. Orlandi, 'Dominanza relativa e illecito commerciale', in G. Gitti and G. Villa eds, n 7 above, 137, 153-160; L. Nonne, *Contratti tra imprese e controllo giudiziale* (Torino: Giappichelli, 2013), 241-243; A. Barba, 'L'abuso di dipendenza economica: profili generali', in Id, *Studi sull'abuso di dipendenza economica* (Padova: CEDAM, 2018), 1, 30-31.

[128] Cf G. Colangelo ed, n 7 above, 79-87; G. Villa, 'Invalidità e contratto tra imprenditori in situazione asimmetrica', in G. Gitti and G. Villa eds, n 7 above, 113, 118-128.

[129] See generally H. Kötz, 'Der Schutzzweck der AGB-Kontrolle. Eine rechtsökonomische Skizze' *JuS*, 209 (2003); A.N. Hatzis, 'An Offer You Cannot Negotiate: Some Thoughts on the Economics of Standard Form Consumer Contracts', in H. Collins ed, *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law* (Alphen aan den Rijn: Kluwer Law International, 2008), 43; M.W. Hesselink, 'Unfair terms in contracts between businesses', in R. Schulze and J. Stuyck eds, *Towards a European Contract Law* (Munich: Sellier, 2011), 131.

[130] P. Sirena, 'L'integrazione del diritto dei consumatori nella disciplina generale del contratto' *Rivista di diritto civile*, I, 787, 814 fn 114 (2004).

An often-mentioned example of a void clause concerns terms which are imposed during the renegotiation of a still existing contract.[131] The renegotiation should be the result of a change in the circumstances, but sometimes it is sought by the stronger business to the detriment of the weaker business, the latter of which made investments with the expectation of continuing the contractual relationship. By way of renegotiation, the stronger business tries to achieve additional benefits compared to the ones obtained through the initial conclusion of the contract. Art 9 legge no 192 of 1998 is applicable also in cases in which the stronger business, according to the contractual provisions, has the right to modify the clauses of the contract (*ius variandi*).[132]

The growing number of judgments that advocate an application of the abuse of economic dependence as a general clause could have a relevant impact on practical matters.[133] Nevertheless, the peculiarity of the provision, which seems to be more related to competition law than to contract law, cannot be understood as a substitute for a substantive control mechanism for standard terms in B2B relationships.

V. Rules on Specific Contractual Terms

In the absence of general rules on substantive control of standard terms in B2B contracts, some particular provisions affect terms, which are often use in B2B relationships. For exclusions or limitations of liability and terms that provide for time constraints for the exercise of a right the Italian Civil Code restricts contractual freedom, in order to assure the effectiveness of rights granted in case of breach.

1. Exclusions or Limitations of Liability

Art 1229 Italian Civil Code provides a regulation on 'Clauses excluding liability'. It prescribes that every clause that excludes or limits liability for intent or gross negligence is void. Moreover, it provides that every clause that excludes or limits liability is void if the fact of the debtor or of his/her auxiliaries constitutes an infringement of duties deriving from public order.[134] The rules contained in Art 1229 Italian Civil Code have a general scope of application, not

[131] Cf R. Natoli, 'L'abuso di dipendenza economica', in V. Roppo and A.M. Benedetti eds, *Trattato dei contratti* (Milano: Giuffrè, 2014), V, 377, 392.

[132] R. Natoli, ibid 393-394.

[133] See M. Maugeri, n 122 above, 791-793.

[134] Art 1229 Italian Civil Code 'Clauses excluding liability': '(1) Every clause that excludes or limits liability for intent (willful acts) or gross negligence is void. (2) In addition, every clause that excludes or limits liability is void if the fact (encompassing conduct) of the debtor or of his/her auxiliaries constitutes an infringement of duties deriving from public order.' Clauses excluding liability are also contained in the list of one-sided/onerous clauses as set out in Art 1341, para 2, Italian Civil Code.

limited to standard conditions and form contracts. Nevertheless, they acquire a significant importance with reference to standard contracts because they provide for a substantive review of terms that are often adopted in B2B contracts. In scholarship, it is stated that such a substantive review partially fills the gap connected to the lack of protection in terms of the mere review as to form provided by Art 1341, para 2, Italian Civil Code.[135] With respect to the relationship of the latter provision with the rules contained in Art 1229 Italian Civil Code, it must be noted that the review in terms of form as regards an express approval in writing (Art 1341, para 2, Italian Civil Code) applies only to limitations or exclusions of liability for ordinary negligence (*colpa lieve*), which entail conducts of the debtor that are not contrary to public policy. Exclusions or limitations of liability for wilful acts or gross negligence are void, irrespective of express approval of the term in writing.[136]

If there is an 'exclusion of liability', no obligation to pay damages arises in case of a breach of contract (according to Art 1218 Italian Civil Code). In terms of a 'limitation of liability', the provision intends to capture clauses that reduce the exposure of the breaching party as concerns an obligation to pay damages.[137] A limitation of liability exists where parties – *ex ante* – provide for a cap indicating the maximum amount of payable damages.[138] However, the scope of application is considered broader and is able to encompass also other contractual remedies,[139] eg, clauses that limit the possibility to terminate a contract in the presence of a fundamental breach[140] or clauses that limit the availability of warranties in a contract of sale.[141]

The first para of Art 1229 Italian Civil Code states that exclusions or limitations of liability provided for intentional or grossly negligent breaches are

[135] See G. Ceccherini, *Responsabilità per fatto degli ausiliari. Clausole di esonero da responsabilità*, in F.D. Busnelli ed, *Il codice civile. Commentario* (Milano: Giuffrè, 2nd ed, 2016), 202. Before the enactment of Directive no 93/13, see E. Roppo, *Contratti standard* n 3 above, 35-38.

[136] C.M. Bianca, *Diritto civile*, 3, *Il contratto* (Milano: Giuffrè, 3rd ed, 2019), 324; G. Ceccherini, n 135 above, 204-205.

[137] See C.M. Bianca, *Diritto civile*, 5, *La responsabilità* (Milano: Giuffrè, 2nd ed, 2012), 75-77; G. Ceccherini, n 135 above, 220-223.

[138] But also a penalty clause (*clausola penale*) could be qualified as a limitation of liability if the stipulated payment for non-performance is significantly lower than the foreseeable damage: see C.M. Bianca, ibid 77; G. Villa, 'Danno e risarcimento contrattuale', in V. Roppo ed, *Trattato del contratto* (Milano: Giuffrè, 2006), V, 2, 751, 966; G. Ceccherini, ibid 223.

[139] See F. Benatti, 'Clausole di esonero della responsabilità' *Digesto delle discipline privatistiche - sezione civile* (Torino: UTET, 1988), III, 400; L. Delogu, *Le modificazioni convenzionali della responsabilità civile* (Padova: CEDAM, 2000), 13; G. Ceccherini, ibid 217; F.P. Patti, *La determinazione convenzionale del danno* (Napoli: Jovene, 2015), 175.

[140] Corte di Cassazione 9 May 2012 no 7054, *Giurisprudenza italiana*, 2255 (2012) with a comment by G Sicchiero.

[141] See R. Montinaro, 'Clausole di esclusione o modifica della garanzia per vizi e/o per evizione', in M. Confortini ed, n 77 above, 385, 399.

void.[142] Therefore, in principle, only exclusions or limitations of liability for breaches resulting from ordinary negligence are enforceable. Nevertheless, even if the provision does not address the issue, some scholars argue that clauses aimed at excluding or limiting strict liability are valid, albeit with a reduced scope of application, except where they are contrary to public policy.[143]

The aforementioned claim is of importance, because often parties shape the wording of the term in a very generic way, without indicating that the clause covers only breaches incurred with ordinary negligence. According to a strict application of Art 1229 Italian Civil Code, such clauses should be considered void. Therefore, with the aim of safeguarding the effects of the contract, in such cases scholars propose reducing the breadth of the clause, in the sense that it covers only breaches committed with ordinary negligence.[144] The Italian courts have not taken an express position on the issue, but on the basis of a survey of the case law it has been possible to confirm that courts generally grant to the breaching party the possibility of demonstrating that the breach was not intentional and was not perpetrated with gross negligence.[145] If the breaching party is able to provide such an evidence, she can escape liability.

The rules typically apply to clauses that exonerate a party from liability for breaches of contractual obligations, even if the performance was provided by a third party who acted as an auxiliary of the contracting party.[146] A difficult issue arises with terms that define the subject matter of the contract (ie, the contractual obligations), which theoretically are not subject to Art 1229 Italian Civil Code. The line to draw in this respect can be fine, and the courts have repeatedly been engaged in the exercise of providing an answer to this crucial question because the efficacy of some terms depend on it.[147] The main examples in case law are insurance contracts, where the predominant orientation is to not consider clauses that define the risk as limitation of liability clauses.[148] By contrast, in the field of banker's liability for loss of items contained in safe deposit boxes, clauses that impose a cap on the value of the items inserted in the boxes are

[142] On the justifications for the provision, see C. Menichino, *Clausole di irresponsabilità contrattuale* (Milano: Giuffrè, 2008), 77-78.

[143] See P Trimarchi, *Il contratto: inadempimento e rimedi* (Milano: Giuffrè 2010), 203-204. A D'Adda, 'Il controllo legale sui patti di esonero da responsabilità negoziale e tutela del credito' *Annuario del contratto 2012* (Torino: Giappichelli, 2013), 3, 7-9.

[144] See L. Delogu, n 139 above, 131-134; A. D'Adda, ibid 11; T. Pasquino, 'Clausole di limitazione della responsabilità', in M. Confortini ed, n 77 above, 477, 496.

[145] A. D'Adda, ibid; T. Pasquino, ibid.

[146] Corte di Cassazione 7 October 2010 no 20808, 'Obbligazioni in genere' *Repertorio del Foro italiano*, 54 (2010).

[147] Se generally C.M. Bianca, *La responsabilità* n 137 above, 776-777; A. D'Adda, n 143 above, 29-33.

[148] See Corte di Cassazione 15 May 2018 no 11757 *Archivio giuridico della circolazione*, 617 (2018). Nevertheless, there are exceptions. The issue is related to an extension of a limitation of risk: see, for instance, Corte di Cassazione 7 April 2010 no 8235, *Foro italiano*, I, 2413 (2010).

usually considered as limitations of liability.[149]

In addition, Art 1229, para 2, Italian Civil Code states that every clause that excludes or limits liability is void if the fact of the debtor or of his/her auxiliaries constitutes an infringement of duties deriving from public policy. The typical example of a clause held void according to the latter provision is an exclusion or a limitation of liability connected to a performance which injures moral or physical integrity or violates criminal law.[150]

The nullity provided by Art 1229 Italian Civil Code usually affects only the individual clause which excludes or limits liability, whereas the rest of the contract remains valid.[151] Such a conclusion follows the general rule of Art 1419 Italian Civil Code on the 'partial' nullity of a contract: The nullity of the single clause results in the nullity of the entire contract only if contracting parties would not have concluded the contract without the part affected by nullity. This is normally not the case when it comes to exclusion or limitation of liability clauses. It means that damages are an available remedy in cases of breach.

2. Time Constraints for the Exercise of a Right

The Italian legal system distinguishes between statutes of limitations, or prescription, (*prescrizione*) (Arts 2934-2963 Italian Civil Code) and statutes of repose (*decadenza*) (Arts 2964-2969 Italian Civil Code). With respect to prescription, modifications of the legal regime are not possible. The rules are mandatory in nature, and Art 2936 Italian Civil Code expressly states that any agreement aimed at modifying the legal regime of prescription is void.[152] Nevertheless, parties can fix by agreement time constraints for the exercise of a right (so-called '*clausole di decadenza*'). According to Art 2965 Italian Civil Code, these clauses cannot render the exercise of the right excessively difficult for one of the parties.[153] The provision can be understood as a recognition of contractual freedom, which counterbalances to a certain extent the prohibition against modifying the prescription periods fixed by the law (Art 2936 Italian Civil Code).[154]

[149] See Corte di Cassazione 22 December 2011 no 28314, *Giustizia civile*, I, 1477 (2012); Corte di Cassazione 30 September 2009 no 20948, 'Contratti bancari' *Repertorio del Foro italiano*, 25 (2009).

[150] C.M. Bianca, *La responsabilità* n 137 above, 781; G. Ceccherini, n 135 above, 307; F.P. Patti, *La determinazione* n 139 above, 347.

[151] T. Pasquino, n 145 above, 495-496.

[152] See, for some comparative remarks, R. Zimmermann, 'Modification by agreement', in N. Jansen and R. Zimmermann eds, n 1 above, 1883-1885.

[153] Art 2965 Italian Civil Code 'Time constraints established by contract': 'The pact through which parties establish time constraints for the exercise of a right are void if they render the exercise of the right excessively difficult for one of the parties.'

[154] See generally S. Patti, 'Certezza e giustizia nel diritto della prescrizione in Europa' *Rivista trimestrale di diritto e procedura civile*, 21, 36 (2010); P. Gallo, 'Decadenze stabilite contrattualmente – Art. 2965', in E Gabrielli ed, *Commentario del codice civile* (Torino: UTET, 2011), 867, 868-869; G. Di Lorenzo, 'Clausola sulla decadenza', in M. Confortini ed, n 77 above, 1299, 1308.

The legal system does not fix a precise limitation on contractual freedom in this regard. The evaluation demanded of the judge as to the difficulty to exercise the right is discretional in nature and decisions are taken on a case-by-case basis.[155] The Court of Cassation has clarified that judges have to consider the length of the period established by the agreement for exercise of the right and/or the activity that is required of the creditor in order to exercise her right.[156] In this context, provisions concerning the suspension or the interruption of the prescription period are not applicable, but parties can stipulate suspension periods by agreement.[157]

Time constraints are admissible only in the field of disposable rights. If contained in general conditions or form contracts, the *clausole di decadenza* are subject to the control as regards form provided by Arts 1341 and 1342 Italian Civil Code.[158] Such clauses are mentioned in the list provided by Art 1341, para 2, Italian Civil Code.

VI. International Application of the Rules

According to well-established case law, the rules provided for by Arts 1341, 1342 and 1370 are part of the domestic *public order*. This means that they are mandatory in nature and cannot be set aside through a contractual agreement.[159] Nevertheless, if according to rules on international private law an international contract is subject to the law of a different State, the aforementioned provisions do not apply. In this respect, there are several examples in case law.[160]

The explanation is that the Italian legal system distinguishes between 'domestic public policy', composed primarily of mandatory rules, and 'international public policy', referring to the fundamental principles of the Constitution.[161] If the judgment adopted in a different State infringes Italian international public policy, the ruling is not enforceable in the Italian jurisdiction.[162] Arts 1341, 1342 and 1370 Italian Civil Code do not make up a part of so-called international public policy, and, therefore, the validity of standard terms can be assessed on the basis of

[155] G. Di Lorenzo, ibid 1311.

[156] See Corte di Cassazione 27 October 2005 no 20909, *Obbligazioni e contratti*, 211 (2006); Corte di Cassazione 25 March 1998 no 3186, available at www.dejure.it.

[157] G. Di Lorenzo, n 154 above, 1308.

[158] See Section III above.

[159] C.M. Bianca, *Condizioni generali* n 57 above, 7.

[160] Corte di Cassazione, 25 March 1961 no 683, *Diritto marittimo*, 252 (1962); Corte di Cassazione-Sezioni unite 2 May 1960 no 968, *Foro padano*, I, 1125 (1961).

[161] See especially Corte di Cassazione 30 September 2016 no 19599, available at www.dejure.it. International public policy is mentioned by Art 16 legge 31 May 1995 no 218.

[162] See for a general overview G. Perlingieri and G. Zarra, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale* (Napoli: Edizioni Scientifiche Italiane, 2019).

the foreign law applicable to the contract.[163] Nor can the rules of the Italian Civil Code on general conditions and form contracts be considered 'overriding mandatory provisions' (*norme di applicazione necessaria*) that may in any case be applied by Italian judges even if a law different than the Italian law is applicable to the contract.[164]

With respect to the other mandatory rules put under scrutiny in the present contribution, only rules that protect personality rights and good faith reflect constitutional principles comprising international public policy. For good faith, the assumption is based on the strong connection to the duty of solidarity stated in Art 2 of the Italian Constitution.[165] At any rate, the minimal body of existing case-law prevents the drawing of any general conclusions. The Court of Cassation has in the past stated that mandatory rules on limitations of liability are not 'overriding mandatory provisions', except in cases in which the aim of the rule is avoiding a limitation of liabilities in relation to non-economic interests.[166]

A different outcome holds true for purely domestic contracts lacking international connections. In these cases, parties cannot set aside national mandatory provisions through a choice-of-law clause.[167] For instance, two Italian parties who concluded a contract in Italy that had to be performed in Italy could not escape the application of Italian mandatory rules by choosing English law as the *lex contractus*. Therefore, one has to distinguish between national default rules, which can be derogated from by the choice of a foreign law, and national mandatory rules, which cannot be derogated from by a choice of a foreign law. If in a purely domestic contract parties choose the law of a different legal system so as to derogate from the law of the Italian legal system, the contract would be subject to the mandatory provisions of both legal systems.[168] Such a conclusion is consistent with Art 3, para 3, Regulation 593/2008 (Rome I).[169]

[163] C.M. Bianca, *Condizioni generali* n 57 above, 7; R. Sacco and G. De Nova, n 35 above, 366; S. Patti and G. Patti, n 41 above, 361-362.

[164] 'Overriding mandatory provisions' are regulated by Art 17 legge 31 May 1995 no 218. See, on the relationship between 'international public policy' and 'overriding mandatory provisions', A. Bonomi, *Le norme imperative nel diritto internazionale privato* (Zürich: Schulthess, 1998), 214-217; S.M. Carbone, 'Le "norme" applicabili alla responsabilità contrattuale nel regolamento Roma I: il ruolo dell'autonomia privata', in N. Parisi et al eds, *Scritti in onore di Ugo Draetta* (Napoli: Editoriale Scientifica, 2011), 93, 104-107.

[165] See generally M. Grondona, 'Solidarietà e contratto: una lettura costituzionale della clausola generale di buona fede' *Rivista trimestrale di diritto e procedura civile*, 727 (2004); F. Piraino, *La buona fede in senso oggettivo* (Torino: Giappichelli, 2015).

[166] Corte di Cassazione 6 September 1980 no 5156, *Rivista trimestrale di diritto e procedura civile*, 923 (1981).

[167] See A. Bonomi, n 164 above, 19-20; A. Frignani and M. Torsello, *Il contratto internazionale. Diritto comparato e prassi commerciale* (Padova: CEDAM, 2nd ed, 2010), 126; G. Alpa, 'Autonomia delle parti e scelta della legge applicabile al contratto interno' *Nuova giurisprudenza civile commentata*, II, 573, 581 (2013).

[168] F. Pietrangeli, 'Clausola di individuazione della legge applicabile', in M. Confortini ed, n 77 above, 1055, 1090.

[169] European Parliament and Council Regulation 593/2008/EC of 17 June 2008, on the

In these cases, the Italian mandatory rules would apply only if the foreign law chosen by the parties does not provide rules able to adequately safeguard the interests protected by the Italian mandatory rules. The latter are applicable also if the parties have chosen a foreign jurisdiction.[170]

From a different point of view, it should be observed that choice-of-law clauses are not subject to the control provided for by Arts 1341 and 1342 Italian Civil Code. The latter refer only to jurisdiction clauses and scholars do not consider these provisions applicable to choice-of-law clauses.[171]

VII. Conclusion

The first important aspect to note is that Italian law does not provide for the substantive judicial review of standard terms in B2B relationships. The control mechanism of Arts 1341 and 1342 merely relates to form. If a business fulfills the requirements set by the Italian Civil Code – ie, 'express written approval' – it is in principle not possible to challenge the validity of an onerous term. This explains why judicial disputes usually affect only small and medium-sized enterprises, whereas big and well-organized businesses normally do not have any problem in satisfying the form requirements and enforcing one-sided clauses.[172] Given the fact that Italian case law is inconsistent and that it is often uncertain whether a term falls under one of the clauses set out in the list of Art 1341, para 2, Italian Civil Code, it is advisable to call for a separate signature whenever doubt exists as to the one-sided nature of a clause.

In the absence of a mechanism for scrutinizing terms for substantive unfairness, there are other ways of protecting the interests of weaker parties in B2B relationships ('indirect' judicial control). Some recent judgments demonstrate that where businesses engage in grossly unfair behavior in relationships with weaker businesses, even if undertaken on the basis of contractual clauses, unpredictable outcomes may result on application of open-ended clauses such as 'good faith' and 'worthiness', notions which are considered of growing importance also in the field of B2B contracts. In cases in which one of the businesses is in the position of exercising a dominance over another, also rules on abuse of economic dependence, provided by Art 9 legge 19 June 1998 no 192, may have an impact on the contractual relationship and cause the nullity of a clause where a business is, in commercial relations with another business, able to realize an

law applicable to contractual obligations (Rome I) [2008] OJL 117, 6-16. With respect to the issue discussed in the text, see E. Cannizzaro, '*Lex contractus* e contratti interni' *Nuova giurisprudenza civile commentata*, II, 585, 589 (2013); N. Boschiero, 'I limiti al principio d'autonomia posti dalle norme generali del regolamento Roma I', in Id, *La nuova legge comunitaria della legge applicabile ai contratti (Roma I)* (Torino: Giappichelli, 2009), 67, 70-75.

[170] F. Pietrangeli, n 168 above, 1091.

[171] G. Alpa, n 167 above, 582.

[172] U. Morello, n 8 above, 343.

excessive imbalance of rights and obligations.

Exclusions and limitations of liability are also tackled by general mandatory rules, which prescribe the nullity of a clause in cases of intentional breach and gross negligence, or for breaches that infringe rights related to public policy. The regime of prescription cannot be derogated from by contracting parties. However, it is possible to establish, through a contractual agreement, time constraints on the performance of obligations. Such limitations cannot render the exercise of a right excessively difficult, according to Art 2965 Italian Civil Code. The application of the latter provision is subject to the discretionary evaluation of the courts.

Except for good faith, the rules are usually not considered overriding mandatory rules or rules related to 'international public policy', with the result that they do not prevent an Italian court from applying a foreign law – one setting different rules as governing the contractual relationship – to an international contract. However, the rules are mandatory under Italian law, meaning that parties cannot set them aside through a choice of a foreign law in a purely domestic contract.

Data as the Object of a Contract and Contract Epistemology

Carolina Perlingieri*

Abstract

The syntagma 'data' enters in the legal language, following the recognition of the right of each person to the protection of personal data and only successively is used also in juridical discipline for the flow of information not referable to the natural person.

The Regulations (EU) 2016/679 and 2018/1807 – that establish the free flow principle of different types of data and permit so to consider the data as intangible entities, and consequently goods – are the foundations of data, considered as a good, and establish the process of legal objectification of data as a good for specific legal purpose and worthy of protection depending on the different uses.

Nevertheless the statement of free flow of data raises the question whether the legal reception of unitary paradigm of data.

The use of the same syntagma 'data' must not obscure the fact that the data relating to the natural person is the object of legal protection as such; differently, the non-personal data can be object of protection only if in an aggregated form, as it is unsuitable of generating a utility if singularly considered, with the consequent exclusion of protection as a legal good.

The above observations, nevertheless, do not prevent to consider a different use of data, meaning finalized or not to circulation.

Therefore the sharing of a case method of analysis has allowed to analyze the different contractual models inherent to data and that have stemmed from the use of the new technologies.

I. Data as a Paradigm in the Definition of the Legal Regime of the Circulation of Information

The word 'data' entered in legal language following the recognition of the right of each person to the protection of personal data[1] and led to the introduction

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[1] The true extent and the real content of the right to data protection, with particular attention to its juridical nature, raised an intense debate by scholars. For an overlook cf G. Resta, 'Il diritto alla protezione dei dati personali', in F. Cardarelli et al eds, *Il codice dei dati personali* (Milano: Giuffrè, 2004), 16. The remedial approach focuses on the breach of behavioural duties and specific information duties of the controller. See 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*

of legal protection of any information regarding the natural person, identified or identifiable,[2] capable of being processed wholly or partly by automated or not

(Milano: Giuffrè, 1999), 225. In contrast with this concept, others opt for a proprietary approach, qualifying the right to data protection as an intellectual property right. Cf for all V. Zeno Zencovich, 'Cosa' *Digesto delle discipline privatistiche, Sezione civile*, IV (Torino: UTET, 1989), 438; see also L.C. Ubertazzi, 'Riservatezza informatica e industria culturale' *AIDA*, 530 (1997); according to some others the right to data protection has a constitutive effect, creating a new immaterial good, which is the personal data: L. Mormile, 'Lo statuto giuridico dei dati personali', in R. Panetta ed, *Libera circolazione e protezione dei dati personali* (Milano: Giuffrè, 2006), 570; V. Cuffaro, 'A proposito del ruolo del consenso', in V. Cuffaro et al eds, *Trattamento di dati personali e tutela della persona* (Milano: Giuffrè, 1999), 121; for an interesting point of view, see P. Manes, *Il consenso al trattamento dei dati* (Padova: CEDAM, 2001), 13, who refers to the rules of copyright law (Arts 20 and 25 of the Act 633/1941), proposing the duplication 'of two different rights on immaterial goods, one of them patrimonial, *ie* the right regarding personal data, which refers to an economically relevant entity which is derived from the commercial and economic exploitation of some information; the other moral, consisting of one's right regarding his or her own information, a genuine personality right, which is inalienable and non-patrimonial and refers to some categories of personal information, the information regarding the most intimate sphere of a person and inseparable from it as an integral part of one's own personality in the same way as the name and the image' (the Author refers to '*due diversi diritti su beni immateriali, l'uno patrimoniale, il diritto sui dati personali, che ha ad oggetto un'entità economicamente rilevante che deriva dallo sfruttamento commerciale ed economico di alcune informazioni; l'altro morale, il diritto sulle proprie informazioni, vero e proprio diritto della personalità caratterizzato dai requisiti dell'indisponibilità e della non patrimonialità, che ha ad oggetto alcune categorie di informazioni personali, le notizie inerenti la sfera più intima della persona ed inscindibili da essa, perché integranti la propria personalità alla stessa stregua del nome e dell'immagine*'). Diametrically opposed to the idea of data as a legal asset, see D. Messinetti, 'Circolazione dei dati personali' *Rivista critica di diritto privato*, 350 (1998); A. Fici and E. Pellecchia, 'Il consenso al trattamento', in R. Pardolesi ed, *Diritto alla riservatezza e circolazione dei dati personali* (Milano: Giuffrè, 2003), 504. Lastly, the right to data protection is considered as an expression of the broader value of the person according to Art 2 of the Italian Constitution, a new personal right: another proof of the close connection existing between the regulation of data processing and the system of protection of personality is also the reference to the human dignity in Art 2, para 1 of the Italian Privacy Code. See G. Mirabelli, 'Le posizioni soggettive nell'elaborazione elettronica dei dati personali' *Diritto dell'informazione e dell'informatica*, 323 (1993); E. Giannantonio, '*Sub* Art. 1', in M.G. Losano et al eds, *La tutela dei dati personali. Commentario alla l. 675/1996* (Padova: CEDAM, 1999), 6.

[2] There is a broad definition of personal data, which includes elements of direct and indirect identification. The indirect identification and/or identifiability represents the more critical case, in which, in practice, different information regarding a user can potentially be used to identify him or her when it is combined (so-called phenomenon of 'unique combinations'): see Art 29 Data Protection Working Party, Opinion 4/2007 on the concept of personal data, 13. In particular: Case C-101/01 *Bodil Linqvist*, (2004) available at http://curia.europa.eu, which clarifies that 'the act of referring, on an internet page, to various persons and identifying them by name or by other means, for instance by giving their telephone number or information regarding their working conditions and hobbies, constitutes the processing of personal data (…) within the meaning of Article (…) of Directive 95/46/EC'. For the qualification of the IP address as personal data see Case C-582/14, *Patrick Breyer* v *Bundesrepublik Deutschland*, Judgement of 19 October 2016, available at http:// curia.europa.eu, according to which the dynamic IP addresses are neutral information, that may constitute personal data, if they are combined with other information or subject to inferential analysis by means of Big Data analytics. Furthermore, the Proposal for the e-privacy Regulation of the European Commission of 10 January 2017, available at https://eur-lex.europa.eu, requires the consent of the subject of the data, which should be freely given, specific, informed, unambiguous and explicit, also for the processing of electronic communications

automated means.

Subsequently, the concept of 'data' has gone beyond the natural person and is now used in law to describe the flow of information not referable to the natural person.[3]

This has come about as a result of the digitalization of the economy and as a result of information and communication technologies which are at the base of the economic systems of societies. Consequently, specific attention is paid to electronic data that has the potential to create enormous value through creation and collection, aggregation and organization, processing, analysis, commercialization and allocation, and use and reuse.

Let us consider, for example, the aggregated and anonymous data used in Big Data analysis, such as data on precision agriculture which can contribute to monitoring and optimizing the use of water and pesticides, or data for the maintenance of industrial machines.

Regarding this topic, following the European Regulation (EU) 2016/679 of 27 April 2016, GDPR on the protection of natural persons[4] with regard to the processing of personal data and on the free movement of such data, the recent European Regulation (EU) 2018/1807 of 14 November 2018 creating a framework for the free flow of non-personal data entered in force on 18 December 2018.

Thus the rapid development of the economy of data and emerging technologies, such as Artificial Intelligence, products and services relative to Internet of Things, independent systems and 5G technology, has forced the EU to consider legal matters related to access to data and their reuse and accountability even when not relatable to natural persons.

II. The Difficult Qualification of Data as Personal or Non Personal

It is not always simple to recognize data as personal or non personal.

metadata (Art 3, letter *c*), as they may enable the subject's identification: data used to trace and identify the source and destination of a communication, data on the location of the device generated in the context of providing electronic communications services, and the date, time, duration and the type of communication (points 2 and 14) may reveal extremely sensitive and personal information.

3 Generally, the digital processing of data does not allow the exclusion of so-called 'irrelevant data' as new electronic systems may get information from 'any kind of data'.

4 On the European Regulation (EU) 2016/679, cf F. Pizzetti, *Privacy e il diritto europeo alla protezione dei dati personali. Dalla direttiva 95/46 al nuovo Regolamento europeo* (Torino: Giappichelli, 2016); S. Sica et al eds, *La nuova disciplina europea della privacy* (Padova: CEDAM, 2016); L. Bolognini et al eds, *Il regolamento privacy europeo. Commentario alla nuova disciplina sulla protezione dei dati personali* (Milano: Giuffrè, 2016); G. Finocchiaro ed, *Il nuovo Regolamento europeo sulla privacy e sulla protezione dei dati personali* (Bologna: Zanichelli, 2017); A. Mantelero and D. Poletti eds, *Regolare la tecnologia: il Reg. UE 2016/679 e la protezione dei dati personali. Un dialogo fra Italia e Spagna* (Pisa: Pisa University Press, 2018); G.M. Riccio et al, *GDPR e normativa privacy. Commentario* (Milano: Giuffrè, 2018), 3; V. Cuffaro et al eds, *I dati personali nel diritto europeo* (Torino: Giappichelli, 2019).

This overlap can easily be seen in the transition from anonymous data to personal data, with the consequent application of the GDPR. Let us consider an owner of an electric or hybrid car, and its component 'smart gateway'. This component contains the data relative to the engine, the performance of the car on the road, and the driver. Such data is gathered, organized and analyzed in an automated manner, by the car producer or by the computational company.

Such data can be considered either non personal or personal, depending on if the user behavior is stored. If it is considered to be personal, a question arises as to whether the ownership is the car producer's, considered as industrial data, or the car owner's in whose car the data is stored. In any case the natural person is the controller of the personal data and such data must be processed in a manner consistent with the law. In this regard, European Regulation (EU) 2018/1807 of 14 November 2018, establishes that, in the presence of personal and non personal data, the of non personal data cannot be differentiated, the GDPR will be applied exclusively.

It is also necessary to consider the distinction between personal data that is subject to the GDPR and that which is not. In this regard it is important to keep in mind the gathering and processing of online information derived from public sources. Such information is then grouped in order to identify and transfer personal data, without any authorization from the subjects of the data and from whom the information is taken and divided into areas of interests (car, make-up, travel), age, status and so on.

III. The Free Flow of Different Types of Data Set Forth by European Legislation and Their Legal Objectification

The GDPR prohibits Member States from restricting or barring the free movement of personal data within the Union for reasons of protection of natural persons in compliance with the processing of personal data; therefore it recognizes the availability of personal data and also the right of data portability. The European Regulation (EU) 2018/1807 of 14 November 2018 proclaims the same free flow principle of non-personal data within the Union, except when there is a restriction or a prohibition for public security reasons.

Thus, these two Regulations establish the free flow of different types of data, personal and non-personal, permitting consideration of the data as intangible entities and consequently goods, even where the principle of *numerus clausus* of the exclusive rights on the intangible entities is accepted. Since these Regulations are the foundations of data being considered as a good, they therefore establish the process of legal objectification of data as a good for specific legal purpose and worthy of protection depending on the different uses.

IV. The Issue of the Legal Recognition of a Unitary Paradigm of Data

1. Data as an 'Entity Susceptible of Observation and Computational Use'

Regardless of the specific Regulations, the principle of free flow of data, personal and non-personal, raises the question of whether the legal reception of the unitary paradigm of data or the non-recognition of data can be reduced to a single good. For this reason, it is necessary to ascertain if data is a paradigm capable of activating the operation of a regulatory discipline or only taking on a simple descriptive role.

The understanding of data as 'any observable entity', and as immaterial representation of an entity, which has a meaning for the natural person, is so extensive that it can be used for any information, therefore assuming no practical relevance. Every human action is likely to turn into personal data. This statement is demonstrated by a new form of capitalism, so-called surveillance capitalism,[5] which is not based on production of goods or on financial speculation, but based on collection of personal data and their commodification.

Technological development and in particular artificial intelligence, as well

[5] On surveillance capitalism cf S. Zuboff, *The Age of Surveillance Capitalism. The Fight For a Human Future at the New Frontier of Power* (London: Profile Book Ltd, 2019), 376, according to whom the digital architectures of surveillance capitalism – the Big Other – are designed to capture and control human behaviour in order to attain a competitive advantage within the new markets since internet users or 'internauts', crucially, are not products, but sources of an added value: objects of a technologically advanced and increasingly inevitable process of extracting raw material, despite themselves – producers of data. In this way, by intercepting personal data, the Big Other may have an impact on the users' behaviour and could threaten democracy. Also Z. Bauman and D. Lyon, *Liquid Surveillance* (Cambridge: Cambridge University Press, 2013) refer to a 'liquid surveillance'. Regarding interventions aiming to hinder surveillance capitalism, especially in America, see: G. Resta, 'La sorveglianza elettronica di massa e il conflitto regolatorio USA/UE', in Id and V. Zeno Zencovich eds, *La protezione transnazionale dei dati personali dai "Safe Harbour Principles" al "Privacy Schield"* (Roma: RomaTre Press, 2016), 44-45, according to whom 'the search for a difficult point of equilibrium between protection of individual rights and the invasiveness of modern technologies of electronic surveillance' paves 'the way for actual forms of global cybersurveillance' in the face of 'local responses, such as the ones offered by the European legal system (…), which are partial and unsatisfactory' and requires 'the strengthening of the tools offered by the international law, in order to effectively implement the principles of art. 12 of the Universal Declaration of Human Rights and art. 17 of the International Covenant on Civil and Political Rights (…), where the privacy is elevated to the status of a human right, independent from national and territorial affiliation, and to adapt them to the reality of the technological context' (according to the Author, the '*ricerca di un difficile punto di equilibrio tra la tutela dei diritti dei singoli e l'invasività delle moderne tecniche di sorveglianza elettronica' pone 'le premesse per vere e proprie forme di global cybersurveillance' di fronte a 'risposte locali, quali quelle offerte dall'ordinamento europeo (…) parziali e insoddisfacenti' e richiede il 'rafforzamento degli strumenti offerti dal diritto internazionale, in modo da dare effettiva attuazione, adeguandoli alla realtà del contesto tecnologico, ai principi iscritti nell'art. 12 della Dichiarazione Universale dei Diritti Umani e nell'art. 17 del Patto Internazionale dei Diritti Civili e Politici (…), ove la riservatezza è elevata al rango di diritto umano, indipendentemente dalle appartenenze nazionali e territoriali*').

as products and services of the Internet of Things, lead to an understanding of data as an 'entity susceptible of observation and computational use', that is to say, capable of being the object of artificial and automated use.

The validity of this limitation of the legal notion of data is confirmed by the express application, *ex* Art 2.1 GDPR, which refers to

> 'the processing of personal data wholly or partly by automated means, but also to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system'.

Therefore, when the data processing is non-automated, the application of this rule is possible only when its final use is as a listing in a database.

Similarly, the Council of Europe Convention on cybercrime (Budapest, 23 November 2001) defines the phrase 'computer data' as

> 'any representation of facts, information or concepts in a form suitable for processing in a computer system, including a program suitable to cause a computer system to perform a function'.

2. Insufficiency of a Qualification of Data Based on Computational Use for the Purposes of a Unitary Assessment of Data

This definition of 'data', anchored to a computational use, however, does not allow a unitary assessment of personal and non-personal data.

Personal data is protected as such, and is related to the essential characteristics of the natural person who, in compliance with the regulations in force, can consent to the processing of such data for an expression of self-determination.[6]

[6] Regarding the key role of consent for the handling of one's privacy cf M.G. Stanzione, 'Il Regolamento europeo sulla privacy: origini e ambito di applicazione' *Europa e diritto privato*, 1249 (2016); F.D. Busnelli, 'La persona alla ricerca dell'identità' *Rivista critica di diritto privato*, 7 (2010); S. Rodotà, *Il diritto di avere diritti* (Roma-Bari: Laterza, 2012), 397; E. Giannantonio, *'Sub* Art. 1' n 1 above, 10; F. Macario, 'La protezione dei dati personali nel diritto privato europeo', in V. Cuffaro and V. Ricciuto eds, *La disciplina del trattamento dei dati* (Torino: Giappichelli, 1997), 29, who sees consent as the 'general rule' for the processing of personal data by private persons and public economic bodies; see also G. Comandè, 'Commento agli artt. 11 e 12', in E. Giannantonio et al eds, n 1 above, 133. On the consent in general, cf V. Carbone, 'Il consenso, anzi i consensi, nel trattamento informatico dei dati personali' *Danno e responsabilità*, 23 (1998); D. Messinetti, 'Circolazione dei dati personali e dispositivi di regolazione dei poteri individuali' *Rivista critica di diritto privato*, 350 (1998); F. Cafaggi, 'Qualche appunto su circolazione, appartenenza e riappropriazione nella disciplina dei dati personali' *Danno e responsabilità*, 615 (1998); S. Sica, 'Il consenso al trattamento dei dati: metodi e modelli di qualificazione giuridica' *Rivista di diritto civile*, 621 (2001); S. Niger, 'Il "mito" del consenso alla luce del codice in materia di protezione dei dati personali' *Cyberspazio e diritto*, 499 (2005); A. Fici and E. Pellecchia, 'Il consenso al trattamento' n 1 above, 504; S. Mazzamuto, 'Il principio del consenso e il problema della revoca', in R. Panetta ed, n 1 above, 996; G. Oppo, 'Sul consenso dell'interessato', in V. Cuffaro et al eds, n 1 above, 124.

Self-determination produces an 'intangible entity' suitable to generate utility[7] and to be the object of a right, different from the rights relative to the essential characteristics of natural person (personality rights).

The relationship of personal data to the essential characteristics of the natural person requires consideration of such data as an object of legal protection as such. Consequently the processing and the circulation of personal data must be in compliance with legal requirements that are, mainly, the self-determination of the subject of the data.[8]

[7] Cf G. Resta, 'La disponibilità dei diritti fondamentali e i limiti della dignità (note a margine della Carta dei Diritti)' *Rivista di diritto civile*, 808 (2002) according to whom 'whereas the principle of self-determination and the prohibition of commercial exploitation are explicitly accepted with regard to the body and parts of the body, this is not the case with regard to other attributes of the person, especially regarding personal data, which also receives a broad and specific guarantee of protection' ('*mentre rispetto al corpo ed alle sue parti è espressamente affermato, oltre al principio d'autodeterminazione, anche il divieto di sfruttamento commerciale, niente di simile è previsto in relazione agli altri attributi della persona ed, in primo luogo, ai dati personali, che pure sono destinatari di un'ampia e specifica garanzia di tutela*').

[8] Self-determination does not only refer to the power to decide in the initial moment if and how to make information about oneself externally available, but also to the power of control over the further circulation of this data. In Germany the transition from privacy in the sense of a trinomial idea 'person-information-secrecy' to a privacy in the sense of a quadrinomial idea 'person-information-circulation-control' can be traced back to the famous *Volkszählungsurteil*, *Bundesverfassungsgericht* 15 December 1983, 1 BvR 209/83, Neue juristische Wochenschrift, 419 (1984) with comment by S. Simitis, 'Die informationelle Selbstbestimmung – Grundbedingungen einer verfassungskonformen Informationsordnung' *Neue Juristische Wochenschrift*, 398 (1984). To understand the importance attributed to this decision, E. Kosta, *Consent in European Data Protection Law* (Boston: Brill Nijhoff, 2013), 51; P. Schwartz, 'The Computer in German and American Constitutional Law: Towards an American Right of Informational Self-Determination' 38 *American Journal of Comparative Law*, 686 (1989). The abovementioned decision is the first of a series of decisions, confirming the safeguarding approach of the German courts in protecting the person from the technological progress. *Bundesverfassungsgericht* 27 February 2008, 1 BvR 370/07; *Bundesverfassungsgericht* 24 January 2012, 1 BvR 1299/05. In the Italian legal system the same transition happened some years later with the decision '*provvedimento*' of the Italian Data Protection Authority, 13 January 2000; see also Corte di Cassazione 4 January 2011 no 186, *Foro italiano*, I, 1120 (2011) which stated that the right to protect personal data is to be understood as 'one's right to maintain control over his or her information, which not only public figures or celebrities are entitled to, but 'anyone' (…) and 'every person' (…) in the different contexts and areas of life and which contributes to establishing a society respectful of one another and of one's dignity under conditions of equality' ('*diritto a mantenere il controllo sulle proprie informazioni che, spettando non solo alle persone in vista ma a 'chiunque' (…) e ad 'ogni persona' (…) nei diversi contesti ed ambienti di vita, concorre a delineare l'assetto di una società rispettosa dell'altro e della sua dignità in condizioni di eguaglianza*'); see also Corte di Cassazione 5 April 2012 no 5525, *Danno e responsabilità*, 747 (2012) according to which 'data may be stored also for purposes different from the ones originally justifying the processing, including the transfer from one archive to another, as well as being stored on the internet (eg online publications in the historical archives of newspapers). At the same time, the subject of data has a right to control in order to protect the dynamic projection of his own data and social image, which includes the right to ask for contextualisation or an update of the information (even when the information in question is true and *a fortiori* if it is news) and, if necessary, with regard to the purpose of archival storage and underlying interests, to ask for the erasure of the information relating to him or her' ('*se del dato è consentita la conservazione per*

It also must be acknowledged that in some instances personal data does not have an economic value as such. Let us consider, for example, the preferences of a specific consumer, which are useful only when they are processed as a whole, and in connection with the preferences of the other consumers. No one would be interested in buying the personal data of a single consumer.

By contrast, non-personal data is not protected as such, but rather only when it is in an aggregated form. Let us consider, for example, the data relative to the operation of a given device, an appliance that is an individually-owned object. The owner of the object has no rights regarding the operational data except for the personal data regarding his interaction with the object. Only the aggregation of non-personal data produces a good which is suitable to be the object of rights and disposition.

If the no personal data has legal relevance as such, then it is not a good, but an intangible entity which, considered individually, becomes a utility that must be treated with distinct and autonomous protection, in compliance with industrial property, intellectual property, industrial secrets, trade secrets, know how, and so on, and thus cannot be reified or commodified.[9]

Therefore, the use of the same syntagma 'data' must not obscure the fact that the data relating to the natural person is the object of legal protection as such; differently, the non-personal data can be object of protection only if in an aggregated form, as it is unsuitable of generating a utility if singularly considered, with the consequent exclusion of protection as a legal good.

V. Use of Personal Data Not-Intended for Circulation: Some Examples

The above observations, nevertheless, do not prevent consideration of different use of data, one that is finalized or not intended for circulation.

A) Personal data can be offered and consent for its use can be granted in order to ensure the exact execution of a contractual obligation, such that the creditor is required to meet the obligation of co-operation. In these cases, personal data is not intended for circulation and is not the object of the contract.

In particular, let us consider the therapeutic contract between patient and

finalità anche diversa da quella che ne ha originariamente giustificato il trattamento, con passaggio da un archivio ad un altro, nonché ammessa la memorizzazione (anche) nella rete di internet (es., pubblicazione on line degli archivi storici dei giornali), per altro verso al soggetto cui esso pertiene spetta un diritto di controllo a tutela della proiezione dinamica dei propri dati e della propria immagine sociale, che può tradursi, anche quando trattasi di notizia vera – e a fortiori se di cronaca – nella pretesa alla contestualizzazione e aggiornamento della notizia, e se del caso, avuto riguardo alla finalità della conservazione nell'archivio e all'interesse che la sottende, financo alla relativa cancellazione').

[9] Cf A. Appadurai, 'Definitions: Commodity and Commodification', in M. Ertman and J.C. Williams eds, *Rethinking Commodification: Cases and Readings in Law and Culture* (New York: New York University Press, 2005), 35; L. Bianchi, 'Dentro o fuori del mercato? *Commodification* e dignità umana' *Rivista critica di diritto privato*, 489 (2006).

doctor. A doctor cannot perform his contractual obligations with regard to pharmacology, surgery, or a preliminary diagnosis, if he does not pre-acquire patient data, even where the patient lacks legal capacity and so access to the necessary information is provided by a legal representative. The content of the information is closely related to the assessment of the risks related to the medical treatment, so it is in the interest of both sides in the contractual relationship to allow access to such information.

Just as the patient has the right to be informed about the medical treatment he will undergo, following his consent, the doctor must also inform the patient of the possible risks of a procedure and carry out the procedure precisely only if he has the necessary details of the personal data of the patient; otherwise he will incur legal liability for any harm suffered by the patient.

B) Personal data can be offered and consent for its use can be granted in order to ensure an accurate assessment of contractual risk. Again, in this hypothesis, personal data is not intended for circulation and is not the object of the contract.

Let us consider insurance contracts when the insurance company, in order to establish a 'tailor-made' premium, may request specific personal data. This information will not lead to a reduction in the insurance premium, and so does not constitute a part of the counter-performance owed by the insured, as it has been claimed,[10] because this 'tailor-made' premium always works in the interest of the insurer. The insurer can use the data provided to engage in a precise risk assessment and most of all prevent any fraud. It might also operate in the interest of the insured, when the data analysis does not entail a strong risk of discrimination.

C) Otherwise, data can be object of a contract even if is not intended for circulation, in order to assess whether or not a contract can be concluded. The data can also be used to evaluate the reliability of the opposing party in contracts that contain data and information not in the public domain which only the other party can provide.

In particular, let us consider the nondisclosure agreements[11] used to begin

[10] See A. De Franceschi, 'Il «pagamento» mediante dati personali', in V. Cuffaro et al eds, n 4 above, 1382.

[11] C. Rossello, 'Le clausole di riservatezza e i non *disclosure agreements*' *Il diritto del commercio internazionale*, 697 (2014) and in G. Alpa ed, *Le clausole dei contratti del commercio internazionale. Seminario del 20 giugno 2014* (Milano: Giuffrè, 2016), 79; A. Zimatore, 'Note sui cc.dd. accordi di riservatezza', in *Studi in onore di F. Capriglione* (Padova: CEDAM, 2010), 725. With special regard to the protection of trade secrets, cf most recently C. Galli, 'Potenziale perpetuità della tutela del *know-how* e contrattualizzazione degli impegni di riservatezza' *Diritto industriale*, 113 (2018), who states that an appropriate contractualization of privacy obligations is necessary in order to guarantee the protection of trade secrets and the validity of the privacy clauses depends on the provision of a *causa* which justifies the patrimonial attribution determined by them and on the context which they are part of and on their specific content. With regard to *devoir de confidentialité* and in reference to *responsabilité dans les conditions du droit commun*, cf A. Federico, '*Négociations* e obblighi di riservatezza' *Giurisprudenza italiana*, 1315 (2018).

or continue the necessary negotiations for the conclusion of a deal. Only the availability of data that is not readily accessible – containing the organization of the company, rights on tangible or intangible assets, inputs, relationships with suppliers, customers, banks, potential liabilities, litigation and so on – can allow an exact evaluation of the concrete economic operation.

Knowledge of non-public data, through its contractual reference, gives rise to specific behavioral obligations to act in good faith in the negotiation phase. Consequently, this contractual protection is joined to criminal and civil law, not only to the Italian Civil Code (Art 2598) but also to the European Parliament and Council Directive 2016/943 of 8 June 2016 (transposed by decreto legislativo 11 May 2018 no 63) that has amended Arts 623 Penal Code and 98-99 Industrial Property Code and reinforced the protection on scientific and trade secrets. The Paris Union Convention for the Protection of Industrial Property (Art 10 *bis*) and the TRIPs on Trade-Related Aspects of Intellectual Property Rights (Art 39) provide further protection.

D) Furthermore, data can be object of a contract even if is not for circulation, in order to be filed and stored. One example of such a contract would be one involving cloud computing,[12] which offers a remote storage service with access to hardware and software. This kind of contract allows creation, modification and display of content, guaranteeing security of stored data, usually upon payment of a fee.

E) Data can also be used for the conclusion of smart contracts,[13] if translated into algorithms. In these cases, however, data is not the object of the contract and not intended for circulation, but it is instrumental in the configuration of these procedures for concluding the contract. For example, it is possible to conclude a Digital Rights Management contract for the purposes of managing, delivering and accessing certain multimedia services, only if the choice corresponds to

[12] See eg L. Valle et al, 'Struttura dei contratti e trattamento dei dati personali nei servizi di *cloud computing* alla luce del nuovo Reg. 2016/679 UE' *Contratto e impresa/Europa*, 343 (2018). See also D. Mula, 'Il contratto di fornitura di servizi *cloud*', in C. Perlingieri and L. Ruggeri eds, *Internet e Diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), 549; M.C. De Vivo, 'Il contratto ed il *cloud computing*' *Rassegna di diritto civile*, 1001 (2013); A. Mantelero, 'Il contratto per l'erogazione delle imprese di servizi di *cloud computing*' *Contratto e impresa*, 1216 (2012). On this topic see also C.A. Rohrmann and J. Falci Sousa Cunha, 'Some Legal Aspects of Cloud Computing Contracts' 10 *Journal of International Commercial Law and Technology*, 1, 37 (2015).

[13] Cf P. De Filippi and A. Wright, *Blockchain and the Law. The Rule of Code* (Cambridge: Cambridge University Press, 2018), 72; B. Carron and V. Botteron, 'How smart can a contract be?', in D. Kraus et al eds, *Blockchains, Smart Contracts, Decentralised Autonomous Organisations and the Law* (Cheltenham, Nothampton: Edward Elgar Publisher, 2019), 101; G. Lemme, '*Blockchain*, *Smart Contracts*, *Privacy*, o del nuovo manifestarsi della volontà contrattuale', in E. Tosi ed, *Privacy digitale. Riservatezza e protezione dei dati personali tra GDPR e nuovo Codice Privacy* (Milano: Giuffrè, 2019), 308; P. Cuccuru, 'Blockchain ed automazione contrattuale. Riflessioni sugli *smart contract*' *Nuova giurisprudenza civile commentata*, 107 (2017); D. Di Sabato, 'Gli *smart contracts*: robot che gestiscono il rischio contrattuale' *Contratto e impresa*, 378 (2017).

the value connected to the service purchased. In this way the use of the service is dictated by algorithms that prevent it from being accessed when the deadline has expired or a new smart contract is offered as long as the choice is made within a deadline or by a specific device.

VI. Use of Personal Data Intended for Circulation and Data as a Good

In all these contracts the provision of data is not intended for circulation since it is exclusively instrumental to a particular purpose – with the configuration of contractual liability for all uses aimed to different purposes – or to the conclusion of the contract.

Therefore, the identification of data as a good takes place only in contracts for data circulation, which become tools for configuration of a single digital market.[14] Such contracts allow the realization and the implementation of free flow of data, personal and not, and only in these circumstances they acquire value not individually but only if aggregated. On the contrary, the data assumes an individual relevance, but not value, in those contracts examined above.

VII. The Different Nature of Consent to Data Processing Depending on Their Different Use. Some Examples of Contracts for the Circulation of Data

The traditional doctrinal approach that leads to the right to the protection of personal data within the personality rights – characterized as absolute, non-transferable, and not prescribed by law – usually barred consent when revealing data would lead to contractual value. The modern approach, however acknowledges an authorization[15] which allows the processing of the subject's data without the

[14] Cf A. De Franceschi ed, *European Contract Law and the Digital Single Market. The Implications of the Digital Revolution* (Cambridge: Cambridge University Press, 2016), 1; A. Boerding et al, 'Data Ownership – A Property Rights Approach from a European Perspective' 11 *Journal of Civil Law Studies*, 2, 328 (2018).

[15] For this point of view see D. Messinetti, 'Circolazione dei dati personali e dispositivi di regolazione dei poteri individuali' *Rivista critica di diritto privato*, 350 (1998), who states that the 'subject of the data's consent, characterized as authorization, forms the instrument which has the power to put an end to the intimate data being subject to the logic of repression by every cognitive process taking place' ('*il consenso dell'interessato, nella sua caratterizzazione di permesso autorizzativo, costituisce lo strumento che ha l'efficacia di rendere i dati intimi della persona non più assoggettati alla logica della repressione di qualunque circuito conoscitivo posto in essere*'). Critically, G. Oppo, 'Sul consenso dell'interessato' n 6 above, 124, according to whom describing consent as an authorization does not solve the problem of the legal qualification 'because it still requires establishment of the impact of the 'authorization' in the legal sphere of the one who gives it. Where does this impact come from if not from an act of will? Is it consequently an act of disposition?' ('*perché si tratta comunque di giudicare della*

natural person losing his essential characteristics.

If we can consider consent as authorization for those contracts where personal data is exclusively instrumental to a particular purpose, it is not simply an authorization but becomes consent with contractual value if that consent is for the circulation of personal data. The principle of the free flow of personal data allows any natural person, within regulatory limits, to give the right of use,[16] for a consideration or free of charge, of his personal data in accordance with the specific aims underlined in the act of disposition. The contractual clause considers personal data as part of an exchange, in other words a remuneration for services, such as access to online platforms.

A) Let us consider contracts concluded between online service providers and users and, in particular, the economic transaction through which the user, in order to have access to network research, websites and social networks, allows the collection, use and sharing of his personal data. An exchange takes place between the operator of the search engine, website or social site and the user, not only on a '*de facto*' level or in a merely economic sense, but also 'in legal terms'.[17]

incidenza della "autorizzazione" nella sfera giuridica di chi la concede. Questa incidenza da che può essere determinata se non da un atto di volontà? Si tratta allora di un atto di disposizione?'). According to S. Mazzamuto, n 6 above, the essence of the authorization is not only to legitimate the processing of data, but also to regulate cases of circulation of data with regard to the development of personality without acts of dispositive nature.

[16] Cf V. Cuffaro, 'A proposito del ruolo del consenso' n 1 above, 121; V. Zeno Zencovich, 'Una lettura comparatistica della l. 675/96 sul trattamento dei dati personali' *Rivista trimestrale di diritto e procedura civile*, 740 (1998); G. Resta and V. Zeno Zencovich, 'Volontà e consenso nella fruizione dei servizi di rete' *Rivista trimestrale di diritto e procedura civile*, 412 (2018).

On the more general topic of data as a legal asset see, P. Perlingieri, 'L'informazione come bene giuridico' *Rassegna di diritto civile*, 331 (1990), who states that 'the relevance of an asset rises not only from the holding of an interest and the protection accorded to its holder, but also when the asset's protection is given to qualified third parties getting (not only economic) utilities from keeping it. This means that not only patrimonial, but also non patrimonial assets, ie assets which are protected independent of their economic relevance, may be legally relevant. The relevance may also arise from the regulation of the asset's circulation, the modalities of access, or from the regulation of the facts regarding it' ('*la rilevanza di un bene è data non soltanto dalla titolarità dell'interesse in cui si sostanzia e nella protezione riservata al titolare ma anche quando la tutela del bene è riservata a terzi qualificati che ne ricavano comunque un'utilità, e non necessariamente economica, dalla conservazione del bene medesimo" e quindi sono "giuridicamente rilevanti non soltanto i beni patrimoniali ma anche quelli non patrimoniali; cioè quelli che sono protetti a prescindere dalla loro eventuale rilevanza economica. La rilevanza si può configurare anche nel regime di circolazione del bene, delle modalità di accesso, ovvero nel regime delle vicende che lo interessano*').

[17] C. Perlingieri, *Profili civilistici dei social networks* (Napoli: Edizioni Scientifiche Italiane, 2014), 88-89. Subsequently, the continuing increase in contracts concluded online with regard to the exchange and the processing of data is highlighted by C. Langhanke and M. Schmidt-Kessel, 'Consumer Data as Consideration' *Journal of European Consumer and Market Law*, 218 (2015); M. Schmidt-Kessel and A. Grimm, 'Unentgeltlich oder entgeltlich? Der vertragliche Austausch von digitalen Inhalten gegen personenbezogene Daten' *Zeitschr für die gesamte Privatrechtswissenschaft*, 84 (2017); A. De Franceschi, 'Il «pagamento» mediante dati personali' n 10 above, 1381.

This definition is confirmed by:

a) analysis of clauses that recur within the principal search engine and social networks' terms and conditions of use, according to which the user grants the operator of the search engine or social network a non-exclusive, transferable licence over IP content, which may in turn be transferred as a sub-licence, free from royalties, and valid throughout the world, as consideration for the personal, global, royalty-free, non-transferable, and non-exclusive licence which the operator grants to the user in order to use the software provided by the search engine or the social network. The waiver of privacy rights and personal data is in return for gaining access to the search engine or social network platform. The user has the right to use the platform – and the operator is obliged to consent to the usage – on the grounds that the operator is permitted to collect and exploit the user's personal data. This conclusion raises serious doubts about the claim that the operator is not obliged to provide the service and does not have to ensure the correct functioning of the search engine, website and social network platforms as the services amount to the consideration for the licence granted to the user.

b) Art 7.4 GDPR, by virtue of which,

> 'when assessing whether consent is freely given, utmost account shall be taken of whether, *inter alia*, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract'.[18]

c) the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content,[19] which allows the consumer to choose how to fulfill his

[18] See Corte di Cassazione 2 July 2018 no 17278, *Guida al diritto*, 42, 75 (2018) which stated that the consent must be freely given, it must not be tied to any conditions, it must be informed, which requires exhaustive and appropriate information to be provided beforehand, it must be specific, meaning that it has to be given for one or more specific purposes, it must not be intended for any indiscriminate collection of personal data, it must be unambiguous, with regard to the processing of sensitive data and decisions based on automated processing, included profiling according to Arts 9 and 22 of the European Regulation EU 679/2016 GDPR it also needs to be explicit. Thus, an operator of a website, who provides a fungible service, which can be renounced by the user without greater difficulties (in this case, a newsletter service on issues related to finance, taxes, law and labour), may tie the provision of the service to the consent to the processing of personal data for advertising purposes under the condition that the consent is separately and unequivocally given with regard to this effect and that the product sectors or services the advertisement will be related to are listed. On this point F. Bravo, 'Lo "scambio di dati personali" nei contratti di fornitura di servizi digitali e il consenso dell'interessato tra autorizzazione e contratto' *Contratto e impresa*, 34 (2019).

[19] Cf, most recently, the European Parliament legislative resolution of 26 March 2019 on the proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content and services [COM(2015)0634 – C8-0394/2015 – 2015/0287(COD)] and the Position of the European Parliament adopted at first reading on 26th March 2019 regarding the adoption of the directive (EU) 2019/770 of the European Parliament and of the Council on certain aspects concerning contracts for the supply

obligation by paying the price[20] or by a non-pecuniary counter-performance in the form of personal data or any other data (Art 3). Under these terms it is possible to imagine the exclusion of enforcement of the GDPR because the data becomes a good and so it will be separated from the protection of the natural person following the act of waiver.

d) the Draft Common Frame of Reference (DCFR)[21] which applies to contracts conferring, in exchange of a price or gratuitously, rights to information or data, including software and databases (Book IV, Section A, Chapter 1, Art 101; Book IV, Section H, Chapter 1, Art 103).

e) The hypothesis regarding data transfer as an exchange and so the consent to contractual value, is also confirmed in the absence of necessary conditions to qualify consent as an authorization with regard these contracts between the operator of web and the user.

As underlined by Art 7 GDPR[22] and in consideration of the 'Territorial scope' of Art 3 GDPR, consent must be autonomous, informed, specific, unequivocal, and explicit when processing special categories and for decisions based solely on automated processing, including profiling (Arts 9 and 22 GDPR). These conditions for consent are absent when operators of search engines, websites and social networks collect personal data.

These operators condition the use of network services on the release of data; data is used for a different purpose than the one that justified its collection; the informative and the consensual profile is not separated, as is evident from the pages of the main search engines, websites and social networks when data and

of digital content and services (P8_TCI-COD(2015)0287), available at https://tinyurl.com/yhq84y5g (last visited 30 December 2019).

For some criticism see A. De Franceschi, 'Il «pagamento» mediante dati personali' n 10 above, 1410, according to whom the proposal only adresses certain aspects of the topic 'paying with data', providing for solutions which are not completely consistent with the existing law ('*per quanto concerne alcuni aspetti limitati ed, in relazione a quelli, non contiene soluzioni del tutto coerenti e soprattutto coordinate con il diritto vigente*').

[20] According to Art 7 para 2 of the Position of the European Parliament adopted at first reading on 26 March 2019 regarding the adoption of the directive (EU) 2019/770 of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content and services [P8_TCI-COD(2015)0287] 'price' means 'money or a digital representation of value that is due in exchange for the supply of digital content or a digital service'.

[21] Cf G. Magri, 'L'armonizzazione del diritto privato europeo attraverso il DCFR', in P. Gallo et al eds, *L'armonizzazione del diritto europeo: il ruolo delle corti* (Milano: Giuffrè, 2017), 87; G. Alpa and G. Iudica eds, *Draft Common Frame of Reference (DCFR), what For?* (Milano: Giuffrè, 2013), 1; M. Maugeri, 'Alcune perplessità in merito alla possibilità di adottare il Dcfr (*draft common frame of reference*) come strumento opzionale (o facoltativo)' *Nuova giurisprudenza civile commentata*, 253 (2011); U. Breccia, 'Principles, definitions e model rules nel 'comune quadro di riferimento europeo' (draft common frame of reference)' *Contratti*, 95 (2010); H.W. Micklitz and F. Cafaggi eds, *European Private Law After the Common Frame of Reference* (Cheltenham, Nothampton: Edward Elgar Publisher, 2010) 1.

[22] Cf eg F. Caggia, 'Libertà ed espressione del consenso', in V. Cuffaro et al eds, n 4 above, 257-267; F. Bravo, *Il consenso e le altre condizioni di liceità del trattamento di dati personali*, in G. Finocchiaro ed, n 4 above, 157-161.

cookies policies are published. In these cases they simply inform the user regarding the processes by which such companies 'collect, use, and share data' and 'use cookies or similar technologies' and require users to confirm 'having read the data and cookies policies'. By contrast a user can decline certain uses of his or her data, by changing the privacy defaults, an option that was only recently included by the main social networks in order to comply with the GDPR (Art 25).

B) Contracts with data brokers that collect information online from public sources (for example, Land Registries, Income Revenue Authorities, Public Automobile Registries, Registries of Companies and so on) are particularly interesting. The data brokers select, analyze, evaluate, organize and give licence to third parties to use this information within the data market. This contract concluded between the data broker and the customer, who is a user of the result who does not have a direct relationship with the subjects of the data, should not give rise to problems in terms of the GDPR because the personal data processed is public; it is made public by public administrations to meet transparency obligations.

However, the fact that such data is easily accessible does not mean that it is also freely reusable by anyone and for any purpose. The enforcement of the principle of purpose (Art 5.1.b GDPR) does not allow the reuse of data if it is incompatible with the original purposes for which the data is public: examples of uses that might be barred include the reuse of contact details of state employees for marketing or campaign purposes or the repurposing of personal data from the Public Automobile Register, and others.

Moreover, the data broker cannot lawfully justify the processing based on the legitimate interests of the entity in control of the data (Art 6.1.f GDPR). In order for such a justification to be possible, the interest of the entity in control of the data, even if legitimate, would have to prevail over the fundamental interests, rights and freedom of the subjects of the data. In this regard Opinion 06/2014 of Working Party 29 on the notion of legitimate interests of the data controller under Art 7 of European Parliament and Council Directive 95/46/EC[23] is confirmed. The legitimate interest of the controller to be aware of the preferences of his customers in order to create targeted advertising and personalized offers, does not involve monitoring their online and offline activities and creating complex personality profiles with the collaboration of data brokers.

In the age of Big Data it is complicated to provide adequate information to the subject of the data on the purposes of processing that are unknown when the data is collected. Therefore, if the data is personal and public, the process of data collection must take place within the limits of the purpose for which it has been made accessible to the public; if the data is personal and non-public without the conditions of lawful processing – including consent and legitimate interest – massive personal data processing can happen only through the enforcement of

[23] See https://tinyurl.com/y999oddq (last visited 30 December 2019).

two rules of GDPR: 1) Art 6.4, which permits the processing, for a purpose other than that for which the personal data has been collected without the subject's consent, if the controller considers: a) any link between the purposes for which the personal data has been collected and the purposes of the intended further processing; b) the context in which the personal data has been collected, in particular regarding the relationship between the subjects of the data and the controller; c) the nature of the personal data, in particular whether special categories of personal data are processed, pursuant to Art 9, or whether personal data related to criminal convictions and offences are processed, pursuant to Art 10; d) the possible consequences of the intended further processing for subjects of the data; e) the existence of appropriate safeguards, which may include encryption or pseudonymisation; and 2) Art 89, which permits the renunciation of measures of pseudonymisation if these are incompatible with the purpose of archiving in the public interest, statistics and scientific or historical research for which it is sufficient that the data is only minimized.

Massive processing of personal data, therefore, must be carried out in respect of accountability, privacy by design and privacy by default and must be subject to a Data Protection Impact Assessment. In this regard the GDPR introduces a legal regime strongly characterized by the need to ensure the free flow of data while balancing its protection and security by offering rules to tackle the new problems generated by Big Data. Consequently, I cannot agree with the recent assertion by Italian academics that

> 'the GDPR remains imprisoned in the individual perspective that since the beginning has characterized the legal regime governing the processing of personal data but which is inadequate in the face of the superpersonal dimension of Big Data'.[24]

Otherwise, if the data processed by the data brokers are non personal, their treatment is regulated, as discussed above, by the legal regime of scientific or trade secrets.

VIII. Concluding Remarks

In conclusion, the sharing of a case method of analysis has allowed the analysis of the different contractual models inherent to data and that have stemmed from the use of new technologies. When the good, object of the contract, has been identified, it can be stated that only contracts for the movement

[24] See A. Iuliani, 'Note minime in tema di trattamento di dati personali' *Europa e Diritto Privato*, 298 (2018). The following authors share this approach F. Piraino, 'Il regolamento generale sulla protezione dei dati personali e i diritti dell'interessato' *Le nuove leggi civili commentate*, 378 (2017); A. Mantelero, 'Responsabilità e rischio nel Reg. UE 2016/679' *Le nuove leggi civili commentate*, 144 (2017).

of data, personal or non, when data acquires a value not in its singularity but aggregated, confirm the now famous phrase '*personal data is the new oil of the internet and the new currency of the digital world*'[25] in the knowledge that the automated processing of personal data is still a human treatment by automated means and as such a source of liability.

[25] M. Kuneva, *Keynote Speech. Roundtable on Online Data Collection, Targeting and Profiling*, Brussels, 31 March 2009. See also European Commission, *Building a European Data Economy*, 2, COM (2017) 9 final of the 10 January 2017: '(d)ata has become an essential resource for economic growth, job creation, and societal progress'.

Essays

The 'User-Centric' and 'Tailor-Made' Approach of the GDPR Through the Principles It Lays down

Francesco Giacomo Viterbo*

Abstract

The European approach to online privacy and personal data concerns in the contemporary digital age appears to have embraced a 'user-centric' approach, inspired by values of 'personalism' and human dignity, regardless of the growing commercial value commonly given to personal data.

These two sides of the same coin have been taken into account by the GDPR. On the one hand, it seems to outline a system of protection of data subjects that presents certain similarities and connections with consumer protection directives, especially as regards the transparency principle and the aim to provide individuals with 'effective' protection, enforceable rights and awareness-raising activities. On the other hand, a radical shift in the data protection policies of big online companies and many other service providers is required by the implementation of the set of mandatory principles and obligations stated by chapter IV of the GDPR, while the notice-and-consent paradigm is now quite remote.

In particular, data minimisation, confidentiality, integrity, data protection by design and by default, as well as accountability and scalability principles require a model of approaching the new challenges brought about by data protection that should be 'contextual' and 'tailor-made'. This means that the appropriate measures to be adopted by controllers and processors must consider the specific circumstances of each individual case, in accordance with a proportionality and reasonableness test on the extent of risks to the rights and freedoms at stake.

The new legal framework provided by the GDPR and Convention 108+ has weakened the role of national laws on personal data protection but has also posed the challenge of providing a uniform legal frame, at the European Union level, as well as of strengthening the harmonisation process among countries that are currently taking different approaches to data protection at a global level.

I. Three Different Approaches to Flows of Personal Data and the New Challenges Brought About by Technological Developments

The General Data Protection Regulation (GDPR) explains its social background under Recital 6, specifying that

> '(r)apid technological developments and globalisation have brought new challenges for the protection of personal data. The scale of the collection

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> and sharing of personal data has increased significantly. Technology allows both private companies and public authorities to make use of personal data on an unprecedented scale in order to pursue their activities. Natural persons increasingly make personal information available publicly and globally'.

The subsequent Recital 7 points out that

> '(t)hose developments require a strong and more coherent data protection framework in the Union, backed by strong enforcement, given the importance of creating the trust that will allow the digital economy to develop across the internal market'.

Even though in recent years virtually no one has doubted that such economic and social developments, involving considerable personal data-sharing platforms in online and offline markets, require a renewed legal framework, such a viewpoint might raise a number of important questions, including: How can personal data be treated in the legal system? To whom do personal data belong? Do they belong to the data subject? Or to the controller? Or to another entity entirely? Can personal data flow in markets and online networks without any legal obligation?

During the period when the European Union (EU) data protection reform was taking shape, some authors focused on the issue concerning 'default entitlements in personal data', assuming as the starting point that

> 'how entitlements in personal data are being allocated initially, ie the default entitlements before the parties negotiate reallocation, is of special importance'.[1]

In short, an important choice had to be given by the European drafter of the reform between building a new legal framework based on the principle of informational self-determination, pursuant to which the individual take control over his/her own personal data; or, in contrast, assigning a great deal of default rights to others, including governments and/or information industries.

In a more general viewpoint, there are three fundamental approaches with regard to the legal regulation of personal data flows in the current digital age:

a) state-centric approach

b) market-centric approach

c) user-centric approach.

These are destined to have different fortunes in accordance with the cultural

[1] N. Purtova, 'Default Entitlements in Personal Data in the Proposed Regulation: Informational Self-Determination Off the Table … and Back on Again?' 1 *Computer Law & Security Review*, 8 (2014). One conclusion of this analysis asserted that the proposed Regulation's draft could shift the balance away from the informational self-determination and default individual's entitlement in favour of competing (business) interests and the default entitlement of others to process personal data.

background and political, social and economic context to which we refer.

Starting from the approach *sub* a), a state-centric regulation takes place when the government uses advanced analytics to collect and process personal data on a mass scale in order to profile all citizens and shape public policy. In this viewpoint, personal data are treated like goods, having a public utility insofar as they belong to the government, which is able to process them for purposes of social utility (eg citizens' safety) or social control (including crime prevention).[2] Nonetheless, it is evident that this kind of approach poses a number of threats to equality, freedom and democracy.

The approach *sub* b) can be termed 'market-centric'. The gist of this approach is either to entitle by default data-hungry private entities or to allow the trade and sale of personal data, *de jure* or *de facto*, in order to boost the free movement of information in the market. In accordance with a market-oriented approach, personal data would have a commercial value:

> 'in a flourishing online ecology, where individuals, communities, institutions, and corporations generate content, experiences, interactions, and services, the supreme currency is information, including information about people'.[3]

The basic assumption underlying this approach to personal data is provided

[2] In accordance with a global trend, 'in recent decades, governments around the world have obligated a wide variety of businesses to collect, retain, and share data about their customers and clients to assist in curtailing money laundering, drug trafficking, tax evasion, terrorism, and other offences. Governments have sought access to personal information held by the private sector not only by asking companies to produce specific records about a single target or a small number of people at a time but increasingly via what we refer to here as "systematic" government access. As used throughout this issue, this term refers both to (1) direct access by the government to private-sector databases, without the mediation or interaction of an employee or agent of the entity holding the data, and (2) government access, whether or not mediated by a company, to large volumes of private-sector data': see F.H. Cate, J.X. Dempsey and I.S. Rubinstein, 'Systematic Government Access to Private-Sector Data' 4 *International Data Privacy Law*, 195 (2012). In this regard, we can consider the case of China's Social Credit System, a national reputation system being developed by the Chinese government in order to rate the trustworthiness of its one point three billion citizens. This system uses big data analysis technology and may be considered a form of mass surveillance. By February 2018, one such program has been implemented in Shanghai through its 'Honest Shanghai' app, which uses facial recognition software to browse government records, and rates users accordingly. In January 2019, Beijing government officially announced that it will start to test 'Personal Credit Score'. For more details, see F. Liang, V. Das, N. Kostyuk, and M. Hussain, 'Constructing a Data-Driven Society: China's Social Credit System as a State Surveillance Infrastructure' 10 (4) *Policy & Internet*, 415-453 (2018); G. Kostka, 'China's Social Credit Systems and Public Opinion: Explaining High Levels of Approval' 21(7) *New Media & Society*, 1565-1593 (2019). Moreover, the legality of this Social Credit System is not compromised by the new 'National Standards on Information Security Technology - Personal Information Security Specification GB/T 35273-2017' ('PI Specification') that came into force on 1 May 2018. The 'PI Specification' is not a mandatory regulation and it does not apply to Chinese public authorities, giving rise to compliance issues only for business operations in China: see B. Li, 'China Issues Personal Information Security Specification' available at https://tinyurl.com/r77ee2f (last visited 30 December 2019).

[3] H. Nissenbaum, 'A Contextual Approach to Privacy Online' 140(4) *Daedalus*, 33 (2011).

by an empirical observation of present-day practices in the marketplace and social life, especially in the online world, where large amounts of personal data change hands or even 'ownership' as part of merger-acquisitions and other strategic transactions. On the Internet, individuals usually make deals for the disclosure, collection, use and reuse of their personal data; in certain situations they receive some form of compensation and thus 'exploit' and 'sell' their habits, customer/user-profile and even sensitive personal data.[4] Indeed, personal data would be labelled 'personal' by virtue of the fact that they 'belong' to the data subject, as well as on the basis of being a property right. The precondition for applying the logic of 'propertisation' to personal data is that data can be subjected to a process of commodification that ends up equating them with any other kind of tradable commodity. The commodification of information would be inevitable, especially for consumers with regard to their personal data.[5] In addition, it is stressed that such a process would lead to a higher level of protection by taking (industrial and intellectual) property rights as a reference.[6] This means that if personal data are deemed similar to a commodity or goods that may be destined for appropriation or commercial exploitation, then the protection and circulation regime appropriate to such goods would be applicable, being loanable from copyright law and contract law.[7]

[4] G. Spindler, 'Datenschutz- und Persönlichkeitsrechte im Internet – der Rahmen für Forschungsaufgaben und Reformbedarf' *Gewerblicher Rechtsschutz und Urheberrecht*, 996 (2013).

[5] A. Bartow, 'Our Data, Ourselves: Privacy, Propertization, and Gender' 34 *University of San Francisco Law Review*, 634 (2000).

[6] Illustrative is the story of Amazon.com, analyzed by L. Lessig, 'Privacy as Property' 69 *Social Research*, 249 (2002). By selling books, Amazon was a collector of data and could build accurate profiles about its customers by monitoring their behavior. The data it was collecting, Amazon said in its privacy policy, would not be sold to others. Information was therefore collected by Amazon only to better serve its customers. At the end of 2000, however, Amazon announced a new policy. From that point on, data collected could be sold to or shared with people outside Amazon, regardless of a consumer's request that it not. Amazon also made that policy retroactive and refused requests to delete earlier data. The consumers who had relied on its policy were told they had no right to remove the data they had given: 'their data was subject to sale'. See what L. Lessig says about this story: 'If it were taken for granted that privacy was a form of property, then Amazon simply could not get away with announcing that this personal information was now theirs'; 'just imagine if we thought about our personal data the way we think about a car. And then think about this analogous case about a contract governing a car. You drive into a parking lot, and the attendant hands you a ticket. The ticket lists a number of rules and promises on the back of the ticket. The lot is not responsible for damage to the car; the car must be picked up by midnight, etc. And then imagine, as with Amazon, that at the bottom of the ticket, the last condition is that this license can be modified at anytime by the management'; 'Obviously, in ordinary property thought, this is an absurd idea. It would be crazy to interpret a condition in a license stating that the license could be changed to mean that the license might be changed to allow the parking lot to sell your car'.

[7] This approach has particularly been proposed by scholars in the United States: R.A. Posner, 'The Right of Privacy' 12 *Georgia Law Review*, 393-422 (1977); J. Litman, 'Information Privacy/Information Property' 52 *Stanford Law Review*, 1283 (2000); A. Bartow, n 5 above, 633; J. Zittrain, 'What the Publisher Can Teach the Patient: Intellectual Property and Privacy in an Era of Trusted Privication' 52 *Stanford Law Review*, 1201-1250 (2000); L. Lessig, n 6 above,

In contrast, the European approach to online privacy and personal data concerns appears to differ from the above default settings. If both Directive 1995/46/EC and the recent GDPR are taken into account, the EU legal system seems to have embraced a user-centric approach inspired by values of 'personalism' and human dignity.[8]

Although some believe that it is possible to sell personal data, such an opinion leads to a false perspective. Personal data are not simply pieces of information. They refer to a particular, identified or identifiable natural person and can be capable of revealing some of the most intimate and delicate aspects of that individual's personality, such as his/her state of health or sex life. Their significance is not linked to the economic and quantitative criterion of marketability, but rather to a rationale based on the protection of human rights and freedoms.[9] This argument may be inferred from the EU personal data protection laws, wherein there is no provision for a specific contract that would allow the data subject or the data controller to dispose of personal data. A further argument is given by Recital 24 of the Directive 2019/770 'on certain aspects concerning contracts for the supply of digital content and digital services', where it is fully recognised that 'the protection of personal data is a fundamental right and that therefore *personal data cannot be considered as a commodity*'.[10] Accordingly,

247–269; P.M. Schwartz, 'Property, Privacy and Personal Data' 117 *Harvard Law Review*, 2056–2128 (2004); in Italy, see L.C. Ubertazzi, 'Banche dati e privacy' *Diritto industriale*, 633 (2002), who remarks that the right of individuals in allowing the processing of their personal data has the same legal framework of the intellectual property rights; and V. Zeno Zencovich, 'Profili negoziali degli attributi della personalità' *Diritto dell'informazione e dell'informatica*, 547 (1993). In the European debate, see Y. Poullet, 'Data Protection Between Property and Liberties. A Civil Law Approach' in H.W.K. Kaspersen and A. Oskamp eds, *Amongst Friends in Computers and Law. A Collection of Essays in Remembrance of Guy Vandenberghe* (The Hague: Kluwer Law International, 1990), 160; L.A. Bygrave, *Data Protection Law. Approaching its Rationale, Logic and Limits* (The Hague: Kluwer Law International, 2002), 120; N. Purtova, *Property Rights in Personal Data: a European Perspective* (The Hague: Kluwer Law International, 2011), 1.

[8] See Recital 4 of the GDPR, which specifies that '*The processing of personal data should be designed to serve mankind*. The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality' (italics added). Approaching these issues in the light of fundamental principles provided by EU Treaties and EU Member States' Constitutions is of paramount importance: see P. Perlingieri, '*Privacy* digitale e protezione dei dati personali tra persona e mercato' *Il Foro napoletano*, 481-490 (2018); Id, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 2006), 719-720; Id, *Il diritto dei contratti fra persona e mercato. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2003), 367-370; A. Gambino, 'Dignità umana e mercato digitale' in G. Contaldi ed, *Il mercato unico digitale* (Roma: Nuova Editrice Universitaria, 2017), 7-18.

[9] F.G. Viterbo, *Protezione dei dati personali e autonomia negoziale* (Napoli: Edizioni Scientifiche Italiane, 2008), 149-152.

[10] The text of the 'Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services' is available at https://tinyurl.com/tourdtu (last visited 30 December 2019). Recital 24 specifies that this Directive applies 'to contracts where the trader supplies, or undertakes to supply, digital content or a digital service to the consumer, and the consumer provides, or

there is no room for the commodification of personal data in both the wording and rationale of Arts 7 and 8 of the EU 'Charter of Fundamental Rights'.

It is precisely in this respect that personal data seem to differ from all other goods in the Italian and EU legal orders. On the one hand, they pose as elements creating the data subject's personal identity. On the other hand, personal data can serve as an important resource that may be the object, not of appropriation but rather of *access*; not for enjoyment or consumption, but rather for *processing* by third parties for specific and worthy purposes.[11]

In accordance with this user-centric approach, personal data may be deemed intangible goods, which are *not* (directly) *transferable*, within the meaning given to this term by the most important civil codes enacted in the EU context. An alternative is to regard personal data as intermediate rather than final goods, instrumental rather than ultimate values. Indeed, people are assumed not to desire or value personal data in themselves, but to use personal data by processing them in order to obtain opportunities for gain or some other measure of utility or welfare.[12] Under this approach, the only *commodifiable* and *marketable*

undertakes to provide, personal data', ensuring 'that consumers are, in the context of such business models, entitled to contractual remedies'. It is important to note that Art 3(1) of the Commission draft of this Directive (COM(2015)0634 – C8-0394/2015 – 2015/0287(COD)) referred to 'any contract where the supplier supplies digital content to the consumer or undertakes to do so and, in exchange, a price is to be paid or *the consumer actively provides counter-performance other than money in the form of personal data or any other data*' (italics added). This draft was later modified and the final text deletes all references to the provision of personal data as a counter-performance: see European Data Protection Supervisor (EDPS), 'Opinion 4/2017 on the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content', adopted on 14 March 2017 (available at https://tinyurl.com/tdjryq3 (last visited 30 December 2019)), where 'the EDPS considers that the term "data as a counter-performance" should be avoided'. For further remarks, see D. Clifford, I. Graef and P. Valcke, 'Pre-formulated Declarations of Data Subject Consent – Citizen-Consumer Empowerment and the Alignment of Data, Consumer and Competition Law Protections' 20 *German Law Journal*, 679-721 (2019); G. Finocchiaro, 'Il quadro di insieme sul Regolamento europeo sulla protezione dei dati personali' in G. Finocchiaro ed, *Il nuovo Regolamento europeo sulla privacy e sulla protezione dei dati personali* (Bologna: Zanichelli, 2017), 2.

[11] F.G. Viterbo, n 9 above, 153-155. See also S. Spiekermann et al, 'Personal Data Markets' 25 *Electronic Markets*, 91 (2015), as they observe that personal data 'is not just an ordinary tradable asset' and 'can be highly sensitive and revealing about a person's identity'; 'processing it is legally restricted by data protection and privacy laws. In many countries, privacy and the right to information self-determination are recognized as a human right.' This viewpoint has been confirmed by G. Buttarelli in EDPS, 'Opinion 8/2016 on coherent enforcement of fundamental rights in the age of big data', 23 September 2016, para 4, where he argues that '(i)n the EU, personal information cannot be conceived as a mere economic asset'.

[12] The above analysis can be linked with the following statements stressed by R.A. Posner: 'People invariably possess information, including facts about themselves and contents of communications, that they will incur costs to conceal. Sometimes such information is of value to others: that is, others will incur costs to discover it. Thus we have two economic goods, "privacy" and "prying". We could regard them purely as consumption goods, the way economic analysis normally regards turnips or beer; and we would then speak of a "taste" for privacy or for prying. But this would bring the economic analysis to a grinding halt because tastes are unanalyzable from an economic standpoint. *An alternative is to regard privacy and prying as intermediate rather*

goods seem to be the benefits and pecuniary advantages that the data controller receives *through* and *after* the processing of personal data, provided that such processing is carried out in full compliance with personal data protection law. From this perspective, when referring to personal data, the concept of processing implies that a special set of rules has to be applied to all concerns regarding personal data and their movement in the market. This regime is wholly autonomous and does not overlap with the rules of the *ius commune* concerning the transfer of ownership and intellectual property.[13] Therefore, there is no room for entitlement in personal data as ownership, on the grounds set out above. The problem is establishing *whether* and *how* personal data may be processed in each specific concrete online or offline context.[14] That is to say, *whether* and *how* the data subject's fundamental rights may be preserved.

This user-centric approach should also be applied in the context of big data[15] and artificial intelligence (AI)-based applications.[16]

than final goods, instrumental rather than ultimate values. Under this approach, people are assumed not to desire or value privacy or prying in themselves but to use these goods as inputs into the production of income or some other broad measure of utility or welfare' (R.A. Posner, n 7 above, 394 (italics added)).

[13] F.G. Viterbo, n 9 above, 156-158. See also F. Ferretti, 'A European Perspective on Data Processing. Consent through the Re-conceptualization of European Data Protection's Looking Glass after the Lisbon Treaty: Taking Rights Seriously' *European Review of Private Law*, 481 (2012).

[14] In this regard, see the 'contextual approach' proposed by H. Nissenbaum, *Privacy in Context: Technology, Policy, and the Integrity of Social Life* (Stanford: Stanford University Press, 2010), 129-244; Id, n 3 above, 33: 'I give an account of privacy in terms of expected flows of personal information, modeled with the construct of *context-relative informational norms*. The key parameters of informational norms are actors (subject, sender, recipient), attributes (types of information), and transmission principles (constraints under which information flows)'.

[15] 'Big Data represent a new paradigm in the way in which information is collected, combined and analysed. (…) In terms of data protection, the main issues concern the analysis of the data using software to extract new and predictive knowledge for decision-making purposes regarding individuals and groups': see 'Guidelines on the protection of individuals with regard to the processing of personal data in a world of Big Data', drafted by the Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, T-PD(2017)01, adopted on 23 January 2017, paras I and III, available at https://tinyurl.com/wtzex5k (last visited 30 December 2019). In Italy, the Supervisory Authority for the protection of personal data ('*Garante* privacy'), the Competition Authority ('AGCM') and the Authority for Communications Guarantees ('AGCOM') have published the 'Big Data Guidelines and policy recommendations', on July 2019, available at https://tinyurl.com/vkefu8w (last visited 30 December 2019). On this topic see A. Mantelero, 'Personal data for decisional purposes in the age of analytics: From an individual to a collective dimension of data protection' 32(2) *Computer Law & Security Review*, 238-255 (2016); C. Kuner, F.H. Cate, C. Millard and D.J.B. Svantesson, 'The challenge of 'big data' for data protection' 2(2) *International Data Privacy Law,* 47-49 (2012); N. Purtova, 'Health Data for Common Good: Defining the Boundaries and Social Dilemmas of Data Commons', in R. Leenes, N. Purtova, S. Adams eds, *Under Observation - The Interplay Between eHealth and Surveillance* (Springer, 2017), 177; A. Soro, 'Big Data e Privacy. La nuova geografia dei poteri', *Convegno per la Giornata Europea della protezione dei dati personali 30 gennaio 2017*, available at https://tinyurl.com/qqpwlqq (last visited 30 December 2019).

[16] H. Nissenbaum, n 3 above, 33.

The reference point is given by the 'Guidelines on the protection of individuals with regard to the processing of personal data in a world of Big Data', drafted by the Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS 108, hereafter 'Convention 108'). The purpose of these guidelines is to

> 'recommend measures that Parties, controllers and processors should take to prevent the potential negative impact of the use of Big Data on human dignity, human rights, and fundamental individual and collective freedoms'

and

> 'to contribute to the protection of data subjects regarding the processing of personal data in the Big Data context by spelling out the applicable data protection principles and corresponding practices, with a view to limiting the risks for data subjects' rights'.[17]

Moreover, one must not overlook the 'Guidelines on Artificial Intelligence and Data Protection', recently drafted by the Consultative Committee of the Convention 108, providing

> 'a set of baseline measures that governments, AI developers, manufacturers, and service providers should follow to ensure that AI applications do not undermine the human dignity and the human rights and fundamental freedoms of every individual',

in particular when AI applications are used in decision-making processes.[18]

This viewpoint seems to require not only a user-centric approach, but also a collectivity-centric approach, affording a 'meta-individual' dimension to personal data protection.

II. Harmonisation Led by the GDPR and Convention 108+: The Points of Divergence from the Past

Almost one year after the GDPR entered into force, the Council of Europe adopted the updated text of Convention 108 in order to promote at the global level the fundamental values of respect for privacy and protection of personal data, given the diversification, intensification and globalisation of data processing and personal data flows, especially in the online world. This 'modernised

[17] See para II of the above mentioned guidelines.

[18] See para I of the 'Guidelines on Artificial Intelligence and Data Protection', drafted by the Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, T-PD(2019)01, adopted on 25 January 2019, available at https://tinyurl.com/qp6r4ux (last visited 30 December 2019).

Convention' (hereinafter: Convention 108+) can be signed and ratified by any country around the world and could represent the global standard for personal data protection.

Both the GDPR and Convention 108+ are having a new impact on the harmonisation of personal data protection. The former is providing a uniform legal frame at the EU level; the latter will strengthen harmonisation among countries that currently have different levels of data protection.

Both the GDPR and Convention 108+ confirm some well-known principles applying to personal data protection, but also introduce some points of breaking with the past, such as the following:

1. The purpose of maximum harmonisation pursued through the adoption of the EU Regulation 2016/679 repealing Directive 95/46 and the introduction of cooperation mechanisms at the European and global levels;
2. A more detailed regulation of consent as a legitimate basis of the processing of personal data, except in cases 'where there is a clear imbalance between the data subject and the controller';
3. Some principles and guarantees set out by data protection law are very similar to those solutions that have already been embraced in the area of consumer law, given the increasing commercial value of personal data;
4. The *accountability* and *scalability* principles, introducing a 'contextual' and 'tailor-made' approach to personal data protection concerns, to be assessed on a case-by-case basis;
5. The pivotal role of cooperation among data scientists, scholars, lawyers and data protection supervisory authorities for the effective protection of the fundamental rights and freedoms of individuals, as well as for the global harmonisation trend.

III. The GDPR's Uniform Legal Frame Weakening the Role of National Privacy Codes: The Italian Case

In accordance with Art 288 TFEU, regulations are binding in their entirety and 'directly applicable'. Therefore, in all EU Member States, internal laws concerning personal data protection have been profoundly reformed since the GDPR uniform legal frame entered into force.[19] In Italy, illustrative is the

[19] On the GDPR as a uniform legal frame on personal data protection in the Union, see G. Finocchiaro, n 10 above, 8-9. The reason that guided the European legislator towards a new regulation in place of a new directive is probably pointed out by Recital 9 of the GDPR: Directive 95/46/EC 'has not prevented fragmentation in the implementation of data protection across the Union, legal uncertainty or a widespread public perception that there are significant risks to the protection of natural persons, in particular with regard to online activity. Differences in the level of protection of the rights and freedoms of natural persons, in particular the right to the protection of personal data, with regard to the processing of personal data in the Member States may prevent the free flow of personal data throughout the Union. Those differences may therefore

reform set out by the decreto legislativo 10 August 2018 no 101, which revised and reshaped the decreto legislativo no 196/2003 (widely known as the 'privacy code', hereinafter: Code).

The above reform abolished all articles and provisions of the Code that were overlapping or inconsistent with regard to the GDPR's contents. For instance, in the new version of Art 154(1) of the Code pertaining to tasks assigned to the Italian supervisory authority (hereinafter: Garante) has been the removal of the previous clause under letter *c)* according to which one of the assigned tasks

> 'shall consist in ordering data controllers or processors, also ex officio, to adopt such measures as are necessary or appropriate for the processing to comply with the provisions in force'.

This is currently provided for by the GDPR itself, pursuant to Art 58(2)(d).

Therefore, only complementary and implementing rules have been left and/or modified in the current text of the Code.[20]

According to this perspective, for instance, Art 2-*quinquies* has implemented Arts 8(1) and 12(1) of the GDPR, admitting the processing of personal data in relation to information society services on the basis of a child's consent where the child is at least fourteen years old. Where the child is younger, the legal basis of such processing requires that consent is given or authorised by the holder of parental responsibility over the child. Moreover, in accordance with the above Articles, the controller must provide the child with all information in a concise, transparent, intelligible and easily accessible form, using clear and plain language, that is to say, user-friendly information for a younger person.

In addition, some Articles of the Code entrust the implementation of the GDPR to the *Garante*.

In this regard, it is appropriate to consider Art 2-*septies* regulating the processing of genetic data, biometric data or data concerning health in accordance with Art 9(4) of the GDPR. Such data processing must be undertaken in compliance with the specific measures laid down by the Garante.[21] One must not overlook the fact that consent given by the data subject is no longer required in order to make data processing for health purposes lawful, pursuant to Art 9(2)(h) of the GDPR.[22] This is an important novelty implemented by the Code and

constitute an obstacle to the pursuit of economic activities at the level of the Union, distort competition and impede authorities in the discharge of their responsibilities under Union law. Such a difference in levels of protection is due to the existence of differences in the implementation and application of Directive 95/46/EC'.

[20] For further details see F. Pizzetti, *Privacy e il diritto europeo alla protezione dei dati personali. Il Regolamento europeo 2016/679* (Torino: Giappichelli, 2016), II, 13-49

[21] As regards the processing of personal data for health purposes, see Garante per la Protezione dei Dati Personali, 7 March 2019 no 55, available at www.garanteprivacy.it.

[22] Art 9(2)(h) of the GDPR refers, in particular, to data processing which 'is necessary for the purposes of preventive or occupational medicine, for the assessment of the working capacity of

Garante assessments.[23] Nevertheless, in the case of data processing through online medical reports, the consent given by the patient (data subject) is required by the Italian legislation as a legal basis in order to render the processing lawful.[24]

Given that definitions, principles pertaining to the processing of personal data, the rights of the data subject, obligations binding controller and processor, transfers of personal data to third countries and even administrative fines are actually contained in the GDPR and directly applicable, the material scope of the internal 'privacy code' has been weakened and its role within data protection legal sources is now quite distant.

IV. Rules and Principles Concerning the Fairness and Lawfulness of any Processing of Personal Data, Focusing on the Issue of Online Services Offered for the 'Provision of Personal Data'

Even though the fairness and lawfulness of any processing of personal data must be assessed on a case-by-case basis, such an assessment always requires an answer to the following preliminary questions: a) Is there a legitimate basis justifying the processing of personal data? b) What purpose does the processing of personal data pursue? Is the processing compatible with the purposes for which the personal data were initially collected?

It is no coincidence that in the gist of information to be provided where personal data are collected from the data subject pursuant to Art 13(1) of the GDPR, 'the *purposes of the processing* for which the personal data are intended as well as the *legal basis for the processing*' are supposed to be mentioned together.[25]

The first condition of lawfulness, ie the disclosure of a legitimate basis, means that the processing of personal data should not be unlimited insofar as it must be carried out with the *consent* of the data subject *for one or more specific purposes*, or be *necessary* in accordance with one of the other cases specified by Art 6(1) of the GDPR.[26]

Consent to process personal data can be qualified as an act of autonomy by which an individual admits others into his/her own private sphere. It is generally

the employee, medical diagnosis, the provision of health or social care or treatment or the management of health or social care systems and services on the basis of Union or Member State law or pursuant to contract with a health professional'.

[23] See Garante, n 21 above, para 1.

[24] See Art 5 of the DPCM 8 August 2013.

[25] See Art 13(1)(c). Italics added.

[26] Pursuant to Art 6(1) of the GDPR, such legitimate basis of data processing may occur, in particular, when the processing 'is necessary for the performance of a contract to which the data subject is party'; or when it 'is necessary for compliance with a legal obligation to which the controller is subject'; or when it 'is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller'; or when it 'is necessary in order to protect the vital interests of the data subject or of another natural person'.

said that consent to data processing that does not expressly permit communication or dissemination of the same data has the effect of rendering lawful only those operations carried out by the data controller, without the data being able to circulate further. However, this approach is no longer appropriate to negotiating the issues and challenges we encounter in the online world today. There is considerable agreement that the paradigm of notice-and-consent has failed insofar as

> 'existing regimes have not done enough to curb undesirable practices, such as the monitoring and tracking associated with behavioral advertising and predatory harvesting of information posted on social networking sites'.[27]

For many critics, 'the fault lies with the ubiquitous regime of offering privacy to individuals on a "take it or leave it" basis'.[28] In order to tackle these concerns, the GDPR and the 'Proposal for a Regulation on Privacy and Electronic Communications' (ePrivacy Regulation) provide further safeguards, ensuring or attempting to ensure that consent could form the legitimate basis of data processing only when it is consciously and freely given by the data subject.[29]

Pursuant to Art 7(4) and Recital 43 of the GDPR, consent is not

> 'a valid legal ground for the processing of personal data in a specific case where there is a clear imbalance between the data subject and the controller'

and, in particular,

> 'consent is presumed not to be freely given if it does not allow separate consent to be given to different personal data processing operations despite it being appropriate in the individual case, or *if the performance of a contract, including the provision of a service, is dependent on the consent despite such consent not being necessary for such performance*'.[30]

[27] H. Nissenbaum, n 3 above, 34. The need of rethinking the 'notice and consent' paradigm has been focused by many authors. In particular, see A. Mantelero, 'The future of consumer data protection in the EU. Re-thinking the "notice and consent" paradigm in the new era of predictive analytics' 30 *Computer Law & Security Review*, 643-660 (2014); S. Thobani, 'Il consenso al trattamento dei dati personali come condizione per la fruizione di servizi online' in C. Perlingieri and L. Ruggeri eds, *Internet e Diritto civile. Atti del Convegno* (*Camerino 26 – 27 September 2014)* (Napoli: Edizioni scientifiche italiane, 2015), 459-484; A. Vivarelli, *Il consenso al trattamento dei dati personali nell'era digitale* (Napoli: Edizioni Scientifiche Italiane, 2019), 81-170.

[28] H. Nissenbaum, n 3 above, 35.

[29] For further details on the requisites for a valid consent, see the 'Guidelines on Consent under Regulation 2016/679', adopted on 28 November 2017, by the Art 29 Data Protection Working Party. On the proposal for a 'ePrivacy Regulation', which is to repeal and replace the Directive 2002/58/EC (ePrivacy Directive), see EDPS, 'Opinion 6/2017 on the Proposal for a Regulation on Privacy and Electronic Communications (ePrivacy Regulation)', adopted on 24 April 2017, available at https://tinyurl.com/vgh3pus (last visited 30 December 2019).

[30] Italics added.

This specification seems to be important especially for data protection in the online environment, where a great number of services are offered for free to end-users. 'Digital content or digital services are often supplied also where the consumer does not pay a price but provides personal data to the trader', ie by giving access to personal data or other data.[31] It follows that the request to collect and process personal data, such as for the purpose of displaying customised advertisements based on behavioural advertising technology to users, would be encompassed within the core business of the contract and accepted by the user as a form of compensation for the provision of the service offered for free.[32] In most cases, consent to the processing of personal data cannot be freely given by users. Therefore, two scenarios can be envisaged, insofar as the processing should find another legitimate basis, or otherwise be rendered unlawful.

In the first scenario, given that the provision of a commodity or service would be bound to the consent (not freely) given by a consumer to the processing of personal data for marketing purposes, the controller (for example, the editor of a website) who does not permit consumers to enjoy a service would be behaving unfairly.[33] Therefore, in such cases, the processing of personal data would never have a legitimate basis, regardless of contractual clauses admitting it. These would be unfair too.

In contrast, the second scenario is where such processing falls within the scope of either Art 6(1)(b) or Art 6(1)(f) of the GDPR.

[31] This specific 'business model' is explicitly taken into consideration by Recital 24 of the Directive (EU) 2019/770, n 10 above. On 24 March 2016, the Organisation for Economic Cooperation and Development (OECD) Council revised its 1999 Recommendation on Consumer Protection in E-commerce, including 'non-monetary transactions' in the key new developments, emerging trends and challenges faced by consumers in today's dynamic e-commerce marketplace: 'Consumers increasingly acquire "free" goods and services in exchange for their personal data and these transactions are now explicitly included in the scope of the Recommendation. Governments and stakeholders are called upon to consider ways to provide redress to consumers experiencing a problem with such transactions'. Whether and how to protect the weaker contractual party in such non-monetary online transactions is a relevant issue: for more details, see F.G. Viterbo, 'Freedom of contract and commercial value of personal data' *Contratto e impresa/Europa*, 612-619 (2016); with regard to the user's act of joining a social network, see C. Perlingieri, *Social Networks and Private Law* (Napoli: Edizioni Scientifiche Italiane, 2017), 63-98.

[32] For more details on 'the agreement concluded between the social network and the user to be conceptualised as a reciprocal contract in a legal sense concerning licences to use intangible material such as IP content and the social site's software platform', see C. Perlingieri, n 31 above, 85-91.

[33] See the '*vademecum*' called 'Up with Tips. Down with Spam. Privacy-Proof Marketing from Your Telephone to the Supermarket', which explains that the provision of a commodity or service cannot be bound to the consumer's consent to the processing of personal data for the purpose of sending ads: Garante per la Protezione dei Dati Personali 20 April 2015, available at www.garanteprivacy.it. Moreover, in presence of dominance in competition law terms, the controller could abuse its dominant position in the market by infringing data protection rules: on this point see N. Zingales, 'Between a Rock and Two Hard Places: WhatsApp at the Crossroad of Competition, Data Protection and Consumer Law' 33 *Computer Law & Security Review*, 555-556 (2017).

The former solution is the case where the legal ground for making data processing legitimate is the conclusion and performance of a contract.[34] No additional consent should be requested in order to process user data. Nevertheless, the data subject shall be informed that the processing of his/her personal data is a 'contractual requirement' and then obligatory, in accordance with Art 13(2)(e). In addition, the processing must be carried out in compliance with the principles and rules of the GDPR to be applied.

The latter solution is the case where the processing may be implemented even without the consent of the data subject, being

> 'necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data'.[35]

Such a balancing test should be conducted with regard to constitutional values (ie in a way that considers the right to privacy, dignity and all other personality rights) and taking into account all the circumstances surrounding the data subject's particular situation.[36]

Therefore, on the one hand, such solutions would imply that it is always possible to remedy the lack of valid consent by simply identifying a new legal ground for the processing, legitimising an uncontrolled movement of personal data, especially in online environments.[37] However, on the other hand, the viewpoint

[34] In the above case, the processing of personal data would be necessary for the *conclusion* of contract. However, in accordance with Art 6(1)(b) of the GDPR, processing is lawful if it 'is necessary for the *performance* of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract' (italic added). The overlap between these two cases may be reasonable in light of market dynamics. For a detailed analysis of this legal basis of processing, see F.G. Viterbo, n 31 above, 612-614. See also Garante per la Protezione dei Dati Personali 12 October 2004, available at www.garanteprivacy.it, where it was specified with regard to the offer of free-of-charge online services that the 'compensation' should consist in 'lawful, fair as well as proportionate user profiling', provided that no additional consent was requested to process user data, as such consent would not have been freely given. For further remarks see F.G. Viterbo, n 9 above, 230-233.

[35] Nonetheless, 'a solution that disregards the principle of consent as legitimation for data processing cannot be endorsed in the absence of a legitimate interest other than the social site operator or advertiser's need to collect personal data in order to process and sell them': C. Perlingieri, n 31 above, 77-78.

[36] Given that the courts had gone on to develop the right to confidentiality and the right to personal data protection as a constitutional check and limit on the free movement of data, this is without prejudice to the need to weigh such rights against equal-ranking interests or rights that may underpin the need for the communication or disclosure of information. For more details see the 'Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC', adopted on 9 April 2014 by the Art 29 Data Protection Working Party.

[37] In this regard, an argument can be represented by the above mentioned Recital 24 of the Directive (EU) 2019/770 where it is specified that '[t]he personal data could be provided to the trader either at the time when the contract is concluded or at a later time, such as when the consumer gives consent for the trader to use any personal data that the consumer might upload or

that combines the presence of a fundamental right (the right to protection of personal data) as a rule with the imposition of a number of limitations to be deemed as exceptions is not adequate to the phenomenon of data protection and data flows, inasmuch as the rules applying to data processing entail some form of balancing of data subjects' and others' interests against each other. As underlined by the European Court of Justice (hereinafter: ECJ), the right to the protection of personal data is not an absolute right, but must be considered in relation to its function in society.[38]

Furthermore, the proposal for a 'ePrivacy Regulation' (replacing the ePrivacy Directive) is intended

> 'to provide a high level of protection to both content and metadata by giving consent, as defined in the GDPR, a central role for the processing of electronic communications data'.[39]

In particular, as regards the issue of 'tracking-walls' obliging the user to consent to the use of third-party tracking cookies despite these are unnecessary for the performance of the service concerned, the proposal encourages providers of software enabling access to internet and web browsers to provide easy ways for end-users to select or change the privacy settings at any time and signify their 'freely given, specific informed, and unambiguous agreement to the storage and access of such cookies in and from the terminal equipment'.[40]

Irrespective of the consent rule and the legal basis of the processing, the major challenge faced in the online world is how to ensure both compliance with data protection principles by online data controllers and the effectiveness of rights enforceable by data subjects in order to retain control over their own personal data or to prevent a breach of privacy or of dignity and autonomy.[41] The pivotal safeguard to be ensured is that both the rights of data subjects and

create with the use of the digital content or digital service. *Union law on the protection of personal data provides for an exhaustive list of legal grounds for the lawful processing of personal data*' (italics added).

[38] See Cases C-92/09 and C-93/09, *Volker und Markus Schecke GbR and Hartmut Eifert* v *Land Hessen*, Judgment of 9 November 2010, para 48, available at https://tinyurl.com/u5wdtpg (last visited 30 December 2019). On this assumption see also N. Witzleb et al, 'An Overview of Emerging Challenges in Privacy Law', in Ead, *Emerging Challenges in Privacy Law* (Cambridge: Cambridge University Press, 2014), 1.

[39] See EDPS, 'Opinion 6/2017' n 29 above, para 3.2.

[40] See Recital 24 of the 'Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2202/58/EC (Regulation on Privacy and Electronic Communications)', 10 January 2017, COM/2017/010 final - 2017/03 (COD), available at https://tinyurl.com/uc8ajkj (last visited 30 December 2019); and EDPS, 'Opinion 6/2017' n 29 above, para 3.4.

[41] On this issue see D. Korff and I. Brown, 'Comparative Study on Different Approaches to New Privacy Challenges, in particular in the light of Technological Developments. Final Report', 20 January 2010, available at https://tinyurl.com/s3amrhb (last visited 30 December 2019).

the data protection principles that are mandatory for any data controller are not dangerously reduced or weakened by the absence of supervisory authorities controls or by the courts' interpretations.

For all the measures provided by the GDPR, the starting point is focusing on the purposes of the processing. These purposes are 'the "*raison d'être*" of the processing operations'.[42] They must be 'explicit, specified and legitimate'[43] and constitute one of the parameters for assessing the lawfulness of all data processing. If the purposes of processing are sufficiently specific and clear, individuals know what to expect and transparency is enhanced. At the same time, clear delineation of the purposes is important to enable data subjects to effectively exercise their rights, such as the right to object to processing.[44]

Moreover, pursuant to Art 5(1)(b) of the GDPR, personal data collected for one or more purposes must 'not be further processed in a manner that is incompatible with those purposes'. It follows that any further processing for a *different* purpose is authorised as long as it is *not incompatible*: this needs to be assessed on a case-by-case basis, given the criteria specified by Recital 50.[45]

Accordingly, the purposes for which personal data are collected and processed are taken into account by the controller when assessing the following further requirements to be fulfilled in order to render the processing lawful:[46] a) personal data must be 'adequate, relevant and limited to what is necessary' in relation to the specified purposes; b) the specified purposes cannot be reasonably fulfilled by means other than the processing of personal data; and c) data processing may not disproportionality interfere with the interests, rights and freedoms at stake.

Just as the contract and its fundamental elements must be checked in order to verify their compliance with mandatory laws and the consistency of contractual contents with constitutional values, so too is the processing of personal data, which must be checked in order to assess the lawfulness of the operations set out by the

[42] The above wording is used in the 'Opinion 03/2013 on the purpose limitation', adopted on 2 April 2013 by the Art 29 Data Protection Working Party.

[43] Pursuant to Art 5(1)(b) ('purpose limitation') of the GDPR. For more details, see para III.1 of the 'Opinion 03/2013 on the purpose limitation' n 42 above.

[44] See para 3.2. of the 'Handbook on European data protection law', edited by European Union Agency for Fundamental Rights and Council of Europe (Luxemburg: Publications Office of EU, 2018): it is available at https://tinyurl.com/vrzrpa4 (last visited 30 December 2019).

[45] Pursuant to Recital 50 of the GDPR, 'in order to ascertain whether a purpose of further processing is compatible with the purpose for which the personal data are initially collected, the controller, after having met all the requirements for the lawfulness of the original processing, should take into account, inter alia: any *link* between those purposes and the purposes of the intended further processing; the *context* in which the personal data have been collected, in particular the *reasonable expectations of data subjects* based on their relationship with the controller as to their further use; the *nature of the personal data*; the *consequences* of the intended further processing for data subjects; and the *existence of appropriate safeguards* in both the original and intended further processing operations' (italics added). For more details see para III.2 of the 'Opinion 03/2013' n 42 above.

[46] Pursuant to Art 5(1)(c) ('data minimisation') of the GDPR. See para 3.3 of the 'Handbook on European data protection law' n 44 above.

controller. The checking has to be carried out ensuring that legitimate and worthy interests are realised and that the fundamental rights and freedoms at stake, which are susceptible to be injured through processing, are protected in the individual case.[47]

A similar approach should be adopted with regard to big data analytics and artificial intelligence-based applications, regardless of considerable agreement that in such areas the 'consent rule' and the 'limitation purpose principle' would fail to protect data subjects. In these cases, transparency should be ensured with the checking of the decision-making algorithm in order to assess the compliance of the decisional criteria with constitutional principles and mandatory laws.[48]

V. Analogies and Connections with Consumer Protection Directives

Given the above frame of principles enhancing the user-centric approach in data protection, the GDPR seems to outline a system of protection of data subjects that presents the following similarities and connections with the consumer protection directives:

1. The 'targeting' criterion indicated in order to define the territorial scope of data protection;

2. The specification of the principle of transparency through the provision that any information and communication be given using 'clear and plain language';

3. The fundamental role of contractual clauses and codes of conduct in order to protect the data subject (especially in the case of transfer of his/her personal data to third countries);

4. The striving for 'effective' protection of the data subject's (fundamental) rights.

Each of these measures will be analysed further in the following parts.

1. The GDPR's Territorial Scope

Since the well-known judgment of the European Court of Justice (ECJ) on the *Costeja González* v *Google Spain SL* case,[49] EU Member States have been able

[47] For further details on the checks to be carried out on contracts, see for all P. Perlingieri, ' "Controllo" e "conformazione" degli atti di autonomia negoziale' *Rassegna di diritto civile*, 204-228 (2017).

[48] The importance of prior checking on the decision-making algorithms has been demonstrated by some recent cases. An illustration is the case of Amazon, which has recently experimented with using machine learning to build a recruitment tool. The project was later abandoned after the engineers found that their artificial intelligence-based tool showed a bias against women: for more details see *Business Insider* news, available at https://tinyurl.com/smnxxmn (last visited 30 December 2019).

[49] Case C-131/12, *Google Spain SL, Google Inc.* v *Agencia Española de Protección de Datos (Aepd), M. Costeja González*, Judgment of 13 May 2014, available at www.eur-lex.europa.eu, and *Computer Law Review International,* 77 (2014). This judgment was implemented by the

to exert pressure so that their own national laws apply to the processing of personal data carried out by big online companies, such as Google and Facebook. Before this judgment, Opinions 1/2008 and 05/2009 adopted by the Data Protection Working Party[50] clarified that Directive 1995/46 generally applied to the processing of personal data by both search engines and social network service providers, although they did not have an establishment in the territory of a Member State: in this case, it was sufficient that the provider had made use of equipment, automated or otherwise, in the territory of a Member State (for example, it made use of cookies or similar software devices) for the purpose of processing personal data in order that the data protection law of that Member State be applied.

Consequently, the EU legislator has defined the territorial scope of the GDPR on the basis of two key criteria: the 'establishment' criterion as per Art 3(1) and the 'targeting' criterion as per Art 3(2).[51]

Pursuant to the former criterion, the GDPR applies to

> 'any processing of personal data *in the context of the activities of an establishment* of a controller or a processor in the Union (…) regardless of whether the processing itself takes place within the Union'.[52]

Establishment implies the effective and real exercise of activity through stable arrangements.

Pursuant to the 'targeting' criterion, the GDPR applies to

> 'the processing of personal data of data subjects who are in the Union by a controller or a processor not established in the Union (…) *where the processing activities are related to offering goods or services to such data subjects irrespective of whether connected to a payment*',[53]

which may occur, for instance, when the online service provider makes

Data Protection Authorities represented in the Data Protection Working Party (WP 29) through the publication of the following document: 'Guidelines on the implementation of the Court of Justice of the European Union Judgment on "Google Spain and Inc. v. Agencia Española de Protección de Datos (Aepd) and Mario Costeja González" C-131/12', adopted on 26 November 2014. In Italy the Judgment has been followed by the 'Decision Setting Forth Measures Google Inc. is Required to Take to Bring the Processing of Personal Data under Google's New Privacy Policy into Line with the Italian Data Protection Code' adopted by Garante per la Protezione dei Dati Personali 10 July 2014, available at www.garanteprivacy.it. For more details on the issues treated by the Judgment, see F.G. Viterbo, 'The Flow of Personal Data on the Internet: The Italian and European Google Cases' 2 *The Italian Law Journal*, 327- 363 (2015).

[50] See 'Opinion 1/2008 on data protection issues related to search engines', adopted on 4 April 2008, and 'Opinion 05/2009 on online social networking', adopted on 12 June 2009, (both available at https://tinyurl.com/r7kb8dx (last visited 30 December 2019)).

[51] For further details on these two criteria see the 'Guidelines 3/2018 on the territorial scope of the GDPR' adopted by the European Data Protection Board (EDPB) on 16 November 2018, available at https://tinyurl.com/syopwfp (last visited 30 December 2019).

[52] Italics added.

[53] See Art 3(2)(a) of the GDPR. Italics added.

> 'use of a language or a currency generally used in one or more Member States with the possibility of ordering goods and services in that other language'.[54]

This provision ensures the effectiveness of data protection in the online environment, even when a service or a digital content is supplied not in exchange for a price but where the user affords access to his/her personal data. Therefore, regardless of the above-mentioned issue of identifying a legitimate basis of the processing, by way of consideration for the supply of a free online service, the consumer can allow personal data to be processed by the provider under the assurance that the processing would be carried out in compliance with the GDPR.[55] This is all the more important given that large online companies that offer online services and digital content for free have the means to make it difficult to verify the place of their establishment and to identify the applicable law.

In addition, the GDPR applies to

> 'the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union (…) when it is related to the monitoring of the behaviour of such data subjects in so far as their behaviour takes place within the Union',

which may occur when individuals

> 'are tracked on the internet including potential subsequent use of personal data processing techniques which consist of profiling a natural person, particularly in order to take decisions concerning her or him'.[56]

Regardless, as a general principle, 'where the processing of personal data falls within the territorial scope of the GDPR, all provisions of the Regulation apply to such processing'. Therefore, controllers and processors, especially those offering goods and services at international level, have

> 'to undertake a careful and *in concreto* assessment of their processing activities, in order to determine whether the related processing of personal

[54] See Recital 23 of the GDPR.

[55] F.G. Viterbo, 'The Flow of Personal Data' n 49 above, 360. Moreover, in the above cases, pursuant to recital 80 and Art 27 of the GDPR – 'unless the processing is occasional, does not include processing, on a large scale, of special categories of personal data or the processing of personal data relating to criminal convictions and offences, and is unlikely to result in a risk to the rights and freedoms of natural persons, taking into account the nature, context, scope and purposes of the processing' – 'the controller or the processor should designate a representative' on the basis of a mandate contract. Art 27(4) specifies that 'the representative shall be mandated by the controller or processor to be addressed in addition to or instead of the controller or the processor by, in particular, supervisory authorities and data subjects, on all issues related to processing'. See also F. Pizzetti, n 20 above, 62.

[56] See Art 3(2)(b) and Recital 24 of the GDPR.

data falls under the scope of the GDPR'.[57]

Given the territorial scope of the GDPR, some authors have recognised in its measures a vocation to have a global application.[58]

It would be better to think of both the 'establishment' and 'targeting' criteria like a solution that must be endorsed due to the simple fact that they may ensure the *effectiveness* of the protection of data subjects (fundamental) rights.[59] The aim to achieve an *effective* protection has already been embraced in the area of consumer law, in accordance with Art 47 of the 'Charter of Fundamental Rights of the EU' having regard to the 'right to an effective remedy'.[60]

2. The Specification of the Principle of Transparency Through the Provision that any Information and Communication Be Given Using 'Clear and Plain Language'

Another connection with the consumer protection directives introduced by the GDPR is the specification of the principle of transparency under Recital 39 and Art 12(1). Pursuant to these provisions, the principle of transparency requires that 'any information and communication' pertaining to the processing of personal data be '*concise*', '*easily accessible* and *easy to understand*', and that '*clear and plain language*' be used, 'in particular for any information addressed specifically to a child'.[61] Moreover, 'in order to give *in an easily visible, intelligible and clearly legible manner, a meaningful overview of the intended processing*', the above information 'may be provided in combination with *standardised icons*',[62] even on the basis of the delegated acts to be adopted by the Commission in accordance with Art 92.

The wording of the GDPR's text brings to mind the transparency of contractual terms in consumer contracts required by Art 5 of Directive 93/13/EEC pursuant to which

> 'in the case of contracts where all or certain terms offered to the consumer

[57] 'Guidelines 3/2018' n 51 above, 4.

[58] As regards this point, in the Italian debate, see M.G. Stanzione, 'Genesi ed ambito di applicazione', in S. Sica, V. D'Antonio e G.M. Riccio eds, *La nuova disciplina europea della privacy* (Milanofiori Assago: Wolters Kluwer, 2016), 19; G. Finocchiaro, n 10 above, 19-20.

[59] On the aim to provide the data subject with effective and enforceable rights see para 5.4 below. Moreover, one must not overlook that the GDPR limits its scope to any information relating to natural persons only, without leaving any margin of discretion to Member States as regards the possibility of extending the protection to legal persons with regard to the processing data that concern them, as had been permitted by Directive 95/46. Likewise, the protection of consumers' rights is addressed to natural persons only, given that in the definition of 'consumer' given by the Directives on consumer's contracts there is no room for legal persons.

[60] For further remarks see F.G. Viterbo, *Il controllo di abusività delle clausole nei contratti bancari con i consumatori* (Napoli: Edizioni Scientifiche Italiane, 2018), 85.

[61] Italics added.

[62] Pursuant to Recital 60 and Art 12(7) of the GDPR. Italics added.

are in writing, *these terms must always be drafted in plain, intelligible language*';[63]

and by Art 13(1) of Directive 2017/14/EU pursuant to which

'*clear and comprehensible general information* about credit agreements is made available by creditors or, where applicable, by tied credit intermediaries or their appointed representatives at all times on paper or on another durable medium or in electronic form'.[64]

Therefore, in order to grasp the effective contents of the information to be provided to the data subject pursuant to Art 12(1) of the GDPR and the consequences of acknowledging the violation of the transparency obligations, one must not overlook that there is a body of case law dealing with a similar issue in the context of consumer protection that may apply by analogy.

In some well-known judgments, the ECJ has held that

'information, before concluding a contract, on the terms of the contract and the consequences of concluding it is of fundamental importance for a consumer',

insofar as it is on the basis of that information in particular that the consumer takes his/her own decisions about the contract. Accordingly,

'the requirement that a contractual term must be drafted in plain intelligible language is to be understood as requiring not only that the relevant term should be grammatically intelligible to the consumer, but also that the contract should set out transparently the specific functioning of the mechanism (…) to which the relevant term refers and the relationship between that mechanism and that provided for by other contractual terms (…), so that that consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it'.[65]

[63] Italics added. In Italy, the above part of Art 5 has been implemented under Art 35(1) of the so-called 'consumer code' (decreto legislativo 6 September 2005 no 206), in order to comply with that Directive on unfair terms in consumer contracts. This is also reflected in Recital 42 of the GDPR, that specifically refers to the Directive 93/13/EEC regarding pre-formulated declarations of consent. For further remarks, see D.J.B. Svantesson, 'Enter the Quagmire – The Complicated Relationship Between Data Protection Law and Consumer Protection Law' 34 *Computer Law & Security Review*, 25-36 (2018).

[64] Italics added. In Italy, the above Art 13(1) has been implemented under Art 120-*novies*(1) of the decreto legislativo 1 September 1993 no 385 (the so-called 'Testo Unico Bancario'), in order to comply with that Directive on credit agreements for consumers relating to residential immovable property.

[65] See Case C-26/13, *Árpad Kásler* v *OTP Jelzalogbank Zrt*, Judgment of 30 April 2014, available at www.eur-lex.europa.eu, *Contratti*, 853 (2014), with the comment of S. Pagliantini,

It follows that if a contractual term does not fit such a requirement, it may be deemed unfair and not binding on the consumer as a result.

Transposing these rulings into the scope of the principle of transparency under the GDPR, it should be acknowledged that the requirement that '*clear and plain language*' be used for any information and communication pertaining to the processing of personal data is to be understood as requiring not only that the relevant information should be grammatically intelligible to the data subject, but also that all information to be provided pursuant to Arts 12, 13 and 14 should set out transparently the purposes of the processing and all other case specifications (eg whether the data subject is obligated to provide his/her personal data as well as whether the provision of personal data is a statutory or contractual requirement; the existence of automated decision-making, including profiling, as well as the logic involved; and whether personal data may be transferred to third countries or international organisations), so that data subjects be able to assess the envisaged consequences of such processing, especially in terms of concrete risks for their fundamental rights and freedoms. It is on the basis of this information, in particular, that the data subject takes his/her own decisions about the processing of personal data. It follows that if the information provided to the data subject does not fit such requirements, the processing of personal data may be considered unfair and not lawful as a consequence, especially when a ground for lawfulness is given by the data subject's informed consent. This checking must be carried out with consideration of the specific circumstances to be assessed on a case-by-case basis.

Given the aforementioned case law, the transparency of the information to be provided to the data subject pursuant to Art 12, para 1, of the GDPR can be acknowledged as a mandatory principle, binding all EU Member States irrespective of their internal data protection laws. The only cases where the scope of this mandatory principle can encounter limitations are specified by Art 23, para 1, of the GDPR. These are restrictions that can be adopted by the EU law or a Member State law as necessary and proportionate legislative measures to safeguard some important objectives of general public interest in a democratic society, as long as they do not lead to bias against the essence of the fundamental rights and freedoms involved.

3. The Fundamental Role of Contractual Clauses and Binding Corporate Rules in Order to Protect the Data Subject (Especially in the Case of Transfer of His/Her Personal Data to Third Countries)

'L'equilibrio soggettivo dello scambio (e l'integrazione) tra Corte di Giustizia, Corte costituzionale ed ABF: "il mondo di ieri" o *un trompe l'oeil* concettuale?', ibid 854-872; and Case C-92/11, *RWE Vertrieb AG* v *Verbraucherzentrale Nordrhein-Westfalen e.V*, Judgment of 21 March 2013, available at www.eur-lex.europa.eu. For further remarks on these rulings, see F.G. Viterbo, n 60 above, 65-69.

EU Member States' legislation ensure that contracts concluded with consumers do not contain unfair terms; moreover, if such terms are used regardless, they will not bind the consumer and the contract will continue to bind the parties without the unfair provisions.

In contrast, in accordance with the GDPR, the addition of particular contractual clauses or adherence to a specific code of conduct within trade agreements can serve to guarantee an adequate level of protection of personal data with respect to some particular cases of data processing. The issue of contractual protection against the risks deriving from personal data processing is destined to acquire greater importance alongside the increasing number and complexity of international transfers of personal data (resulting from, eg, cloud computing, globalisation, data centres, social networks). The principal condition for any transfer to non-EU countries is the existence of an adequate level of protection in the recipient country, a level that is assessed by the European Commission pursuant to Art 45. If a country is not found to ensure an adequate level of protection, certain contractual safeguards may serve to permit the transfer of data.

In accordance with Art 46, these safeguards may be provided for (in particular) by:

i) *Standard data protection clauses*[66] adopted by the Commission or those previously adopted by a supervisory authority and hence approved by the Commission;

ii) *Binding corporate rules* (hereinafter: BCRs)[67] stated by a corporate

[66] In order to facilitate compliance with the Directive 95/46 of data transfers outside the EU, the European Commission adopted sets of standard contractual clauses – 2001/497/EC on 15 June 2001 and 2004/915/EC on 27 December 2004 – in order to frame transfers between controllers; and 2010/87/EU on 5 February 2010 for transfers between controllers and processors. For further details, see F.G. Viterbo, *Protezione dei dati personali* n 9 above, 267-276.

[67] For further details on BCRs, see the following documents adopted by the Art 29 Data Protection Working Party: 'Recommendation on the Standard Application for Approval of Controller Binding Corporate Rules for the Transfer of Personal Data', WP 264, 11 April 2018; 'Recommendation on the Standard Application for Approval of Processor Binding Corporate Rules for the Transfer of Personal Data', WP 265, 11 April 2018, both available at https://tinyurl.com/yemrwble (last visited 30 December 2019); 'Explanatory Document on the Processor Binding Corporate Rules', WP 204, 19 April 2013; 'Working Document Establishing a Model Checklist Application for Approval of Binding Corporate Rules', WP 108, 14 April 2005; 'Working Document: Transfers of personal data to third countries: Applying Article 26, para 2 of the EU Data Protection Directive to Binding Corporate Rules for International Data Transfers', WP 74, 3 June 2003 (all documents between 1997 and November 2016 are available at https://tinyurl.com/azwd6hb (last visited 30 December 2019)). In the Italian literature see: G. Buttarelli, 'Il trasferimento all'estero dei dati personali', in G. Santaniello ed, *La protezione dei dati personali* (Padova: CEDAM, 2005), 265; V. D'Antonio, *Il trasferimento dei dati all'estero*, in P. Stanzione and S. Sica eds, *La nuova disciplina della privacy* (Milano: Giuffrè, 2004), 156; Ri. Imperiali and Ro. Imperiali, *Il trasferimento all'estero dei dati personali* (Milano: Giuffrè, 2003), 308; M. Bellabarba, 'Il trasferimento all'estero dei dati personali', in R. Panetta ed, *Libera circolazione e protezione dei dati personali* (Milano: Giuffrè, 2006), I, 1753; A. Putignani, 'Strutture contrattuali nella disciplina del trasferimento all'estero dei dati personali' *Contratti*, 843 (2001). For

group for its international transfers of personal data from the EU to organisations within the same corporate group as the controller, or annexed to the contract between an EU controller and processor's group, in accordance with Art 47;

iii) An approved *code of conduct*[68] pursuant to Art 40 together with some other specific measures;

iv) '*Customised*' *contractual clauses*[69] between the controller or processor and the controller, processor or the recipient of the personal data in the third country or international organisation, given authorisation from the competent supervisory authority.

There is no room here to analyse each of these measures. Nevertheless, it is important to note that although

> 'standard contractual clauses generally work best for linear transfers of data from point A to point B', 'their rigid structure is not well suited to the web of data transfers and onward transfers between service providers and subcontractors, which frequently occur on a fluid basis, particularly in cloud-based platforms'.[70]

A more flexible tool is provided by BCRs. Each set of BCRs needs to be tailor-made to the particular needs of a given corporation. In particular, they seem to accord with the pragmatic approach sought by multinational organisations with regard to compliance issues.[71] One of the fundamental requirements for

further remarks on Art 47 of the GDPR, see M.C. Meneghetti, 'Trasferimenti di dati personali verso paesi terzi o organizzazioni internazionali', in G. Finocchiaro ed, n 10 above, 469-475.

[68] In particular, Art 46, para 2, letter *e)* refers to 'an approved code of conduct pursuant to Article 40 together with binding and enforceable commitments of the controller or processor in the third country to apply the appropriate safeguards, including as regards data subjects' rights'. Furthermore, pursuant to Arts 24, para 3 and 28, para 5, adherence to approved codes of conduct as referred to in Art 40 may be used as an element by which to demonstrate that the processing meets the requirements of the GDPR, ensuring compliance with the obligations of the controller or processor.

[69] The wording 'customised clauses' is used by P. Hustinx, 'Besides Binding Corporate Rules (BCRs) and Safe Harbor, What are the Rules Governing the Transfer of Data Between Europe and the Newly Industrialised Countries?', 18 January 2012, available at https://edps.europa.eu/: 'Any controller wishing to use contractual clauses may choose between standard clauses adopted by the European Commission and other, customised clauses'.

[70] See the study led by the US Chamber of Commerce and Hunton & William LLP, 'Business Without Borders: The Importance of Cross-Border Data Transfers to Global Prosperity' 19-20 (2014), available at https://tinyurl.com/yzt8bxsf (last visited 30 December 2019), where it is specified that 'in practice, the requirement to negotiate and execute separate agreements with every data exporter and importer, and for every new category of data or purpose not covered by a preexisting agreement, represents a significant bureaucratic burden that may be particularly onerous for small and medium-sized enterprises'.

[71] See paras 1.2 and 1.3 of the 'Explanatory Document' n 67 above. For a practical implementation of BCRs, see Garante per la Protezione dei Dati Personali, 'Autorizzazione al trasferimento dei dati personali all'estero mediante BCR da parte di Intel corporation Italia Spa', 21 November 2013, available at www.garanteprivacy.it. Nonetheless, some concerns have

the implementation of this tool is the binding nature of rules both internally and towards the outside world (legal enforceability of the rules).[72] This implies that on the one hand the members of the corporate group or organization – as well as each employee within it – are compelled to comply with the internal rules. On the other hand, data subjects covered by the scope of the BCRs must become third party beneficiaries by means of inclusion of a 'third party beneficiary clause' within the BCRs, which must be given a binding effect either by unilateral undertakings (where possible under national law) or by contractual arrangements between the members of the corporate group. In any case, data subjects shall be entitled to enforce compliance with the rules both by lodging a complaint before the data protection authority or before the court competent for the EU controller. Therefore, BCRs have to contain contractual arrangements with protective effects in favour of third parties, ie data subjects.

4. The Aim to Provide the Data Subject with Effective and Enforceable Rights

Providing the data subject with effective and enforceable rights is pursued by the GDPR and effective protection of consumer rights is pursued by the Directives on consumer contracts.

In this regard, an illustration is given by the implementation of the GDPR measures for the transfer of personal data to third countries on the basis of appropriate safeguards or an adequacy decision.

First, the safeguards provided by BCRs must fulfil a certain level of adequacy and effectiveness. In particular, 'effectiveness' refers to the mechanisms for ensuring the verification of compliance with the BCRs (eg an audit programme), the complaint procedures to be handled by the corporate group and the mechanisms for reporting to the competent supervisory authority any legal requirements from a third country that are likely to have a substantial adverse effect on the guarantees provided by the BCRs.[73]

Second, when assessing the adequacy of the level of data protection provided by a third country or when negotiating a legally binding convention or another instrument with a third country in order to permit the transfer of personal data

been forecast for BCRs, described as ' "far too costly", "impractical" and "time-consuming" ': see 'Business without Borders' n 70 above, 24.

[72] See para 2.3 of the 'Explanatory Document' n 67 above.

[73] Pursuant to Art 47, para 2, of the GDPR. See Section 5 of the application form to be submitted by companies seeking approval of BCRs, which is entitled 'Effectiveness' in accordance with the 'Recommendation on the Standard Application for Approval of Controller Binding Corporate Rules for the Transfer of Personal Data', WP 264, n 63 above; and Section 2 of the toolbox, describing the conditions to be met to facilitate the use of Binding Corporate Rules (BCR) for Processors, as shown by the 'Working Document 02/2012 setting up a table with the elements and principles to be found in Processor Binding Corporate Rules', WP 195, adopted on 6 June 2012.

pursuant to Art 45 of the GDPR, the Commission has to take into account numerous elements, starting from

> 'the rule of law, respect for human rights and fundamental freedoms, relevant legislation, both general and sectoral, (…) as well as the implementation of such legislation, data protection rules, professional rules and security measures, (…) case-law'.[74]

In particular:

- '[T]he third country should offer guarantees ensuring an adequate level of protection essentially equivalent to that ensured within the Union',
- '[T]he third country should ensure effective independent data protection supervision and should provide for cooperation mechanisms with the Member States' data protection authorities', and
- '[T]he data subjects should be provided with *effective* and *enforceable rights* and *effective administrative* and *judicial redress*'.[75]

It is precisely in this respect that the US and EU should negotiate and establish a new framework ensuring an adequate level of protection for data transfers from the EU to organizations established in the US, taking into account the level of protection ensured by the GDPR, given that the 'EU-US Safe Harbor' adequacy Decision was declared invalid by the ECJ[76] and replaced by the 'EU-US Privacy Shield' adequacy Decision, adopted on 12 July 2016.[77] Privacy Shield has been under fire ever since it was negotiated by the European Commission and US Department of Commerce, and now the issue of its legality has been challenged in cases that are already pending before the ECJ.[78]

The assessment of adequacy should be extended to the entire legal system of the third country.[79] Accordingly, the obligation for Member States to ensure

[74] Pursuant to Art 45, para 2, letter *a)* of the GDPR.

[75] Pursuant to Recital 104 of the GDPR. Italics added.

[76] See Case C-362/14, *Maximillian Schrems* v *Data Protection Commissioner*, Judgment of 6 October 2015, available at https://tinyurl.com/yjre2rd7 (last visited 30 December 2019). On this judgment, in the Italian debate, see A. Mantelero, 'L'ECJ invalida l'accordo per il trasferimento dei dati personali fra EU ed USA. Quali scenari per i cittadini ed imprese?' *Contratto e impresa/ Europa*, 719-733 (2015); R. Bifulco, 'La sentenza Schrems e la costruzione del diritto europeo della privacy' *Giurisprudenza costituzionale*, 289-305 (2016).

[77] For more details on the Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-US Privacy Shield, see EDPB, 'EU - U.S. Privacy Shield - Second Annual Joint Review' adopted on 22 January 2019, available at https://tinyurl.com/yzzxdpr8 (last visited 30 December 2019).

[78] It will come as no surprise that the man behind one of those cases is Maximillian Schrems, the Austrian whose case brought down Safe Harbor in 2015. As with the Safe Harbor case, the contention is that US surveillance agencies have too much unfettered access to Europeans' data: for more details see J. Baker, 'EU High Court Hearings to Determine Future of Privacy Shield, SCCs', available at https://tinyurl.com/yzz9ey5c (last visited 30 December 2019).

[79] On this point see Case C-362/14 n 76 above, paras 73 and 74. Here the Court specifies

the effectiveness of the rights that consumers derive from Directive 93/13 against the use of unfair clauses implies a requirement of judicial protection, also guaranteed by Art 47 of the Charter, which must be assured both as regards the designation of courts having jurisdiction to hear and determine actions based on EU law and as regards the definition of detailed procedural rules pertaining to such actions.[80] Moreover, as regards the principle of effectiveness, the ECJ has often emphasised that national procedural provisions must meet the condition that 'they should not in practice render impossible or excessively difficult the exercise of rights conferred by the EU legal order', and thus every case in which this threat may occur must be analysed with reference to the role of the relevant provision in the procedure, viewed as a whole, before the various national bodies. In particular, 'it is necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system'.[81]

The aim of an effective protection of fundamental rights, especially in the online world, is also pursued by providing the data subject with the right to data portability, introduced by Art 20 of the GDPR.[82] This allows for data subjects to receive the personal data that they have provided to a controller in a structured, commonly used and machine-readable format, and to transmit those data to another data controller without hindrance. Therefore, such an important tool can facilitate switching between different service providers and be implemented by means of interoperable formats such as download tools and application programming interfaces. Some authors have stressed that

that '*it is the legal order of the third country covered by the Commission decision that must ensure an adequate level of protection*. Even though the means to which that third country has recourse, in this connection, for the purpose of ensuring such a level of protection may differ from those employed within the European Union (…), *those means must nevertheless prove, in practice, effective* in order to ensure protection essentially equivalent to that guaranteed within the European Union' (italics added). See also F. Pizzetti, n 20 above, 81.

[80] See Case C-169/14, *Sánchez Morcillo and Abril García* v *Banco Bilbao*, Judgment of 17 July 2014, para 35, available at www.eur-lex.europa.eu. 'Likewise, legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification or erasure of such data, does not respect the essence of the fundamental right to effective judicial protection, as enshrined in Art 47 of the Charter. The first paragraph of Art 47 of the Charter requires everyone whose rights and freedoms guaranteed by the law of the European Union are violated to have the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article': Case C-362/14 n 76 above, para 95.

[81] See Case C-169/14 n 80 above, paras 31 and 34; Case C-470/12, *Pohotovosť* v *Miroslav Vašuta*, Judgment of 27 February 2014, para 51; and Case C-415/11, *Aziz* v *Catalunyacaixa*, Judgment 14 March 2013, para 50, all available at www.eur-lex.europa.eu.

[82] Pursuant to Recital 68 of the GDPR, 'that right should apply where the data subject provided the personal data on the basis of his or her consent or the processing is necessary for the performance of a contract. It should not apply where processing is based on a legal ground other than consent or contract. By its very nature, that right should not be exercised against controllers processing personal data in the exercise of their public duties'. Furthermore, it is important to note that the right to data portability does not cover 'inferred data' and 'derived data', namely personal data that are created by a service provider (for example, algorithmic results).

> 'this may incentivize the development of user-centric platforms where all digital services shall be more interconnected and so interoperable'.[83]

It is not 'a first step to an idea of data subjects' default ownership of their personal data',[84] as it could appear in the recent case pertaining to the app 'Weople'.[85] Rather, the portability of digital services would constitute a fundamental mechanism that can foster the movement of personal data on the digital market with the safeguards provided by the GDPR that must be ensured even when the data are transferred and thereby processed on the basis of a contract.

One purpose of the GDPR is to re-balance the (contractual) relationship between data subjects (consumers) and data controllers (service providers).[86] In this perspective, the right to data portability is provided in order to avoid adverse effects to the data subject and the third parties involved, insofar as personal data must not be misused by the receiving 'new' data controller (to whom the data should be transmitted at the request of the user) in a way that could be qualified as either an unlawful processing or an unfair practice.[87] On the one hand, the 'new' data controller may not use the transmitted personal data for his/her own purposes, such as to propose marketing products and services to those third party data subjects without informing them, otherwise such processing is likely to be unlawful and unfair. On the other hand, the data controller providing an online service must not reject a data portability request on the basis of the infringement of another contractual right or only for hindrance. Such a 'lock-in' effect could be qualified as an unfair business-to-consumer commercial practice pursuant to Directive 2005/29/EC.[88]

[83] See P. De Hert et al, 'The Right to Data Portability in GDPR: Towards User-Centric Interoperability of Digital Services' *Computer Law & Security Review*, 197 (2018). In particular, they observe that 'from the *user perspective*, the impact of data portability is evident both in terms of *control* of personal data (and in general in the sense of empowerment of control rights of individuals), and in terms of a more user-centric interrelation between services. At the same time, it is a challenge to third data subjects' rights'.

[84] ibid 201.

[85] As regards this case, see Garante per la Protezione dei Dati Personali 1 August 2019, available at www.garanteprivacy.it. In short, an Italian company is indeed requesting, on behalf of data subjects, the personal data held by important business entities, in particular in the large retail sector, in order to bring them together in their own database after having provided data subjects with a compensation. Therefore, the Garante has sent a request for EDPB's opinion on this case, in particular on the issue of whether the right to data portability can or cannot be exercised by delegated powers in order to create a database for data enrichment process.

[86] For further details, see para I of the 'Guidelines on the right to data portability', WP 242 rev.01, adopted on 13 December 2016, as last revised and adopted on 5 April 2017, available at https://tinyurl.com/yg4mgmzb (last visited 30 December 2019).

[87] On this point, see para III of the 'Guidelines on the right to data portability', WP 242 rev.01 n 86 above.

[88] In the above case, Arts 2, letter *e)* and 5 of Directive 2005/29/EC concerning business-to-consumer unfair commercial practices could be applied inasmuch as the unfair rejection of the data portability request could prevent the user from taking a transactional decision that he/she would have taken otherwise. In a different context, it would be easier to switch between

One must not overlook how the protection of data subjects' rights is not only based on the rules applying to data processing, given that the principles of 'data protection by design and by default' laid down by Art 25 of the GDPR must already be applied to the activity of designing and organising the methods, tools and means used for the processing. This rationale seems to be similar to that covered by the aforementioned Directive 2005/29/EC, which introduced a control over the practices preceding the contractual agreements between business and consumers in order to make negotiations compliant with fairness rules. Therefore, the GDPR measures are intended for controllers, processors and also producers of certain technologies including software, apps and devices through which personal data are processed and that should be configured by default with limited possibilities of setting. The purpose of 'data protection by design and by default' is to intervene before personal data are processed, focusing on both the process of configuring those products and the procedure of planning the data processing, in order to create all conditions ensuring compliance with the GDPR. This further approach needs to be investigated below.

VI. The Accountability and Scalability Principles to Be Implemented by the Data Controllers and Processors: A 'Contextual' and 'Tailor-Made' Approach

The GDPR has partially changed the approach to be adopted towards personal data protection.

In essence, a radical shift in the data protection policy of major online companies and many other service providers is required by the implementation of the principles and obligations stated by Chapter IV of the GDPR, while the *notice-and-consent* paradigm is now quite marginal.

A new 'contextual' and 'tailor-made' approach is given by the 'accountability' and 'scalability' principles in accordance with Arts 5, para 2, 24, 25, 32 and 35.

1. The Accountability Principle

Art 5, para 2, expressly refers to 'Accountability' in order to sum up the responsibility of the data controller for compliance of the processing with the principles laid down by para 1 of Art 5 itself. 'Accountability' is not 'liability': this must be made clear. The latter would especially be the case where the controller or processor must give appropriate compensation to any person who has suffered material or non-material damage as a result of an infringement of the GDPR,

different service providers (eg in the context of online banking or in the case of energy suppliers in a smart grid environment). Therefore, the unfair practice is likely to materially distort the economic behaviour of consumers.

provided that the exemption from such tort liability cannot be proved.[89] In contrast, the 'accountability principle' finds its own rationale in the purpose to prevent the data processing from causing any damage to data subjects and other persons, being performed on the basis of 'appropriate technical and organisational measures', including 'appropriate data protection policies', implemented by the controller.[90] In accordance with such a distinction, 'accountability' has been correctly translated into the Italian term '*responsabilizzazione*' rather than '*responsabilità*'.[91]

Moreover, there is no room for standard measures and policies. The required 'technical and organisational measures' must be implemented by the data controller

> 'taking into account the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for the rights and freedoms of natural persons'.[92]

It follows that a 'contextual' approach must be applied by controllers when setting up the data protection policy in relation to processing activities. Furthermore, the data controller must be able to demonstrate that processing is performed in accordance with the GDPR by virtue of the implemented measures. These can be reviewed and updated where necessary, in relation to further changes of the 'context' in which personal data may be processed.

Therefore, the accountability principle requires a new approach by integrating legal, technical and organisational knowledge into the following three implementation stages:[93]

i) A *preliminary assessment* of the processing and relevant risks for data subjects' rights must be carried out by the controller in order to identify the appropriate technical and organisational measures ensuring compliance with the GDPR in the individual case. This can be done on the basis of the requirements established by the GDPR and the national implementing rules, as well as of further requirements identified on a voluntary basis and aimed at increasing safeguards to a higher level of data protection;

ii) The identified appropriate *measures must be applied and implemented by taking and keeping sufficient evidence of compliance* with the GDPR;[94]

iii) The *monitoring of processing operations and relevant risks* for data

[89] On civil liability in the European context see G. Alpa, 'General Remarks on Civil Liability in the European Context' 4 *The Italian Law Journal*, 47-64 (2018).

[90] Pursuant to Art 24 of the GDPR.

[91] On this point see G. Finocchiaro, n 10 above, 14-15; E. Lucchini Guastalla, 'Il nuovo regolamento europeo sul trattamento dei dati personali: i principi ispiratori' *Contratto e impresa*, 120-121 (2018): the author stresses that the term 'accountability' is not easy to translate into the Italian (legal) language.

[92] Pursuant to Art 24, para 1 of the GDPR. Italics added.

[93] G. Finocchiaro, n 10 above, 12-16.

[94] In this regard Art 24, para 3, specifies that 'adherence to approved codes of conduct as referred to in Art 40 or approved certification mechanisms as referred to in Art 42 may be used as an element by which to demonstrate compliance with the obligations of the controller'.

subjects' rights must be assured in order to review and update technical and organisational measures where necessary.

The aforementioned first stage preceding the processing operations has been specifically regulated by the GDPR. The standard procedure for identifying the above-mentioned 'appropriate measures' must be carried out through the following steps:

- The first step is where the controller has to ascertain whether or not a significant risk to the rights and freedoms of natural persons may occur by virtue of the processing operations to be performed;

- The second step is where it is found that the processing may entail a significant risk to the rights and freedoms of individuals. In such a case, pursuant to Recital 90 and Art 35,

> 'a *data protection impact assessment* should be carried out by the controller prior to the processing in order to assess the particular likelihood and severity of the high risk, taking into account the nature, scope, context and purposes of the processing and the sources of the risk';[95]

- A further step may be the 'prior consultation', where a significant risk is indicated by the data protection impact assessment, in the absence of appropriate safeguards and security measures. In such a case, the supervisory authority

[95] Italics added. One must not overlook that Recital 91 makes an open list of cases where a data protection impact assessment should be required. In particular: 'large-scale processing operations which aim to process a considerable amount of personal data at regional, national or supranational level and which could affect a large number of data subjects and which are likely to result in a high risk, for example, on account of their sensitivity'; 'other processing operations which result in a high risk to the rights and freedoms of data subjects, in particular where those operations render it more difficult for data subjects to exercise their rights'; processing of personal data 'for taking decisions regarding specific natural persons following any systematic and extensive evaluation of personal aspects relating to natural persons based on profiling those data or following the processing of special categories of personal data, biometric data, or data on criminal convictions and offences or related security measures'. Another case is the 'monitoring' of 'publicly accessible areas on a large scale, especially when using optic-electronic devices'. Furthermore, a data protection impact assessment is required 'for any other operations where the competent supervisory authority considers that the processing is likely to result in a high risk to the rights and freedoms of data subjects, in particular because they prevent data subjects from exercising a right or using a service or a contract, or because they are carried out systematically on a large scale'. For more details, see the 'Guidelines on Data Protection Impact Assessment (DPIA) and determining whether processing is "likely to result in a high risk" for the purposes of Regulation 2016/679', WP 248 rev.01, adopted on 4 April 2017 and as last revised and adopted on 4 October 2017, available at https://tinyurl.com/yg3v69cx (last visited 30 December 2019). Among scholars, see P. De Hert, 'A Human Rights Perspective on Privacy and Data Protection Impact Assessments', in D. Wright and P. De Hert eds, *Privacy Impact Assessment* (London: Springer Science & Business Media, 2012), 33-74; R. Binns, 'Data Protection Impact Assessment: a Meta-Regulatory Approach' 7(1) *International Data Privacy Law*, 22-35 (2017); A. Mantelero, 'Il nuovo approccio della valutazione del rischio nella sicurezza dei dati. Valutazione d'impatto e consultazione preventive (Artt. 32-39)', in G. Finocchiaro ed, n 10 above, 287-317.

should be consulted prior to the commencement of processing activities.[96]

In light of this stepwise approach envisaged by Chapter IV of the GDPR, it would be advisable to focus on the 'technical and organisational measures' that must be implemented by the controller 'both at the time of the determination of the means for processing and at the time of the processing itself'.[97] Such measures must be 'appropriate' and 'designed to implement data-protection principles (…) in an effective manner' in accordance with Art 25, para 1. What does this mean?

2. Attention to the Principles to Be Applied in Order to Determine the Technical Measures: Data Minimisation, Confidentiality, Integrity, Data Protection by Design and by Default

A preliminary question to be investigated is whether or not the processing of personal data is necessary with regard to the 'context' of the individual case.

If the processing of personal data is not necessary then there is no risk to the rights and freedoms of natural persons, and so there is no need for any further assessment.

In contrast, if the processing of personal data is necessary in the individual case, it must fit the principle of 'data minimisation' in accordance with Art 5, para 1, letter *c)* and the principles of adequacy and proportionality in accordance with Arts 2 and 3 of the Italian Constitution. It follows that personal data must be 'adequate, relevant and limited to what is necessary in relation to the purposes for which they would be processed'. Otherwise the processing would be unfair and unlawful.[98]

Another principle to be applied in order to make the 'technical and organisational measures' 'appropriate' is that of 'integrity and confidentiality', ensuring adequate 'security of the personal data' and 'the ongoing confidentiality, integrity, availability and resilience of processing systems and services', in accordance with Arts 5, para 1, letter *f)* and 32. In particular, the measures must be set up in such a way as to protect personal data from change, where 'change' is deemed as pertaining to:

- The expectations of confidentiality that occurs when information intended for specific recipients reaches different recipients;
- Integrity, whenever personal data undergo mutations that alter their structure, characteristics or meaning;
- Availability, whenever a piece of information is missing due to a malfunction

[96] Pursuant to Recital 94 and Art 36, para 2 of the GDPR, the supervisory authority may, within period of up to eight weeks of receipt of the request for consultation, provide written advice to the controller and, where applicable to the processor, and may use any of its powers referred to in Art 58.

[97] Pursuant to Art 25, para 1 of the GDPR; compare Art 10, paras 2 and 3 of the Convention 108.

[98] On the 'purpose' as a fundamental parameter for assessing the lawfulness of the processing operations, see para 4 above.

and accidental loss, removal, cancellation or damage.[99]

Especially in the online environment it is reasonable to assume that such technical measures should be envisaged at the time of the determination of the means for processing, otherwise they could not ensure a level of security and protection appropriate to the risk. Therefore, the GDPR has introduced two fundamental principles under Art 25 for enhancing the rights and freedoms of data subjects. The European legislator has qualified them as 'data protection by design' (commonly renamed 'privacy by design') and 'data protection by default' (commonly renamed 'privacy by default setting'), respectively.[100]

The former principle finds its basis in the idea of embedding data protection safeguards in the architecture of information systems and of other types of technology that may be used for data processing. Such a viewpoint envisages data protection in proactive rather than reactive terms, making 'privacy by design' preventive and not simply remedial.[101]

Those who develop the architecture of an information system must at an early stage assess the likely risks to the rights and freedoms of individuals from using the system itself as well as the appropriate remedies. Once this impact assessment is completed, the appropriate technical tools and measures must be included in the product design. Therefore, an *ex ante* intervention is required, taking into account that this must be related to the information system under 'front-end and back-end design'.[102] In other words, the 'design' may be defined in terms of both front-end user interface, which determines the manner in which personal data are collected by users and other user experiences regarding the privacy setting (eg notice, consent, access) are handled; and back-end

[99] On this point see G. D'Acquisto and M. Naldi, *Big Data e privacy by design. Anonimizzazione. Pseudonimizzazione. Sicurezza* (Torino: Giappichelli, 2017), 171-172.

[100] The principle of privacy by design as a conceptual business model is probably due to the work of Ann Cavoukian, the Information and Privacy Commissioner (IPC) of Ontario, Canada. In particular, she advanced the view that firms may accomplish privacy by design by practicing the following seven 'foundational' principles: 1) Proactive not Reactive; Preventative not Remedial; 2) Privacy as the Default Setting; 3) Privacy Embedded into Design; 4) Full Functionality – Positive-Sum, not Zero-Sum; 5) End-to-End Security – Full Lifecycle Protection; 6) Visibility and Transparency – Keep it Open; and 7) Respect for User Privacy -Keep it User-Centric. For further details see A. Cavoukian et al, 'Privacy by Design: Essential for Organizational Accountability and Strong Business Practices' (2010), available at https://tinyurl.com/yhxwq4ux (last visited 30 December 2019). Among the Italian scholars, see R. D'Orazio, 'Protezione dei dati *by deafault e by design*', in S. Sica et al eds, *La nuova disciplina europea della privacy* (Milano: Giuffrè, 2016), 79-110; A. Principato, 'Verso nuovi approcci alla tutela della *privacy*: *privacy by design* e *privacy by default settings*' *Contratto e impresa/Europa*, 197-229 (2015); I.S. Rubinstein, 'Regulating Privacy by Design' 26 *Berkeley Technology Law Journal*, 1409-1411 (2012); U. Pagallo, 'On the Principle of Privacy by Design and its Limits: Technology, Ethics and the Rule of Law', in S. Gutwirth et al eds, *European Data Protection: In Good Health?* (Berlin: Springer, 2012), 331-344.

[101] ibid 332-333.

[102] For a more detailed analysis see I.S. Rubenstein and N. Good, 'Privacy by Design: A Counterfactual Analysis of Google and Facebook Privacy Incidents' 28 *Berkeley Technology Law Journal*, 1352 (2013).

software, which is generally hidden from the user but drives the heart of any digital infrastructure including the processing of personal data.

As regards the front-end user interface, an illustration of how the 'privacy by design' principle may be implemented is provided by encrypting personal data in transit and in storage, or by making use of anonymity mechanisms that delink users from all traces of their online activity or of user-centric identity management systems that enable anonymous or pseudonymous credentials. On the other hand, appropriate back-end software should include, for instance, a mechanism ensuring the automatic erasure of personal data when the purpose of the processing has been achieved, or a user-centric privacy management system that could make it easier for users to exercise data subjects' rights.

Nevertheless, the vast majority of Internet service providers continue to collect personal information about users without deeming these measures of 'privacy by design' important. Of course, after the GDPR entered into force, with a binding effect on 'data protection by design', some measures will have to be implemented by controllers. Among the various approaches to 'privacy by design' taken by commentators and scholars, two different viewpoints seem to stand out.[103] Some stress that such a principle entails an obligation to make the digital product or the online service compliant with the GDPR by building the digital system in a manner that most legal provisions on data protection should be made preventive and automatic, hence all processing operations always meet the requirements of the GDPR automatically, regardless of individual preferences and the self-determined options available to users. Others argue that 'privacy by design' should not be implemented on the basis of 'self-enforcement technologies', but rather should be applied by making use of technologies that encourage people to pay greater attention to the business privacy policy and hence to their privacy (eg user-friendly interfaces), limit the negative effects of harmful behaviour, strengthen data subjects' rights and broaden the range of their choices. This latter interpretation seems to be preferred inasmuch as it allows data subjects to make free and informed choices with regard to their own private lives, in accordance with Arts 7 and 8 of the Charter of Fundamental Rights of the Union.

Once the design of a digital system is user-friendly, one must not overlook the issue of whether such a digital system is or is not *by default setting* arranged for collecting and processing the personal data of users. Art 25, para 2 of the GDPR provides that

> 'the controller shall implement appropriate technical and organisational measures for ensuring that, by default, only personal data which are necessary for each specific purpose of the processing are processed'

[103] On this point see U. Pagallo, n 100 above, 333-334.

and in particular that

> 'such measures shall ensure that by default personal data are not made accessible without the individual's intervention to an indefinite number of natural persons'.

Of course, the principle of 'data protection by default' should not be limited to overlapping with the principle of data minimisation. The rationale behind such a principle should be the notion that where a setting has already been pre-selected, users tend not to change it and instead remain on the default setting. A typical example is represented by profiling cookies, which are by default transferred to the user's terminal except when blocking them by refusing consent, but it is well-known that the vast majority of users do not block or are unable to block them. Thus, the principle of 'data protection by default' should be interpreted as entailing that, by default, the functioning of each information system or digital platform should be set up in a manner that the user's personal data remain protected in the absence of another distinct and explicit choice.[104] It follows that by default, profiling cookies should never be transferred to the user's terminal unless the user gives his/her explicit consent, or another legal basis for profiling can be found.[105]

3. The 'Scalability Principle'

The accountability principle engenders a governance model based on organisations taking responsibility for protecting privacy and information security appropriately and protecting individuals from the risks to their fundamental rights and freedoms as a consequence of data protection failures.[106] In Italy, a practical application of this model is given by the recent approval of a 'Code of Conduct' for the processing of personal data, addressed to companies that manage commercial information.[107] Pursuant to this Code, these companies may process personal data on a legal basis other than data subjects' consent, but must do so in accordance with a risk-based approach, adopting technical, procedural, physical and organisational measures in order to prevent or minimise the risks of destruction, loss, modification and unauthorised disclosure of managed personal data.

In the recent debate on Arts 24 and 25 of the GDPR, some scholars have remarked that the two articles can be read as specifying that the compliance measures taken by the controller should consider the risks posed by the processing

[104] On this point see R. D'Orazio, n 100 above, 89.

[105] This issue is presently discussed with regard to the proposal for a 'ePrivacy Regulation': see EDPS, 'Opinion 6/2017' n 29 above, para 3.5.

[106] A. Cavoukian, S. Taylor and M. Abrams, n 100 above, 407.

[107] See Garante 12 June 2019, doc. web no 9119868, available at www.garanteprivacy.it. Commercial information is a fundamental tool to evaluate the solidity and reliability of potential customers or business partners.

operations, and thus the risk-based approach should be the reference point for the interpretation and implementation of the GDPR.[108]

The Art 29 Working Party (WP29) has always supported the inclusion of a risk-based approach in the EU data protection legal framework. It is important to recall its statement of 27 February 2013 on discussions regarding the data protection reform package adopted on 2012, its view being that

> '*all obligations must be scalable to the controller and the processing operations concerned*. Compliance should never be a box-ticking exercise, but should really be about ensuring that personal data is sufficiently protected. How this is done, may differ per controller. This difference however, is not only dependent on the size of the controller, or on the amount of processing operations it carries out, but is also dependent for example on the nature of the processing and the categories of the data it processes. (…) Therefore (…) *all controllers must act in compliance with the law, though this can be done on in a scalable manner*'.[109]

The GDPR has developed the risk-based approach as previously known under the Directive 95/46/EC[110] by implementing the 'scalability' principle, that is to say the 'scalability' of compliance measures based on risk:

> 'This means that a data controller whose processing is relatively low risk may not have to do as much to comply with its legal obligations as a data controller whose processing is high-risk'.[111]

In accordance with a 'tailor-made' approach, the vast majority of technical and organisational measures to be adopted by controllers and processors may vary with regard to all of the specific circumstances in which processing is performed in the individual case, such as its 'nature' (eg large-scale processing, ie the processing of a considerable amount of personal data), 'scope' (eg processing of special categories of personal data), 'context' (eg online or offline; a big company or a small or medium-size entrepreneur as controller), 'purposes' (eg entailing

[108] See C. Quelle, 'Enhancing Compliance under the General Data Protection Regulation: The Risky Upshot of the Accountability- and Risk-based Approach' 9(3) *European Journal of Risk Regulation*, 502-526 (2018); compare A. Mantelero, n 95 above, 306.

[109] See the 'Statement of the Working Party on the current discussions regarding the data protection reform package' adopted on 27 February 2013, available at https://tinyurl.com/yhxwq4ux (last visited 30 December 2019). Italics added.

[110] See Art 17 and recital 46 of the Directive 95/46, where it is specified that 'appropriate technical and organizational measures' must be taken in order to ensure 'an appropriate level of security, *taking into account the state of the art and the costs of their implementation in relation to the risks inherent in the processing* and the nature of the data to be protected' (italics added).

[111] See the 'Statement on the role of a risk-based approach in data protection legal frameworks' adopted by the Working Party on 30 May 2014, available at https://tinyurl.com/ydsbjq75 (last visited 30 December 2019).

the transfer of personal data to third countries), 'the state of art' (in particular, for technical measures), 'the costs of implementation', as well as 'the risk of varying likelihood and severity for the rights and freedoms of natural persons'.[112]

To offer more detailed examples of where the scalability principle is applied, the following measures can be taken into consideration:

- The obligations referred to in Art 30, paras 1 and 2, binding the controller to maintain a record of processing activities under its responsibility, do not apply

> 'to an enterprise or an organisation employing fewer than two hundred and fifty persons unless the processing it carries out is likely to result in a risk to the rights and freedoms of data subjects, the processing is not occasional, or the processing includes special categories of data';[113]

- A data protection impact assessment is required, *inter alia*, in the case of

> 'processing on a large scale of special categories of data referred to in Article 9, para 1, or of personal data relating to criminal convictions and offences referred to in Article 10';[114]

- The designation of a data protection officer is required, *inter alia*, where

> 'the core activities of the controller or the processor consist of processing operations which, by virtue of their nature, their scope and/or their purposes, require regular and systematic monitoring of data subjects on a large scale';

or where

> 'the core activities of the controller or the processor consist of processing on a large scale of special categories of data'.[115]

Furthermore, it is important to note that the technical and organisational measures implemented by the controller or processor must be taken into account when deciding whether to impose an administrative fine and the amount of the administrative fine in each individual case.[116] Given that 'Member States should implement a system which provides for *effective*, *proportionate* and *dissuasive*

[112] The above parameters are mentioned in Arts 24, para 1, 25, para 1, 32, para 1 and 35, para 1, of the GDPR.

[113] Pursuant to Art 30, para 5, of the GDPR.

[114] Pursuant to Art 35, para 3, letter *b)* of the GDPR. For more details on the cases where a data protection impact assessment is required, see n 95 above.

[115] Pursuant to Arts 9, 10 and 37, para 1, letters *b)* and *c)* of the GDPR. For more details on the cases where a data protection officer (DPO) may or must be designed, as well as on position and tasks of the DPO, see the 'Guidelines on Data Protection Officers (DPOs)', WP 243 rev.01, adopted by the Working Party on 13 December 2016 and as last revised and adopted on 5 April 2017, available at https://tinyurl.com/ye3f9gyj (last visited 30 December 2019).

[116] Pursuant to Art 83, para 2, letter *d)* of the GDPR.

penalties'[117], the GDPR is also scalable with respect to the amount of the administrative fines. In particular, as regards undertakings, the infringements of specific provisions of the GDPR may be subject to administrative fines up to a determined percentage of the total worldwide annual turnover of the preceding financial year.[118]

In essence, in order to ensure appropriate safeguards for the rights and freedoms of natural persons, the compliance measures must meet all of the mandatory principles emphasised by the GDPR: transparency, accountability, data minimisation, confidentiality, integrity, data protection by design and by default, scalability. Furthermore, the compliance measures must always be considered with respect to the specific circumstances to be assessed on a case-by-case basis, and in accordance with a *proportionality* and *reasonableness* test on the extent of the risks to the rights and freedoms at stake.[119]

A similar approach should be adopted with regard to big data analytics and artificial intelligence-based applications, regardless of considerable agreement that in such an area the 'limitation purpose principle' would fail in protecting data subjects, and the risks to the rights and freedoms of individuals may be unclear or ambiguous. Nonetheless, in these cases too, data controllers and processors must guarantee the confidentiality and security of the data and take all necessary technical and organisational measures to ensure fair processing and to prevent any undue impact.[120]

VII. The Role of Data Scientists, Scholars, Lawyers and Data Protection Supervisory Authorities

Data protection issues regarding the implementation of the GDPR encompass multiple interests and expertise and hence the coordination of multiple parties, each with their own sets of concerns, whether legal, business, engineering, marketing and policy, to name but a few.

[117] Pursuant to recital 152 of the GDPR.

[118] See Art 83, paras 4, 5 and 6 of the GDPR. These provisions can make the administrative fines effective and dissuasive against the major online companies such as Google, Facebook and Apple when operating in the EU.

[119] Pursuant to Arts 7, 8 and 52, paras 1 and 4 of the EU 'Charter of Fundamental Rights'. On the fundamental role of principles as a pivotal guidance for interpreting and applying laws and rules to the individual case, see A. Federico, 'Applicazione dei princípi generali e funzione nomofilattica' *Rassegna di diritto civile*, 797-818 (2018); P. Perlingieri, 'I princípi giuridici tra pregiudizi, diffidenza e conservatorismo' *Annali SISDIC*, 1-24 (2017); Id, 'L'interpretazione giuridica e i suoi canoni. Una lezione agli studenti della Statale di Milano' *Rassegna di diritto civile*, 405-434 (2014). For a complete analysis of the reasonableness test in the civil law, see G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015).

[120] See 'Annex 2: Big data and open data' of the 'Opinion 03/2013' n 42 above; and para 10 of the 'Handbook on European data protection law' n 44 above.

Only by combining the work of data scientists, scholars, lawyers and data protection supervisory authorities is it possible to implement the effective strategy envisaged by the GDPR, which is grounded on the following three pillars:

a) Data protection impact assessment and implementation of the appropriate compliance measures;

b) Cooperation both at a global level among the national supervisory authorities and at a local level among controllers, processors, data protection officers (DPOs), other experts and the competent supervisory authority; and

c) Privacy education and awareness-raising activities.

The first pillar has been widely analysed above.

As regards the second pillar, the capability and willingness of supervisory authorities to cooperate with one another and, where relevant, with the Commission and the European Data Protection Board, are central to a more holistic approach to data protection.

It appears that under Directive 95/46, cooperation between authorities was often discussed but rarely occurred in practice.[121] The GDPR has significantly enhanced such cooperation by regulating it into its Chapter VII[122] and by introducing a 'consistency mechanism' to be applied

> 'where a supervisory authority intends to adopt a measure intended to produce legal effects as regards processing operations which substantially affect a significant number of data subjects in several Member States'.[123]

To provide some examples, this is the case where a supervisory authority aims to adopt a list of the processing operations subject to the requirement for a data protection impact assessment pursuant to Art 35, para 4, or a draft code of conduct pursuant to Art 40, para 7; or aims to approve binding corporate rules within the meaning of Art 47.[124] The rationale of the 'consistency mechanism' is to ensure the consistent and uniform application of the GDPR legal framework throughout the EU.

[121] On this point see EDPS, 'Report of workshop on Privacy, Consumers, Competition and Big Data' of 2 June 2014, available at https://tinyurl.com/yfj26mrz (last visited 30 December 2019).

[122] See Art 60 of the GDPR, regulating the 'Cooperation between the lead supervisory authority and the other supervisory authorities concerned'; the subsequent Art 61, para 1, according to which '[s]upervisory authorities shall provide each other with relevant information and mutual assistance in order to implement and apply this Regulation in a consistent manner, and shall put in place measures for effective cooperation with one another'; and Art 62, para 1, focusing on the 'joint operations of supervisory authorities'.

[123] See Recital 135 and Arts 63-65 of the GDPR. In applying the consistency mechanism, the Board should, within a determined period of time, issue an opinion on the matter submitted to it. The supervisory authority takes utmost account of the opinion of the Board and shall, within two weeks after receiving the opinion, communicate to the Chair of the Board by electronic means whether it will maintain or amend its draft decision. In the latter case and in other clearly specified cases where there are conflicting views among supervisory authorities, the Board may issue a legally binding decision.

[124] Pursuant to Art 64, para 1, of the GDPR.

Following a recent trend, the national supervisory authorities for data protection, competition and communications guarantees are cooperating in order to better analyse the implications of the development of the digital economy based on the acquisition and analysis of increasingly large volumes of data, for privacy, regulation and anti-trust and consumer protection. Of course, the Italian model given by the current cooperation carried out jointly by the Garante, the AGCM and the AGCom on the basis of the 'Big Data Guidelines and policy recommendations' of July 2019[125] is a good practice to be enhanced in the near future.

Similarly, at a lower level, cooperation between controllers, processors, DPOs and the competent supervisory authority is essential to the effectiveness of data protection. There is an explicit provision in this regard under Art 31. Moreover, in some cases, the supervisory authority should be consulted by the controller prior to processing in order to provide advice on the measures to be adopted, in particular where the controller has insufficiently identified or mitigated the risk on the basis of the data protection impact assessment.[126]

In Italy, recognition of the central role of the Garante is not without justification. This authority has been assigned supervisory tasks devoted to guaranteeing the right to protection both of personal data and of those fundamental rights of the individual that can be irreparably injured by the processing of data, that is, rights to privacy, personal identity and dignity. Thus, the supervisory authorities are the guardians of those fundamental rights and freedoms.

Since its earliest years of working, the Garante has generally exercised those of its powers that are directed at interrupting unlawful conduct and prohibiting its continuation. It has frequently opted for simple measures, formally finding a violation while abdicating its institutional duty to ensure the effective protection of the fundamental rights and freedoms involved.[127] In contrast, the Garante's role must be understood as sufficiently extensive to guarantee both the formal application of the legal framework and effective protection for the rights and

[125] See 'Big Data Guidelines and policy recommendations' n 15 above.

[126] Pursuant to Art 36, paras 1 and 2 of the GDPR.

[127] Illustrative is the case in which the Garante's intervention was invoked by a famous football player following the publication of photographs of him in a public place with some friends, accompanied by vulgar expressions and suggestive comments based on double meanings related to his sex life. This data processing by a journal was deemed lawful by the Garante on the basis of the following two assumptions: (i) personal data regarding circumstances or facts disclosed by the individual directly or through his public conduct could have been processed for publication in the press; (ii) the harm to the personal sphere of the data subject did not derive from the photographs disclosed, but depended on the defamatory comments, including captions, as to which the competence to assess their compliance with law and to ascertain the damage to be compensated should have been reserved to the courts. See Garante 11 December 2000, in M. Paissan ed, *Privacy e giornalismo* (Roma: Presidenza del Consiglio dei Ministri, 2003), 193. The conclusions of this case seem incoherent. Indeed, it seems that in this case the photographs, including captions and comments, represented some personal information with an evaluative content that was not necessary for the completeness of information. Moreover, the processing should have been declared unlawful if it was likely to affect the dignity of the person concerned.

freedoms involved in the processing of personal information. To this end, the Garante may exercise its powers even when it finds that processing is unfair or unlawful owing to breaches of laws that do not pertain to the protection of personal data but that can nevertheless put a data subject's fundamental right at risk. An illustrative case is that in which the Garante stated that the processing of sensitive data (disclosing racial or ethnic origin, religious or other beliefs, health and sex life), carried out by a real estate brokerage company through their collection by customers (eg sellers, buyers, tenants, landlords) at the pre-contractual stage, was unlawful because

> 'some owners would have not liked to rent apartments and offices to homosexual or non-EU people or as, in some condos, people of Muslim faith would have not been welcome'.[128]

In this case, the purpose and methods of the processing were assessed in light of the overall legal order, and the fundamental freedoms and human rights of the persons concerned were taken into account by the Garante when drawing up its decision. More specifically, the unlawfulness of the data processing was declared on the basis of its discriminatory nature, injuring the dignity of the persons concerned, and having regard to its unlawful purpose infringing the principle of equal treatment between persons irrespective of racial or ethnic origin pursuant to Directive 2000/43/EC and Arts 2 and 3 of the Italian Constitution.

It is clear that a fundamental task of data protection authorities is

> 'to counterweigh the general power imbalance between the data controllers and data subjects, and that their role is to supplement and give more force to the early stage control by the "consumers/data subjects" and the ex-post factum control by the courts'.[129]

This is all the more important in light of the challenges of the contemporary digital age.

In addition, the GDPR has provided each national supervisory authority with another fundamental task, namely promoting 'public awareness and understanding of the risks, rules, safeguards and rights in relation to processing' and 'the awareness of controllers and processors of their obligations' under the current data protection legislation.[130] It follows that awareness-raising activities will be addressed to all people, including specific measures directed at weaker data subjects such as children, as well as at various controllers and processors such as micro-, small- and medium-sized enterprises and their employees.[131]

[128] See Garante 11 January 2007, doc web no 1381620, available at www.garanteprivacy.it.

[129] R. Gellert and S. Gutwirth, 'The legal construction of privacy and data protection' 29 *Computer Law & Security Review*, 525 (2013).

[130] Pursuant to Recital 132 and Art 57, para 1, letters *b)* and *d)* of the GDPR.

[131] See the case study of IBM Corporation in A. Cavoukian, 'Privacy by Design: From Policy to

The purpose of promoting privacy education programmes, both at a social level and at a business level, is another pillar of the new legal framework. Making people aware of the risks and their rights regarding data protection, as well as making controllers and processors aware of what is expected of them in this scope, helps build a culture that values protecting personal data and allows the dignity and fundamental rights of individuals to be fully respected.

Practice', September 2011, available at https://tinyurl.com/yha8v3x8 (last visited 30 December 2019).

Essays

Lights and Shadows of the Italian Law on Citizens' Income

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Abstract

The article aims at analysing the recent Italian decreto legge 28 January 2019 no 4 (converted by legge 28 March 2019 no 26) on Citizens' Income. After examining the new regulatory measure, the article deals with the role of the local authorities in the implementation of the measure, analysing also the role of the Municipalities in the activation of projects useful for the Community, in which to employ the beneficiaries of the Citizens' Income. In conclusion, the article considers the scope of the constitutional provision of basic level of benefits relating to social entitlements, in light of the provisions of the decreto legge on Citizens' Income, both in the social and labour spheres.

I. Introduction

> 'Does poverty have the same characteristics everywhere? Can we identify objective criterias, or conditions, to distinguish the poor from the non-poor regardless where they live and how they assess their own situation?'.[1]

The answer is probably a negative one to both questions.

Poverty is a concept that needs to be built on shared coordinates, having first made clear what are the goals that legislature and institutions intend to pursue, and what are the limits that must characterise their activities.

In other words, poverty is a relative concept.[2] But *not arbitrary*.

Nevertheless, there is another important aspect of the above questions not to be overlooked related to the perception of poverty and of the poor by the individuals and society. One may feel poor even after comparative evaluation with respect to others and with respect to the level of well-being characterising the society in which one lives; evaluations that become all the simpler and more

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[1] C. Saraceno, *Il lavoro non basta. La povertà in Europa negli anni della crisi* (Milano: Feltrinelli, 2015), 27.

[2] M. Baldini, 'Questioni valutative in relazione alla definizione di «povertà»', in F. Mastromartino ed, *Teoria e pratica dell'eguaglianza* (Roma: Asino d'Oro, 2018), 169; E. Granaglia, 'Premesse concettuali e nodi critici', in Fondazioni Astrid and Circolo Fratelli Rosselli eds, *Nuove (e vecchie) povertà: quale risposta? Reddito d'inclusione, reddito di cittadinanza, e oltre* (Bologna: il Mulino, 2018), 41.

accessible thanks to the role played by the media. Is this a relevant issue for public policies? Moreover, the way in which poverty is faced determines the way in which the experience of poverty and the status of the poor is made.[3]

This second theme appears to be relevant to the extent that the perception of poverty influences, in the words of Sen, the possibility of translating one's *capability* – understood as substantial freedoms of a person to do the things to which, for one reason or another, they assign a value – in functioning corresponding to what a person desires because of the value assigned to it.[4]

To question what poverty is today and how to build public policies means, therefore, from a constitutional law scholar perspective, to query the meaning that the Constitution assigns to the value of the dignity of the person and to the principle of equality, in an attempt to recover 'a global broad-spectrum vision [of the] condition of human frailty'.[5]

As authoritatively affirmed from the provisions on rights and duties, a constitutional design emerges that imposes a continuous action aimed at the transformation of society, in which the foundation of the duty of public powers in the eradicate against poverty and social exclusion

> 'can be deemed as empowered by the specific constitutional commitment to the removal of inequalities, clearly an expression of the need to place man in the conditions to be able to exercise his rights and therefore to carry out his personality'.[6]

The guarantee of a vital minimum can effectively represent the material pre-condition to exercise rights and participate in the economic, political and social life of the Republic. In this regard, and with specific reference to Art 38, para 1, of the Constitution[7], among scholars there are those who argued that the provision 'refers to the solidarity of the entire community that should not tolerate people without the vital minimum'.[8] The right to social assistance is, indeed, a constitutionally guaranteed right of which the essential nucleus cannot be affected

[3] C. Saraceno, n 1 above, 28. In this sense the classification of poverty proposed by Paugam (S. Paugam, 'Les formes contemporaines de la pauvreté et de l'exclusion en Europe' *Études rurales*, 73-96, 159-160 (2001), is interesting and it distinguishes between forms of integrated poverty, typical of southern Europe, where poverty is so widespread that those who are poor do not feel different from others, from forms of marginal *poverty*, typical of contexts in which poverty is not much widespread and therefore the poor are and are perceived as excluded.

[4] A. Sen, 'Human Rights and Capabilities' 6 *Journal of Human Development*, 151 (2005).

[5] Q. Camerlengo, 'Il senso della Costituzione per la povertà' *Osservatorio Costituzionale*, 1-2, 2 (2019).

[6] M. Ruotolo, *Sicurezza, dignità e lotta alla povertà* (Napoli: Editoriale Scientifica, 2012), 226.

[7] 'Every citizen unable to work and without the necessary means of subsistence has a right to maintenance and social assistance'.

[8] L. Violini, 'Art. 38', in R. Bifulco, A. Celotto and M. Olivetti eds, *Commentario alla Costituzione* (Torino: UTET, 2006), 789.

by the legislature in the exercise of his powers.[9]

Building public policies able to eradicate poverty, also through measures aimed at guaranteeing the vital minimum means, first of all, looking at the social complexity and taking note that the forms of exclusion are not determined exclusively by economic deprivation; consequently, having a job – although representing a crucial condition to get out of poverty – does not ensure achieving the scope.[10] On the contrary, to take on this datum would mean to consider different situations as equal, and therefore to assume a distorted conception of equality. In fact, the observation of the reality demonstrates, on the one hand, the increase in *working poor*, on the other, it leads to reflect on profound social exclusion situations in which family members do not have a chance of working due to personal conditions or for welfare burdens towards other members of the family unit.[11] In these cases the intervention of the Republic aimed at

> 'removing obstacles of an economic and social nature that, by limiting the freedom and equality of citizens, prevent the full development of the human being and the *effective participation of all workers in the political, economic and social organisation of the country*' (Art 3 of the Italian Constitution)

must take the form of further and previous interventions that can allow these people to commit and free themselves from need.

On these premises, the article analyses the Italian decreto legge 28 January 2019 no 4 (converted by legge 28 March 2019 no 26) on Citizens' Income (hereafter CI). Firstly, the article examines the provisions of the new regulatory framework and how the CI ranks with respect to the factual data on poverty, considering also the other similar regulatory interventions adopted in the last twenty years. Secondly, the article is focused on the investigation of the specific conditions and access requirements of the CI. Then, an analysis of the role of the local authorities in the implementation of the measure is carried out, in order to assess the compatibility with the constitutional framework even through the analysis of the role of the Municipalities[12] to activate projects useful

[9] In this sense, a clear confirmation came from the Corte costituzionale 15 January 2010 no 10, *Giurisprudenza costituzionale*, 135 (2010).

[10] M. Chan and R. Moffit, 'Welfare Reform and the Labor Market' 10(1) *Annual Review of Economics, Annual Reviews*, 347 (2018); M. Ferraresi ed, *Reddito di inclusione e reddito di cittadinanza. Il contrasto alla povertà tra diritto e politica* (Torino: Giappichelli, 2018), 3; C. Goulden, *Cycles of Poverty, Unemployment and Low Pay* (York: Rowntree Foundation, 2010); E. Granaglia and M. Bolzoni, *Il reddito di base* (Roma: Ediesse, 2016); P. Tullini, 'Opinioni a confronto sul reddito di cittadinanza. Un dialogo aperto' *Rivista del Diritto della Sicurezza Sociale*, 4, 687 (2018).

[11] E. Ranci Ortigosa, 'Dal reddito di inclusione al reddito di cittadinanza: continuità o discontinuità?' *Prospettive sociali e sanitarie*, 1 (2019).

[12] The Italian social assistance system is organized on a multilevel basis. Local authorities exercise administrative functions, regions have legislative power and the state should define basic level of benefits relating to social entitlements.

for the community and in which to employ the beneficiaries of the CI. The article concludes with a reflection on the current scope of the provision of 'basic level of benefits relating to social entitlements' (Art 117, para 2, letter m) of the Italian Constitution) in light of the new legislative measure of the CI, both in the social and labour spheres.

II. Decreto Legge 28 January 2019 no 4 and Policies to Fight Poverty

Citizens' Income[13] is defined in the Art 1 of the decreto legge 28 January 2019 no 4 as

> 'fundamental measure of active labour policy to guarantee the right to work, to eradicate poverty, inequality and social exclusion, (...) aimed at promoting the right to information, education, training and culture through policies aimed at economic support and the social inclusion of those at risk of marginalisation in society and in the world of labour'.

To understand the real extent of this reform, it must be remembered that this is not the first attempt to introduce a tool to combat poverty in the Italian context. In fact, many experiments have been carried out in the last twenty years, both at national and regional levels, much more studied by the social sciences but never subjected to a serious monitoring and evaluation process by public institutions.

The long process of experimentation seemed destined to end positively with the approval of legge 15 March 2017 no 33 (and the following implementation with decreto legislativo 15 September 2017 no 147 containing 'Provisions for the introduction of a national poverty reduction measure'), which aimed to introduce a new instrument, the Inclusion Income[14] (II), extended to the entire national territory, as part of a comprehensive reform of Italian welfare.

Legge 15 March 2017 no 33 had indeed a very broad ambition: to reorganise monetary benefits, to strengthen the coordination of interventions on social services, to reintroduce a series of national programming tools. Just after less than two years, the decreto legge 28 January 2019 no 4, hereafter examined, has introduced a new tool to combat poverty, stopping the ongoing reform process based on the previous legge 15 March 2017 no 33 that at that moment was

[13] The choice not to use the term *universal basic income* wants to emphasise the distance between forms of unconditional income, as recently theorised, among others, by Ph. Van Parijs and Y. Vanderborght, *Basic Income: A Radical Proposal for a Free Society and a Sane Economy* (Cambridge: Harvard University Press, 2017), and the measure here analysed.

[14] The measure was reserved to certain categories of fragile subjects, it was subject to the means test and adherence to a personalised project of activation and social and work inclusion (Art 1, para 2, legge 15 March 2017 no 33). I will return to some aspects of the II in the following paragraph, to highlight some features of citizens' income.

taking its first steps.

The fact that the Citizens' Income reform has been approved with the instrument of decreto legge appears even more controversial. As known, in the Italian legal system, a decreto legge can only be issued 'in extraordinary cases of necessity and urgency', under the responsibility of the Government, and it is a 'provisional provision' that the Parliament must convert into the legge within sixty days, under penalty of forfeiture with retroactive effects. The emergency decree has been widely abused of for a very long time; an abuse that legge 23 August 1988 no 400 already attempted to stem by providing that

> 'Decrees must contain measures of immediate application and their content must be specific, homogeneous and corresponding to the title' (Art 15.3).

In the specific case analysed in the current article, as stated in the preamble of the decreto legge 28 January 2019 no 4, the extraordinary need and urgency is in the need

> 'to provide for a measure to eradicate poverty, inequality and social exclusion aimed at guaranteeing the right to work and favour the right to information, education, training, culture through policies aimed at economic support and the inclusion of those at risk of marginalisation in society and in the world of work and thus guarantee a useful measure to ensure a minimum level of subsistence, encouraging the personal and social growth of the individual'.

From this point of view, the use of the decreto legge is certainly not new: in fact, it was preceded by three decreti legge that had been approved after one another in the short period of time from 2008 to 2012.[15] Later, more or less incisive reforms followed, adopted with the Legge di Bilancio for 2014 first and then the Legge di stabilità of 2016 (legge 28 December 2015 no 218), to then the legge 15 March 2017 no 33, and decreto legislativo 15 September 2017 no 147 that included the implementation of the Rei regime.

[15] Decreto legge 25 June 2008 no 112, converted into legge 6 August 2008 no 133, a special fund was set up to answer mainly food-related needs for disadvantaged people and the so-called social card. In 2010, a new experiment was regulated with decreto legge 29 December 2010 no 225, the so called 'mille proroghe' decree, converted with legge 26 February 2011 no 10, to be activated in cities with at least two hundred and fifty thousand inhabitants, in which the cards are assigned to charitable organisations, having determined which will provide and give them to the people in need. Lastly, the experimental Purchasing Card was regulated with decreto legge 9 February 2012 no 5 (the so called Semplifica Italia), converted into legge 4 April 2012 no 35, not cumulative with the previous ordinary Purchasing Card, for which it is expected that the Municipalities will act as intermediaries in the distribution of the purchase card while the third sector entities will be involved in the management of projects aimed at job placement and social inclusion, developed in collaboration with local administrations.

It seems that this consisted of a series of clumsy and ineffective attempts to find a way to respond also to the recommendations coming from the European side, to face a constant growth of relative and absolute poverty from 2007 to today.[16]

Whilst the use of the regulatory instrument devised to deal with situations of exceptional gravity can be based on the anti-crisis *ratio* of the economic measures adopted, the inadequacy of Parliament to cope with issues with organic policies, such as what is being discussed, that have taken on such a nature of chronicity that seems, in a certain sense, ordinary, and therefore surely not sudden or unforeseen.

Moreover, decreto legge 28 January 2019 no 4 has also another critical profile, related to the presence of contents that are not immediately applicable.[17] From this point of view, the lack of the nature of the immediate applicability of some provisions required by the aforementioned Art 15 of legge 23 August 1988 no 400 that derives coherently from the connotation of a source intended to answer immediate and undelayable needs, has been recently sanctioned by the Constitutional Court. In fact, the latter pointed out that, as conceived by Art 77 of the Constitution 'for specific and timely interventions, made necessary and undelayable by the occurrence of *extraordinary necessary and urgent* cases' the use of the decree would violate the constitutional norm 'if it contained provisions that would have practical effects deferred over time' due to of the

> 'obvious inadequacy of the Decreto legge instrument to implement an organic and systemic reform that [...] requires implementation processes necessarily protracted over time, such that suspensions of effectiveness, postponements and progressive systematisation become indispensable, and that are difficult to reconcile with the immediacy of effects inherent in the Decreto legge'.[18]

Considering the brief description above, it seems that a strategic part of the reform has not been implemented yet. Therefore, the use of the decreto legge is controversial, even starting from the consideration that, as mentioned above, an organic reform for the income support instruments had been set up during the last legislature and that provided for a gradual extension of the recipients.

The use of the decreto legge and the desire to leave that reform unfinished and give life to another that can then be credited to a very precise political majority, can probably be explained in terms of electoral consensus: as effectively observed, in fact,

[16] Istat, 'Le statistiche sulla povertà in Italia. 2018', Roma, 19 June 2019; Inps (Osservatorio statistico), 'Reddito/Pensione di cittadinanza e Reddito di inclusione' available at www.inps.it.

[17] R. Bin, 'Un nuovo problema per il Presidente Mattarella: si può introdurre il reddito di cittadinanza con un decreto-legge?' *la Costituzione.info*, 16 January 2019.

[18] Corte costituzionale 19 July 2013 no 223, *Giurisprudenza costituzionale*, 3296 (2013).

> 'There is no party or coalition or government program that does not evoke the eradicate against poverty among its qualifying points (…). And the reason is clear: by promising a battle on the side of poverty, the political actor turns to a relatively large audience consisting in potential supporters by levering the value that seems to be dominant in the current social context, namely money'.[19]

So, in this case, urgency is not only dictated by the scope of pursuing the fight against poverty, but by the immediate reinforcement of the political force that is ready to answer a specific social need.

III. Citizens' Income: What's It?

Unlike the Inclusion Income (hereafter II)[20], the CI is addressed to all citizens (not only to certain categories), but still remains conditioned to a series of requirements[21] linked to the availability of a certain amount of revenue and assets,[22] to the availability of durable goods and to citizenship and prolonged residence in the national territory.[23] It is therefore a measure of a universalistic[24] nature, but selective at the same time.[25]

[19] Q. Camerlengo, n 5 above, 1.

[20] In this regard it is useful to remember that the Legge di stabilità for 2018 provided for the repeal of Art 3, para 2, of decreto legislativo 15 September 2017 no 147 starting from 1 July 2018, thus erasing the categorical limitations to access pertaining to the members of the family unit (presence of a member under 18 years in the family or of a person with a disability or a pregnant woman, presence of a worker aged 55 or above who is unemployed and does not qualify for any unemployment benefit).

[21] G.B. Sgritta, 'Il reddito di cittadinanza' *Politiche sociali*, 142 (2019).

[22] To access the CI, the required ISEE value (the equivalent economic status indicator) has increased by fifty-six per cent (from six thousand to nine thousand three hundred sixty Euro) and the value of the real estate assets (that goes from twenty thousand to thirty thousand Euro), other that the house of residence; the value of movable assets remains the same (equal to six thousand Euro), even if maximum amounts not previously envisaged are introduced in relation to disabled family members (for which the envisaged threshold can be increased up to five thousand Euro) or seriously disabled and not self-sufficient (for which the envisaged threshold can be increased up to seven thousand five hundred Euro).

[23] It is interesting to note that we move from a prolonged residence on the national territory of two years, typical of the II, to a ten-year one – of which the last 2, consecutive, of the Citizenship Income. On this point: A. Bonomi, 'Osservazioni sparse sul Reddito di cittadinanza: sarebbe costituzionalmente legittimo estenderlo ai soli cittadini italiani' *Dirittifondamentali.it*, 1-20 (2018); more generally, F. Biondi Dal Monte, *Dai diritti sociali alla cittadinanza. La condizione giuridica dello straniero tra ordinamento italiano e prospettive sovranazionali* (Torino: Giappichelli, 2013), 144; P. Palermo, 'Welfare immigrazione. Disuguaglianza, discriminazione e libera circolazione. "Declinazioni" locali alla luce del diritto europeo e della giurisprudenza delle Corti' *Dirittiregionali.it*, 1-31 (2018); C. Panzera, 'Immigrazione e diritti nello Stato regionale. Spunti di riflessione' *Diritto pubblico*, 141-180 (2018).

[24] O. Jacques and A. Noël, 'The Case for Welfare State Universalism, or the Lasting Relevance of the Paradox of Redistribution' 28 *Journal of European Social Policy*, 70 (2018).

[25] M. Baldini and C. Gori, 'Il reddito di cittadinanza' *il Mulino*, 269 (2019); G. Bronzini, 'Il

It consists of a series of benefits: a) income integration (that takes the name of a citizenship pension for the over-seventy-seven years of age); b) contribution for rent or contribution for the payment of the loan instalments; c) employment pact (excluding the citizenship pension beneficiaries), d) pact for social inclusion.

Therefore, compared with the II[26] and the measures that preceded it, CI is characterised of a more strictly 'job' connotation that, at least in the intentions of reform supporters, it has the purpose of constituting a stimulus towards the search for an occupation for those who are inactive. In fact, Art 4, para 1, decreto legge 28 January 2019 no 4, affirms that

> 'the payment of the benefit is conditioned by the declaration of an immediate availability to work by the members of the family who are over eighteen, (...), as well as adhering to a personalised path to accompany the insertion work and social inclusion that includes activities at the service of the community, professional retraining, completion of studies, as well as other commitments identified by the competent services aimed at entering the labour market and social inclusion'.

Some subjects are excluded from the declaration of immediate availability to work, provided by Art 4, paras 2 and 3, including the adults that are employed or attend a regular course of studies, the members of the family unit with care burdens.

This 'employment' vocation reverberates on the path of access, which sees the alternation of the two fundamental poles on which the reform is based: the Employment Centre[27], on the one hand, and the Municipality on the other, depending on the prevailing needs and the employment and care situation of the beneficiary.

For those who find it easier to access to the employment as they do not seem to have social problems,[28] they are 'identified and made known' to the Employment Centres through a digital platform so that they can be summoned within thirty days from the recognition of the benefit and they are called to sign a Labour Pact.

In the other cases (Art 4, para 11), the families 'are identified and made known' to the Municipalities through the platform that coordinate at territorial level, so

reddito di cittadinanza, tra aspetti definitori ed esperienze applicative' *Rivista del Diritto della Sicurezza Sociale*, 1 (2014); F. Ravelli, *Il reddito minimo. Tra universalismo e selettività delle tutele* (Torino: Giappichelli, 2018), 35.

[26] E. Ranci Ortigosa, *Contro la povertà. Analisi economica e politiche a confronto* (Milano: Francesco Brioschi, 2018); S. Toso, 'Una ricostruzione storico-analitica', in Fondazione Astrid and Circolo Fratelli Rosselli eds, n 2 above, 223.

[27] E. Reynery, 'I centri pubblici per l'impiego', in Fondazione Astrid and Circolo Fratelli Rosselli eds, n 2 above, 239.

[28] According to Art 4, para 5, these are those without a job for over two years; that have a social benefit for involuntary unemployment or have ended their use for no more than a year; have not signed a customised project pursuant to Art 6, decreto legislativo 15 September 2017 no 147.

that they are summoned, in the same period of time, by the services in charge of fighting poverty. To the interventions connected to the CI, including the support for employment, the applicant and family unit access after a multidimensional assessment aimed at identifying the needs of the family unit, pursuant to Art 5, decreto legislativo 15 September 2017 no 147. Whenever it emerges from this assessment that the needs of the family unit and its components are mainly related to the work situation, the competent services are, in any case, identified at the employment centres, where the employment pact is stipulated, within which the activities to be carried out weekly must be identified.

This is a kind of agreement signed between the beneficiary and the local authority that contains a series of obligations, and the failure to comply gives way to – in defined terms and conditions – the forfeiture of the economic benefit. The heart of this Pact is represented by the need to accept at least one of three suitable job offers;[29] obligations are also provided like: registering on the specific digital platform and consulting it daily as a support of an active search for work; carrying out active job search activities, verifying the presence of new job offers, according to the procedures defined in the Employment Pact; accepting to be referred to activities identified in the employment pact; supporting psycho-attitudinal interviews and any selection tests aimed at recruitment, upon advice of the competent services and in relation to certified competences.

If the need is complex and multidimensional, the beneficiaries undersign a Pact for social inclusion. Para 12 of Art 14 underlines the importance that the Pact is aimed at giving unitary responses to the family nucleus, with the involvement, in addition to the Employment Centres and social services, of the other territorial services for which competence is declared in the preliminary assessment. Moreover, in this case, the Inclusion Pact corresponds to the personalised project provided by Art 6, decreto legislativo 15 September 2017 no 147 and includes interventions and social services to fight poverty referred to in Art 7 of the above decreto legislativo. Within this binary access system, corrections are made during the conversion so as to make the system more functional and less rigid. Art 4, para 5-*quater*, provides that, in the event that the operator of the Employment Centre discovers issues in relation to which it would be difficult to activate a job placement procedure, the applicant may be referred to the social services for assessment multidimensional. While in Art 4, para 13, a provision has been added according to which

> 'the interventions and social services to eradicate poverty are activated,

[29] The congruity parameter changes in relation to the time of enjoyment of the benefit and the number of refused job offers (Art 4, para 9). Corrective measures are provided if there is a member of the family with a disability or minor children. It is also provided that, if an offer for a job that is over two hundred and fifty kilometres away is accepted, the economic benefit is acknowledged from three to twelve months by way of compensation for the transfer costs incurred.

where appropriate and requested, also in favour of the beneficiaries signing the employment Pact'.

Therefore, the two changes should answer, at least on paper, the criticisms of excessive rigidity of the binary system proposed by the decreto legge.

Beyond the emphasis that was given to the provisions in drafting of the new provisions – and in the political communication – the so called 'anti-couch' (Art 4 regulates the Employment Pact in detail, while the Pact for inclusion is relegated to what continues to be in force in accordance with the decreto legislativo 15 September 2017 no 147), upon a more attentive reading it emerges that active policy measures for work are not addressed to all beneficiaries of the CI. In fact, upon closer inspection, the Legge implies a triple categorisation among the beneficiaries of the measure: those who are excluded from obligations of any kind, because they have care burdens; those who are primarily addressed to social services for the stipulation of the Pact of inclusion; lastly, those who are considered as more easy to employ, to whom active labour policy measures are primarily addressed.

With reference to the Employment Pact and the Social Inclusion Pact, as well as the multidimensional evaluation that precedes them, Art 4, para 14, specifies that they are basic levels of benefits, within the limits of the resources available under current legislation.

Therefore, a complex system, articulated between Municipalities, Employment Centres and beneficiaries, that, through the digital support represented by the Platforms, embodies – in a revisited form – the model, already experimented on several occasions in Italy, of the so-called *conditionality*.[30]

IV. Citizens' Income Between State, Regions and Local Authorities: What Governance for Policies to Eradicate Poverty?

The CI is composed of a series of measures and interventions that cross state, regional and local level competences. This complexity should also be reflected in terms of governance, requiring, at least in the abstract, the preparation of a series of interactions among the various parties involved in the implementation of the measure. However, this supposed complexity is not reflected in the system outlined by the legislation that has, upon first instance, a significant downsizing of the directorial role that the Municipalities had within the institutional scheme of the II.[31] As observed,[32] this aspect is a consequence

[30] M.A. Gliatta, 'Le misure di sostegno al reddito nel sistema costituzionale di garanzia sociale', in F. Marone ed, *La doverosità ` dei diritti: analisi di un ossimoro costituzionale?* (Napoli: Editoriale Scientifica, 2019), 221.

[31] V. Casamassima and E. Vivaldi, 'Ius existentiae e politiche di contrasto della povertà' *Quaderni costituzionali*, 115 (2018).

[32] A. Somma, 'Contrasto della povertà e politiche attive del lavoro: reddito di cittadinanza,

of the more 'work-relates' vocation of the CI that intends being characterised to be a stimulus towards the search for a job for those who are inactive.[33] If this were true, the consequent governance system should call into question the main institutional actors of labour market, state and regional policies, creating structured inter-institutional forms of collaboration. Instead, the attention of the legislature focused on the functioning of offices and technical-operational[34] and information tools. The Information System of the CI is established within the Ministry of Labour and Social Policies, within which two specific digital platforms operate: one at the ANPAL, for the coordination of the Employment Centres; the other at the Ministry of Labour and Social Policies, for the coordination of the Municipalities, individually or associated. The platforms

> 'are tools to make information available to the central administrations and to the territorial services involved, in compliance with the principles of minimisation, integrity and confidentiality of personal data' (Art 6, para 1, decreto legge 28 January 2019 no 4).

In other words, they are the place of coordination between the operators of the Employment Centres, the social services of the Municipalities and the other territorial services supporting multidimensional teams.

Furthermore, the general framework of existing State-regional-local authorities relations has changed, on which the legislation establishing the II had already intervened in an important way, empowering the functions of coordination and state directions for the issue. In fact, legge 15 March 2017 no 33 laid down in Art 1, para 1, letter c) the objective of

> 'empowering the coordination of interventions in the field of social

reddito minimo garantito e regime delle condizionalità' *Diritto pubblico comparato ed europeo*, 433-458 (2019).

[33] M. Forlivesi, 'Reddito minimo garantito e principio lavoristico: un'interazione possibile?' *Rivista del Diritto della Sicurezza Sociale*, 721-730 (2018).

[34] It is sufficient to observe on which aspects – in detail, with respect to the overall economy of the reform under comment – the 'Conference system' intervenes. In particular, the State-Regions Permanent Conference intervenes: in the definition of national guidelines and models for the drafting of the Labour Pact (Art 4, para 7); in the definition of guidelines on the basis of which the accredited training institutions can stipulate a training Pact at the Employment Centres and at accredited entities to ensure training or retraining (Art 8); in defining the Extraordinary Plan for empowering employment centres and active labour policies (Art 12). While the Unified Conference intervenes: in the definition of principles and general criteria to evaluate the categories exempt from the obligations to which the beneficiaries are bound (Art 4, para 3); in defining the methods of implementation of public utility projects that the Municipalities are called upon to activate (Art 4, para 15); in defining the summoning procedures for the beneficiaries by the Municipalities and Employment Centres (Art 4, para 15-*quinquies*); in defining procedures to verify the residence and residency requirements of the Municipalities (Art 5, para 4), in the approval of the technical plan for the activation and interoperability of the digital platforms, through which the exchange of information and governance between the institutions at national and territorial level is provided (Art 6, para 1).

services, in order to guarantee the basic level of benefits throughout the national territory, within the framework of the principles of Legge 328/2000'.

Chapter IV of decreto legislativo 15 September 2017 no 147 has been dedicated to this, currently in force with some modifications, within which the Network of protection and social inclusion is regulated. This is a coordinating body for the system of interventions and social services created to promote greater territorial homogeneity in the provision of services and to define guidelines for the interventions. The Network, established at the Ministry of Labour and Social Policies, is responsible, as well as for the elaboration of the Plan for interventions and social services to eradicate poverty (letter b), even for the elaboration of the National Social Plan, as a programmatic tool for the use of the resources of the National Fund for social policies (letter a) and of the Plan for non-self-sufficiency (letter c), plans, the latter, that are not expressly provided for by legge 15 March 2017 no 33. Therefore, the overall design envisaged in the above refereed legge was that of a *cascading programming system* that involved the Regions jointly within the network, and, individually, in the implementation process, through the adoption, with a three-year period cadence, a regional plan to eradicate poverty and to plan the services necessary for the implementation of the II, to be communicated to the Ministry of Labour and social policies within thirty days of its adoption.

Decreto legge 28 January 2019 no 4 intervened to significantly amend the decreto legislativo 15 September 2017 no 147, repealing, for what is more relevant here, Arts 13 and 14, concerning the functions of the Municipalities, the territorial areas, the Regions and the autonomous provinces for the implementation of the II, but also Art 8 called 'National Plan to Combat Poverty and Social Exclusion'. Thus, there is no system outlined by the previous legislative intervention, in which local and regional autonomies were acknowledged with functions of promotion, connection and involvement of third sector bodies, sub-state employees planning and evaluation.

With the repeal of the provision relating to the National Plan to Combat Poverty,[35] a three-year Extraordinary Plan is introduced, aimed at empowering the Employment Centres and active labour policies (Art 12, decreto legge 28 January 2019 no 4); it is a one-time tool introduced to prepare the system outlined by the decreto legge: defining the navigator's[36] needs on a regional basis, dictating the technical assistance plan for Regions and Employment Centres for the system to become fully operational for interventions addressed to the

[35] However, para 6 of Art 21 formally enforced assigns to the Network the responsibility for the elaboration of 'a Plan for interventions and social services to eradicate poverty, as a programmatic tool for the use of the Poverty Fund resource quota referred to in Article 7, paragraph 2'.

[36] Role of a private actor aimed at facilitating the encounter between labour demand and supply.

beneficiaries of the CI. National agency for active labour policies (ANPAL) and the Ministry are the main actors of the actions, the Regions, directly and through the Employment Centres, are the recipients of the financial interventions and technical assistance considered in the Plan.

Lastly, with regard to inter-institutional bodies, the decreto legge abolished the Committee to eradicate poverty and the Observatory, previously regulated by Art 16, decreto legislativo 15 September 2017 no 147, both composed of representatives of the Network of protection and social inclusion, to introduce, with para 10-*bis* of Art 21, decreto legislativo 15 September 2017 no 147, a Control room dedicated to the implementation of the CI within the Network of protection and social inclusion. The Control Room also adds those in charge of regional labour policies, a representative of ANPAL and one of the National Social Security Institute (INPS) to the members of the Network. It is expected that it operates through technical articulations and consults social parties and institutions of the third sector periodically.

Therefore, in view of the lack of participation of the Regions and local authorities in defining the main axes of the CI, and, more generally, in the strategic choices of adopting policies to eradicate poverty, institutional forums are maintained for the coordination like Social Protection Network and the new technical body as the Control Room. On the one hand, these organisms allow for structural enhancement of the connections with labour policies; on the other hand they have a more technical-operational function than an overall policy governance, a dimension that is completely under the new structure that is outlined.

V. The Beneficiary's Participation in Socially Useful Projects Activated by Municipalities of Residence: Problems and Prospects

The beneficiaries of the CI are required to offer their availability to participate in socially useful projects, owned by Municipalities of residence, by making available a number of hours compatible with the other activities (not less than eight per week that can be increased up to sixteen with the consent of both parties). This is an important hourly commitment summed to the series of obligations provided for the beneficiary, both regarding the Pact for social inclusion and the Pact for work.

The willingness to participate in these projects is requested when defining the Pact for employment and the Pact for social inclusion, 'consistent with the professional competences of the beneficiary and with those acquired in a formal, non-formal and informal context, as well as based on the interests and propensities that emerged during the interview held at the employment centre or at the service offices at the municipalities'. Thus, the forecast has a dual scope: for those who have signed the Labour Pact, employment in these projects stops the loss of skills and abilities related to being away from the world

of work; for those who, on the other hand, it was not possible – for situations of serious social hardship – to sign it, it has the equally important function of constituting a first employment experience.

The provision poses a series of problems, only partially solved by the legge that has converted the decreto legge. In fact, the latter has freed the Municipalities from having to arrange the administrative procedures useful to launch the projects. Now this fulfilment is by the Minister of Labour and social policies that a ministerial decree will indicate forms, characteristics and methods of implementation of the projects, subject to agreement in the Unified Conference. Subsequently, the Municipalities proceed with the drafting of these projects to include in a section of the ministerial platform dedicated to the CI.

Therefore, the single Municipalities decide upon the start of the projects. Since no type of incentive is envisaged, it is reasonable to believe that there will be a strong differentiation at the local level: in terms of the number and quality of the initiatives, areas of intervention, professional and economic resources used in the planning and implementation of the interventions. Moreover

> 'the lack of reference to the legislation on the Third Sector and the possibility of activating co-programming and co-planning forms between third sector entities and public bodies is consistent with the *institutional-digital* model introduced that does not contemplate any form of horizontal subsidiarity and involvement of intermediate bodies'.[37]

However, the most complicated knot to untangle remains: how can this type of activity be qualified?

The element that distinguishes it from all the others mentioned in the Pact for inclusion (the frequency of training internships, for example) or in the Labour Pact (active job search, undergoing an aptitude interview) is that while the latter are aimed at increasing the beneficiary's skills and making the entrance into the world of work faster and easier (therefore they are designed in the interest of the beneficiary), the former are activities that, although important for increasing and consolidating the CI beneficiary's skills, are carried out primarily in the immediate interest of the community; therefore, they have the scope of linking the benefit performance to a kind of payment. Art 4, para 15, refers expressly to

> 'participation in projects owned by the Municipalities, useful to the community, in the cultural, social, artistic, environmental, educational and in the protection of common goods'.

Moreover, although not explicitly referring to a mandatory activity, Art 7,

[37] E. Innocenti and E. Vivaldi, 'Dal reddito di inclusione al reddito di cittadinanza', in Fondazione Emanuela Zancan ed, *La lotta alla povertà è innovazione sociale* (Bologna: il Mulino, 2019).

para 5, letter d), decreto legge provides for the forfeiture of the benefit in the event of non-compliance with the projects if the Municipality of residence has established them. The fulfilment of these obligations is certified by the Municipalities by updating the dedicated platform. At the same time, it is specified that the participation in projects is optional only for persons not bound by the obligations connected to the CI.

It is thus not a matter of individual voluntary activity, now explicitly recognised by the Third Sector Code,[38] characterised by the performance of

> 'activities in favour of the community and common good (...) in a personal, spontaneous free, and no-profit, not even indirectly, and exclusively for the scope of solidarity' (Art 17, para 2, decreto legislativo 3 July 2017 no 117).

But it cannot be fully included within the category of socially useful jobs, recently reformed by decreto legislativo 14 September 2015 no 150 (in fact, never mentioned by the decreto legge 28 January 2019 no 4), now defined as 'activities for the scope of public utility for the benefit of the territorial community to which it belongs' (Art 26, para 1). Actually the new discipline that repealed the decreto legislativo 1 December 1997 no 468 provides that, under the direction and coordination of public administrations and according to defined criteria and methods,

> 'workers benefiting from income support instruments with employment may be required to carry out activities for public scope utility for the benefit of the territorial community to which it belongs'.

Therefore, in the latter case, these are beneficiaries that, unlike the users of the CI, are holders of an employment relationship. The aforementioned legislation provides that unemployed workers over the age of sixty who have not yet acquired the right to retirement or early retirement can also be employed. For the latter, that therefore – like the users of the CI – do not have a work relationship, para 5 of Art 26, decreto legislativo 14 September 2015 no 150, prescribes the right to receive a subsidy called 'check for socially useful activity', that is proportionate to the number of hours worked. In the case of CI beneficiary, carrying out socially useful activities is a kind of payment for the provision of the service to eradicate poverty.

The non-applicability of the current provision for public utility works highlights the need for this type of activity to be regulated with a series of fundamental aspects that Art 26, decreto legislativo 14 September 2015 no 150 does not omit to regulate, such as, first of all, the necessary insurance coverage

[38] L. Gori, 'La disciplina del volontariato individuale, ovvero dell'applicazione diretta dell'art. 118, ultimo comma, Cost.' *Rivista AIC*, 1-21 (2018).

against accidents and occupational illnesses related to the work performance, but also civil liability towards third parties, the regulation of periods of rest and that relating to sick leave. Fundamental aspects of the employment right that cannot be overlooked precisely within a reform that has the ambition to represent a 'fundamental measure of an active labour policy, to guarantee the right to work, to eradicate poverty, inequality and social exclusion'.

But concerns about these predictions are also of a more general nature. The obligatory nature of participation in socially useful projects, the tendential correspondence between the economic advantage and the number of hours that the person must employ in these projects, the possibility of non-compliance, are typical elements of the *conditionality* measures practiced for decades in the Systems of Western welfare, more work-oriented. Lastly, as is known, these elements have long been the object of strong criticism regarding their effectiveness and adequacy.

VI. The Prevision of Basic Level of Benefits Relating to Social Entitlements in the Light of the Reform on the Citizens' Income

According to the Constitutional Court jurisprudence, Art 117, para 2, letter m), of the Constitution has introduced

> 'a fundamental instrument to guarantee the maintenance of an adequate uniformity of treatment in terms of the rights of all subjects even in a system characterised by a decidedly increased level of regional and local autonomy'.[39]

Precisely in reference to the constitutional legitimacy of state provisions that aimed to protect situations of extreme weakness (in this case, the social card established by decreto legge 25 June 2008 no 112) the Court stated that this provision, although affecting the issue of social services and of assistance of residual regional competence, must also be reconstructed in the light of the fundamental principles of Arts 2 and 3, para 2, of the Constitution, of Art 38 of the Constitution and of Art 117, para 2, letter m), of the Constitution. The entirety of these constitutional regulations returns among 'social rights' and the national legislator is responsible for, the right to obtain basic level of benefits to alleviate situations of extreme need and to affirm the duty of the State to establish their qualitative and quantitative characteristics, in the event that a lack of such prevision could jeopardise them. Furthermore, it consents to retain that the objective of guaranteeing the immovable nucleus of this fundamental right legitimate intervention on the part of the State which includes providing for an appropriate and ready distribution of a given benefit in favour of individuals.

Consequently, the principle of this title of competence and the need to

[39] Starting with the Corte costituzionale 27 March 2003 no 88, *Foro italiano*, I, 2915 (2003).

safeguard the fundamental rights implied by it, allow to believe that it could represent the juridical basis of the provision and of the direct distribution of a specific social benefit, in order to insure more fully, the satisfaction of the interest which was considered worthy of safeguarding, when it was made unavoidable by unique circumstances.

What does the decreto legge on Citizens' Income call for at basic level? As above mentioned, in its entirety the CI is defined as the basic level of benefits (Art 1, para 1); furthermore the same qualification is attributed to the Work Pact and the Pact for social inclusion, to 'support provided by it, as well as the multidimensional evaluation which may precede the (art 4, paragraph 14)'.[40]

If there are no particular differences identifying basic level of benefits on the 'social' side between the II, the novelty that could take on greater meaning is the one regarding reinforcement – with general limits that will be discussed below – of the working side of the measure in connection to the qualification of the active policy measures like the basic level of benefits.

In other words, the affirmation according to which the Work Pact, with the measures provided in it (measures which obligate the beneficiary as well as the administration) could lead to a reinforcement and enhancement of the 'rights' side of the 'right/duty to work' sanctioned by Art 4 of the Constitution. Although it is not possible to attribute a merely programmatic or political value to Art 4 of the Constitution, it is in fact known that the regulation cannot be invoked in front of a judge by a person looking for a job who has not been able to find one through other channels.

Art 4, para 7 specifies that the Labour Pact is equivalent to the personalised service pact mentioned in Art 20, decreto legislativo 14 September 2015 no 150. This last regulation provides, beside a series of obligation for beneficiaries, a series of obligations for the administration, which become relevant in view of an improvement in the position of the beneficiary and his aspiration to find an employment. In this perspective, the provisions of para 2 letters a), b), and d) of Art 20 are particularly important. These regulations provide: the obligation for Work Centres to select a person in charge of activities that the beneficiary can contact; the definition of the frequency of contacts between the beneficiary and the person in charge of activities (an element that represents a commitment not only for the unemployed worker, but also for the administration in charge); additionally, perhaps the most important feature, the requirement for a definition of the personal employable profile according to the technical procedures prepared by ANPAL. The compliance with the latter requires,

[40] Legge 15 March 2017 no 33 and decreto legislativo 15 September 2017 no 147 had already defined the II as an essential level the benefits (Art 1, para 1, letter a), legge 15 March 2017 no 33 and Art 2, comma 13, decreto legislativo 15 September 2017 no 147). Besides, the latter had considered in the same way the multidimensional evaluation (Art 5, para 10, Decreto legislativo 15 September 2017 no 147) and the personalised project (Art 6, para 13). The last two regulations are still in force.

essentially, the definition of an overall evaluation of the personal and employment condition of the user. The aim of the regulations is evidently to lead to the most comprehensive and detailed evaluation of the distance from the job market, and the draft of a more effective and focused personalised service Pact in which the measures and services of active policies suitable for the construction of real opportunities for social inclusion and inclusion in the work force are indicated.

However, the true problematic aspect concerns the cross-compliance to which these basic levels are subjected to. Conditionality that, as effectively observed translates, basically, into a conditioned cross-compliance: first of all by available resources[41] (both Art 1, para 1 and Art 4, para 14 clarify it); this means, as observed effectively, the

> 'articulation of public duty to remove obstacles of economic and social order to the realisation and equality is entrusted to contingent choices regarding the use of public funds'.[42]

But it is also conditioned by the predisposition of a series of organisational, professional, human resources (think about the actual implementation of digital platforms required by a strategic part of the reform, or the impact the Navigators will succeed in producing). Finally, it has been considered more simply the diversity of productive and local contexts and, more in general, the ability of the job market to offer concrete job opportunities.

VII. Final Remarks

As recently affirmed,

[41] For a reconstruction of the interventions of the Constitutional Court in the relationship between effectivity of social rights and the balanced budget rule (in particular Corte costituzionale 16 December 2016 no 275, *Foro italiano*, I, 2591 (2017) and Corte costituzionale 11 April 2019 no 83, *Giurisprudenza costituzionale*, 1004 (2019)) see, among others, R. Cabazzi, 'Diritti incomprimibili degli studenti con disabilità ed equilibrio di bilancio nella finanza locale secondo la sent. della Corte costituzionale n. 275/2016' *Le Regioni*, 593 (2017); L. Carlassare, 'Bilancio e diritti fondamentali: i limiti "invalicabili" alla discrezionalità del legislatore' *Giurisprudenza costituzionale*, 2336 (2017); I. Ciolli, 'I diritti sociali «condizionati» di fronte alla Corte costituzionale' *Rivista giuridica del lavoro e della previdenza sociale*, 353 (2017); E. Furno, 'Pareggio di bilancio e diritti sociali: la ridefinizione dei confini nella recente giurisprudenza costituzionale in tema di diritto all'istruzione dei disabili' *Consultaonline.it*, 1-21 (2017); M. Luciani, 'Diritti sociali e livelli essenziali delle prestazioni pubbliche nei sessant'anni della Corte costituzionale' *Rivista AIC*, 1-18 (2016); L. Madau, '"È la garanzia dei diritti incomprimibili ad incidere sul bilancio, e non l'equilibrio di questo a condizionarne la doverosa erogazione". Nota a Corte cost. n. 275/2016' *Rivista AIC*, 1-13 (2017); M. Massa, 'Discrezionalità, sostenibilità, responsabilità nella giurisprudenza costituzionale sui diritti sociali' *Quaderni costituzionali*, 73-96 (2017); F. Saitto, '«Costituzione finanziaria» ed effettività dei diritti sociali nel passaggio dallo «Stato fiscale» allo «Stato debitore»' *Rivista AIC*, 1-42 (2017); C. Salazar, 'Crisi economica e diritti fondamentali'4 *Rivista AIC*, 1-39 (2013).

[42] A. Somma, n 32 above, 432.

> 'an income supplement that establishes conditions of *reciprocity* seems (...) to better reflect the constitutional idea of citizenship, both in terms of rights and responsibilities'.[43]

In this perspective, it seems that the correspondence between claiming rights and observing obligations to solidarity must be the a foundation of a welfare reform in which the 'social equivalent' along with some social rights, is the

> 'condition necessary so that each person can claim the right to freedom from welfare-related dependence, from help that does not know dignity and capabilities'.[44]

As evidenced, the hypothesis is based on the assumption that in the perspective of solidarity inscribed in our Constitution lies undoubtedly the conviction that obligations that benefit the common good can be imposed upon members of the community and that the hypothesis of accompanying the distribution of a benefit by public institutions (expression of vertical solidarity) with the expectation of a service on the part of subjects who benefit with the aim of establishing actions which benefit others, constitutes a mutual 'give and take', in which the various dimensions of solidarity combine and produce a positive 'added value' for everyone.[45]

Thus, the types of activation disciplined in the succession of twenty-year experimentations carried out in Italy and studied by the doctrine, constitute a sort of evocation of the labour principle. In fact, it is relevant to remark that, alongside the personal and solidarity principles, in the economy of the Italian Constitution the labour principle carries significant weight. The right/duty to employment sanctioned in Art 4 of the Constitution is, in fact, the foundation of our republican order, to which Art 1 of the Constitution assigns a function of guideline. A democracy founded on work constitutes the basis of the entire constitutional architecture, in which work is considered, indeed, not only a means through which one can express his/her personality, but also a source of social validation for holding and exercising any other position. Its aptitude, as a means by which a person can achieve his goals both materially and spiritually and participate fully in social life, make work a dimension that deserves to be particularly esteemed and protected by the legislature, without permitting that the protection it is granted becomes a way for public powers to legitimate inaction regarding needs and necessities that are not related to the conditions of

[43] C. Tripodina, *Il diritto a un'esistenza libera e dignitosa. Sui fondamenti costituzionali del reddito di cittadinanza* (Torino: Giappichelli, 2013).

[44] Fondazione E. Zancan ed, *Vincere la povertà con un welfare generativo. La lotta alla povertà. Rapporto 2012* (Bologna: il Mulino 2012), 10.

[45] E. Rossi, 'Prestazioni sociali con "corrispettivo"? Considerazioni giuridico-costituzionalistiche sulla proposta di collegare l'erogazione di prestazioni sociali allo svolgimento di attività di utilità sociale' *Consultaonline.it*, 1-20 (2012).

workers (or former workers). These elements have led part of the doctrine to consider incompatible with the constitutional provisions proposals that aim to introduce unconditional forms of guaranteed income, which do not take into consideration the condition of need and the laboriousness of the person.[46] Therefore, in a constitutional perspective, the objective of the participation of the recipient of the benefit in job training/placement programmes, enhancing his/her skills, seems fundamental and qualifying, inasmuch as it aims at consolidating the concept of an interdependence between citizens and community, aimed at the construction of the common good.[47]

How have these elements been translated into legislative measures whose fundamental features as above outlined?

Most of the emphasis with which the Citizens' Income reform has been presented – which significantly affected the perception of the poor as idlers – seems to deflate opposite a plurality of normative conditions (the implementation of measures and procedures which require the approval of bills which have not yet been adopted) and contextual ones (the labour market's actual flexibility and capacity to absorb) that, a few months after the emanation of the decreto legge 28 January 2019 no 4, seem clearer. Ultimately these conditions, if not met, risk causing the collapse of the articulate system of obligations (some, *first level*, such as those linked to the stipulation of the Work Pact and the Pact for social inclusion; others, *second level*, such as those related to activities linked to public utility projects, potentially activated by Municipalities) on which the actual integration of essential levels of benefits defined by the analysed legislation stands.

In fact, these previsions presuppose the existence of a system of social services and employment start-up services that are currently not available homogeneously in the national territory. The role of social services is particularly important in the fight against poverty and how these are distributed and financed at national level. Italy is still characterised by strong territorial differences, not only in terms of spending capacity and the provision of social services, but also in terms of enhancing relations between public operators and third sector.

Only after having tackled these two crucial questions, it would be possible to understand whether socially useful projects, Labour Pacts and Pacts for Social Inclusion would be effective tools to enable people to escape poverty.

[46] F. Pizzolato, *Il minimo vitale. Profili costituzionali e processi attuativi* (Milano: Giuffrè, 2004), 82; C. Tripodina, n 43 above, 239.

[47] E. Rossi, 'La doverosità dei diritti: analisi di un ossimoro costituzionale?', in F. Marone ed, n 30 above, 9.

Hard Cases

'Inertia Selling' Within Electronic Communications Services. The Role of National Regulatory Authorities in Light of the 'Speciality Principle'

Francesca Bartolini*

Abstract

The European Court of Justice (ECJ) (Joined Cases C-54/17 and 55/17) was called upon to clarify whether marketing SIM cards with pre-activated functions, charged to the user if not deactivated, when the user is not informed in advance of the existence of those services, nor of their costs, falls within the definition of 'inertia selling' as described in the Annex I of Directive 2005/29/EC. This notwithstanding the fact that the electronic communications sector is regulated by specific EU sources (the so-called Framework Directive and Universal Service Directive). This contribution aims at evaluating the approach of the ECJ in interpreting EU rules devoted to protect consumers against aggressive commercial practices in a particularly sensitive market like that of telecommunication services.

I. Facts of the Case and Ruling

It all started with two sanctions that the *Autorità Garante della Concorrenza e del Mercato* (AGCM), the Italian Competition Authority empowered to tackle unfair commercial practices, imposed in 2012 on two of the main Italian mobile services providers (Wind and Vodafone).

By two decisions[1] the AGCM sanctioned Wind and Vodafone for marketing SIM (Subscriber Identity Module) cards with pre-loaded and pre-activated functionalities, such as internet browsing services and voicemail services, the use of which was charged to the user if they were not deactivated at his express request, without that user having been informed in advance of the existence of those services or of their cost.

The AGCM intervened in response to complaints from consumers who had been charged fees for unsolicited services and for internet connections made without their knowledge.[2]

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[1] AGCM decisions nos 23356/2012 and 23357/2012, available at www.agcm.it, related respectively to Wind and Vodafone.

[2] The AGCM was called upon both by individual consumers and by Altroconsumo, the main Italian consumer organization.

Reasons for such an intervention were essentially that the conduct fell within the category of 'aggressive commercial practices' as described by Arts 24, 25 and 26, para 1 of the Italian Consumer Code.[3]

The AGCM, thus, imposed an administrative fine proportioned with the seriousness and the length of the conduct, as prescribed by Art 27 of the Italian Consumer Code (resulting in fines of two hundred thousand euro on Wind and two hundred fifty euro on Vodafone).

Wind and Vodafone appealed to the *Tribunale amministrativo regionale Lazio-Roma* (Regional Administrative Court in Rome), claiming AGCM's lack of competence, holding that, by virtue of the principle of speciality laid down in Art 3, para 4 of Directive 2005/29/EC[4] (and repeated in Art 19, para 3 of the Italian Consumer Code), the practices at stake were subject to special legislation that empowers the AGCom,[5] exclusively, to inspect, prohibit and sanction businesses within electronic communication services. The Court sided with the claimants, asserting that the abovementioned general regulations on business malpractice were not applicable to the case, and, as a result, the AGCM was not competent to intervene.

The AGCM appealed before the *Consiglio di Stato* (Italian Supreme Administrative Court), claiming, in particular, that the principle of speciality should be understood as meaning that the special legislation could only play a role in case of divergence from the general rules and provided that such special legislation covered specific aspects of unfair business practices, by regulating circumstances similar to those defined by the general rules, but providing different solutions. In the course of this second proceeding the issues at stake proved to be complex, deserving peculiar attention; therefore the case was referred to the *Adunanza Plenaria* (the Plenary of the Court), by asking what was the correct interpretation of Art 27, para 1-*bis* of the Italian Consumer Code, regulating the competence of Administrative bodies. The question arose, indeed, whether that provision might be regarded as giving exclusive competence to the AGCM with reference to unfair commercial practices, even when the conduct at stake is covered by specific sectoral rules under EU law.

The Plenary argued that the conduct at stake might fall under the definition of 'commercial practice that is in all circumstances considered aggressive', implicating the competence of AGCM, since it results in impairing or even removing the consumers' freedom of choice regarding the use of and payment

[3] Decreto legislativo 6 September 2005 no 206.

[4] European Parliament and Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) no 2006/2004 of the European Parliament and of the Council [2005] OJ L149/22.

[5] *Autorità per le Garanzie nelle Comunicazioni* (National Regulatory Authority (NRA) for Electronic Communications).

for pre-installed services, which could lead to that practice being regarded as demanding immediate or deferred payment for products unsolicited by the consumer. Therefore, even if infringement of information obligations in the electronic communications sector may fall within the AGCom's competence, in the light of the principle of speciality, the AGCM had the competence to intervene, because the conduct could be considered an 'aggressive commercial practice'.

When the case was brought back the case to the Sixth Chamber of *Consiglio di Stato*, a doubt arose whether Art 27, para 1-*bis* of the Italian Consumer Code, as interpreted by the Plenary, was compatible with EU law.[6] The proceedings were stayed and referred to the ECJ, which was called upon to rule on several preliminary questions concerning the interpretation of: (i) Arts 3, para 4, 8, 9 and Annex I, pt 29 of Directive 2005/29/EC (so-called Unfair Commercial Practices), (ii) Arts 3 and 4 of Directive 2002/21/EC (so-called Framework Directive)[7] and (iii) Arts 20 and 21 of Directive 2002/22/EC (so-called Universal Service Directive).[8]

These questions may be gathered into two essential issues, which will be discussed in the following.

First: whether selling SIM cards on which specific services such as internet browsing services and voicemail services had been pre-loaded and pre-activated, without first sufficiently informing the consumer of that pre-loading and pre-activation, nor of the cost of those services, may be deemed to be within the definition of 'aggressive commercial practice' under Arts 8 and 9 of Directive 2005/29/EC or of 'inertia selling' within the meaning of Annex I, pt 29.

To this question, the European Court of Justice (ECJ) answered in the affirmative, stating that the term 'inertia selling' within the meaning of Annex I, pt 29 of the Directive 'must be interpreted as including, subject to verifications by the referring court, conduct such as that at issue in the main proceedings' (below, section II).

Based on such an interpretation, the second issue, which deals with the principle of speciality as a tool to solve conflicts between EU rules, comes into

[6] As the Advocate General highlights in his Opinion in the Case (para 31) the European Court of Justice recognizes the possibility for a single chamber to make a reference for a preliminary ruling in which it takes a position not necessarily the same as that advocated by the Plenary of the same institution, although not called into question by any of the parties involved. See Case C-689/13 *Puligienica Facility Esco SpA (PFE)* v *Airgest SpA*, Judgment of the Court (Grand Chamber) of 5 April 2016, available at www.eur-lex.europa.eu, where 'Article 267 TFEU must be interpreted as precluding a provision of national law, in so far as that provision is interpreted to the effect that, where a question concerning the interpretation or validity of EU law arises, a chamber of a court of final instance must, if it does not concur with the position adopted by decision of that court sitting in plenary session, refer the question to the plenary session and is thus precluded from itself making a request to the Court of Justice for a preliminary ruling' (para 36).

[7] European Parliament and Council Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services [2002] OJ L108/33.

[8] European Parliament and Council Directive 2002/22/EC of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services [2002] OJ L108/51.

play. A doubt arose whether conduct constituting inertia selling (as recognized by the first answer) should be assessed and sanctioned subject to the Unfair Commercial Practices Directive (2005/29/EC). If it were, the National Regulatory Authority (NRA) charged with regulatory tasks in the specific sector of electronic communications networks and services, would not be competent to sanction such conduct. In other words, the question was whether the existence of a regulatory body, entrusted by an EU source of law (the Framework Directive, 2002/21/EC) to deal with commercial practices within the electronic communications networks and services sector, prevents the AGCM from exercising jurisdiction over aggressive commercial practices.

The ECJ ruled that

> 'Art 3.4 of Directive 2005/29/EC must be interpreted as not precluding national rules under which conduct constituting inertia selling, within the meaning of Annex I, pt 29 of Directive 2005/29/EC, must be assessed in the light of the provisions of that directive, with the result that, according to that legislation, the ARN, within the meaning of the Framework Directive, is not competent to penalize such conduct'.

These two issues will be investigated starting from the substantive problem of the identification of the conduct carried out by the communication and network services providers and whether it should be included within the definition of 'aggressive commercial practice' laid down in Directive 2005/29/EC on Unfair Commercial Practices.

II. 'Inertia Selling' and Its Insight

Legal antinomies exist insofar as different sources of law are potentially applicable to the case. Sometimes, as in the present case, antinomies also give rise to a conflict of competence over different administrative bodies entrusted with the task to supervise compliance with different sets of rules.

To solve such a conflict, the ECJ first had to verify whether the conduct at stake was potentially subject to the scope of Directive 2005/29/EC, garrisoned by the Italian Authority for competition (AGCM).

Directive 2005/29/EC, devoted to 'Unfair Commercial Practices', enacted a general set of rules, in the aim both to enhance competition in the internal market and to protect consumers' contractual freedom.[9] In order to approximate the

[9] For an overview of Directive 2005/29/EC and its first-decade impact, through a selection of main practical concerns, see W. van Boom, A. Garde and O. Akseli, *The European Unfair Commercial Practices Directive. Impact, Enforcement Strategies and National Legal Systems* (Farnham: Ashgate, 2014); see also B. Keirsbilck, *The New European Law of Unfair Commercial Practices and Competition Law* (Oxford: Hart Publishing, 2011) for a comparative

laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests, the EU adopted a multifaceted technique to design the scope of intervention against potentially harmful conduct.[10] Such a design played an important role in guiding the ECJ to the interpretative solution finally adopted in the case at issue.

At first, the European legislature chose to broadly define unfair commercial practices, by indicating (Art 5, para 1) two elements that must be recognized in order for the conduct to fall within the definition. The practice must be 'contrary to the requirements of professional diligence' (letter a), and 'materially distort' or be 'likely to materially distort the economic behavior with regard to the product of the average consumer whom it reaches or to whom it is addressed' (letter b). Such an open-ended clause encompasses both unfair and aggressive practices, referring to subsequent Art 8 to define 'aggressive commercial practices'. Once again, the technique used at EU level is that of broadly indicating the harmful effects triggered by the conduct: aggressive practices are those able to 'significantly impair the average consumer's freedom of choice or conduct with regard to the product', resulting in a contractual choice that the consumer would not have taken otherwise.

Art 8 identifies some details on aggressiveness, mentioning the use of 'harassment, coercion, including the use of physical force, or undue influence' as possible means of pressure on the consumer. Finally, Art 9 provides for details on how to assess those behaviors.[11] The key concept is, in a single word, that of *pressure*.

Considering that the unfairness test has to be carried out at the national level, taking into account its context and 'all its features and circumstances', it wouldn't be a very difficult task for National Courts and Administrative Authorities to identify a practice as aggressive. The risk of uncertainty being for sure the

overview on the transposition of the Directive into English, German, Dutch, Belgian and French national law.

[10] A technique scholars call 'pyramid' regulation' or 'in concentric circles': see M. Libertini, 'Clausola generale e disposizioni particolari nella disciplina delle pratiche commerciali scorrette' *Contratto e impresa*, 74-75 (2009).

[11] According to Art 9, 'in determining whether a commercial practice uses harassment, coercion, including the use of physical force, or undue influence, account shall be taken of: (a) its timing, location, nature or persistence; (b) the use of threatening or abusive language or behavior; (c) the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the trader is aware, to influence the consumer's decision with regard to the product; (d) any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader; (e) any threat to take any action that cannot legally be taken'. See, for an Italian standpoint on aggressive commercial practices and relative case law, M.A. Caruso, *Le pratiche commerciali aggressive* (Padova: CEDAM, 2010) and L. Di Nella, 'Le pratiche commerciali «aggressive»', in G. De Cristofaro ed, *Pratiche commerciali scorrette e codice del consumo. Il recepimento della direttiva 2005/29/Ce nel diritto italiano* (decreti legislativi nn. 145 e 146 del 2 agosto 2007) (Torino: Giappichelli, 2008), 286.

sworn enemy of effectiveness,[12] the drafting choice has been to help interpreters by listing – in Annex I – typical aggressive practices into a so-called black list (of commercial practices to be 'considered in all circumstances unfair'). This is where inertia selling deserved specific attention: to define it, the EU legislator gleaned from market practice some typical examples of coercing conduct, able to force the consumer's consent. Section 29 of Annex I refers to

> '(d)emanding immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer (…)'.

The above mentioned definitions and 'supporting list' have been transposed into the Italian Consumer code,[13] triggering a discussion among scholars about the relationship between the broad definition of unfair commercial practice (transposed into Art 20, para 2), the rules on aggressive commercial practice (transposed into Arts 24 and 25) and the black list of practices considered in all circumstances misleading or aggressive (transposed into Art 26). On the one side, it has been argued that, at first, the interpreter should verify whether the conduct falls within one of those exemplified by the black list. If not, it must be ascertained if the conduct meets the requirement provided for by the definition of (misleading or) aggressive practice. Only if the conduct fails this second test, should the interpreter resort to the open-ended definition.[14]

On the other side, it has been claimed that the interpreter should verify first that the conduct at stake meets the requirements provided by the open-ended

[12] Effectiveness plays a pivotal role not only within the jurisdictional processes, guiding the ECJ in the interpretation of EU Law, but also at legislative level, pushing the EU legislature in drafting rules and principles to be then applied at national level. On the crucial impact the principle of effectiveness has in order to pursue consumer protection against unfair commercial practice, see F.P. Patti, ' 'Fraud' and 'Misleading Commercial Practices': Modernizing the Law of Defects in Consent' *European Review of Contract Law*, 312-315 (2016). On the meaning, extension and crystallization of the principle of effectiveness in EU contract law, see N. Reich, 'The Principle of Effectiveness and EU Contract Law' *Osservatorio del diritto civile e commerciale*, 337 (2013). See also S. Pagliantini, 'Effettività della tutela giurisdizionale, 'consumer welfare' e diritto europeo dei contratti nel canone interpretativo della Corte di giustizia: traccia per uno sguardo d'insieme' *Nuove leggi civili commentate*, 804 (2014).

[13] Although the Italian legislature transposed almost literally the mentioned rules, some mismatches have been highlighted as triggering interpretative issues. See F. Massa, 'Art 20', in V. Cuffaro ed, *Codice del consumo e norme collegate* (Milano: Giuffrè, 5th ed, 2019), 156-158. On the Italian implementation of Directive 2005/29/EC, and its defects, see G. De Cristofaro, 'L'attuazione della direttiva 2005/29/CE nell'ordinamento italiano: profili generali', in Id, *Pratiche commerciali scorrette* n 11 above.

[14] The open-ended definition laid down into Art 20 would have, thus, a subsidiary function: G. De Cristofaro, 'La Direttiva 2005/29/CE. Contenuti, *rationes*, caratteristiche', in Id, *Le pratiche commerciali sleali tra imprese e consumatori: la direttiva 2005/29/CE e il diritto italiano* (Torino: Giappichelli, 2007), 10; C. Granelli, 'Le "pratiche commerciali scorrette" tra imprese e consumatori: l'attuazione della direttiva 2005/29/CE modifica il codice del consumo' *Obbligazioni e contratti*, 776, 777 (2007).

clause of Art 20. Which is to say that the practice does not meet the acceptable standards of professional diligence and it is able to significantly impair the average consumer's freedom of choice. Only by combining those elements and the prescriptions laid down by the black lists may the interpreter identify a prohibited commercial practice, as the lists only provide for presumptively (misleading and) aggressive practices.[15]

The latter approach appears to be more suitable within the investigations carried out by the AGCM, which does not limit its analysis to a comparison between the suspect conduct and those on the list, but verifies that, on a case-by-case basis, the requirements of infringement of professional diligence and ability to distort the consumer's consent are met.[16]

On the contrary, the ECJ's answer to the first preliminary question, aiming at qualifying the conduct put in place by Wind and Vodafone, seems to have endorsed the former approach, following, on the method, the Opinion of the Advocate General in the case.[17] According to the Advocate General, once the conduct qualifies as unsolicited supply as per Annex I, pt 29, there is no need for further investigation.

On the merits, however, in the case at issue, according to the Advocate General, following the definition of unsolicited supply, a service does not qualify as unsolicited supply simply by supplying an unsolicited service. Rather, the trader must also demand payment for what it supplied. To the Advocate General, the conduct at issue does not meet the latter requirement, simply corresponding to an undue demand,

> 'the sole complaint against the operator being the failure to provide the information that the services were pre-loaded on the SIM card'.[18]

Failure of matching the definition of inertia selling by Annex I, pt 29 opens the investigation to the broader definition of aggressive commercial practice (Arts 8 and 9 of Directive), which, however, does not exhibit the characteristics thereby provided: to the Advocate General, the conduct at issue lacks the requirement of 'pressure', rather corresponding to the failure of disclosing information.[19]

However, the arguments on the method are the only ones that the ECJ

[15] M. Libertini, n 10 above, 86; M. Rabitti, 'Art 20. Le pratiche commerciali scorrette', in E. Minervini and L. Rossi Carleo eds, *Le modifiche al codice del consumo* (Torino: Giappichelli, 2009), 147; C. Castronovo and S. Mazzamuto, *Manuale di diritto privato europeo* (Milano: Giuffrè, 2007), III, 466.

[16] As occurred in the case at issue: see AGCM decisions nos 23356 and 23357, n 1 above. Such an approach seems also more successful also among Italian scholars: F. Massa, n 13 above, 156-158.

[17] See Opinion of Advocate General Campos-Sánchez Bordona (para 44), available at www.eur-lex.europa.eu.

[18] ibid paras 56-58.

[19] ibid paras 62-70.

shares with the Advocate General. On the merits, the Court does not endorse the above mentioned arguments.

Stressing the indications offered by recital 17 of Directive 2005/29/EC, the ECJ argues that, comparing the conduct at issue with those of the black list, there is no need for a case-by-case assessment against the provisions of Arts 5 to 9 (20 to 26 of the Italian Consumer Code).[20]

Because the subjective scope of application of Directive 2005/29/EC was undisputed,[21] the Court immediately searched for a 'coverage' within the list of 'practices aggressive in all circumstances', particularly by abovementioned point 29 of Annex I, devoted to 'inertia selling'.

Before having been normatively defined, inertia selling had obviously an 'economic pedigree': it is a well-known marketing strategy practice where suppliers deliver goods or perform services for a consumer without the consumer's knowledge or request and then follow it up with invoices demanding payment. Businesses benefit from such a strategy, as many consumers will prefer to keep the unsolicited goods or services rather than to return them at a later stage.[22]

The EU legislature chose to focus the normative definition on the substance of the (non)bargain:[23] the trader demands payment from a consumer for a product or service which has been provided to that consumer without the consumer soliciting it. In other words: the business imposes services (to be paid) to the consumer. The ECJ easily paved its way to find the match it was searching for by saying that 'it is sufficient (...) to establish whether the provision of those services at issue can be considered unsolicited by the consumer'.

The ECJ recalled the underlying rationale of the key word 'unsolicited': a

[20] In so doing, the ECJ follows a direction already expressed recently: see Case C-310/15 *Vincent Deroo-Blanquart* v *Sony Europe Limited*, Judgment of 7 September 2016, para 29; Case C-435/11 *CHS Tour Services GmbH* v *Team4 Travel GmbH*, Judgment of 19 September 2013, para 38, and the previous case-law there cited, all available at www.eur-lex.europa.eu.

[21] See E. Bargelli, 'La nuova disciplina delle pratiche commerciali tra professionisti e consumatori: ambito di applicazione (art. 18, lett. a)-d) e art. 19, comma 1°, c. cons.)', in G. De Cristofaro ed, *Pratiche commerciali scorrette* n 13 above, 95.

[22] In his editorial, T. Wasserman, 'Inertia: A marketer's best friend' 42 *Brandweek*, 28 (2001) evocatively describes inertia selling as a marketing strategy: 'though always ethically dubious, inertia selling still survives today. Companies hawk everything from healthcare memberships to credit cards using a form of inertia selling called opt-out marketing; meaning if you do not expressly say you do not want something, you will get it and then have to pay for it. But for marketers, inertia is mostly a good thing. It would probably be a lot tougher, for instance, if people took the time to read Consumer Reports, clip coupons and bake their own bread. Instead, people are notoriously lazy and that is not likely to change any time soon. Marketers should thank their lucky stars for inertia. That is, if they can get properly motivated to do so'.

[23] For some comparative C. Van Heerden, 'Unsolicited goods or services in terms of the Consumer Protection Act 68 of 2008' 4 *International Journal of Private Law*, 553 (2011) investigates how the concept of unsolicited goods and services is dealt with in the South African Consumer Protection Act. And, for a German overview, J. Schmidt, ' 'Inertia selling' de lege lata und de lege ferenda – die Reform im europäischen und deutschen Recht' *Zeitschrift fur das Privatrecht der Europäischen Union*, 73 (2014).

consumer soliciting a product is a consumer making a free choice. A choice is free only where 'the information provided by the trader to the consumer is clear and adequate'.[24] And, the Court reasoned, what information would be crucial for the business to provide to the consumer if not the price? A fully informed transactional decision requires a full understanding of what is the price for the product (or service).[25]

Pre-activating functions on the SIM cards without informing the consumer of the existence of the functions or of the costs associated with them means of course jeopardizing the formation of a free consent to the transaction.

The Court points out that, considering the 'average consumer' as a benchmark,[26] the choice of browsing the internet or using the voice mail might not be considered free if the consumer is not aware of the costs of such actions. Furthermore, those services could technically work even without the consumer noticing it (eg, the mobile phone establishing a connection automatically).

On top of that, the Court considers immaterial that the consumer could make the 'opposite choice' of deactivating the services, depending on his/her ability and knowledge of technical opportunity.

These being the arguments offered, one could ask why the ECJ did not also make some effort to analyze the aspect of the demand for payment of the supplied services, which is still a structural part of the definition of inertia selling.[27] To the ECJ, unsolicited services for which there is a cost qualify as inertia selling if they are technically connectable without the consumer's knowledge.

Such a focus on the sole requirement of 'inertia', rather than on the demand for payment may be explained in light of the 'policy argument' that closes the part of the ruling dedicated to the first issue. The Court recalls that Directive 2005/29/EC aims to achieve a high level of consumer protection, assuming consumers are in a weaker position particularly with regard to information

[24] The Court cites the Case C-428/11 *Purely Creative and Others*, Judgment of 18 October 2012, available at www.eurlex.europa.eu, where '(c)lear and sufficient consumer information is important where the trader wishes to ensure that consumers can identify a prize and assess its nature' (para 53).

[25] Reference is made (at para 47) to the Case C-611/14 *Canal Digital Danmark A/S*, Judgment of 26 October 2016, where '(i)n so far as the price is, in principle, a determining factor in the consumer's mind, when it must make a transactional decision, it must be considered necessary information to enable the consumer to make such a fully informed decision' (para 55).

[26] The investigation on the consumer's technical capability is a task left to the referring court. Indeed, according to Recital 18 of Directive 2005/29/EC, such analysis consists of establishing the typical reaction of the average consumer in circumstances such as those at issue in the main proceedings.

[27] Any case of aggressive practice present two features: a structural nature (the conduct incisive on the freedom of choice through threats, coercions or physical or psychological pressures) and a functional nature (the effect of the conduct being that of – even potentially – convincing the consumer to make a transactional decision which he or she would not have taken otherwise). See E. Labella, *Pratiche commerciali scorrette e autonomia privata* (Torino: Giappichelli, 2018), 42-44.

asymmetry; this is particularly true in a sector as technical as that of electronic communications by mobile telephony, where 'it cannot be denied that there is a major imbalance of information and expertise between the parties'.[28]

Therefore, the Court cuts off the analysis of Arts 8 and 9 of Directive 2005/29/EC, simply verifying that conduct whereby a telecommunications operator sells SIM cards on which services are pre-loaded without first informing the consumer of that pre-loading or of the cost of those services corresponds to the category of inertia selling, triggering the competence of the AGCM.

In analyzing the conduct at issue, the ECJ adopted an extensive approach (omitting to check the general requirements of Arts 8 and 9), pursuing a policy of utmost consumer protection. This is not surprising; aggressive commercial practices present a striking example of the abuse that businesses might inflict to their weaker counterparties (consumers), and rules about unfair commercial practices play a pivotal role in granting effective protection to consumers.[29]

III. The 'Speciality Principle' in the Light of (Effective) Consumer Protection

The Wind and Vodafone litigation concerns the roles of administrative independent bodies charged with the task of policing unfair commercial practices that are able to harm consumers.

Given the answer to the first issue – ie, the challenged conduct qualifies as unsolicited supply of services (inertia selling) under Directive 2005/29/EC – the second issue arises whether this body of rules should 'take a step back', ceding to other EU rules and descending national provisions regulating the specific sector of telecommunications.

The issue arises as under Art 3, para 4 of Directive 2005/29/EC (as, then, under Art 19, para 3 of the Italian Consumer Code)

> 'in the case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects'.

This provision crystallizes one of the bases of EU Law, ie the principle of speciality, which serves not one, but several functions.

[28] Indeed, A. Fachechi, 'Gli orientamenti dell'Autorità garante della concorrenza e del mercato in materia di pratiche commerciali scorrette (Anno 2016)' *Concorrenza e mercato*, 413-414, observes that unsolicited services are commonly supplied (as ancillary to those already provided under 'basic' contracts) within the markets of telephone, gas and electricity and often through teleselling marketing strategies. The supply of unsolicited services is a technique commonly used to promote transactions: see G. De Cristofaro, 'Le «forniture non richieste»', in Id, *Pratiche commerciali scorrette* n 13 above, 433.

[29] F.P. Patti, n 12 above.

Firstly, this broad rule may be seen as a tool to solve a pathology: as a rule of selective reference to those (other) provisions of EU law which deal with very specific aspects, it comes into play only in a situation of 'conflict', providing a remedy against a pathology.[30]

In a quite different direction, the principle of speciality might be intended as a glue of the EU Law system, essential to enable the coherence and the harmony of its interpretation mechanism.[31]

In fact, from a broader perspective, the speciality principle must be seen in connection with that of legality: to serve the public interest (here we may think of consumer protection), a legal system cannot but limit powers given by the legislature to different administrative bodies. To do so, powers are specifically defined and are conferred to achieve specific goals: those which must be abided by respective institutions.[32]

The abovementioned functions are not mutually exclusive, but rather compound one another, designing the speciality principle as a flexible tool able to fulfil different interpretative objectives, the first of which is effectiveness in implementing a policy goal (here consumer protection against aggressive commercial practices).

A very helpful and promising tool, thus; however, the Italian vicissitude of the AGCM competence in regulated markets showed it to be problematic as well.[33]

As anticipated, the EU legislator, aware of the significance and the proliferation of unfair commercial practices, provided for a rule (Art 3, para 4 of Directive 2005/29/EC) on the prevalence of other EU rules regulating specific aspects of unfair commercial practices.

However, when Art 19, para 3 of the Italian Consumer Code came to be implemented, the relationship between general and sectoral norms gave rise to

[30] This is an extreme situation, when the rule set by Art 3, para 4 reacts to a normative contrast. According to the Advocate General (Opinion, para 98), such a perspective cannot exhaust the role of the speciality principle.

[31] In this direction seems to work Recital 10 of Directive 2005/29/EC, where '(i)t is necessary to ensure that the relationship between this Directive and existing Community law is coherent, particularly where detailed provisions on unfair commercial practices apply to specific sectors. (…) This Directive accordingly applies only insofar as there are no specific Community law provisions regulating specific aspects of unfair commercial practices, such as information requirements and rules on the way the information is presented to the consumer. It provides protection for consumers where there is no specific sectoral legislation at Community level and prohibits traders from creating a false impression of the nature of products. (...) This Directive consequently complements the Community acquis, which is applicable to commercial practices harming consumers' economic interests'.

[32] According to J.H. Jans, 'European Law and the Inapplicability of the 'Speciality Principle' 1 *Review of European Administrative Law*, 35 (2008), '(w)hen exercising public law powers, administrative authorities may not further public interests other than those with a view to which the power was conferred'.

[33] To understand in brief how this chain of events developed, see A. Ciatti Càimi, 'Art 27', in E. Capobianco et al eds, *Codice del consumo annotato con la dottrina e la giurisprudenza* (Napoli: Edizioni Scientifiche Italiane, 2nd ed, 2018), 111-113.

opposite interpretations, supported by different branches of Administrative Courts. To sum up, The Administrative Supreme Court (*Consiglio di Stato*) argued that, according to the principle of speciality, in fields where a sectoral regulation exists, the general rules (and so the competence of the AGCM) must cede, the former prevailing.[34] Later on, the Administrative Court of first instance supported the opposite view, under which general and sector-specific regulations must be intended as complementary, the general rules laid down in the Italian Consumer Code providing for an additional protection, aimed at increasing that offered by sectoral rules.[35] Moreover, the Plenary of *Consiglio di Stato*, with regard to the telecommunication market, argued that compliance with the principle of speciality requires that, to avoid overlap between regulations, the general norm must cede where a sectoral norm regulates the case in a more specific way.[36] A broad discussion arose among Italian scholars on the uncertainty such a jurisprudence triggered, along with a strong concern that the speciality principle, by sector and not by single norms might put in jeopardy the actual scope of the general regulation laid down into the Italian Consumer Code.[37]

Furthermore, in 2013, the European Commission started an infringement proceeding by virtue of Art 258 TFUE against Italy for not having correctly implemented the Directive 2005/29/EC, and precisely for having mistakenly interpreted its Art 3, para 4 devoted to the speciality principle.

Pushed by these circumstances, in 2014 the Italian legislator inserted[38] paragraph (*comma*) 1-*bis* into Art 27 of the Italian Consumer Code,[39] definitively

[34] Consiglio di Stato 3 December 2008 no 3999, available at www.personaedanno.it, opinion on financial intermediation.

[35] Tribunale Amministrativo regionale Lazio-Roma 8 November 2009 no 8400 and Tribunale Amministrativo regionale Lazio-Roma 15 June 2009 no 5620, all available at www.giustiziaamministrativa.it.

[36] Consiglio di Stato (Plenary) 11 May 2012 nos 11, 12, 13, 15 and 16, all available at www.giustiziaamministrativa.it.

[37] G. De Cristofaro, 'Art 19', in Id and A. Zaccaria eds, *Commentario breve al diritto dei consumatori* (Padova: CEDAM, 2013), 144. For an overview on the mentioned debate see L. Lorenzoni, 'Il riparto di competenze tra autorità indipendenti nella repressione delle pratiche commerciali scorrette' *Italian Antitrust Review*, 83 (2015) and P. Fusaro, 'Il riparto di competenze tra Autorità amministrative indipendenti nella recente giurisprudenza del Consiglio di Stato', available at www.federalismi.it, 3 April 2013, 1-29.

[38] By Art 1, para 6, letter *a*), of decreto legislativo 21 February 2014 no 21.

[39] '*Anche nei settori regolati, ai sensi dell'articolo 19, comma 3, la competenza ad intervenire nei confronti delle condotte dei professionisti che integrano una pratica commerciale scorretta, fermo restando il rispetto della regolazione vigente, spetta, in via esclusiva, all'Autorità garante della concorrenza e del mercato, che la esercita in base ai poteri di cui al presente articolo, acquisito il parere dell'Autorità di regolazione competente. Resta ferma la competenza delle Autorità di regolazione ad esercitare i propri poteri nelle ipotesi di violazione della regolazione che non integrino gli estremi di una pratica commerciale scorretta. Le Autorità possono disciplinare con protocolli di intesa gli aspetti applicativi e procedimentali della reciproca collaborazione, nel quadro delle rispettive competenze*' (Also within regulated markets, the competence to investigate and sanction those conducts which may be considered unfair commercial practices, in compliance with the rules in force, is given to the Antitrust Authority, which obtains the

prescribing that the AGCM has exclusive competence over unfair commercial practices even in regulated sectors, whereby the specific regulatory authority must give its – non-binding – opinion.

Complementarity between regulations won the battle, at least at the legislative level.

Notwithstanding the clear literal meaning of Art 27, para 1-*bis*, the case at issue shows that the Administrative Supreme Court felt the need for a further (and hopefully definitive) clarification. It was still unclear to the referring court what to do when presented with a 'contrast between EU rules' triggering the applicability of the speciality principle, as Directives 2002/21/EC and 2002/22/EC – regulating the market of telecommunications – also contain rules on information that the trader must disclose to consumers. The case at issue seems thus a test case for understanding the relationship between general and sectorial regulation, between Antitrust and Sectorial Authorities.

On this issue, the ECJ endorsed the Advocate General's Opinion, which remarkably dissected the question in two sub issues.

The first issue to solve is to what the speciality principle applies: is it a criterion to choose between sets of rules (sectorial choice), and, thus, where a regulation dedicated to unfair commercial practices into a specific market exists, the general rules are cut off? Intuitively, the answer is no: the speciality principle, as laid down into Art 3, para 4 works between single norms, preferring those regulating 'specific aspects' in the sectorial market.[40]

Second: what is the nature of the norms in potential conflict? A contrast able to be solved by the principle of speciality is only that between EU rules, and not between national rules. In other words: only EU sources of law might generate a contrast.[41]

Finally, what degree of divergence rises to 'contrast' in our context? Here again, the ECJ endorses the Opinion of the Advocate General[42] by arguing that

opinion of the relevant regulatory authority. Still, competence to investigate and sanction those conducts which do not represent unfair commercial practices is of the relevant regulatory authority. The Authorities may regulate the application and procedural aspects of their mutual collaboration through memoranda of understanding, within their respective competences).

[40] The Advocate General stresses (Opinion, para 100) that not only the literal meaning supports a strict interpretation, but also 'the fact that Directive 2005/29/EC has established 'a high common level of consumer protection' as a result of the 'high level of convergence achieved by the approximation of national provisions through this Directive'. (...) (A)ny non-application of its provisions 'runs the risk of breaching the safety net established by that directive where the other EU rules – those with primacy – do not guarantee as high a level of consumer protection' (citing Opinion on Case C-632/16 *Dyson Ltd and Dyson BV* v *BSH Home Appliances NV*, paras 81-85).

[41] In line with the Opinion of Advocate General (paras 115-118) in which a noteworthy observation: 'here EU law allows Member States to regulate specific aspects of unfair commercial practices in a potentially stricter fashion than Directive 2005/29/EC, the latter's replacement will come not from the national provision enacted pursuant to that option but from the (sectoral) directive permitting this' (para 120).

[42] Opinion of Advocate General (paras 124-126).

a mere divergence does not correspond to a 'contrast'; rather, a conflict exists

> 'only where provisions, other than those of Directive 2005/29, which regulate specific aspects of unfair business practices, impose on undertakings, in such a way as to leave them no margin for discretion, obligations which are incompatible with those laid down in Directive 2005/29'.[43]

Applying those criteria to the case at issue means thus investigating whether the Universal Service Directive and the Framework Directive (EU sectorial regulations, empowering the NRA – AGCom in Italy) contain norms on aggressive commercial practices such as inertia selling, offering incompatible normative solutions.

This exercise requires a little effort: bearing in mind that both the Framework Directive[44] and the Universal Service Directive[45] do not provide for full harmonization of consumer-protection aspects, although it is true that Art 20, para 1 of Universal Service Directive requires providers of electronic communications services to include certain information in the contract;[46] once again a clear norm (Art 4, para 1 of Universal Service Directive) states that provisions of that directive concerning end-users' rights apply without prejudice to Union rules on consumer protection and national rules in conformity with Union rules. Because the applicability of Directive 2005/29/EC is not affected by the provisions of the Universal Service Directive, there might be no conflict.

No conflict means that general and sectorial rules contrasting aggressive commercial practices must be seen as compatible and complementary in light (and with the aim) of ensuring not only a high level of coherence and harmony within the interpretation of EU Law, but also, let's say mostly, to ensure that consumer protection is effective. For sure, the general rules on unfair commercial practices provide for a higher level of protection, which may not be set aside by extensively interpreting a principle of EU Law which, as said, aims at reaching a high level of functioning of the entire EU system.

The principle of speciality, as identified above, operates not only at the

[43] ECJ, para 61.

[44] The Universal Service Directive, concerning the provision of electronic communications networks and services to end-users, aims to ensure the availability throughout the EU of good-quality publicly available services through effective competition and choice and to deal with circumstances in which the needs of end-users are not satisfactorily met by the market.

[45] According to the Framework Directive, the NRAs, in carrying out their tasks, are required to promote the interests of citizens of the Union by ensuring a high level of protection for consumers (Art 8, para 4 letter *b*).

[46] Pursuant to its Art 20, para 1, Member States are to ensure that, when subscribing to services providing connection to a public communications network and/or publicly available electronic communications services, consumers, and other end-users so requesting, have a right to a contract with an undertaking or undertakings providing such connection and/or services. That provision lists the factors that the contract must specify in a clear, comprehensive and easily accessible form as a minimum.

theoretical level: it has (to have) its practical implementation. This trivial remark calls into question another very basic principle of EU law – that of proper co-operation. With respect to the relationship between the EU and Member States, the constitutional principle of loyal co-operation, as laid down in Art 4, para 3 of the TEU,[47] implies a mutual legal obligation on the EU and its Member States 'to assist each other in carrying out the tasks which flow from the Treaties'.[48] Broadly intended, as is often the case when different (autonomous) legal systems are strictly connected to one another, it imposes a great and widespread effort to put in place any measure useful to reach the common goals (here, the most effective consumer protection).[49]

Applied to the case at hand, the obligation of loyal co-operation could tie the administrative bodies charged with powers of decision making within the same area – that of consumers' protection against the telecommunications providers (ie, AGCM and AGCom).

Years ago, the Italian Constitutional Court, in a dispute on the liberalization of the transportation sector, argued that in cases where competition issues are at stake there should be no room for the principle of loyal co-operation with independent administrative authorities, because competition issues an exclusive competence of the State; thus, the cooperative model should be simply set aside, in favor of mechanisms of 'procedural participation'.[50] Scholars challenged such statements, not only because laconically expressed, but firstly because the principle of loyal co-operation, even where involving national dynamics, is recognized as a

[47] Art 4, para 3 of the Consolidated Version of the Treaty on European Union (2012) OJ C 326/13: 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives'.

[48] An introduction on the constitutional foundation of the principle of co-operation may be read in P. Van Elsuwege, 'The duty of sincere cooperation and its implications for autonomous Member State action in the field of external relations', in M. Varju ed, *Between Compliance and Particularism: Member State Interests and European Union Law* (Basel: Springer, 2019), 285.

[49] Legal systems and their complexity imply a strong interaction: a process which must always adopt a functional perspective, avoiding strict formalism. Loyal cooperation as a key tool to build a unitary system is the topic P. Perlingieri, *La leale collaborazione tra Corte costituzionale e Corti europee. Per un unitario sistema ordinamentale* (Napoli: Edizioni Scientifiche Italiane, 2008) addresses with a particular view on the fundamental rights of individuals. At national level, the constitutional principle of co-operation went through a difficult path, being in a first phase underestimated by the Italian Constitutional Court; after the constitutional reform of 2001, rebalancing competences and powers between State and Regions, the principle of loyal cooperation as recognized has its basis into the framework of 'cooperative regionalism' laid down into Title V of the Italian Constitution. See on this A. Gratteri, 'La faticosa emersione del principio di leale collaborazione nel quadro costituzionale', in E. Bettinelli and F. Rigano eds, *La riforma del Titolo V della Costituzione e la giurisprudenza costituzionale. Atti del seminario di Pavia svoltosi il 6-7 giugno 2003* (Torino: Giappichelli, 2004), 426-449.

[50] Corte Costituzionale 15 March 2013 no 41, available at www.federalismi.it.

general constitutional principle. The technical DNA characterizing administrative independent authorities seems not to be an argument for the efficiency of co-operation to be put at jeopardy.[51]

Here, the principle of co-operation, in conjunction with (and as a practical outcome of) the principle of speciality, requires the administrative bodies at stake to collaborate in respecting the boundaries set out in light of the speciality principle, and in communicating between each other in the aim of the unique goal they pursue.[52] To do so, a specific protocol of understanding has been enacted in 2016 to detail the activities which, addressing unfair commercial practices in the telecommunication sector, may be carried out through cooperation.[53]

IV. Concluding Remarks

It is pretty well known that the policy goal of consumer protection is a 'shared task' between all EU institutions: not only is it the subject of EU legislative action, but it is also managed at the jurisdictional level. And this is not the first time the ECJ played an important role in making EU law effective.

The law of unfair commercial practices is an important test for measuring the above-mentioned respective roles; the case at issue shows how important may be that the policy of consumer protection is effective.

The ECJ, in its dialogue with the Italian Supreme Administrative Court, gave an extensive interpretation of the notion of inertia selling, including in the definition laid down in Annex I to Directive on Unfair Commercial Practice the case of a provider which fails to inform consumers of pre-loaded paid services in the SIM cards sold. One may be disappointed with arguments offered by the Court to support such a ruling, lacking a deep analysis of any of the elements the Directive gives to the interpreters to identify a case of aggressive commercial practice. The feeling is that, on a policy ground, awareness of consumers, especially in the telecommunication sector, is a key aspect for an effective EU protection policy on those (nowadays) basic services. And (lack of) awareness was enough for the Court (not for the Advocate General in the case).

The ECJ gave, instead, a strict interpretation of the principle of speciality, resulting, on the one side, in the applicability of the general rules on unfair commercial practices; on the other side, in the competence of the Antitrust

[51] Challenges by A. Cardone, 'Autorità indipendenti, tutela della concorrenza e leale collaborazione: troppi "automatismi" a danno dell'autonomia?' *Rivista della Regolazione dei mercati*, 190 (2014). See also M. Giachetti Fantini, 'Autorità di regolazione dei trasporti, tutela della concorrenza e principio di leale collaborazione' *Federalismi.it*, 14 May 2014.

[52] See A.M. Slaughter, 'A Global Community of Courts' 44 *Harvard International Law Journal*, 191 (2003), where cooperation means also disregard the formal boundaries of sectorial sciences and national geographical borders, aiming at the function pursued (ie, solving the dispute at stake).

[53] Protocollo d'intesa AGCM - AGCom 23 dicembre 2016, available at www.agcm.it.

Authority to investigate and sanction businesses even within regulated markets, which are usually the realms of National Regulatory Authorities. Aggressive commercial practices remain a problem to be dealt with through the strongest rules and bodies.

Extensive, strict. Interpretative choices follow policy goals: in the present case, that of effective consumer protection.

Hard Cases

Algorithmic Decisions and Transparency: Designing Remedies in View of the Principle of Accountability

Michael W. Monterossi*

Abstract

The lack of explainability of algorithms' decision-making processes raises numerous issues, both when used by the public administration and private subjects. The Council of State has intervened in this matter, by establishing some principles to be followed when using automated IT systems in executing administrative activity. However, these principles, to some extent, have been pondered in the 2016 EU General Data Protection Regulation. The pivotal point towards which the legal discussion is heading regards the necessity to develop algorithms in a manner that renders their decisions transparent. In this respect, the principle of accountability, as foreseen by the Regulation, may acquire ever more relevance, as a tool for re-adapting the rules governing diverse areas of Private Law to the new 'smart' technological scenario.

I. Governing Algorithmic Decisions

In a recent sentence, the Italian Council of State has coped with some of the critical issues which stem from the use of Information Technology (IT) systems based on algorithms, in order to execute the activity of the public administration.[1]

The ruling inserts itself, as a further thread, into a thick fabric of administrative sentences, which wraps around the activity performed by a 'mindless' algorithm.[2] The legal case originates from the complaints filed by a multitude of teachers, whose public administration hiring procedure was entrusted entirely to a system managed by an algorithm. More precisely, the algorithm was assigned the task of managing the placement phase for the teachers within the national territory. The assignment of posts was based on certain parameters among which, in particular, the preferences expressed by the teachers regarding the location of hiring as well as the subject to be taught and the school level and grade. These preferences were to be satisfied according to the order of merit ranking, as

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[1] Consiglio di Stato 8 April 2019 no 2270, available at www.leggiditaliaprofessionale.it.

[2] See in particular Tribunale amministrativo regionale Lazio-Roma 10 September 2018 no 9224; Tribunale amministrativo regionale Lazio-Roma 9 November 2018 no 10828; Tribunale amministrativo regionale Lazio-Roma 13 September 2019 no 10963 and 10964; Tribunale amministrativo regionale Lazio-Roma 27 May 2019 no 6606, all available at www.giustiziaamministrativa.it.

established by law. However, the algorithm decided to act in its own way: it sent the teachers ranked the highest far from their provinces of residence and assigned them subjects and levels of schools which they had not requested. On the contrary, teachers with lower scores, and thus lower in the same ranking, managed to benefit from the assignments of teaching posts in their areas of residence and according to the other preferences expressed in their relative applications.

The Council of State recognized that the results of the automatized procedure were 'illogical' and 'irrational' and that, consequently, there had been a violation of the principles and norms of law which were to be applied. Thus, by reforming the sentence handed down by the court of first instance, it established that the teachers should be assigned to available posts in places which respected the ranking order and the teachers' preferences.

The case provided the opportunity for the Council of State to face the insidious question of whether, and within which limits, the public administration can make use of algorithms – defined by the court as an 'ordered sequence of calculations' – in order to expedite its activity.

According to the Council of State, the use of algorithms, especially when carrying out 'serial and standardized procedures',[3] is not only possible but must also be encouraged. In fact, the use of an automatized IT procedure, when compared to activity carried out by humans, guarantees a twofold advantage. On one hand, the algorithm – like all machines – enhances human ability by ensuring a reduction in the time needed to reach a final decision; on the other, and at the same time, it limits 'human risk' factors (to a certain extent inevitable) associated with possible negligence, if not outright malice, on the part of public officials – those in the flesh and blood – in charge of the administrative activity.

In light of this, the Council of State points out that the technological alignment within the public administration is in accordance with the canons of efficiency and cost-effectiveness for administrative action which, in compliance with the principles of the Italian Constitution regarding the good functioning of administrative action (Art 97 Constitution), impose on the administration the pursuit of its own ends with the least possible expenditure of time and resources.

At any rate, the use of IT systems-based procedures must always comply with the principles that regulate administrative activity, among which, in particular, that of publicity and transparency (Art 1, legge 7 August 1990 no 241).[4] To such an end, the court holds that two requirements must be satisfied. Firstly, the mechanism through which the 'robotic decision' is put into effect must be 'knowable'. Secondly, the algorithmic rule must be subject to the full cognition of and review by the administrative judge. Both requirements are instrumental

[3] This observation recalls the remarks offered by F. Patroni Griffi, 'La decisione robotica e il giudice amministrativo', speech given at the 'Decisione robotica' conference, organized as part of the 'Leibniz' Seminari per la teoria e la logica del diritto – Roma, Accademia dei Lincei, 5 July 2018, available at https://tinyurl.com/scglzey (last visited 30 December 2019).

[4] See Gazzetta ufficiale 18 August 1990 no 192.

in allowing the judge to examine how the administrative power was concretely exercised, by conducting a full assessment of the legitimacy of the decision.

However, the jurisprudence of the Regional Administrative Tribunal (TAR) seems to move in a different direction. Indeed, their decisions – both precedent and successive to the sentence under comment – seem, at first glance, to be in open contrast with the arguments developed by the Council of State.[5] The point of discord, which marks the difference between the opinions, is the necessary presence of human officers to accompany and guide the administrative activity carried out by the algorithm, as a prerequisite for guaranteeing compliance with the principles that regulate public administration activity.

According to the Council, in fact, entrusting an activity of mere automatic classification to an (efficient) electronic elaborator – even in the absence of human intervention – is nothing more than the consequence of the (necessary) updating of the principle of the good functioning of the public administration (Art 97, para 2, Constitution) to the new technological scenario. Conversely, the sentences handed down by the TAR placed emphasis on the fact that the use of algorithms within an administrative activity still requires the presence of a 'human' official as '*dominus*' of the procedure along with the employed computer system.[6] More in detail, the TAR judges hold that an algorithm cannot substitute *tout court* the cognitive and acquisitive activity as well as that of judgments which, in the ambit of the administrative procedure, is entrusted to the control and supervision of a human officer.[7]

The risk, in absence of such an intervention, is that the algorithm – owing to its 'impersonal' nature – undermines the institutes of participation, transparency and access that regulate the citizen-public administration relationship, which are all functionally oriented to allow the former to have knowledge of the activity conducted by the latter. Furthermore, and above all, what could be compromised is the duty to motivate administrative decisions, thus impeding the interested party, before, and the judge invoked, after, from understanding the logical-juridical *iter* followed to achieve these decisions.[8] A different solution would result in a violation of the constitutional values established by Arts 3, 24, 97 of the Italian Constitution as well as Art 6 of the European Convention on Human Rights.[9]

[5] See n 2 above.

[6] Tribunale amministrativo regionale Lazio-Roma 13 September 2019 no 10963, available at www.giustiziaamministrativa.it.

[7] The necessary presence of a person in charge of the proceeding, known as 'responsabile del procedimento', is foreseen by Art 5, legge 7 August 1990 no 241. See for deeper analyses F. Patroni Griffi, 'La l. 7 agosto 1990 n. 241 a due anni dall'entrata in vigore. Termini e responsabile del procedimento; partecipazione procedimentale' *Foro italiano*, III, 66 (1993).

[8] ibid.

[9] Tribunale amministrativo regionale Lazio-Roma 10 September 2018 no 9224, available at www.giustiziaamministrativa.it. See L. Viola, 'L'intelligenza artificiale nel procedimento e nel processo amministrativo: lo stato dell'arte' *Foro italiano*, 1598 (2018); P. Otranto, 'Decisione amministrativa e digitalizzazione della p.a.' *federalismi.it*, 15 (2018).

After all, as noted by some authors in the legal doctrine,[10] the problem posed by algorithms in these cases does not directly regard the correctness of the decision but rather the correspondence of the decision-making process to the criteria of the just process. A position which seems to be shared by both legal doctrine and jurisprudence, even in other legal systems called upon to respond to similar issues,[11] due to the importance which, in case of algorithmic decisions, is acquired by judicial review.[12]

On closer inspection, in fact, the two orientations recalled are not so far apart as it may seem. The Council of State, in fact, does not exclude the necessity for the integration of human activity in the sphere of procedures performed by the algorithm, which, on the contrary, is considered essential to guarantee the respect of the principles governing administrative activity. The difference lies in the fact that, according to the Council of State, the co-operation between

[10] See D.U. Galetta and J.G. Corvalán, 'Intelligenza Artificiale per una Pubblica Amministrazione 4.0? Potenzialità, rischi e sfide della rivoluzione tecnologica in atto' *federalismi.it*, 1, 18 (2019).

[11] Similar issues were faced by the French *Conseil constitutionnel*, in the Decision no 2018-765 DC of 12 June 2018, available at https://tinyurl.com/vmfyna8 (last visited 30 December 2019). The Council was called upon to evaluate the constitutional legitimacy of the dispositions introduced by Loi 20 June 2018 no 2018-493, which modified Loi 6 January 1978 no 78-17 *relative à l'informatique, aux fichiers et aux libertés* in order to adapt national legislation to the European Parliament and Council Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (2016) OJ L119/1.

The applicants contested the provisions that allowed the administration to adopt individual decisions having legal effects or decisions which significantly affect a person only on the basis of an algorithm (see Art 21 of Loi 20 June 2018 no 2018-493 which modified Art 10 of the aforementioned Loi 6 January 1978 no 78-17).

According to them, the use of self-learning algorithms, which entailed the constant revisions of the rules on the basis of which they operate, could make it impossible for the administration to comprehend the logic behind that decision-making process employed by the algorithms. Therefore, there would be no guarantee that the rules applied by the algorithms are in compliance with the law and the administration would no longer have any regulatory power over the algorithms to define their own rules.

However, the Council noted that, on one hand, there is no abandonment of the competence of regulatory power considering that the decision can only be taken on a legal basis and, on the other, the administration has in any case to comply with several conditions. In particular, the data processor must always be able to understand the functioning of the algorithmic process as well as the way in which it evolves, in order to explain to the person interested – in detail and in an intelligible manner – the way in which the processing was carried out. It follows that the public administration cannot use those algorithms whose automatic functioning is not understandable by the person in charge of processing. See on this regard Art R 311-3-1-1 and Art R. 311-3-1-1-2 of the Décret of 14 March 2017 no 2017-330 setting the conditions of application of Art L. 311-3-1 of Loi 6 January 1978 no 78-17.

[12] F. Patroni Griffi, 'La decisione' n 3 above, 4-5, who highlights that by making use of a robotic decision, the administration burdens the judge with its role of 'mediation' of the interests involved, of evaluation and at times of investigation into facts. Therefore, when evaluating the correctness of the algorithm, that is, of the decision-making process and of its factors, as well as the facts at the basis of the administrative provision the judge may have to make – for the first time on a 'human' plane – evaluations done directly by the algorithm.

automatized systems and humans,[13] is not to be pursued during the execution of the procedural activity, but before, at the time of the programming and developing phase of the algorithm.

The Court notes, in fact, that what characterizes the action of the algorithm as an 'IT administrative act' is precisely the technical rule – constructed by a man or a woman – which supports, by governing it, the decision-making process of the algorithm. Before it can be set in motion, this rule must be formulated in a manner that guarantees that the procedure is carried out legitimately. In view of this, it must first of all 'incorporate' the principles which regulate administrative activity, among which, in particular, those already mentioned of publicity and transparency. Furthermore, it must be formulated so as to reasonably foresee a definite solution for all possible cases, even the most improbable, as it is not possible for an electronic elaborator to make discretionary assessments. At the same time, the algorithmic rule must undergo continuous tests and updating, in order to allow for constant checking. Last but not least, it must allow the judge to be able to evaluate the correctness of the automatized process in all of its components. Such an aspect constitutes a pivotal element of the reasoning of the Council of State. According to the judges, allowing full cognition and full review by administrative judges of the technical rules which govern the algorithm responds to the need to evaluate the administrative decision under the profile of legitimacy, in that it allows the judge to examine how the power was concretely exercised. As a matter of fact, the impossibility of understanding how the teaching posts were assigned, by means of the algorithm referred to above, constitutes in and of itself an irregularity such as to invalidate the procedure.

II. Opaqueness as a Thread for Weaving the New 'Smart' Ecosystem

The issues faced by the court do not exclusively involve the execution of administrative activities. The growing tendency, both in the public and private sectors, to delegate decision-making processes – previously carried out only by humans – to algorithms raises multiple concerns, which the law is called upon to deal with.[14] Generally speaking, it is possible to distinguish two major issues, which are not separate from each other.

[13] For some further reflections on the topic of human-machine cooperation see C. Misselhorn, 'Collective Agency and Cooperation in Natural and Artificial Systems', in C. Misselhorn ed, *Collective Agency and Cooperation in Natural and Artificial Systems: Explanation, Implementation and Simulation* (London: Springer, 2015), 3.

[14] For an overview of the diverse questions opened up by the use of algorithms in society see A. Carleo ed, *Decisione robotica* (Bologna: il Mulino, 2019); G. Resta, 'Governare l'innovazione tecnologica: decisioni algoritmiche, diritti digitali e principio di uguaglianza' *Politica del diritto*, 199 (2019); S.C. Olhede and P.J. Wolfe, 'The Growing Ubiquity of Algorithms in Society: Implications, Impacts and Innovations' 376 *Philosophical Transactions of the Royal Society A: Mathematical, Physical and Engineering Sciences*, 1 (2018).

The first refers to the possibility that the decision-making processes by algorithms lead to discriminatory decisions, due to either defects in their structural functioning or, more often, to bias embedded in the data used to train the software program.[15] To provide some examples consider the case of algorithm-based systems, used by authorities in many US States in order to quantify the risk that an offender may repeat crimes, which results in bias against Afro-Americans;[16] or that of the software used by Amazon to determine areas to benefit from one-day delivery service, which ended up being prejudiced against poor and depressed neighborhoods.[17] In this regard, the need to regulate the gathering and use of data and, more generally, the techniques of data analytics emerges, so as to reduce the risk that the welding between economic and technological power produces decisions which are in violation of fundamental rights.[18]

The second issue, directly taken into consideration by the Council of State, concerns the lack of information regarding how the decisions taken by algorithms are produced, when their modes of functioning are opaque.

[15] F.Z. Borgesius, *Discrimination, artificial intelligence, and algorithmic decision-making* (Strasbourg: Council of Europe, 2018). Especially on the correctness of decisions as dependent on data quality see S. Barocas and A.D. Selbst, 'Big Data's Disparate Impact' 104 *California Law Review*, 671 (2016). On discrimination generated by algorithms in employment relationships see D.J. Dalenberg, 'Preventing discrimination in the automated targeting of job advertisements' 34 *Computer Law & Security Review*, 615 (2017); J.A. Kroll, 'The Fallacy of Inscrutability' 376 *Philosophical Transactions of the Royal Society A: Mathematical, Physical and Engineering Sciences,* 2133 (2018). With special regards to the impact of algorithms on the public sphere see H. Shah, 'Algorithmic Accountability' 376 *Philosophical Transactions of the Royal Society A: Mathematical, Physical and Engineering Sciences*, 2128 (2018). As for discriminations related to the creation of clusters by using personal data see A. Mantelero and D. Poletti eds, *Regolare la tecnologia: il Reg. UE 2016/679 e la protezione dei dati personali. Un dialogo fra Italia e Spagna* (Pisa: Pisa University Press, 2018), 289.

[16] See Supreme Court of Wisconsin, *State of Wisconsin* v *Eric L. Loomis*, Case no 2015AP157-CR (2016). In determining a six-year term of imprisonment for the crime committed by Eric L. Loomis, the judges of the La Crosse circuit court had taken into account the results elaborated by the COMPAS (*Correctional Offender Management Profiling for Alternative Sanctions*) software program which identified Loomis as being at a high risk of recidivism. This program is used in various States to calculate recidivism over a two-year period, despite the fact that several studies found it to be systematically biased against African Americans.

The Court concluded that the use of COMPAS did not violate Loomis's right to due process. According to the Supreme Court justices, the risk factor calculated by the software was only one of many considerations taken into account to determine the penalty (and that these were not contested by Loomis). The Supreme Court observed that although the judges of La Crosse court made reference to the results of COMPAS, they had attributed little importance to the risk factor and that they would have reached the same decision in the absence of those results.

[17] The case refers to a study conducted by Bloomberg in 2016 with regards to some depressed areas, such as Bronx, New York and Roxbury, Boston whose inhabitants were denied the service in question. See D. Ingold and S. Soper, 'Amazon doesn't Consider the Race of its Customer. Should it?' *Bloomber*, available at https://tinyurl.com/k36cx4z (last visited 30 December 2019). Both examples are referred to by G. Resta, n 14 above, 215.

[18] G. Resta, n 14 above, 233. As for different modes of regulating data-driven algorithms see M. Hildebrandt, 'Algorithmic regulation and the rule of law' 376 *Philosophical Transactions of the Royal Society A: Mathematical, Physical and Engineering Sciences*, 2128 (2018).

As far as this paper is concerned, the concept of opaqueness refers to the difficulty that a subject who has not taken part in the programming, production or training of the algorithm has in understanding the functioning of the relative software (eg the technical structure which connotes the system or type of data used in the training) and/or the outcome of the decision-making process. This could be caused by a multiplicity of factors. Opaqueness can be, so to speak, 'induced' by its creator/programmer, in order to protect a trade secret concerning the technical formula implemented by the algorithm, so as to reserve for itself the power to utilize and economically exploit the software. It can be associated with the lack of technical competency on the part of the subject (eg consumer or judge) who wants to or must become aware of the mechanism which underlies the algorithm's behavior. Finally, opaqueness can be connected to the unpredictability of the actions carried out by artificial intelligence systems capable of learning and actively interacting within their environment in a manner which can be unique and unforeseeable, even – to some extent – for its own developers.[19]

The problem of opaqueness of the algorithms is capable of affecting all of the relationships mediated by the intervention of 'intelligent' IT systems, whatever the nature – public or only private – of the legal subjects involved is.[20] This may not only impede the discovery of biased and discriminatory decisions, but also affect the correct functioning of the market. In fact, the 'inscrutability' of the algorithm may impinge on, by reducing it, the degree of effectiveness of the protection which, in the new 'smart' socio-economic context characterized by the exponential employment of algorithms, is granted to the citizen-consumer. Indeed, the lack of transparency of the algorithm operates as a sounding board for information asymmetry that, under a plurality of profiles, marks the distance between those market players who operate at the top or intermediate level of the value chain and consumers, who represent the final link in the chain. As a consequence, opaqueness can lead to a 'suspension' of the safeguards foreseen by the multiple norms which are intended to protect consumers within the European Union and to reinforce their (weak) position within the market. Some examples may be useful to clarify these remarks.

1. The Case of Anti-Competitive Algorithmic Behavior

The lack of algorithmic explainability can favor, by hiding it, anti-competitive behavior on the part of the economic actors. There is no doubt that the use of algorithms by the market players, as tools through which to act in the market,

[19] See E. Pellecchia, 'Profilazione e decisioni automatizzate al tempo della black box society: qualità dei dati e leggibilità dell'algoritmo nella cornice della responsible research and innovation' *Le nuove leggi civili commentate*, 5, 1209 (2018).

[20] For a general overview of the problem see F. Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* (Cambridge MA: Harvard University Press, 2015).

can foster market efficiency and competition. Nevertheless, the intelligence of those artefacts – which is '*supra*-human' – can also be used by competing firms to enact collusive strategies, with the objective of raising profits to a higher level than the non-cooperative equilibrium.[21]

In a traditional non-algorithmic environment, a joint-profit maximization strategy can be sanctioned as anti-competitive behavior whenever there is proof of a direct or indirect contact, capable of demonstrating that firms have not acted independently from each other (the so-called *meeting of the minds*). However, by employing algorithms – especially in transparent markets with few sellers and homogenous products – firms acquire the capability to pursue anti-competitive strategies without the necessity to conclude formal agreements or, more generally, without the intervention of humans.[22]

In some cases, the algorithms can be utilized as devices intended as facilitators of coordinated behavior,[23] to the extent that they guarantee firms (or market players) the possibility of manifesting their will to undertake a collusive strategy and, at the same time, to implement it without any explicit communication among the players. As an example, the 'signalling algorithms' are software programmed to send – in a continuous and re-iterative way – an indication of market prices, monitor the reactions of other market players and then decide whether to confirm the price in case of alignment or, conversely, to indicate a new price. By means of such a mechanism, a firm can announce its intention to collude with other market players by disclosing information, such as an increase in price, on the basis of which, if followed by other competitors, a collusive strategy can be implemented. In such circumstances, independent and rational behavior – like that of the competitors who 'intelligently' adapt the price of their own goods to that indicated in order to maximize profits – can become part of a collusive strategy even without utilizing the means which are usually required in order to make the conduct sanctionable.

Under this profile, it has been pointed out[24] that in such cases, the behavior of the firm can lead to a 'concerted practice' intended as a form of more informal cooperation among firms, which, despite not being pursued by means of an

[21] See Organisation for Economic Co-operation and Development (OECD), 'Algorithms and Collusion: Competition Policy in the Digital Age' (2017), available at https://tinyurl.com/yx3s4wdt (last visited 30 December 2019); A. Ezrachi and M. E. Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-driven Economy* (Cambridge, MA: Harvard University Press, 2016). As regards Italian legal literature see G. Pitruzzella, 'Big Data and Antitrust Enforcement' *Rivista italiana di Antitrust*, 77 (2017); P. Manzini, 'Algoritmi collusivi e diritto antitrust europeo' *Mercato concorrenza regole*, 163-164 (2019); A.M. Gambino and M. Manzi, 'Intelligenza artificiale e tutela della concorrenza' *Giurisprudenza italiana*, 1744 (2019); L. Calzolari, 'La collusione fra algoritmi nell'era dei big data: l'imputabilità alle imprese delle "intese 4.0" ai sensi dell'art. 101 TFUE' *Rivista di diritto dei media*, 219 (2018); A. Minuto Rizzo, 'I profili antitrust del nuovo web e della nuova economia digitale' *Diritto Industriale*, 113 (2019).

[22] OECD, n 21 above, 19.

[23] L. Calzolari, n 21 above, 221.

[24] P. Manzini, n 21 above, 171. OECD, n 21 above, 20.

agreement, still produces the effect of eliminating or reducing market competition.[25] More in detail, the use of algorithms allows the firms to undertake those

> 'direct or indirect contacts (…) the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market',[26]

which are capable of putting the market players in virtual yet effective contact, thus committing an infringement of Art 101 TFUE.[27]

However, the use of algorithms may lead to a restriction of competition, even in the absence of a structure – such as that of 'signalling algorithms' – created by managers to facilitate collusion.[28] Indeed, in the case of algorithms based on machine-learning and deep-learning technologies, they may not even be aware of such a restriction. Differently from traditional algorithms, which are programmed to automatically execute a precise and deterministic series of pre-programmed instructions in order to reach well-defined decisions, 'self-learning algorithms' take their decisions on the basis of data and experience gleaned from their environment, by using predictive models developed by programmers.[29] Such models, incorporated in a software module, are obtained by training the machine through a process of 'trial and error', according to the fundamental cybernetic principle of 'feedback'.[30] In such a way, the machine can adapt its actions to an external environment and produce decisions without the burden of providing complete domain knowledge *a priori*.

When such algorithms are used by companies to maximize their profits, the goal will be pursued by learning from the environment in which they operate and adapting themselves to the actions of other competitors, by for instance automatically setting prices. Therefore, the optimal output – ie the maximization of profit – is achieved without displacing the strategy behind the decisional process, which may be contrary to the rules governing competition law.

Before and besides the issues concerning who should respond for the infringement caused by the algorithm, the opaqueness which characterizes such algorithms can limit the detection of an infringement of competition law norms.

[25] See for example Case C-8/08 *T-Mobile Netherlands BV and Others*, (2009) ECR I-4529; Joint cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Coöperatieve Vereniging "Suiker Unie" UA et al* v *Commission*, (1975) ECR 1663.

[26] See, among others, Case 49/92 P *Commission* v *Anic Partecipazioni*, (1999) ERC I-4162.

[27] To this regard see P. Manzini, n 21 above, 171.

[28] OECD, n 21 above, 19.

[29] For deeper insights into the structure and functioning of these technologies see, among others, N. J. Nilsson, *The Quest for Artificial Intelligence: A History of Ideas and Achievements* (New York: Cambridge University Press, 2010); R. Calo, 'Robotics and the Lessons of Cyberlaw' 103 *California Law Review*, 513 (2015).

[30] See N. Wiener, *Cybernetics: Or Control and Communication in the Animal and the Machine* (Paris: Herman & Cie, 1948).

If this can result in an obstacle for the public authority, called upon to supervise the behavior of market actors, it will be even more complex for consumers to initiate actions for damages, especially when they 'stand-alone'.[31] Considering that the consumer may not even be aware of the use of algorithms by competitors and, in any case, will lack information about their mode of functioning, the capacity of private antitrust enforcement to play a role in contrasting collusive behavior or the concentration of power among a reduced number of (technologically empowered) market players may be curtailed, even more than it is at present.

2. The Case of Damage Caused by Fallible Algorithms

Similar problems seem to affect the area of liability law. Differently from previous hypotheses, in which opaqueness may constitute a 'desired' characteristic of the algorithm, being an expression of its correct functioning, in this second sphere the problem emerges as a consequence of the fallibility which can connote the actions of intelligent machines.

It is by now well-known, both on institutional and doctrinal planes, that the use of products endowed with 'intelligence' will increase not only the functional features of previously 'inanimate' objects, but also the occasions for damage that they can generate. It is equally clear, however, that when damage is associated with a smart product, above all when founded on self-learning systems, the application of the discipline intended to manage the re-allocation of risks among parties becomes more difficult.[32] Under this profile, attention is centered on the subject who should be burdened with the risk for damage caused by a decision that, being based on accumulated experience of the algorithm, may not appear to be ascribable to the manufacturer of the device. Thus, in the attempt to find a point of equilibrium between the need for consumer safety and technological-economic development, various solutions have been proposed which oscillate between the two extremes of the attribution of liability to the producer of the smart device,[33] of which the self-learning algorithm would constitute a component[34]

[31] As disciplined by European Parliament and Council Directive 2014/104/EU concerning actions for damages for infringements of the competition law provisions (Official Journal of the European Union, 5 December 2014, L 349/1), which was transposed in the Italian legal system by decreto legislativo 19 January 2017 no 3 (Gazzetta Ufficiale 19 January 2017 no 15).

[32] The liability problems posed by the use of smart products and artificial intelligence is currently under study by the European institutions. See in particular European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015) 2103(INL); Commission Staff Working Document, Liability for emerging digital technologies, Accompanying the document, Communication from the Commission, Artificial intelligence for Europe, Brussels, (2018) 137 final. For a deeper look into these issues see also U. Ruffolo, 'Intelligenza artificiale, machine learning e responsabilità da algoritmo' *Giurisprudenza italiana*, 1689 (2019); A. Amidei, 'Intelligenza artificiale e product liability: sviluppi del diritto dell'Unione europea' *Giurisprudenza italiana*, 1715 (2019). E. Palmerini, 'Robotica e diritto: suggestioni, intersezioni, sviluppi a margine di una ricerca europea' *Responsabilità civile e previdenza*, 1816 (2016).

[33] See in this regard the insights offered by A. Bertolini, 'Robots as Products: The Case for

or to the machine itself.[35] However, even in this case, the aforesaid inscrutability of the algorithm could, indeed, render vain any choice of legislative policy. Machine failure could be connected to an inadequate or insufficient testing and training phase; to the use of information and records which were inadequate for the construction of the software model, in light of the functions for which it was designated; further still, it could be due to the development of software characterized by a low level of accuracy, so that, despite having been trained in an adequate way, it presents a wide margin of error. In light of this, the duty to prove the existence of a defect in the algorithm or, more in general, to demonstrate the illicitness of its conduct would risk inhibiting an effective protection of the consumer. In other words, it is to be asked how consumers can absolve the duty of demonstrating the elements at the basis of their claim, when they cannot have at their disposition – due to technical reasons – the information regarding the way in which the device functions.[36]

3. The Case of Automated Decision-Making Process in Data Protection

In the one case (correct functioning) or the other (poor functioning), the opaqueness of the algorithm may also affect the ability to effectively exercise the rights recognized for a physical person whose data is the object of automatized processing. EU Regulation no 679 of 2016 on the protection of natural persons with regard to the processing of personal data (GDPR)[37] contemplates the possibility for the controller to carry out the operations performed on personal data or sets of personal data, solely by automated means, that is, without human intervention.[38] This regards in particular, but not exclusively, the activity of profiling which is the 'automated processing of personal data' by which personal information or behavioral patterns of individuals or groups of individuals are

A Realistic Analysis of Robotic Applications and Liability Rules' *Law Innovation and Technology*, 214 (2013).

[34] A. Amidei, n 32 above, 35.

[35] A. Matthias, 'The responsibility gap: Ascribing Responsibility for the Actions of Learning Automata' 6 *Ethics and Information Technology*, 175 (2004); G. Teubner, 'Digitale Rechtssubjekte? Zum privatrechtlichen Status autonomer Softwareagenten' 218 *Archiv für civilistische Praxis*, 155 (2018). Italian version: Id, *Soggetti giuridici digitali? Sullo status privatistico degli agenti software autonomi* edited by P. Femia (Napoli: Edizioni Scientifiche Italiane, 2019).

[36] A. Amidei, n 32 above, 35.

[37] European Parliament and Council Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (2016) OJ L119/1. For a broad overview of the Regulation see G. Finocchiaro et al, *La protezione dei dati personali in Italia. Regolamento UE n. 2016/679 e d.lgs. 10 agosto 2018, n. 101* (Bologna: Zanichelli, 2019); P. Voigt and A. von dem Bussche, *The EU General Data Protection Regulation (GDPR). A Practical Guide* (New York: Springer, 2017).

[38] Art 29 Data Protection Working Party, 'Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679', 6 February 2018, available at https://tinyurl.com/r7kb8dx, 8 (last visited 30 December 2019).

gathered and analyzed, so as to create suitable clusters for the purpose of predicting human behavior and preferences (Art 4, para 4, GDPR). On this front, the Regulation establishes a general prohibition on subjecting the natural person to a decision based solely on automated processing, including profiling, which produces legal effects concerning the subject or significantly affects him or her in other ways (Art 22, para 1, GDPR). There are, however, some hypotheses in which the use of automated processing in the absence of human intervention is legitimate. In particular, the controller can use a fully automated, decision-making process when the data subject has explicitly expressed his or her consent or when such a tool is necessary for the controller to enter into, or for the performance of, a contract between the data controller and the data subject (eg, the selection of a great number of candidates (Art 22, para 2, GDPR).[39]

According to the legislator, however, the absence of human intervention in the decision-making process of the IT system, when admissible, cannot result in compromising or limiting the data subject's rights, freedoms and legitimate interests. The Regulation ensures that the controller implements suitable measures to safeguard such rights while guaranteeing, at least, a way for the data subject to obtain human intervention, express their point of view, and contest the decision.[40] However, the management and control, on the part of the data subject, of the data elaborated by the algorithm may be restricted by a lack of understanding of its functioning mechanisms. Consider the case in which an algorithm is given the task of deciding, without human intervention, whether to grant a loan to a subject based on imprecise projections; or, another still, the case in which such a loan is denied by a human being due to derived or inferred data such as the profile of the individual created by means of an algorithm (eg a credit score),[41] on the basis of an incorrect classification owing to biased data.[42] In such cases, it is clear that the effective possibility for the data subject to exercise his/her rights, depends on whether he or she has access to the evaluation processes which led to the imprecise projections or incorrect classifications.[43]

[39] The other hypothesis in which a solely automated decision-making process can be carried out regards the case in which the decision is authorized by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subjects rights and freedoms and legitimate interests (eg to combat tax evasion).

[40] Art 29 Data Protection Working Party, n 38 above, 42.

[41] See in this regard D.K. Citron and F. Pasquale, 'The Scored Society: Due Process for Automated Predictions' 89 *Washington Law Review*, 1 (2014).

[42] See in particular A. Mantelero and D. Poletti eds, n 15 above. F. Pizzetti, 'La protezione dei dati personali e la sfida dell'Intelligenza Artificiale', in Id ed, *Intelligenza artificiale, protezione dei dati personali e regolazione* (Torino: Giappichelli, 2018), 30; M. Temme, 'Algorithms and Transparency in View of the New General Data Protection Regulation' 3 *European Data Protection Law Review*, 473, 481 (2017).

[43] Art 29 Data Protection Working Party, n 38 above, 27.

III. Transparency in the General Data Protection Regulation

From the observations expressed so far, it is easy to note how the lack of complete information associated with more or less autonomous IT systems can compromise, to the point of sabotaging them, the principles and rules that govern the discipline set down to safeguard consumers and their role as market actors placed at the end of the value chain. To be sure, the consequent loss of faith on the part of consumers can create a significant obstacle to the construction of a single, digital market.[44]

If, at least at the legislative level, the debate regarding (tacit) collusion as well as liability for damage caused by algorithms is still in an embryonic stage, some interesting insights as to how foster transparency can be drawn from the set of rules introduced by the GDPR. The Regulation has, in fact, outlined some provisions intended to face the problems associated with the opaqueness of automatic processes.

1. The Right to Explanation

The theme of transparency, in the perspective of the GDPR, runs on a twofold track. The first one has, so to speak, a substantial nature and concerns the breadth and the content of the right, recognized for the data subject, to be informed of the processing of his or her data. From this angle, the focal point of the discussion revolves around the question of whether, in cases regarding processing carried out by means of automated mechanisms, such a right implies an actual claim to explanation of the decision taken by the algorithm.[45] What causes the various interpretations on this matter to differ is the circumstance for which the European legislator – as a result of the negotiation that characterized the legislative process which culminated in the final text – has explicitly recognized a right 'to obtain an explanation of the decision reached after such assessment and to challenge the decision'; however, this provision was inserted into a Recital – the 71st, thus depriving it of the strength of a binding rule. According to some researchers,[46]

[44] All of the legislative efforts of the European Union aim to enhance the trust of consumers, so as to foster the new data economy. See European Commission, A Digital Single Market Strategy for Europe (Communication), Brussels, (2015) 192 final. See also European Commission, Artificial intelligence for Europe, Brussels (Communication), (2018) 237 final, where it is stated that in order to strengthen trust, citizens 'need to understand how the technology works'. Hence, the Commission points out the importance of research into the explainability of AI systems.

[45] See S. Wachter et al, 'Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation' 7 *International Data Privacy Law*, 76 (2017); G. Comandé and G. Malgieri, 'Why a Right to Legibility of Automated Decision-Making Exists in the General Data Protection Regulation' 7 *International Data Privacy Law*, 243 (2017); G. Finocchiaro et al, n 37 above; E. Pellecchia, n 19 above.

[46] See for example A. D. Selbst and J. Powles, 'Meaningful information and the right to explanation' 7 *International Data Privacy Law*, 233 (2017); B. Goodman and S. Flaxman, 'European Union regulations on algorithmic decision-making and a "right to explanation" ' *ArXiv:1606.08813*, available at https://tinyurl.com/wccrg29 (last visited 30 December 2019).

such a provision should acquire a binding nature on the basis of a systematic interpretation of the GDPR and, in particular, of Artt 13, para 2, lett (f), 14, para 2, lett (g) and 15, para 1, lett (h) of the GDPR. These provisions foresee, in the case of an automatized decision-making process pursuant to Article 22, the right of the person involved to receive 'meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject'. As noted by the (ex) Article 29 Data Protection Working Party, such information is of particular relevance whenever the understanding of the purposes for collecting personal data and by whom they are being collected is rendered difficult due to technological complexity.[47] In light of this, the (growing) complexity – associated with machine learning based algorithms – should not exempt the data controller from providing such pieces of information.

According to other scholars, the actual existence of the right to explanation in the GDPR depends on the way in which such a right is understood, as concerns the object and timing of the explanation.[48] In particular, the wording of the abovementioned articles – which refer to 'the envisaged consequences of the processing' – would entail that the data subject's right to be informed is to be exercised prior to automated decision-making taking place. However, such an *ex ante* explanation may only refer to the usage and the *system functionality* of the algorithm, intended as the general and abstract mode of producing decisions starting from given datasets of information. This would include, for example, the system's requirement specifications, classification structures and pre-defined models. However, the information would not encompass an explanation of the rationale, reasons and circumstances surrounding the specific, individual outcome of the algorithmic process. Indeed, such an explanation, which would require, for example, the disclosure of the specific information as regards data or profile groups used by the algorithm, can only be offered after the decision has been made.[49] Conversely, other scholars argue that the formulation of the text, as used by the legislator to describe the information to be provided to the data subject, implies, when specifically referred to the right of access (Art 15, para 1 (h) GDPR), the possibility of requesting the disclosure of information at any time and, thus, even after the decision has been made. [50] Consequently, the data subject shall have the right to be informed not only about the (abstract) architecture of the algorithm used, but also about the contextual implementation in which the algorithm performed its tasks in order to reach the specific decision involving a data subject.

In any case, such an explanation – even where it is recognized by way of interpretation – would face other difficulties in order to be offered. As noted

[47] Art 29 Data Protection Working Party, n 38 above, 25.
[48] See S. Wachter et al, n 45 above, 78.
[49] ibid.
[50] See G. Comandé and G. Malgieri, n 45 above, 246.

above, the right to receive an explanation may be limited – or should be balanced – with the interest (or right) of the producer of the algorithm not to disclose the formula (source-code) on which the software is based, so as not to lose the competitive advantage to be gained through his investments in software development.[51] Furthermore, as noted above, the investigation into the decisional process may turn out to be particularly difficult – especially with regards to machine-learning systems – due to both the technicality of the machine programming language or to other technical factors, such as the use of self-learning systems, whose outcome may be – to a certain limit – unpredictable. The subsequent unintelligibility for individuals of the algorithmic modes of production of actions may impede – *de facto* – not only the exercise of the (asserted) right to explanation, but also the possibility of charging the controller with the responsibility for an error in the algorithmic decision.

2. The Intersection Between the Principles of Accountability and Transparency by Design

Along with and beyond the recognition of a right to explanation, the theme of opaqueness takes on, in the sphere of EU Regulation 2016/679, a second declination which has been less investigated by legal doctrine, even though it is perhaps more decisive. Under close inspection, the discipline drawn up by the legislator – if observed from the perspective of the obligations imposed on the controller rather than the rights of the data subjects – outlines the fundamental points of a remedial approach which, under certain profiles, mirrors the rationale of the arguments set down by the Council of State.

What shines light on this second interpretative path is the intertwining of the principles of transparency and accountability. The principle of transparency constitutes, along with that of lawfulness and fairness, one of the cardinal principles which must underlie any processing activity as defined by the Regulation (Art 5, para 1, lett (a) GDPR). Such a principle is strengthened by some provisions which are meant to ensure (*ex ante*) that the processing is carried out in a transparent manner.

First of all, the transferal of knowledge from the controller to the data subject – which is the ultimate goal of transparency – should be executed by taking appropriate measures to render the information in 'a concise, transparent, intelligible and easily accessible form, using clear and plain language [...]' (Art 12 GDPR). This reinforced declination of the principle of transparency finds confirmation also with reference to the set of information that the controller shall supply in order to ensure the fairness and transparency of the process executed by means of an automated decision-making process. Indeed, the wording

[51] As explicitly stated by the Regulation (EU) 2016/679, in Recital 63, the right of the data subject to receive information 'should not adversely affect the rights or freedoms of others, including trade secrets or intellectual property and in particular the copyright protecting the software'.

used by the legislator in Artt 13, para 2, lett (f), 14, para 2, lett (g) and 15, para 1, lett (h) of the GDPR, and in particular the expression 'meaningful information', suggests that the principle of transparency – whether it is substantiated as the right to receive mere information or to an effective explanation about the decision made – should be combined with that of 'comprehensibility' of the algorithm, so as to guarantee the capability of individuals to autonomously understand the functioning and the impact of algorithms used to process their data.[52] In this sense, for example, the mere release of the source code of an algorithmic system would not provide 'meaningful' transparency.[53]

This also appears coherent with the disposition foreseen by Art 22, para 3, of the GDPR. The paragraph recognizes the right of the data subject to challenge the decision, thus making, at least under this profile, the *ex post* approach of Recital 71 binding. It is evident that a decision can be challenged by the data subject only to the extent to which he/she can have full understanding of how and on what basis the decision was made.[54] From this angle, it is possible to observe how the rationale followed by the GDPR reappears in the ruling of the Council of State: both unveil the essential necessity to translate the technical rule that guides the machine into a language that is comprehensible for citizens and/or judges.

However, there is more. The legislator does not merely shed light on the necessity to render the algorithm 'comprehensible'. Rather, the Regulation under examination also seems to establish the modes by which such a requirement shall be fulfilled, in order to avoid sanctions. In fact, the controller is not simply burdened with the obligation to guarantee transparency; he/she must also demonstrate that the necessary measures have been adopted in order to guarantee such transparency. What determines the latter duty is the principle of accountability introduced by the Regulation.

The term accountability is polysemous and appears, in turn, opaque.[55] Generally speaking, the term refers to the ability to account for a certain action. In the specific ambit of the EU Regulation on data protection, this concept is split into two parts, as emerges from the same notion put forth in para 2, of the

[52] See G. Comandé and G. Malgieri, n 45 above, 245, who refer to such a concept as *legibility*.

[53] European Parliamentary Research Service, 'A Governance Framework for Algorithmic Accountability and Transparency', Study managed by the Scientific Foresight Unit, within the Directorate-General for Parliamentary Research Services (EPRS) of the Secretariat of the European Parliament, Brussels, March 2019, available at https://tinyurl.com/tes3903 (last visited 30 December 2019).

[54] Art 29 Data Protection Working Party, n 38 above, 27.

[55] As highlighted by the Art 29 Data Protection Working Party, 'Opinion 3/2010 on the principle of accountability', WP 173, 13 July 2010, available at https://tinyurl.com/r7kb8dx, 7 (last visited 30 December 2019). The difficulties in finding the precise meaning of the term are compounded by translation. In Italian the term is usually translated as *responsabilizzazione*, a term which lacks the nuances of English. See also on this concept, G. Finocchiaro, 'Il quadro d'insieme sul Regolamento europeo sulla protezione dei dati personali', in Id et al, n 37 above, 1.

above-mentioned Art 5: 'the controller shall be responsible for, and be able to demonstrate compliance with, paragraph 1'. On one hand, this disposition implies 'the need for a controller to take appropriate and effective measures to implement data protection principles', among which, indeed, is the principle of transparency; on the other, the controller must be able to demonstrate – by providing evidence – that those appropriate and effective measures have been taken.[56]

In this light, the concept of accountability would seem to take on a technical-IT meaning. The proof of transparent processing appears to be dependent on the possibility of demonstrating that the algorithm has been programmed to be transparent. Indeed, several technical methods exist which may reduce opaqueness or 'extract' an explanation for the machine's behavior.[57] These mechanisms need to be designed into systems and, thus, require the intervention of their system developers and operators.[58]

To be sure, the adoption of these systems can be a challenging task in practice, especially when facing black-box algorithms that make inherently autonomous decisions and might contain implicit bias.[59] Yet, the principle of accountability, as interpreted herein, can stimulate the responsible development (in addition to responsible use) of such intelligent systems, in view of the protection of citizens.[60]

After all, this perspective appears to be coherent with – by giving it application – the principle of 'privacy by design' which characterizes the regulatory framework laid down by the legislator. This concept imposes that controllers find technical solutions, in addition to organizational ones, to be adopted both at the time of the determination of the means for processing and at the time of the processing itself, so as to satisfy the principles underlying data processing. More precisely, Article 25 requires the controller to provide for

> 'appropriate technical and organisational measures […] which are designed to implement data-protection principles […] in an effective manner and to integrate the necessary safeguards into the processing in order to meet the requirements of this Regulation and protect the rights of data subjects'.

[56] Art 29 Data Protection Working Party, 'Opinion 3/2010' n 55 above, 9.

[57] European Parliamentary Research Service, 'Understanding Algorithmic Decision-making: Opportunities and Challenges', March 2019 available at https://tinyurl.com/v4p902f, 51 (last visited 30 December 2019). J.A. Kroll et al, 'Accountable Algorithms' 165 *University of Pennsylvenia Law Review*, 633 (2017), available at https://tinyurl.com/qnstj2f (last visited 30 December 2019). See also D. Pedreschi et al, 'Open the Black Box Data-Driven Explanation of Black Box Decision Systems' *Arxiv abs/1806.09936* (2018).

[58] European Parliamentary Research Service, 'Understanding' n 57 above, 34. See also OECD, n 21 above, 47.

[59] It has been suggested that data controllers may be obliged to use, in some cases, human interpretable decision-making methods. See for example J. Burrell, 'How the Machine 'Thinks': Understanding Opacity in Machine Learning Algorithms' *Big Data & Society*, 1 (2016). In this sense see also S. Wachter et al, n 45 above.

[60] H. Nissenbaum, 'Computing and Accountability', in D. G. Johnson and H. Nissenbaum eds, *Computers, Ethics and Social Values* (London: Pearson, 1995), 526.

These measures, as expressly specified in Recital 78, also include those intended to offer transparency as regards the functioning and processing of data. At the same time, Article 24 foresees the responsibility of the controller, should he not ensure and be able to demonstrate that he/she implemented such measures.

Moving backwards along the observations put forward, it is possible to detect how the problem connected to the transparency of algorithms, when analyzed from the obligation imposed on the controller, transcends, at least in part, the distinctions which have emerged with respect to the right to explanation of algorithmic behavior. Indeed, the principle of accountability, when applied to the hypothesis of automated decision-making processes, such as those conducted by algorithmic systems, would seem to indicate that the data controller – beyond consideration of the breadth of the data subject's right to be informed – is required to develop the algorithm in such a way that the decision can then be explained. Under this profile, the normative framework of the GDPR exhibits a tendency to make the fulfillment of the obligation on the part of the data controller dependent on how the IT systems used to implement the processing were developed and programmed. From this point of view, the relevance given to the human-machine cooperation during the developmental stage seems to mirror the logic of the decision adopted by the Council of State.

IV. Towards a New Remedial Perspective?

These final elucidations, though they may seem subtle at first, offer significant insights, in a prospective sense, into facing the problem of algorithms' opaqueness even beyond the sphere of the GDPR. That the model drawn up by the Regulation – and structured on the transparency by design and accountability binomial – has expansionary potential is witnessed by numerous documents published by European institutions. It is sufficient to note that in the 'Artificial Intelligence for Europe' communication released in 2018, the Commission affirmed that in order to increase transparency and minimize the risk of bias or error, 'AI systems should be developed in a manner which allows humans to understand (the basis of) their actions'.[61] Then again, in the more recent communication on 'Building Trust in Human-Centric Artificial Intelligence',[62] it has been pointed out that persons affected by an algorithmic decision-making process should be provided with an explanation of the same to the furthest extent possible. To this end, the Commission has emphasized that research to develop explainability mechanisms should be pursued. Moreover, the perspective of 'compliance by design' appears to be envisaged at the institutional level in the specific realm of competition law

[61] European Commission, 'Artificial' n 44 above, point 3.3.

[62] European Commission, 'Building Trust in Human-Centric Artificial Intelligence' (Communication), Brussels (2019), 168 final.

regulation.[63] On a doctrinal level, it has been pointed out that the most promising solutions to governing algorithmic decisions include instruments intended to regulate the programming phase, according to a sort of 'legality by design'.[64] This perspective seems to be able to find fertile ground not only when fundamental rights are involved, but also in those fields in which the protection of private actors also permits fostering more general interests.

What has been little investigated are the consequences of what a re-reading of the previously discussed legal disciplines in light of the combination of accountability and transparency by design principles could produce on the front of attribution of liability for actions or decisions carried out by algorithms. According to general principles of law, liability for the adverse effects provoked by an algorithm (regardless of which person – whether physical or legal – is called upon to respond) would require proof that those effects were the consequence of the automated decision-making process. However, as noted in the previous sections, finding that proof can end up being particularly complex, when the opaqueness of the algorithm does not make it possible to explain how the relative decision was reached.

In this scenario, the introduction of the concept of accountability of the algorithm could lead, so to say, to an anticipation of the threshold of protection. Should the rationale and logic introduced by the GDPR be extended to other areas, liability would be assigned to the responsible party, not only in the case of an infringement of law and damage caused by algorithmic decisions, but also whenever he/she is not able to account for the relative decision-making processes. In other words, the party could be held responsible for decisions made by the algorithms employed, even if – and due to the fact that – it is not possible to explain how the algorithms produce their results.[65] To be sure, provisions of this kind would need to be fashioned differently according to the context in which the algorithm is used as well as the sort of technology employed to execute the decision-making process. Furthermore, they would have to take into account the need to defend competitive advantages for the creators of the software code and formulas, when protected by intellectual property and trade secrets law.[66]

[63] According to EU Commissioner Vestager, an obligation to program algorithms so as to comply – by design – not only with the set of rules concerning data protection but also with antitrust law should be imposed on companies. See OECD, n 21 above, 47. With respect to competition law, some authors proposed establishing a series of rules, to be followed in the development phase of the software, so as to ensure more transparency. See A. M. Gambino and M. Manzi, n 21 above.

[64] G. Resta, n 14 above, 234.

[65] See in this regard the principles set down by the Association for Computing Machinery, US Public Policy Council (USACM), 'Statement on Algorithmic Transparency and Accountability', l, Washington, DC, 2017, available at https://tinyurl.com/qkslara (last visited 30 December 2019).

[66] This necessity is expressly stated in the EU Regulation on data protection, Recital 63, in which it is also affirmed that such rights or freedoms should not lead to a refusal to provide all information to the data subject. See for further analysis on this topic S. Wachter, B. Mittelstadt and L. Floridi, n 45 above, 90.

However, what is worth noting is that such an approach seems to indicate a re-centering of the axis of liability. The risk, from a legal point of view, would not (only) be associated with the decision made by the algorithm, but (also) with that of the subjects who are involved in the programming and development stage: the latter would be burdened with the costs, to a certain extent inevitable, of unexplainable decisions.

In the final analysis, the concept of accountability emerges as a device (even if not the only one) through which the legal system, having realized the complexity of algorithms, re-adapts its rules in order to make their ineluctable uncertainty tolerable.

Corporate and Financial Markets Law

The New ICO Intermediaries

Vanessa Villanueva Collao* and Verity Winship**

Abstract

Smart contracts promise a world without intermediaries. However, that promise has quickly proved elusive, including in the context of Initial Coin Offerings (ICOs), a vehicle for funding startups built on smart contracts and blockchain. Particularly as ICOs attract retail investors who are not code-literate, the question arises: is there a role for new intermediaries? This article assesses the possibility of an ICO auditor, providing a framework for understanding potential audit functions. In particular, it identifies three main roles: to *translate* the code for retail investors who are not code-sophisticates, to *reconcile* the code with promises made in other materials aimed at ICO participants, and to *verify* offline activity and identity where these remain important to the transactions. It then maps these functions onto emerging models.

I. Introduction

At the beginnings of the crypto anarchist movement, the *Crypto Anarchist Manifesto*[1] announced that the technological revolution would change dramatically the perception of concepts such as property, expression, and identity. Hence, current legal rules would be deemed obsolete. Recession and distrust of financial markets following the 2008 financial crisis had incentivized the crypto community to develop private coinage, looking for a way to protect money from politics. The cyberpunk movement started thinking about a new currency based entirely on trust among its participants or 'consensus'.[2]

Intermediaries were viewed with suspicion, in part because they were considered complicit in the financial crisis. By design, technology rendered them unnecessary. Blockchain would be intermediary-free by its very nature, eliminating the need for the institutions that traditionally served as middlemen in the financial markets.

One of the applications of blockchain is as the underlying technology for raising money for startups in the Initial Coin Offering (ICO) process. ICO

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[1] T. May, 'The Crypto Anarchist Manifesto' available at https://perma.cc/P3XW-J5GA (last visited 30 December 2019).

[2] P. De Filippi and A. Wright, *Blockchain and The Law: The Rule of Code* (Cambridge (MA): Harvard University Press, 2018), 22.

promoters ask participants to send funds (often in cryptocurrency) to a smart contract, which is designed to issue the startup's internal digital currency (tokens or coins) in exchange.[3] The funds are used to support a range of cryptoenterprises (*criptoattività*).

The promise that ICOs would be free of intermediaries lies in part in their use of smart contracts, a type of blockchain architecture that makes certain terms self-executing.[4] Smart contracts built on blockchain were, at least in theory, entirely self-contained, including both the terms of the agreement and the means for execution.[5] This atomization allowed decentralization and promised a world without the (suspect) middlemen. The promised avoidance of the existing infrastructure for accessing funds is so fundamental to the structure of the ICO that regulators point to it as one of the ICO's distinguishing characteristics.[6]

The mechanism relied in part on the ability of potential investors to read and understand the code. It was often made available ahead of time and coders could review and correct, testing for security and execution. Technical security issues tended to be the focus.

When code-sophisticates were the only investors this model may have worked, but the mix of investors has shifted to include retail investors as well.[7] During the 2018 crypto exploit, retail investors relied on popular channels of information (Youtube, Instagram, the web) and, guided by word of mouth, invested in projects

[3] Bitcoin Magazine, 'What Is an ICO?' available at https://perma.cc/MT6M-9D5R (last visited 30 December 2019).

[4] The coinage of the name smart contracts by Nick Szabo during the 1990s originally designated what we would call today electronic or automatized contracts, N. Szabo, 'Smart Contracts: Building Blocks for Digital Markets' available at https://perma.cc/XD5C-K49V (last visited 30 December 2019). This article uses the term in its current meaning (as highlighted in J. Frankenfield, 'Smart contracts' *Investopedia*, available at https://perma.cc/X6YX-H6GR (last visited 30 December 2019) and 'Smart contract' *Wikipedia,* available at https://perma.cc/KKV7-3D3C (last visited 30 December 2019).

[5] F. Möslein, 'Legal Boundaries of Blockchain Technologies: Smart Contracts as Self-Help?', in A. De Franceschi, R. Schulze et al eds, *Digital Revolution – New Challenges for Law* (München: C.H. Beck, 2019). Forthcoming, available at https://tinyurl.com/y64f4aak (last visited 30 December 2019).

[6] In a 2019 consultation paper, CONSOB (Commissione Nazionale per la Società e la Borsa) defined blockchain as a technology capable of offsetting the typical intermediate infrastructures: '*Le ICOs si caratterizzano, rispetto a quanto tradizionalmente avviene per le offerte di strumenti finanziari, per: l'utilizzo della tecnologia blockchain, che permette di disintermediare le infrastrutture tipiche dei mercati dei capitali (es. banca depositaria, consorzio di collocamento, mercati secondari)* (…)' (ICOs are characterized, compared to traditional offers of financial instruments, by: the use of blockchain technology that allows disintermediation of the typical infrastructure of the capital markets (especially deposit banks, underwriters, secondary markets) (…)). Consob, 'Le offerte iniziali e gli scambi di cripto-attività. Documento per la discussione', 19 March 2019, available at https://perma.cc/A6QE-JTCX (last visited 30 December 2019).

[7] S. Cohney et al, 'Coin-Operated Capitalism' 119 *Columbia Law Review*, 591 (2019); US Securities and Exchange Commission (US SEC), 'Statement on Cryptocurrencies and Initial Coin Offerings' 11 December 2017, available at https://perma.cc/P6NC-9ZKF (last visited 30 December 2019).

of doubtful reliability.[8] Some jokesters even issued tokens such as 'PonzICO' and 'Useless Ethereum Token' – reportedly making money despite the cautionary names.[9] Even the more ambiguously named 'Confido' simply disappeared with several hundred thousand US dollars of investor money.[10]

Crypto investors may never have previously engaged in financial markets – the ICO is the first investment. A series of podcasts aimed at crypto investors features hosts that are leading figures in the cryptomarket, such as CEOs of billionaire blockchains' enterprises.[11] The recurrent opening question is 'Have you ever invested in traditional capital markets?' The common reply is negative.

While the cryptocurrencies' market may have been prepared to be joined by coders, it was not well structured for retail investors, and has been compared to gold rushes in the 'Wild West'. This shift has intensified the need to address investor confidence in the marketplace and the perennial problem of fraud in the financial markets – or crypto-lemons.[12]

Certainly introducing new intermediaries is in tension with the most utopian view of an anonymous, intermediary-less, decentralized system. However, it does not require the replication of all intermediaries or complete absorption of ICOs into existing frameworks. Nor does it require complete ban.[13]

Moreover, the claim here is not that auditors, as intermediaries, should be or are an exclusive means of addressing issues in the ICO marketplace. Rather they may be part of a reasonable response to activity that is an awkward fit with existing regulatory frameworks and that poses a challenge for regulators and laws. The activity is not just cross-border, but could be characterized as borderless, which is challenging for regulators whose jurisdiction is traditionally based on

[8] Most ICO teams, possibly blinded by the cyberpunk aspirations, launched ICOs that were easy to target and uncover by administrative agencies. This was the case for Centra (Ticker: CTR), SEC Press Release 2018-53, 'SEC Halts Fraudulent Scheme Involving Unregistered ICO' available at https://perma.cc/8QG5-QE6N (last visited 30 December 2019).

[9] C. Brownell, 'Perils of the Crypto Currency Gold Rush' *National Post* (*Canada*), available at https://tinyurl.com/snb7l9j (last visited 30 December 2019).

[10] A. Kharpal, 'Crytocurrency start-up Confido disappears with $375,000 from an ICO, and nobody can find the finders' *CNBC Tech*, available at https://perma.cc/M9WJ-3A2M (last visited 30 December 2019).

[11] See Flippening, available at https://perma.cc/DEX9-MTLG (last visited 15 October 2019).

[12] This focus on avoiding or punishing fraud is not entirely antithetical to a cyberlibertarian position, which might approve sporadic regulatory intervention in the cases of market malfunction, as in the case in ICO's fraud. F.A. Hayek, *Choice in Currency, A way to stop inflation* (London: Institute of Economic Affairs, 1976).

[13] China announced in September 2017 that 'fundraising through coin offering shall be banned immediately', calling coin offerings 'unauthorized and illegal public fundraising (…). suspected of involving in (sic) criminal activities such as illegal selling of tokens, illegal issuance of securities, illegal fundraising, financial fraud and pyramid schemes.' The Central Bank of the People's Republic of China, 'Public Notice of the PBC, CAC, MIIT, SAIC, CBRC, CSRC and CIRC on Preventing Risks of Fundraising through Coin Offering' 8 September 2017, available at https://tinyurl.com/tmuzsjs (last visited 30 December 2019).

physical geography. Categorizing crypto-assets has also been difficult,[14] leading to uncertainty about how they fit with existing legal frameworks and jurisdictional lines based on asset class.

These challenges drive us to analyze the ICO auditor in terms of its functions. These functions can then be mapped onto existing models and emerging regulatory schemes, and can also adapt to changing and hybrid technologies. The article identifies key areas in which the new intermediaries might act in the interface between the offline world and digital realities, translating between computational and other requirements. In other words, it proposes a framework to address the difficult sorting questions about what can be automated and what (still) needs outside validation and review.

This article identifies three main roles of an ICO auditor: to *translate*, *reconcile*, and *verify*. First, even if the codes were self-contained and self-executing, the movement away from investment exclusively by code-sophisticates requires the communication of the meaning of key terms of that code. In other words, it requires translation by an actor who is able both to read the code and to translate it for others.

Second, some promises may be external to the code, communicated, for instance, through a white paper or other marketing materials. A third party could reconcile these promises with the code, ensuring that promises made to potential participants are effectively encoded.

Third, offline activities and identities are also important to some aspects of the transaction. Offline activity may matter for the fulfillment of triggering conditions within an agreement, and the offline identity of the actors may sometimes matter to investors. This verification function reflects one of the advantages of identifying categories of auditor tasks and a framework rather than a static picture or prescription. In particular, the framework is able to accommodate a shifting line between digital and offline as the Internet of Things digitalizes an increasing amount of information from the traditionally offline world.

The article begins in Part Two by examining the structure and process of ICOs. It introduces the technical aspects, especially the relationship among ICOs,

[14] The ESMA in the ICO and crypto-assets advice paper acknowledges that there is no current legal definition of 'crypto-assets'. At the same time, it distinguishes utility tokens from security tokens: 'Investment-type crypto-asset: A type of crypto-asset that resembles a financial instrument. Utility-type crypto-asset: a type of crypto-asset that provides some 'utility' function other than as a means of payment or exchange for external goods or services'. ESMA 50-157-1391, 'Initial Coin Offering and Crypto-Assets' January 2019, 43. For a recent classification of tokens from European perspective, see, F. Annunziata, 'Speak, If You Can: What Are You? An Alternative Approach to the Qualification of Tokens and Initial Coin Offerings' *Bocconi Legal Studies*, Research Paper no 2636561 (2019), available at https://tinyurl.com/y6rabud4 (last visited 30 December 2019). The author identifies digital assets (tokens) in three main categories: Payment tokens, Utility and Financial Investment tokens. For another system of categorization, see P. Hacker, C. Thomale, 'Crypto-Securities Regulation: ICOs, Token Sales and Cryptocurrencies under EU Financial Law' 15 *European Company and Financial Law Review*, 645 (2018).

blockchain, and smart contracts. It then traces the process of an ICO, highlighting the similarities and differences with an Initial Public Offering (IPO). Part Three provides a framework for understanding the possible functions of ICO auditors, with particular focus on the auditor's role in relationship to the code, the white paper, and offline activity. Part Four points to existing models that incorporate some of the functions the article identifies, both to provide evidence of the need for these functions and also to suggest possible routes to effectuating this role. The article then briefly concludes.

II. The Structure of ICOs

The new blockchain industry goal is to provide financing through a fundraising mechanism, the Initial Coin Offering (ICO), which involves minting (or coinage).[15] This process is accomplished by the exchange of fiat currencies (such as Euro or US dollars) or cryptocurrencies (such as Ether or Bitcoin)[16] conveyed to the platform in exchange for digital assets. Participants send funds to a smart contract, which is designed to issue an equivalent value of ICO tokens or coins.[17]

Smart contracts are a type of blockchain architecture. These DApps (decentralized applications) are built on top of a very well-known platform, Ethereum.[18] Recollection and *recordation*[19] of information are secured through a

[15] The minting process is distinct from the most popular mining process. V. Buterin, Ethereum whitepaper, 'A Next-Generation Smart Contract and Decentralized Application Platform' available at https://perma.cc/CCA3-R76T (last visited 30 December 2019). In the minting process, the participant exchanges x ETH for x SNT tokens. The computer program creates a business logic function. This logic function establish the total number of tokens (usually less than a max hard cap), the exchange rate and the amount of ETH transferred. Moreover, the program must establish how these tokens are generated, how to update the balance and transfers from the initial system, called system zero address (SNT), to the token buyer.

[16] Bitcoin and Ethereum are the most common cryptocurrencies and possess similar features. For example, both Bitcoin and Ethereum are Proof-of-Work (PoW). Decentralized nature in blockchain does not rely on a central point of control but implies a network made of globally connected computers, peer or nodes. The network constantly puts its own digital signature to batches of transactions (blocks). The blocks are built within a process called *mining*; namely, a network of computers receive an input and apply a function to gather a 'single random-output' – the *Hash* function. Miners solve a complicated mathematical puzzle, or algorithm, in the shortest possible way and in exchange for this output they are rewarded with Bitcoins. If two or more miners have solved the problem at the same time, then the one that has the longest code answer wins. PoW system operates in this way. The *hash* function is generated whenever the server suspects a Denial of Service Attack, puts into motion the entire mining mechanism and releases the answer called *hash*. N. Sakamoto, 'Bitcoin: A Peer-to-Peer Electronic Cash System' available at https://perma.cc/A2FM-DD53 (last visited 30 December 2019).

[17] Bitcoin Magazine, n 3 above.

[18] V. Buterin, n 15 above.

[19] The recollection and aggregation of information at a large scale, Big Data, is a current issue in the European framework post-GDPR (European Parliament and of the Council Regulation (EU) 2016/679, on the protection of natural persons with regard to the processing of personal data and on free movement of such data, and repealing Directive 95/46/EC -

consensus mechanism, which is virtually impossible to infringe assuring security and privacy of the transaction through ledger verification.[20]

ICOs raise money for startups (cryptoenterprise: *criptoattività*), often those composed of a small group of persons with solely ideas and no influence over the market more broadly. CONSOB (Commissione Nazionale per la Società e la Borsa) has described ICOs as a fundraising mechanism initiated by corporations, individuals or network of programmers, giving high emphasis to startups as the main actor in the issuance of tokens.[21]

The resemblance to traditional Initial Public Offerings (IPOs) is striking, although the ICO form emerged regardless of any intermediary or regulation. The rules governing IPOs have been relaxed to facilitate capital injection to the market, in the United States through legislation, the Jumpstart Our Business Startups Act (JOBS Act),[22] and in Italy by the *Borsa Italiana* through the *Regolamento Alternativo del Capitale* (AIM Italia).[23] Nonetheless, there is still an appetite for ICOs, particularly in early stage technological entrepreneurships.

In some markets, Kickstarter and other forms of crowdfunding play a partial role in allowing small, early stage start-ups to access the capital markets. These are predecessors of ICOs, and one could crowdfund through the sale of tokens, tightening the comparison.

In at least one example, the relationship to crowdfunding has been formalized. In 2019, CONSOB delivered a consultation paper on ICOs and crypto-assets.[24] This consultation paper aims to assess the extent of cryptoassets in Italy, while waiting for a more accurate framework at the European level. The paper described the venue of cryptoassets's offers as the online platform,[25] without

General Data Protection Regulation). V. Zeno-Zencovich, 'Ten Legal Perspectives on the "Big Data Revolution" ' *Concorrenza e mercato*, 50 (2016). The data within blockchain, although shielded by anonymity may conflict with the GDPR's principles enclosed in the above-mentioned regulation. In particular, the unavailability of a deletion function to erase the code (ie: the transaction) is the main issue European regulators might face.

[20] P. De Filippi and A. Wright, n 2 above, 22.

[21] Consob, n 6 above, 3.

[22] Jumpstart Our Business Startups Act, Pub L No 112-106, 126 Stat 306 (2012) (codified at 15 U.S.C. §§ 77a-77r, 78a-780).

[23] In Italy, the *Borsa Italiana* through the *Regolamento Alternativo del Capitale* (AIM Italia) – *Regolamento Emittenti* 1 Marzo 2012, has built up an entire sector devoted to facilitate the entrance on the so-called Alternative Capital Markets for small and medium type business. These entities enjoy a particular structure that goes from the appointment of a nominated advisor – that takes the function of the underwriters –, coupled with the Partner Equity Markets. The latest is a network of highly-qualified institutions (advisory companies, law firms and auditing firms) that follow international standard practices, offering support throughout the life cycle of the enterprise. Borsa Italiana, 'Private Equity Markets' available at https://perma.cc/2XYW-QPS2 (last visited 30 December 2019).

[24] Consob, n 6 above. The consultation paper was open to different actors in the crypto market targeting Italian investors, as well as academics, for commentaries addressed to the Public Hearing that took place in May 2019.

[25] Riquadro 2. Consob, n 6 above, 8.

describing how this platform may operate. Notably it forwarded inquiries and assistance to the *gestori di portali per la raccolta di capitali di rischio* (web providers for the collection of risk capital) already regulated by the crowdfunding regulation.[26] CONSOB's consultation paper does not exclude the possibility of a different type of counsel, not tied to crowdfunding specialists, but even that would need to meet the crowfunding regulation requirements.

One main difference between this type of crowdfunding and ICOs is the wider public that ICOs are able to attract.[27] Indeed, some crowdfunding structures may be a bad fit due to the divergence of audience (domestic in the crowdfunding, potentially global in the case of ICOs), and the difference of the assets exchanged. In the case of crowdfunding the capital is requested in exchange for either a pre-order (in the best case scenario) of those assets or a thank you note. In contrast, in the ICO what is given in exchange are digital assets that enclose a variety of rights, commonly voting and dividends.

In financial markets, centralized intermediaries assist companies going public, employed mainly as an interface between exchanges and companies dealing with regulation, establishing the procedures for trading securities,[28] and significantly, keeping the record of the transactions. Blockchain had substituted this role, by being (allegedly) tamper-resistant, transparent and establishing a reliable record of all the transactions with one action.[29]

Information about ICOs is available to investors, but not in the canonical way. The code is at the same time the contract itself and the source of information available to the public. This code provides valuable information that can help distinguish bad projects from good ones, as well as incorporating the price into the token.

Information in the blockchain environment is open source and most code is publicly available on github.[30] An empirical study showed that about ninety percent of ICO codes were published before the ICO.[31] The success of the project is

[26] Regolamento Consob 26 June 2013 no 18592 (Regolamento Crowdfunding).

[27] SEC, Securities and Exchange Commission, 'Investor Bulletin: Initial Coin Offerings' 25 July 2017, available at https://perma.cc/A5KE-8RNE (last visited 30 December 2019).

[28] The nature of tokens, as a security, remains uncertain. Recent studies have highlighted the resemblance of tokens to equity securities. For example, see, E. Lyandres et al, 'Do Tokens Behave like Securities? An Anatomy of Initial Coin Offerings' (2019) available at https://tinyurl.com/y3kekcbl (last visited 30 December 2019). Another empirical analysis – considering a sample of 1000 ICOs' white papers – shows that fourteen point two percent are of the equity type. See D. Zetzsche et al, 'The ICO Gold Rush: It's a Scam, It's a Bubble, It's a Super Challenge for Regulators' *University of Luxembourg Law*, Working Paper no 11/2017; *UNSW Law* Research Paper no 83; *University of Hong Kong Faculty of Law*, Research Paper no 2017/035; *European Banking Institute*, Working Paper Series 18/2018; 63 *Harvard Internationl Law Journal* (2019) forthcoming, available at https://tinyurl.com/y2e9cfls (last visited 30 December 2019).

[29] P. De Filippi and A. Wright, n 2 above, 93.

[30] Github, Inc, available at https://tinyurl.com/4dyt6b (last visited 30 December 2019).

[31] S. Adhami et al, 'Why do businesses go crypto? An empirical analysis of initial coin offerings' 100 *Journal of Economics and Business*, 64-75 (2018).

tied to the release of the code. When the code is published, more money is raised.[32] Because of review by the crowd of coders, the idea was that problems with the code would be identified and fixed before the ICO. Indeed, Ethereum provided a cautionary tale about the perils of ignoring coder comments. It went forward in the ICO process notwithstanding the continuous 'warnings' of the community regarding the multiple vulnerabilities of the code and ultimately had to spend more money than it earned to fix it.[33] The process relies on an opinion network to review the code and anticipate the offering. ICO's advertisement generally comes only after the code is public for a bit; Gnosis, for example, spent a year revising its code.[34]

The 2018 Italian legislation[35] defining and regulating cryptoassets is a good example of the emphasis on self-contained and self-executing code. The legislation defines a smart contract as software[36] (*programma per elaboratore*) that binds the parties. It thus reaffirms its contractual nature and at the same time equates the smart contract to a written agreement satisfying the formalities for its efficacy under Art 2720 of the Italian Civil code. The strong relationship between smart contract and blockchain is visible in this definition, which is narrow, cutting off all the types of smart contracts outside the blockchain.[37] The description of blockchain-based smart contracts as 'self-executing contract(s) expressed through software' is another precise definition that has been proposed.[38]

[32] ibid 73.

[33] SEC, 'Securities and Exchange Commission, Release No. 81207/July 25, 2017. Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO'; hereinafter the DAO report.

[34] Gnosis raised in April 2017 twelve point five million USD using a reverse Dutch auction, after two years of pre-public engagement and one year of post-public engagement. Commonly, the pre-public engagement takes between six months to one year while post-public engagement (namely, when the launch of the ICO is announced) takes up to three months. This shorter period is aimed to maintain the public attention and involvement; the choice of a larger period will probably dissipate interest in the ICO. See, Gnosis, 'White paper ed. December 2017: 2. Roadmap', available at https://perma.cc/3JJD-YVZT (last visited 30 December 2019), 10-11. For the method employed by Gnosis in the reverse Dutch auction see, V. Buterin's website, 'Analyzing Token Sale Models', available at https://tinyurl.com/y5j9xk5b (last visited 30 December 2019).

[35] Legge di conversione 11 February 2019 no 12 of decreto legge 14 December 2018 no 135, *recante disposizioni urgenti in materia di sostegno e semplificazione per le imprese e per la pubblica amministrazione* (Decree no 135, bearing urgent provisions for support and streamlined compliance procedures of private companies and public administration).

[36] ibid Art 8-*ter*, comma 2.

[37] This definition gives legal certainty to the smart contract, treating it as an electronic document both *ad substantiam* and *ad probationem* (the latest due to the timestamp function). However, it is unclear which type of timestamp by electronic validation is mentioned. The electronic Identification Authentication and Signature regulation (eIDAS) asserts the distinction between qualified and non-qualified electronic time stamp, the latest judicially ascertained. Art 41, European Parliament and of the Council Regulation (EU) 910/2014 of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, [2014] OJ L257/13.

[38] C. Bomprezzi, 'Commento in materia di blockchain e smart contract, alla luce del nuovo Decreto Semplificazioni' *Diritto, Mercato e Tecnologia*, 27 February 2019.

Unlike the IPO, the ICO launch – which evolved without a regulatory framework – provides little information regarding the enterprise itself. The practice of issuing a white paper emerged over time, and evolved into a source of information about the ICO. Some evidence suggests that the white paper is more robust when the code itself is not released, indicating that it sometimes serves as a substitute source of information. The code may not be released in cases where the originality of the project (the know how) is considered valuable, and needs to be protected by non-disclosing it. Moreover, the availability of the programming code source increases hacking chances.[39]

The white paper might have a unique role when promises that may be important to investors and ICO promoters – and that are routine in lawyer-drafted contracts – are difficult or impossible to encode. One such example is *force majeur* or hardship clauses, which would appear in a lawyer-drafted contract but that, even if included in a white paper, would be difficult to express in code.[40]

While some are freestanding online documents, clearly labeled white paper,[41] the term 'white paper' is sometimes a formal label for what is essentially a webpage and some social media communications marketing the ICO.[42] The white paper may be the sole source of information available to retail investors who are not code-literate. It accomplishes a very specific function: to drive information to retail investors in the crucial moment of the ICO process, before the token sales.[43]

The white paper is not a formal prospectus; it likely never crossed the minds of programmers to have one. Some white papers include an explicit statement that they are *not* to be considered a prospectus and should not trigger the accompanying regulation and requirements.[44] Nonetheless, white papers have the connotations of an unofficial prospectus. CONSOB's definition of the white

[39] S. Adhami et al, n 31 above, 4.

[40] C. Dannen, *Introducing Ethereum and Solidity. Foundations of Cryptocurrency and Blockchain Programming for Beginners* (Brooklyn, New York: Apress, 2017), 78; T. Butler et al, 'Smart Contracts and Distributed Ledger Technologies in Financial Services: Keeping Lawyers in the Loop' 36 *Banking & Financial Services Policy Report*, 1, 4 (2017).

[41] Eg Paragon, 'Whitepaper version 1.0', available at https://perma.cc/R7WP-RBT3 (last visited 30 December 2019).

[42] Eg Tron (Ticker: TRX) focused primarily on the visual content of their website with the purpose of showing a solid company. However, under the rubric 'developers documentation,' in a confined angle of their website, are available three types of whitepapers. Electroneum (Ticker: ETN) has its own youtube channel where all the news related to the enterprise are updated. See, Electroneum youtube, available at https://perma.cc/6CQT-YQMK (last visited 30 December 2019). Ripple (Ticker: XRP) does not provide a whitepaper on their website but two versions are available online. In most cases, such as the case of Ripple, the white paper is mentioned as a source for historical or educational purposes and does not reflect the current protocol. See, 'Ripple Protocol Consensus Algorithm' available at https://perma.cc/UL6P-D26L (last visited 30 December 2019). Compare with B. Chase and E. MacBrough, 'Analysis of the XRP Ledger Consensus Protocol' *Ripple Research* (2018). The latter has a level of sophistication difficult to process.

[43] S. Cohney et al, n 7 above.

[44] JUR, Decentralized Dispute Resolution Infrastructure, 'White Paper v.0.3' (2) available at https://perma.cc/P5KN-5MCE (last visited 30 December 2019).

paper, as a publication in which the principal characteristics of the (project or) operation[45] and the object of the offer, gives the sense that we are dealing with some sort of informal prospectus. The analogy to a prospectus is also supported by existing ICO white papers that include information typical of a prospectus such as risk factors;[46] others are even titled 'prospectus'.[47]

Treatment of the white paper as a prospectus is also the approach of Malta, one of the first governments to regulate cryptoassets. Malta's 2018 Virtual Financial Assets Act (VFA)[48] provides that certain types of decentralized ledger technology assets (DLT)[49] are subject to a particular prospectus regulation.[50] Another provision in the Maltese regulation of cryptoassets requires an auditor, appointed by the license holder, and further exonerates her from any type of professional responsibility while reporting issues to the competent authority (Malta Financial Services Authority), incentivizing disclosures and extending these duties to VFA agents and issuers.[51] However, the liabilities for the issuer[52] are referred solely to the white paper or other human readable contents described in the website.[53] This and other provisions allocate the white paper, and further readable information, as prospectus *per relationem*.

[45] *Operazione*. Understood as the project itself. CONSOB, n 6 above.

[46] Paragon, n 41 above.

[47] Polybius, 'Polybius Prospectus: A Project of a Regulated Bank for the Digital Generation' (2019), available at https://perma.cc/83AT-GZYP (last visited 30 December 2019).

[48] The VFA Act aims to provide investor's protection and is tied to the European directive on Money Laundering. European Parliament and of the Council Directive (EU) 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) no 2012/648 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [2015] OJ L471/73.

[49] Regulated by the Innovative Technology arrangements and Services Act (ITAS). Chapter 592, Act XXXIII of 2018. AN ACT to provide for the regulation of designated innovative technology arrangements referred to in this Act, as well as of designated innovative technology services referred to in this Act, and for the exercise by or on behalf of the Malta Digital Innovation Authority of regulatory functions with regard thereto.

[50] Art 47 of Virtual Financial Assets Act (VFA). Chapter 590, Act XXX of 2018. AN ACT to regulate the field of Initial Virtual Financial Asset Offerings and Virtual Financial Assets and to make provision for matters ancillary or incidental thereto or connected therewith. The act distinguishes among asset types. Competent authority must introduce a test excluding from the definition of *virtual financial assets* those tokens that are *virtual tokens* (which in turn are utility tokens), *financial instruments* (subject to MiFID II regulation) and *fiat currency in electronic form*. The VFA Act does not regulate those partially centralized technologies that deal with cryptoassets, as well as hybrids (ibid).

[51] ibid Art 50 et seq Part VIII, Duty of Auditors. The regulation does not develop the auditor's role beyond the mention of the duties of the auditor.

[52] The VFA refers to an issuer as a 'legal person duly formed under any law for the time being in force in Malta which issues or proposes to issue virtual financial assets in or from within Malta', leaving the door open to DAOs as possible issuers if recognized as legal persons. Art 1 (2), VFA. Note that in the ICO process there is no issuer in the conventional sense; its decentralized nature makes the entire network the real issuer. See F. Annunziata, n 14 above, 28.

[53] ibid Art 10.

In sum, despite its novelty, the ICO shares some features with the IPO and other existing forms of accessing capital. However, in addition to underlying assets and the current dearth of regulatory structure, a key difference is the source of information accessible to participants. The ICO and its terms are communicated to participants through the code and/or the white paper and other human readable promotional materials.

III. ICO Auditors

Originally, ICOs were targeted to a specific market of 'sophisticated investors' (read coders), capable of deconstructing the code and analyzing the feasibility of the project.[54] The open assets in blockchain may have some impact on sophisticated investors capable of reading and understanding the code. However, many projects rely on a high volume of capital to achieve their purposes, so target retail investors more broadly. During 2017, within the cryptocurrencies' boom, the market for cryptocurrencies shifted from the sophisticated investors to include retail investors as well.[55] Here the complexities of the unregulated market became visible.

ICOs rely on the code to communicate terms, but the entry of retail investors who are not code-sophisticates complicates such reliance and gives rise to the need for new intermediaries. ICO auditors are needed to bridge the elements of the ICO process – the code, the white paper, and, in some circumstances, related offline activity. After examining pros and cons, this section analyses each of the functions in turn: translation of the code for retail investors, reconciliation of the code with other information targeted at ICO participants, and verification of offline activity and identity.

1. Advantages and Disadvantages

The efficacy of ICO auditors relies on their role as reputational renters. A useful definition of these gatekeepers is as 'reputational intermediaries' whose value lies in being

> 'repeat players who provide certification or verification services to investors, vouching for someone else who has a greater incentive than they to deceive'.[56]

Auditors accomplish a double task, first *i)* control the operations of the company that required the audit and, second but most importantly, *ii)* create a

[54] S. Adhami et al , n 31 above.

[55] S. Cohney et al, n 7 above, 19. For a contrary view, C. Catalini and J.S. Gans, 'Some Simple Economics of the Blockchain' *Rotman School of Management*, Working Paper no 2874598; *MIT Sloan* Research Paper no 5191-16 (September 21, 2017), available at https://tinyurl.com/yxsmpnfk (last visited 30 December 2019).

[56] J. Coffee, *Gatekeepers: The Professions and Corporate Governance* (New York: Oxford University Press, 2006), 2.

transparent market 'assuming a public responsibility transcending any employment relationship with the client'.[57] Through their auditing, these companies send to the general public a message of quality and guarantee of accuracy and reliability of the business they have audited, which is necessary to tackle the market for lemons.[58] The credibility of auditing companies rests in the fact that they are repeat players[59] with reputational capital acquired through the years.

Information asymmetry is reduced by these intermediaries, since they come into play at an early stage of the transaction, when the promise of ICOs/ Tokens is released through the code and white paper. The ICO auditor could protect investors directly, by an *ex ante* verification at the time of the ICO minting process. The ICO auditor might also have a role *ex post*, protecting the private interests of investors in smart contract's enterprises, screening the information in the code with the information provided after the ICO has taken place.[60]

Ex ante review of the terms is particularly important in the context of ICOs because of barriers to remedies. Once the smart contract satisfies the condition for which it was programmed, there is no way to reverse the transaction. The only remedy (if any) available is under restitution.[61] However, the shielded identities of the parties makes this *ex post* remedy impractical.

Because there is no current alternative of a legislative system capable of regulating decentralized markets, reliance on a reputational intermediary is a concrete and appealing option. The introduction of an auditor does not necessarily recreate a centralized system of intermediaries. In fact, part of the appeal is that the auditor could be a signal of quality even in a decentralized marketplace. Examples have emerged of developing social norms and decentralized jurisdictions that try to recreate a regulated environment.[62]

Moreover, regulating these startups by an incisive role of the auditor is less expensive than regulating end-users. The more data collected in cyberspace, the

[57] United States v Arthur Young & Co 465 US 805, 818 (1984).

[58] G.A. Akerlof, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' 84 *Quarterly Journal of Economics*, 488 (1970).

[59] M. Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change' 9 *Law & Society Review, Litigation and Dispute Processing: Part One*, 96-98 (1974).

[60] C. Tedeschi, 'L'indipendenza dei revisori: a proposito della nuova normativa sulla revisione legale dei conti' *Giurisprudenza Commerciale*, 771 (2010). J. Cohen et al, 'Corporate Governance and the Audit Process' 19 *Contemporary Accounting Research*, 573 (2002).

[61] In the Italian panorama, it has been argued that the subject matter of this 'contract' is determinable at a later future time, when the condition enclosed in the promise is satisfied. Hence the contractual content is not known at the time it is performed but becomes known when the condition is performed. See, G. Finocchiaro, 'Il contratto nell'intelligenza artificiale' *Rivista Trimestrale di Diritto e Procedura Civile*, 452 (2018). However, as noted along these lines, a definite conditioned promise does not exclude parties' information asymmetry. The potential investor may be incapable of understanding the extent and significance of the encoded promise, it is more than merely ambiguous, and it falls short of being unconscionable.

[62] eg Aragon Network, 'White Paper' available at https://perma.cc/FUM7-ES8E (last visited 30 December 2019).

more chances to target individuals. Notwithstanding, end-user regulation is expensive and frustrating, since users can be located outside the boundaries of specific jurisdictions.[63] The object of regulation[64] in blockchain disappears as it is replaced by a code.

That said, ICO auditors are not a panacea. In fact, they face some of the same issues as traditional financial auditors and other gatekeepers. Much of the discussion and critique has revolved around auditor independence, particularly when they are paid by the companies they audit. As one author summed up: 'one problem overshadows all others: typically, the party paying the gatekeeper will be the party that the gatekeeper is expected to monitor'.[65] European Union regulation has encouraged alternatives in the auditor's description to embrace the real role of auditors in financial markets.[66] For obvious reasons, the auditor cannot be totally unrelated to the company that is audited.[67] It may be more realistic to opt for an alternative word for this requisite such as objectivity, autonomy, self-determination, professionalism, etc.[68]

Another way to address the problems of independence is through a so-called statutory auditor, appointed by the state to provide certification and auditing. This is already done in practice for small and medium enterprises (which is the same target of tech startups).[69] Notaries – discussed further below – are also a good example of a hybrid system, where the notary has duties and

[63] P. De Filippi and A. Wright, n 2 above, 176. Other ideas of regulating the Internet proposed by De Filippi and Wright involve the Internet, ie, the TCP/IP protocol. The transparency of the blockchain operates by sharing publicly the code. The Internet Service Provider can be regulated by blocking the traffic on a specific blockchain-based application, limiting their services. Nevertheless, the use of Tor browsers can shield the traffic encrypting it.

[64] The so-called *pathetic dot*. L. Lessig, *Code: Version 2.0* (New York: Basic Books, 2006), 122-125. For a contrary opinion, where the object of regulation is always present in online activities. See G. Resta and V. Zeno-Zencovich, 'Volontà e consenso nella fruizione dei servizi in rete' *Rivista Trimestrale di Diritto e Procedura Civile*, 441 (2018).

[65] J. Coffee, n 56 above, 3. However, the gatekeeper activity is also tied to the regulator which has a primarily interest in making information emerge, as a stakekeeper in financial markets. C. Alves, 'Corporate Governance Auditoria e Regulação: Há Conflito de Interesses' (Corporate Governance Audit and Regulation: Conflict of Interest) 55 *Cadernos do Mercado de Valores Mobiliários* (December 2016), 121. Furthermore, the constant interaction with the administrative agencies makes the gatekeeper role a conjoint task. See J. Correia de Miranda and S. Coimbra Henriquez, 'Riscos de auto-revisão e interesse pessoal – Contributos para a compreensão das amenaças ao dever de independência dos auditores' (Risks of self-review and personal interest – Contributions to the understanding of the threats to the duty of independence of auditors) 55 *Cadernos do Mercado de Valores Mobiliários* (December 2016), 152.

[66] European Commission, 'Green Paper, Audit Policy: Lessons from the Crisis' COM (2010), 561.

[67] C. Tedeschi, n 60 above, 779.

[68] Moreover, auditor's independence is described in a negative way, highlighting circumstances in which this requisite is lacking. European Parliament and the Council Regulation (EU) 2014/537 of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities and repealing Commission Decision 2005/909/EC [2014] OJ L158/77.

[69] Borsa Italiana, 'AIM Italia – Mercato Alternativo del Capitale' available at https://perma.cc/W44T-TA46 (last visited 30 December 2019).

regulation of a public officer, but is paid by private parties seeking the service.[70]

Despite these caveats, in a decentralized and disorganized market that crosses jurisdictional boundaries, these sorts of third-party intermediaries may serve an important role.[71]

2. The Functions of an ICO Auditor

What type of intermediary is suitable for ICOs? This section identifies and analyzes three main roles for the ICO auditor: to translate the code for retail investors, to reconcile the code with promises made in other materials, and to verify offline activity and identity.

a) Translate

One issue in these decentralized markets is the reliability of the encoded promise. Before retail investors had access to this emergent market, coders were (mostly) capable of improving and perfecting the publicly available code. Therefore, technical security issues were of most interest for the community.

The centrality of the code is also built into emerging legal approaches. The CONSOB consultation paper provides some insights regarding ICOs and traditional financial markets, as well as their interaction with existing European regulations (MiFID II).[72] For example, it assimilates token released in the minting process to a certificate constituting legal title for the transmission and incorporation of the rights embedded in the token. Following this reasoning, the extent of those rights would be totally encoded. The real project or operation, as CONSOB calls it – mirroring the financial operation regularly described in formal prospectuses – is described in the code.[73]

It is not always an easy task to read the code, even for experts, in part because of the cumulative and additive nature of the code writing built into the pre-ICO public availability and crowd review. Some may be available only in machine-readable form such as bytecode, which is publicly available in theory, but not easily accessible.[74] The role of the ICO auditor is accordingly as a code reader and translator, who can inform investors of the important encoded terms of the ICO. Asymmetry of information would be reduced also among sophisticated investors in regulated markets.[75]

[70] A. Anselmi, *Principi di arte notarile*, (Roma: Libreria Forense - Editrice, 1952), 24.

[71] The need of a supranational regulation is desirable, however utopic. The concepts developed in each legal order reflect a policy choice, which is difficult to merge. P. Maume and M. Fromberger, 'Regulations of Initial Coin Offerings: Reconciling U.S. and E.U. Securities Laws' 19 *Chicago Journal of International Law*, 548, 585 (2019).

[72] CONSOB, n 6 above.

[73] ibid.

[74] S. Cohney et al, n 7 above, 47.

[75] L. Lin and D. Nestarcova, 'Venture Capital in the Rise of Crypto Economy: Problems and Prospects' 16 *Berkeley Business Law Journal* (2019) forthcoming, *NUS Law*, Working

b) Reconcile

Whereas the role of translator is focused on making the main features of the code intelligible to non-code-sophisticates, the reconciliation function is all about the intersection between the code and other information. Contractual promises are complex, included inside the code as well as outside of it. Although in the idealized ICO, the code contains everything, often the main information accessible to the retail investor is the surrounding information online, including in the white paper. This surrounding information may include promises. Someone who is not able to read the code cannot confirm that the promises are encoded; they cannot, in other words, reconcile the code and the white paper (or other non-code materials promoting the ICO).

In this context, auditors can accomplish a specific function: verify the consistency between the white paper and the code. It is possible to leave the blockchain unaltered and, at the same time, require an auditor to pre-monitor the extent of the promise (what is advertised and declared, by any means of information) integrating this promise into the code.[76] The role is to check that additional promises made in materials such as white papers are actually encoded: a mind-the-gap function reviewing the correspondence of code with the other available information. The importance of the continuous aggregation of information is crucial for prospective ICO holders, as well as for holders in the post-ICO process, in order to attenuate the opaqueness of the quality of ICO characteristics.[77]

This concept overlaps with the translation function discussed above, in that it assumes that one of the needs for an auditor is as a code reader. What is additional here, however, is that the focus is not on the code alone and explaining what is encoded, but on the relationship between the code and other information. It requires dual expertise – someone who reads and understands the code and who reads and understands (and cares about) the additional available material. On this account, the rise of legal engineers that handle basic notions of cryptography would be helpful to the realms of law.[78]

The need for such a function is supported by the available data. One empirical study examined three categories of terms that have been important to protecting traditional investors: supply restrictions, restrictions on insider transfers, and immutability, in particular whether ICO promoters retain the right to modify

Paper no 2019/003, *NUS Centre for Banking & Finance Law*, Working Paper 19/01, available at https://tinyurl.com/ygmnarrg (last visited 30 December 2019).

[76] S. Cohney et al, n 7 above.

[77] Bancor (BNT) ICO reached its hard cap and ignored it, continuing to issue tokens. E. Lyandres et al, n 28 above. The hard cap (total issuance of a coin) is one of the elements that future holders consider relevant ie, the creation of scarcity, avoidance of dilution and the match between the project funds raised and the roadmap. All those elements indicate an increased future value of digital assets.

[78] K. Werbach and N. Cornell, 'Contracts Ex Machina' 67 *Duke Law Journal*, 313 (2017).

the code.[79] In its sample of large ICOs from 2017, the study identified significant gaps between what was encoded and what was promised to participants through white papers and other information.[80]

So far, this description assumes that the auditor's role is backwards looking, assessing existing white papers and other information. One can also imagine a system where the ICO auditor is involved in ensuring the quality of the information in the white paper or even in drafting the white paper based on its reading of the code. Accordingly, the translation function described above and the reconciliation functions may very well overlap.

Finally, more established markets rely on mandatory disclosure to avoid information asymmetry. The contents of the IPO prospectus are dictated by statute and regulation.[81] But it is worth noting that mandatory disclosure is not the only possible mechanism. If ICOs are interested in signaling quality, they might make some voluntary disclosures. The ICO Governance Foundation, a non-governmental organization, has even designed a form – Form IGF-1 – to structure voluntary disclosure in the ICO context.[82]

c) Verify

The last category addresses the persistent intersection between the digital and the offline. Offline information is important to know whether offline conditions are satisfied. In regular contractual agreements the intention of parties, the conditions imposed, and other features make the promise as clear and intelligible as it can be for the subscriber. In smart contracts these aspects of the contractual language, the denotational aspects, do not appear. A contract possesses operational and non operational parts, whereas the smart contract has the operational parts but lacks most of the non operational parts, such as conditioned terms.

Emerging intermediaries specifically target the intersection between the digital and the offline. As one put it:

> 'Building a truly valuable smart contract requires the use of multiple inputs to prove contractual performance. (…) Smart contracts require secure middleware to connect them to real world data. This external data will trigger the contract, creating the need for its high reliability'.[83]

In other words, verifying offline performance of a condition remains a task

[79] S. Cohney et al, n 7 above, 6.
[80] ibid 51 & Appendix C.
[81] eg US Securities Act of 1933.
[82] M. Matsumura, 'ICO Governance: a Protocol-Based Self-Regulation of Token Sales in Decentralized Capital Markets' December 2017, available at https://perma.cc/X58W-WH2T (last visited 30 December 2019)
[83] ChainLink Features, available at https://perma.cc/6CJ9-AFJB (last visited 30 December 2019).

that cannot be executed through the code alone.

Considering the fast progress of technology, the line between offline and virtual is not static. It is possible to include information in the code through the expansion of the Internet of Things, and mixed automated devices (such as GPS devices). Nevertheless, what will constitute the added value of the auditor consists in the verification and validation of the code by the offline recording of transactions, wherever that line is drawn.[84]

The identity of those involved with the startup and those investing may also matter. One of the promises of transactions based on blockchain was that those involved could remain anonymous (or pseudonymous).[85] The *Manifesto* acknowledged that this would lead to money laundering and illicit trades,[86] but was unconcerned with this possibility. In some ways this function for an ICO auditor stems from a disagreement about the premise. If we are troubled by money laundering, then offline identity may very well matter. Even outside these more extreme possibilities, the identity of those involved in a startup may matter to investors, and certainly regulators may want to know, particularly as participants expand beyond code-sophisticates.

Anonymity is not the only concern. Online descriptions may claim identities and credentials that are fictitious when compared to the offline identity and that may raise concerns about fraud. For instance, reportedly copy writers advertising on China's Taobao offered to draft white papers with little connection to the offline identity: service providers reportedly advertised that they could

> '(…) "falsify the education and professional background of these ICO teams. Harvard, Yale, Stanford, Cambridge, Apple, Google, you name it. And we will ensure their profile pictures remain unsearchable on the internet" '.[87]

Offline identity of ICO promoters may inform decisions to invest and need some mechanism to verify this identity.

Because it is not possible to assess the identity of the person involved in the startup from the digital information alone, the alleged transparency of the code (which is public) seems also not to be adequate protection against the potential risk of market manipulation and insider dealing. ICO auditors, through their verification of the offline, might address these concerns about offline contractual conditions and the relevance of offline identity.

[84] C. Catalini and J.S. Gans, n 55 above, 11.

[85] T. May, n 1 above. 'Computer technology is on the verge of providing the ability for individuals and groups to communicate and interact with each other in a totally anonymous manner. Two persons may exchange messages, conduct business, and negotiate electronic contracts without ever knowing the True Name, or legal identity, of the other'.

[86] ibid.

[87] W. Zhao, '$600 Fraud? Fake ICO White Papers Are Drawing Scrutiny' *CoinDesk*, available at https://perma.cc/5BFH-D7WR (last visited 30 December 2019). The article quoted a Beijing news story available at https://perma.cc/RB9Z-K9M8 (last visited 30 December 2019).

Collateralized stablecoins[88] provide another example of the need for verification. Stablecoin – also called the anti-bitcoin – is a type of cryptocurrency that maintains a stable value, a ratio of 1:1USD.[89] Verification is needed of the amount of off-chain collateral. One of the first stablecoins, Tether (Ticker: USDT), lost credibility after suspicions arose regarding the exact amount and consistency of the cash reserves held as a collateral. The distrust generated in the community placed USDT in a dangerous position backed by USD at a ratio of 1:0.96. Moreover, an unofficial audit showed that Tether USD funds backed 74% of its reserves.[90] An external off-chain audit might be helpful in assessing the extent of the amounts collateralized, all while preserving decentralization.[91]

The transparency offered to the public does not stop at the nature and composition of the reserved funds. In an immature virtual financial market, tracing operations is fundamental to ferret out issues such as commingling of assets, as these types of vehicles facilitate opaque activities.[92]

IV. Implementation and Existing Models

We have identified broad functions of a third-party auditor in the ICO context. This section examines examples of existing models. Despite the promise of trust without intermediaries, as soon as the platform developed, intermediaries began to emerge. They both indicate the need for such intermediaries and suggest possible routes for integrating these functions.

1. Consulting and Auditing Services

[88] See M. Dell'Erba, 'Stablecoins in Cryptoeconomics. From Initial Coin Offerings (ICOS) to Central Bank Digital Currencies (CBDCS)' 51 *New York University Journal of Legislation and Public Policy*, Forthcoming, available at https://tinyurl.com/yhe6fmt6 (2019) (last visited 30 December 2019).

[89] Liquid collateral could be gold, USD or algorithmic mechanisms of stabilization. ibid.

[90] W. Suberg, 'Fractional Reserve Stablecoin Tether Only 74% Backed by Fiat Currency Say Lawyers' *Cointelegraph*, 30 April 2019, available at https://perma.cc/X2BT-5LSD (last visited 30 December 2019).

[91] The need for off-chain audits of collateral is related to proposals to use escrow accounts to structure the ICO market. See, E. da Cruz Rodrigues e Silva, *Legal framework of initial coin offerings* (2018) available at https://tinyurl.com/ykxww4ps (last visited 30 December 2019). See U. Rodrigues, 'Semi-Public Offerings? Pushing the Boundaries of Securities Law' *University of Georgia School of Law Legal Studies*, Research Paper no 2018-30, available at https://tinyurl.com/yekkvyj4 (last visited 30 December 2019).

[92] New York Attorney General, Letitia James, issued a preliminary injunction freezing a $900 million line-of-credit transaction indefinitely, fruit of a settlement agreement between Tether Holdings Limited, Tether Operations Limited, Tether Limited and Tether International Limited (Tether issuer) and the alleged controlling trading platform Bitfinex (operated by BFXNA Inc, NFXWW Inc, and iFinex, Inc). The latter holding a significant amount of Tether's reserves. The allegations involve fraud, commingling of assets and duty of loyalty violations. Press Release, 25 April 2019, available at https://perma.cc/QZ9F-MLZZ (last visited 30 December 2019).

The existing smart contract and blockchain auditing and consulting companies provide code auditing and sometimes white paper writing and consulting. The most common audit service is a code-based, technical one, based on security grounds. One of these examples is Zeppelin,[93] which provides a cybersecurity audit of smart contracts.

However, given uncertainty about how these assets and activity will be regulated, a technical audit may not be enough.[94] In this field, CodeLegit has established partnerships with law firms to provide a complete package of security, in cyberspace and the real world. Moreover, its services embrace dispute resolution through arbitration. The arbitrator is appointed by the parties and is both a technical and legal expert.[95]

IBCGroup, instead, assumes a propulsive role in the ICO process, offering consulting services that are not mere code audit but also legal audit. Among its services, IBCGroup provides fund liquidation and distribution, marketing and advertising, and white paper analysis.[96]

2. Oracles

The contradiction of the smart contracts technologies lies in the impossibility of entirely eradicating the intermediaries. Oracles are proof of it. While banning middlemen those startups have introduced middlewares which fulfill some of the same tasks of traditional intermediaries without the protection provided in centralized/regulated markets.

An oracle is a third party (individuals or programs) capable of introducing external data into the smart contract. Its role is determinative for the smart contracts' development due to its interaction with the real world persons and reaction to events. These external data need to be transferred in a safe and reliable manner. Indeed, in the decentralized environment, the oracle works in a decentralized way, though using multiple external sources, which are centralized. Coders associate centralization in this context, usually through banks, with lack of reliability[97] because it introduces vulnerabilities when assets are transferred

[93] See Zeppelin 'Zeppelin verifies that your decentralized systems work as intended by performing an audit. Our engineers fully review your system's architecture and codebase, then write a thorough report with actionable feedback for every issue found'. Zeppelin, 'Security Audits for High Impact Projects' available at https://perma.cc/8E53-P696 (last visited 30 December 2019).

[94] See CodeLegit, 'Mission: Technical Compliance' available at https://perma.cc/6AXR-64U4 (last visited 30 December 2019) ('All technological compliance audits are carried out by Codelegit as the technical auditor in cooperation with leading law firms as the legal auditor. This integrated approach of technical and legal expertise allows Codelegit to offer true LegalTech products').

[95] CodeLegit, 'CodeLegit White Paper on Blockchain Arbitration' available at https://perma.cc/EW92-P8PT (last visited 30 December 2019).

[96] IBCGroup, available at https://perma.cc/PE95-7PXA (last visited 30 December 2019).

[97] With especial attention to centralized applications such as Ripple. See P. Eze et al, 'A Triplicate Smart Contract Model Using Blockchain Technology' 1 *Disruptive Computing, Cyber-Physical Systems (CPS), and Internet of Everything (IoE)*, 4 (2017).

electronically. However, oracle intervention makes the transaction more reliable since it is linked to real world situations enhancing trust in the flux of information transmitted.[98] These could be described as mathematical auditors in the Ethereum platform.[99]

The most feasible way to bring into play a gatekeeper is through such oracles. The information received by means of white paper or voting decisions (commonly through blogs of prospective ICOs) can update, incorporate or decide the final outcome,[100] and the performance of a particular contract. Ambiguous terminology, as common in contracts, is exacerbated in smart contracts.[101] Essentially, the written language of coders in the white paper reflects computational thinking, which is unsuitable to provide enough information and disclosure of the risks of the enterprise.[102]

Solidity, one of the most common languages for smart contracts, allows for the use of oracles to reconcile the code with offline activity. It has a way to combine the mathematical proof of the working section or operational parts of the smart contract with the denotational parts claimed in the white paper (and other official sources such as ICO blogs) through oracles. The ICO auditor here assumes a specific role in the assessment of legal, technical and semantic terms. Then this new gatekeeper will exclude bad programs by using machine-checkable proof (the program of programs), to verify mathematically that the program is doing what it's supposed to do[103] and by validation of the results (a human input given via oracles).

a) ChainLink

ChainLink, an oracle enterprise, presents a mixture of blockchain parts based on smart contracts and offline/offchain parts of decentralized nature.[104] The combination of both and its aggregation in nodes supplies an important characteristic of the market makers/OTC operations, the meeting of demand and

[98] N. Attico, *Blockchain. Guida All'ecosistema. Tecnologia, business, società* (Milano: Guerini Next, 2018), 178.

[99] Up until now, the issue in decentralized technologies/blockchain consists in the missing economical (and legal) thinking and reasoning of the coders/programmers. In fact, the main flaws in cryptocurrencies belong to the lack of business models of these startups that create new projects on top of Ethereum without considering important factors of success such as a basic business plan or cash flow. T. Butler et al, 'Smart Contracts and Distributed Ledger Technologies in Financial Services: Keeping Lawyers in the Loop' 36 *Banking & Financial Services Policy Report*, 1 (2017).

[100] P. Ortolani, 'Self-Enforcing Online Dispute Resolution: Lessons from Bitcoin' 36 *Oxford Journal of Legal Studies*, 595-629 (2016).

[101] P. De Filippi and A. Wright, n 2 above, 75.

[102] D. Di Sabato, 'Gli *smart contracts*: *robot* che gestiscono il rischio contrattuale' *Contratto e Impresa*, 379 (2017).

[103] C. Dannen, Introducing Ethereum and Solidity. Foundations of Cryptocurrency and Blockchain Programming for Beginners (Brooklyn, New York: Apress, 2017), 78.

[104] *ChainLink* has its native/intrinsic token. As per *ChainLink* features: 'Smart contracts require secure middleware to connect them to real world data. This external data will trigger the contract, creating the need for its high reliability', see n 83 above.

supply. The online parts of *ChainLink* generate requests of information (demand) while the offline parts decide whether or not to provide a reply. The nodes are reputational renters of this type of market, and frequently provide bond postings to assure the transparency of the transactions. There is a higher probability of the accuracy of information transmitted given its decentralized nature. However, their alleged reputation succumbs to opportunistic incentives that make it possible to copy the information from another node and receive the compensation in exchange.[105]

The provider of the input (human or not) can rely on the most common and useful mechanism of information in cryptos: CoinMarketCap,[106] which mirrors online databases that provide dissemination of information and disclosure of companies that raise money from the public.[107] The function of CoinMarketCap, besides sharing information about crypto enterprises, is to provide the trusted websites where the ICO takes place.[108]

b) Notaries

Another example of oracle enterprise are notaries. In civil law countries, long before the auditor, the *latin notary* accomplished the function of public officer and certifier. This type of legal intermediary has long provided reliability between contractual parties and encouraged multiparty transactions. Different from the auditor's role, this intermediary operates on behalf of both parties. Its superior role and reputation is monitored by a centralized body (in Italy the Consiglio Nazionale del Notariato) providing guidance in conflict of interest issues and a sanctioning apparatus that oversees the notary labor nationwide.[109]

In Italy, and in most civil law countries, the *latin notary* figure fulfils, at the

[105] N. Attico, n 98 above, 178-179.

[106] This website is a data provider with reliable and verified information regarding the current state of cryptocurrencies. Recently CoinMarketCap announced the launch of two cryptocurrency benchmark indices on Nasdaq Global Index Data Service, Bloomberg Terminal, Thomson Reuters Eikon. CMC Crypto 200 (CMC200) – cryptocurrencies under influence of Bitcoin –, and CMC Crypto 200 ex BTC (CMC200EX). CoinMarketCap Blog, 'CoinMarketCap cryptocurrency benchmark indices to launch on NASDAQ, Bloomberg and Thomson Reuters today' available at https://perma.cc/X5BQ-A5E3 (last visited 30 December 2019).

[107] Such as the SEC company filings EDGAR (Electronic Data Gathering, Analysis, and Retrieval system) available at https://perma.cc/64ED-66WP (last visited 30 December 2019), or the document section of the Borsa Italiana website, available at https://perma.cc/RCL6-BYMR (last visited 30 December 2019).

[108] The listing criteria for cryptocurrencies must be publicly and actively traded on at least two exchanges, supported by CoinMarketCap, and meet the definition of cryptocurrency as stated in Wikipedia. Those are the minimum requirements needed for cryptocurrencies' submission for consideration. The success of a submission for addition on CoinMarketCap further depends on community interest, trading volume, uniqueness, age of project. See, CoinMarketCap, 'Methology: Listing Criteria' available at https://perma.cc/8GMA-4BU8 (last visited 30 December 2019).

[109] The CNN enacts the code of professional responsibility/deontological rules binding for all notaries in Italy while the deputy body that guaranties rules compliance is the *Consigli Notarili Distrettuali*.

same time, the duties of a public officer and the performances of a private practitioner in the legal field.[110] Different from public officers, the notary's fees do not derive from the State but from private parties – as it is in the case of lawyers. Furthermore, notaries' reputation and independence is preserved by the lack of fixed clients – as repeat players that may condition the notary decision process –; the competition, which is limited due to the high bar to entrance through the notary exam and often the bar exam; the fixed taxes and state fees that they must carry on behalf of the State; plus civil and criminal liabilities, arising from the exercise of their role.[111]

Following this approach *Provable*[112] (previously known as *Oraclize*, an oracle company) provides the external data with a double authenticity proof. Provable is a smart contract that uses the TLS Notary technology, which ensures the truthfulness of the information acquired from an internet website in a specific moment, giving it firm date. The transaction master key is split between the auditee (Provable), the auditor (an open-source Amazon Machine Image) and the server.[113]

To summarize, in the case of oracles the transaction is not fully self-enforced since it is required to segregate funds until the condition in the contract is met and the person has not raised a complaint. In the case of dissatisfaction, the dispute is resolved by the oracle (the machine as in Provable), or a human acting as a third-party arbitrator, which would render a decision and release the escrowed accounts.

3. Certifiers

New types of technical blockchain auditing firms[114] have emerged to give confidence in the project and attract investors. Following this path, the crypto currency certification consortium (C4) is an online organization devoted to establishing cryptocurrency standards, namely minimum requisites of code compliance.[115] High profile current and past members include the inventor of

[110] A. Anselmi, n 70 above, 24.

[111] Hence, placing their activity within the general contracts for intellectual services (Art 2230 Italian civil code) for the safeguard of public trust. M. Di Fabio, 'Il notaio pubblico ufficiale e libero professionista, Notaio (diritto vigente)' *Enciclopedia del Diritto* (Milano: Giuffré, 1978), XXVIII.

[112] One of their main services is the certified processes. 'While authenticity proofs give transparency to the execution of our processes, external audits verify that our code does what it should do. We cover the entire audit trail - everything is being monitored from inception to execution'. Provable, 'Top Features: Certified Processes' available at https://perma.cc/JR44-ZMKB (last visited 30 December 2019).

[113] Provable, 'Authenticity Proofs Types: TLSNotary proof' available at https://perma.cc/CRA4-KYCZ (last visited 30 December 2019).

[114] ADBK Consultancy available at https://perma.cc/8DZH-E9EP (last visited 30 December 2019) and also available at https://perma.cc/C5WE-J97J (last visited 30 December 2019).

[115] As emphasized in their Mission 'The CryptoCurrency Certification Consortium (C4) establishes cryptocurrency standards that help ensure a balance of openness & privacy, security & usability, and trust & decentralization'. CrytoCurrency Certification Consortium, 'Mission' available at https://perma.cc/K73L-5W7R (last visited 30 December 2019).

Ethereum (Vitalik Buterin) who is on the Board of Directors, and the Chief Scientist at Provable (Piotr Piasecki) who was an advisor. C4 provides training and releases certifications such as the Certified Ethereum Developer (CED), which has a contract learning section in the second unit based on Solidity.

In this scenario, the trust reposed in the intermediary (enhanced by the technology) descends from the professional responsibility to which they are subject. Certifiers, as required by the C4, must follow a code of ethics. The status of certifier must be both earned (the courses last two years) and maintained. Compliance with these rules makes C4 one of the first examples of a self-regulatory organization in this area.[116]

The US context has developed its own self-regulatory organization for virtual commodities, the 'Virtual Commodities Association', (VCA), which sets forth industry standards in virtual commodity marketplaces, and best practices for SROs, potentially issuing reports. VCA was established by Gemini Trust Company (LLC) and is regulated under New York banking law. Gemini is, at the same time, the greatest US exchange and custodial services for cryptocurrencies (XBT, ETH, LTC, ZEC).[117] VCA's scope remains uncertain. Vain were the efforts of the Winklevoss brothers, founders of Gemini, to introduce bitcoin ETF on a regulated exchange – the proposal was rejected twice by the SEC.[118] However, the SEC's caution does not equate to a definitive rejection but allows the agency more time to consider its approach to cryptoassets.[119]

4. Dispute Resolution Systems

Dispute resolution systems, in blockchain, place themselves as intermediaries in the ex ante phase of design of the smart contracts. One of these examples is Aragon (Ticker: ANT).[120] Parties that use this platform for smart contracts submit

[116] Greater degree of expertise, innovatory possibilities, and information costs are benefits that self-regulatory organizations provide. A. Ogus, 'Rethinking Self-Regulation' 15 *Oxford Journal of Legal Studies*, 97-108 (1995). Indeed, those advantages are measured with the fact that there are not legally sanctioned rules imposed but social norms or 'reactive measures' ('*misure di reazione*'). See M. Ramajoli, 'Self regulation, soft regulation e hard regulation nei mercati finanziari' *Rivista della Regolazione dei Mercati*, 53 (2016).

[117] Only Bitcoin (XBT) was traded as futures in both the Chicago Board Option Exchange (CBOE) and the Chicago Mercantile Exchange (CME), but now put on hold – restraining any issuance. At the current moment there are no Bitcoin futures contracts; the last one listed expired last June. A. Osipovich, 'Cboe Abandons Bitcoin Futures' *Wall Street Journal*, available at https://perma.cc/JTK2-SABT (last visited 30 December 2019).

[118] K. Rooney and B. Pisani, 'Winklevoss twins bitcoin ETF rejected by SEC' *CNBC*, available at https://perma.cc/JQB2-MJH6 (last visited 30 December 2019).

[119] SEC, File no SR-CboeBZX-2019-004, Release no 34-85475, 'Notice of Designation of a Longer Period for Commission Action' 29 March 2019, and Release no 34-85896, 'Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to List and Trade Shares of the VanEck SolidX Bitcoin Trust' 20 May 2019.

[120] Aragon Network, 'White Paper' (2018), available at https://perma.cc/A8LA-VT9Z (last visited 30 December 2019).

their controversies to this specific jurisdiction posting a bond, using collateralized agreements. Aragon is similar to an arbitration court. However, instead of having arbiters or qualified persons in the decision making process, controversies are solved by jurors, namely, members of the network. They receive the appointment as jurors as long as they earn reputation by resisting bribery attacks.

The automatization in the response to a future event rests in the nature of the smart contract. In this scenario, contractual parties can settle in advance the scheme for the audit that could possibly reduce the need for dispute resolution (through the aggregation of information).[121] However, as in the DAO, the automatization via the smart contract does not guarantee the remedial effects of the legal contract.[122]

Another example in the blockchain scenario is Augur,[123] a smart contract based on predictive markets.[124] Augur's token REP stands for reputation. By predicting future events, this altcoin helps people in the blockchain community ferret out possible frauds and report on existing state of art in the blockchain. The probability of the outcome of the events relies on logarithmic market scoring rules.[125] The cost of its creation is relative and varies upon the amount of information aggregated in order to predict the outcome, regardless of the frequency or number of participants that give information. Oracles in smart contracts by giving the input of (human) information assess the honesty of the information by mathematical models.[126]

Augur can assume the role of an alternative arbitration court or alternative juries.[127] These new technologies are already in use in research,[128] and some argue that they can also work as decentralized courts, or better said juries, because the importance is not to have a proper juror, especially in private litigation, but

[121] C. Catalini et al, n 55 above, 7.

[122] K. Werbach, 'Trust, But Verify: Why the Blockchain Needs the Law' 33 *Berkeley Technology Law Journal*, 489, 545 (2018).

[123] Ticker: REP.

[124] It works by creating an event tied to the acquisition of the outcome token (two or more depending on the event outcomes) – which reflects posting a bond –, and the squared token distribution. So that the payment of the winner token occurs through the amount received by the loser token (N. Attico, n 85 above, 131).

[125] Different from Augur is the Gnosis, (Ticker: GNO) https://perma.cc/KV6Z-FLDS (last visited 30 December 2019), a different type of Ethereum based prediction market that operates on the futarchy theory, the ability to create laws employing solely market predictive forces in the aggregation of information. At the same time, it disregards any external input on the modality to reach a particular objective, the event that triggers a particular decision to reach that objective is fully market based. Essentially, employing the measurement of welfare by a cost benefit analysis it is possible, for example, to remove managers. R. Hanson, 'Votes, Values, but bet beliefs' (2013) available at https://perma.cc/7WE7-RBT3 (last visited 30 December 2019).

[126] R. Hanson, 'Logarithmic Market Scoring Rules for Modular Combinatorial Information Aggregation' 1 *Journal of Prediction Markets*, 2-3 (May 2003).

[127] See K. Werbach, n 122 above, 549 and P. De Filippi and A. Wright, n 2 above, 75.

[128] A.Z. Robertson & A.H. Yoon, 'You Can Get What You Pay For: An Empirical Examination of the Use of MTurk in Legal Scholarship' 72 *Vanderbilt Law Review*, 1633 (2019).

to deliver the ruling, a task that is not necessarily better performed by in-person jurors.

V. Conclusion

'(T)ales of fortunes made and dreamed to be made' characterize the ICO market.[129] ICOs push 'financial disruption' and the entry of new investors driven by 'passion for cryptoassets, blockchain, altcoins, and distributed ledger technology'.[130] And the underlying smart contracts promise a new decentralized world of consensus that makes traditional intermediaries obsolete.

The broadening of the ICO investor population to investors who are not code-literate, however, has put pressure on the market. Without advocating the replication of old financial structures, this article identifies areas of continuing need for some intermediation. In explaining this scenario of ICOs, we tried to highlight the necessity of bridging information from the code, the white paper and other human readable information, and the offline world.

The activities of the new ICO intermediary can be understood as falling into three categories: translation, reconciliation, and verification. First, there is a need for a third-party intermediary to translate code. A code reader and translator could inform investors of the important encoded terms of the ICO. The second role for a new ICO intermediary is to reconcile the code with other promises. It would look at both the code and the other materials directed at investors to determine whether they correspond. It would determine to what extent the code reflects the promises advertised and disseminated through the means of information that induced investors to take part in the venture – the white papers, websites, podcasts, social media, etc. Finally, the ultimate ICO gatekeeper's task is to verify the offline/offchain information from the real world relevant for its impact on the ICO. All three functions of a new ICO intermediary would support confidence in the market.

[129] US Securities and Exchange Commission (US SEC), n 7 above.
[130] See, Flippening available at https://perma.cc/64RK-ZU65 (last visited 30 December 2019).

Comments on New Italian Legislation

The New Italian Class Action: Hope Springs Eternal

Angelo Danilo De Santis*

Abstract

This paper analyzes class action for damages and collective action for injunctive and declaratory relief as new collective proceedings introduced in the Code of Civil Procedure. It examines the main questions brought about by the new class action, regulated by a form of simplified proceedings. It is also considered the adhesion proceedings, which aims to state adherents' rights, and that is structured in two phases, the first following the decision of admissibility, the second stemming from the final decision on merits. Rules providing for appeals, class action settlements and collective enforcement of judicial orders are analysed.

I. Introduction

Legge 1 April 2019 no 31 has introduced Title VIII-*bis*, «Dei procedimenti collettivi», in the fourth Chapter of the Code of Civil Procedure and the Title V-*bis*, «Dei procedimenti collettivi», in the annexed rules.[1]

The new Legge has provided for a *vacatio legis* of twelve months after its publication on the *Gazzetta Ufficiale*, recently extended to eighteen.

Fifteen new articles have been added to the Code of Civil Procedure (from Art 840-*bis* to Art 840-*sexiesdecies*), and two in the annexed rules (Arts 196-*bis* and 196-*ter*).

Arts 139, 140 and 140-*bis* of the Consumer Code are going to be repealed, according to the *vacatio legis* term.

At a glance, the system of collective redresses in consumer protection has been dismantled (only Art 37 Consumer Code survives, but with some limitations, as we are going to explain), and has been replaced by two different forms of collective actions – the class action for damages and the collective action for injunctive and declaratory relief – which will apply in a wide range of mass tort cases.

During the last two years, we have observed acceleration towards a radical

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[1] See B. Sassani ed, Class action. *Commento sistematico alla l. 12 aprile 2019, n. 31* (Pisa: Pacini editore, 2019); D. Dalfino et al, 'Le nuove forme di tutela collettiva (l. 12 aprile 2019 n. 31)' *Foro italiano*, V, 321-389 (2019); C. Consolo, 'La terza edizione dell'azione di classe è legge ed entra nel c.p.c. Uno sguardo d'insieme ad un'amplissima disciplina' *Corriere giuridico*, 737-743 (2019); G. Scarselli, 'La nuova azione di classe di cui alla legge 12 aprile 2019, n. 31' *judicium.it*, 7 June 2019, 1-12.

overhaul of the system of collective redresses,[2] motivated by the feeling that in the European common area of justice there are not sufficient conditions to deal with an effective harmonization of the technical procedure tools adopted by national laws.[3]

In any event, it is a fact that the consumer class action for damages, enacted in 2009,[4] has failed to live up to expectations, so that legge no 31/2019 has innovated the procedural *panorama*; a deeper analysis and study would have been more appropriate, keeping in mind the proposals of two new European directives, coming from the European Commission.[5]

II. Class Action for Damages. General Overview

The new class action for damages is ruled by Art 840-*bis* to Art 840-*quinquiesdecies* Code of Civil Procedure.

The representative plaintiff files the suit against the defendant and the trial is held between two parties: any joinder of parties is forbidden as this is the same solution adopted by the next-to-die consumer class action.

The class action is regulated by the rules of simplified proceedings (Arts 702-*bis*, 702-*ter* and 702-*quater* Code of Civil Procedure), with some *sui generis* variations, and it is carried out in three phases:

a) the first one to declare the admissibility of the claim (such as a certification, according to Rule 23 of the US Federal Rules of Civil Procedure) and to define, by judicial order that can be appealed before the Appeal Court, the potential class members rights, as well as to open the first window to join the class through the adhesion;

b) the second one depends on the declaration of admissibility of the claim, is functional to the declaratory judgment on common issues (such as responsibility,

[2] During the current legislature, the bill no 844/XVIII has been presented before the Senate; this bill has been approved, with some modifications, and has become the Legge no 31/2019.

[3] In the European Commission communication to the European Parliament COM (2013) 401 final (available at https://bit.ly/2phAASP (last visited 30 December 2019)) the Commission explains the need to respect different legal systems and legal traditions of Members States, in specific areas, such as civil procedure, that are well-grounded at national level but recent at EU level. The requirement to 'ensure global competitiveness and to create an open, functional market' can be pursued through the harmonization of collective redresses, so that the European Commission has enacted the Communication 11 April 2018 (COM) 2018 183 final, containing two directive proposals 11 April 2018, COM (2018) final and 11 April 2018 COM (2018) 185 final (see A. Palmieri, 'Perdite seriali dei consumatori e tutela collettiva risarcitoria: dove si dirige l'Europa?' *Foro italiano*, V, 205-210 (2018)).

[4] First, Art 140-*bis* Consumer Code has been inserted in the Consumer Code by Art 2, para 446, legge 24 December 2007 no 244, as 'collective action for damages' and, after many delays of its effectiveness, never entered into force and was substituted by the current class action *ex* Art 49, legge 23 July 2009 no 99.

[5] R. Caponi, 'Ultime dall'Europa sull'azione di classe (con sguardo finale sugli Stati uniti e il Dieselgate)' *Foro italiano*, V, 332-339 (2019).

tort causation etc) regarding the plaintiff, class members and potential class members and (in case of a plaintiff suffering economic damages) to the sentence to pay compensation for damages; this second phase of the trial is regulated by innovative rules concerning evidence gathering and Court powers;

c) the third phase is designed to collect all the adhesions of potential class members who have chosen to wait for a favorable decision, instead of gambling on joining the class after the admissibility decision, and it is managed by a judge; he has to verify, through contradictory and written proceedings, the validity of the class members claims; the Court nominates a class representative, which is in charge as a public official, and assists the judge in the determination of the liquidation for each class member.

The legislator's choice of binding the class is grounded on the voluntary joinder (opt-in instead of the more efficient and widespread opt-out), which is the same solution adopted by Art 140-*bis* Consumer Code and that seems to be a real ballast preventing a successful development of collective redresses for damages.

Also the optional stay of proceedings depending on the contemporary administrative proceedings before an independent authority or an administrative Court is provided by the new procedural rules: this is not new, since both Art 140-*bis* Consumer Code and the decreto legislativo 19 January 2017 no 3, concerning antitrust private enforcement, pertain the same tool.

Regarding the area of application, the new class action has been untied by the consumer protection and now can be intended as a general action for damages,[6] with some residual limitations.

First of all, the class action is alternative to individual suits.

There are no restrictions or conditions to becoming a representative plaintiff or a class member, so that everyone can file a suit, that is natural persons, legal entities, consumers, professionals, investors, savers,[7] enterprises, public and private entities, and, probably, also workers and employees.[8] Furthermore, organizations representing collective interests can file a class action for damages, but their standing to sue depends on their capacity to satisfy some requirements in order to be inserted in a special list, controlled by the *Ministero dello sviluppo economico* (Ministry of Economic Development).

The suit cannot be filed against just anyone, since Art 840-*bis* requires the status of enterprise or public authority or entity managing public services.

The rights grounding the plaintiff claim must be homogenous to all the other subjective rights of the potential class members affected by the same conduct or by different similar conducts, and the class *numerosity* can be considered a condition of admissibility of the action; combining these two requirements

[6] C. Petrillo, 'Situazioni soggettive implicate', in B. Sassani ed, n 1 above, 45.

[7] C. Cavallini, 'Azione collettiva risarcitoria e controversie finanziarie' *Rivista delle società*, 1115 (2010).

[8] R. Donzelli, 'L'ambito di applicazione e la legittimazione ad agire', in B. Sassani ed, n 1 above, 8.

permits to affirm that the structure of the subjective rights must be based on common issues that can efficiently be brought before the court and decided.

Both the class action for damages and the class action for injunctive relief will apply to action filed for torts occurred after the entry into force of the legge no 31/2019.

It's easy to predict that several questions that have emerged during the application of Art 140-*bis* Consumer Code, with reference to torts concerning long term contractual or non-contractual relation, will arise again, but with an additional critical point:[9] from the day of entry into force of the new rules, Arts 139, 140 (regulating the class action for injunctive and declaratory relief) and 140-*bis* (class action for damages) Consumer Code will be repealed, so that there will not be any collective redress for consumer torts occurred before the entry into force of the legge no 31/2019 but still not pursued within the same date.

Art 37 Consumer Code, regulating injunctive relief against unfair contractual terms, will survive, even without proceedings rules, because it refers to the repealed Art 140 Consumer Code.

III. Action for Damages and Declaratory of Common Issues. The Proceedings

The representative plaintiff who files a class action claims, alternatively:

- for damages, if he has suffered harms;

- for declaratory relief of common issues, when the plaintiff is an organization included in the special government list and, even though it has not suffered any harm, brings the collective interest before the court.

In the second instance, it is necessary to imagine a new form of mootness: the only gain that the plaintiff can achieve with his claim would be the binding effect of the adjudication for class members in the subsequent third phase of the proceedings.[10]

This innovative form of class action for damages can be associated with the *Kapitalanleger-Musterverfahrensgesetz*[11] and with the new *Musterfeststellungsklage*,[12]

[9] A.D. De Santis, 'L'azione di classe a dieci anni dalla sua entrata in vigore' *Foro italiano*, I, 2180-2187 (2019).

[10] See a thorough analysis of the problems arising from the *res judicata* effects of the injunctive relief order ruled by Consumer code collective redresses and specifically concerning the effects on common issues, in A.D. De Santis, *La tutela giurisdizionale collettiva. Contributo allo studio della legittimazione ad agire e delle tecniche inibitorie e risarcitorie* (Napoli: Jovene, 2013), 499-519.

[11] See C. Consolo and D. Rizzardo, 'Due modi di mettere le azioni collettive alla prova: Inghilterra e Germania' *Rivista trimestrale di diritto e procedura civile*, 891 (2006); D. Rizzardo, '*Class actions* «fuori dagli Usa»: qualcosa si muove anche alle nostre (ex-) frontiere settentrionali almeno quanto al case management' *Int'l Lis - Rivista di diritto processuale internazionale e arbitrato internazionale*, 28 (2006); see more references in A.D. De Santis, *La tutela* n 10 above, 339, fn 475.

[12] A brief commentary is available at https://tinyurl.com/wopemk5 (last visited 30 December 2019).

but, considering the wide differences regarding forms and techniques in the German and the Italian law system, it is very complicated to imagine a successful transplant of the German approach in Italy.

The suit must be filed before the specialized section of the Tribunal, since the jurisdiction seems to be ordinary,[13] and the venue is determined by the residency of the defendant. Forms of the simplified proceedings are special and the case is decided by the formation of the Court with a sentence, instead of ordinance[14] (Art 840-*ter* Code of Civil Procedure).

Regarding the limits to the national jurisdiction, the Italian jurisdiction can be determined if the action is filed versus a foreign defendant but torts have occurred in Italy (or, anyway, if the rules of the European Parliament and Council Regulation (EU) 2012/1215 of 12 December 2012 determine it); combining the rules of the Reg UE no 1215/2012 with Arts 18-30-*bis* Code of Civil Procedure could permit to identify the Italian Tribunal that has jurisdiction.

The problem concerning the plurality of *criteria* to choose the right jurisdiction in case of class members resident in different EU States, could be solved applying Art 6, para 2, Regulation no 1215/2012, and requiring them to have an address for service in Italy.

With reference to the structure of the proceedings, the suit should be considered subject to the procedural condition of mediation proceedings, if the case concerns one of the topics in the Art 5, para 1, decreto legislativo 4 March 2010 no 28, as well as to the mandatory negotiation proceedings, according to Art 3, decreto legge 12 September 2014 no 132.

In contrast with Art 140-*bis* Consumer Code, legge no 31/2019 has introduced a system of notice of the action whose costs are borne by the Tribunal. The function is to guarantee the largest knowledge of the pending class action, and to avoid costs for the representative plaintiff.

Specifically, the new procedural rules provide the mandatory notice on the web site of the *Ministero della Giustizia* (Ministry of Justice), of:

- the pleading containing the claim and the decree containing the date of the first hearing, within a mandatory date (Art 840-*ter*, para 2);

- the order deciding on admissibility, within ten days from its issuing;

- the order declaring the inadmissibility of the action, the one declaring the dismissal of proceedings (Art 840-*quater*, para 2 states that it is duty of the clerk to notice the order 'immediately');

[13] In the Italian law system, ordinary judges (*Giudice di Pace*, *Tribunale*, *Corte di Appello* and *Corte di Cassazione*) have jurisdiction (id est, the power to decide) on cases concerning subjective rights; there exist also special judges, who have jurisdiction on cases concerning *interessi legittimi* (arising from the *public agencies* powers; eg *Tribunale Amministrativo Regionale* and *Consiglio di Stato*, called administrative courts) and some kinds of subjective rights (eg *Corte dei Conti*, *Tribunale Superiore delle Acque Pubbliche*; also administrative courts have jurisdiction on a large number of cases involving violation of subjective rights).

[14] In the Italian law systems, judges decide cases by sentence, as a general rule.

- the sentence containing the order to pay for damages, within fifteen days from its emission (Art 840-*quinquies*, last para);

- each appeal filed against the decision and each decision defining the appeal proceedings (Art 840-*decies*, para 1);

- the proposal of settlement coming from the Tribunal (Art 840-*quaterdecies*).

In relation to the subsequent phase of adhesion, the notice is mandatory for:

- the drafted settlement drawn up by the representative of the class, according to Art 840-*quaterdecies*, para 3;

- the order which approves or denies the authorization of the representative of the class to settle, according to Art 840-*quaterdecies*, para 6.

IV. (In)Admissibility of the Action

Art 840-*ter*, para 4, Code of Civil Procedure states that:

> 'the claim is declared inadmissible:
>
> a) if it is clearly groundless;
>
> b) if the tribunal does not recognize the homogeneity of individual rights;
>
> c) if there is a conflict of interests between the plaintiff and the defendant;
>
> d) if the plaintiff does not appear to be an adequate representative of individual homogenous rights of class members'.

It seems reasonable to suppose that the decision could be rendered at the first hearing and that, if it is necessary to consider issues proposed by parties, the Tribunal could give them a legal term to lodge statements.[15]

The choice of an admissibility judgement answers the need of balancing different interests, that is, on one hand, the defendant demanding to dismiss the case as quickly as possible, and, on the other hand, the potential class members, claiming for homogenous rights, to be protected from the risk of joining an ungrounded class action.

But, paying attention to the inadmissibility reasons, it seems sufficiently clear that the Tribunal cannot disregard the numerosity requirement; it seems difficult to imagine that conflict of interests, inadequacy of the plaintiff and lack of homogeneity of individual rights can be scrutinized if there is no reference to the large number of potential class members.

Moreover, if the claim is suited by an organization for the declaration of common issues, an inquiry on the multi offensive conduct seems necessary.

[15] In Italy there is no pre-trial phase, and the judgement can be also achieved after the first hearing. The first hearing is held after the notice of the pleading containing the plaintiff's claim.

The 'homogeneity of rights' between plaintiff and class members has determined, under Art 140-*bis* Consumer Code, great hermeneutic efforts, that have produced uncertain decisions;[16] it is plausible that new class action rules will impose a new interpretation of the notion of homogeneity, considering that class members could not be described as a homogeneous category, such as consumers.

Legge no 31/2019 has modified and clarified the notion of conflict of interest, referring to the conflict between the plaintiff and the defendant.[17]

The new wording, more limited than the one that we find in Art 140-*bis*, para 6, Consumer Code, should remove all doubt about the relevance of conflict of interests between plaintiff and class members,[18] as well as among different groups of class members.[19]

Regarding the adequacy of representation, the wording of Art 840-*ter*, para 4, letter d), differs from the one used by Art 140-*bis* Consumer Code, where the adequacy is referred to the representation of interests of the class.

It is necessary to underline the consequences of this change that forces the plaintiff to represent individual homogenous rights instead of 'interests of the class'.

Considering economic incentives and other simplifications in evidence gathering, as well as the provision that the plaintiff must be an adequate representative of adherents' individual rights, the scrutiny will be directed not

[16] In case law, see Tribunale di Venezia 25 May 2017, *Foro italiano*, I, 2432 (2017); Tribunale di Milano 9 December 2013, *Foro italiano*, I, 590 (2014); Tribunale di Milano 8 November 2013, *Foro italiano*, I, 274 (2014); Corte d'Appello di Napoli 29 June 2012, *Foro italiano*, I, 342 (2013); Tribunale di Napoli 9 December 2011, *Foro italiano*, I, 1909, (2012), with note by A. Palmieri and A.D. De Santis; Tribunale di Firenze 15 July 2011, *Foro italiano*, I, 1910, (2012); Tribunale di Torino 31 October 2011, *Foro italiano*, I, 1910 (2012); Corte d'Appello di Torino 23 September 2011, *Foro italiano*, I, 3422 (2011).

[17] The problem of conflict of interests are well recognized by american academic commentators and courts; see, for example, D. Rhode, 'Class Conflicts in Class Actions' 34 *Stanford Law Review,* 1183 (1982); J.C. Coffee Jr., 'Class Wars: The Dilemma of the Mass Tort Class Action' 95 *Columbia Law Review*, 1343, 1432 (1995) (stressing inadequacy of future claims classes to monitor attorneys); H.M. Downs, 'Federal Class Actions: Diminished Protection for the Class and the Case for Reform' 73 *Nebraska Law Review*, 646, 651 (1994); S. Issacharoff, 'Class Action Conflicts' 30 *UC Davis Law Review*, 805, 828 (1997); S.P. Koniak, 'Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.' 80 *Cornell Law Review*, 1045, 1121-1122 (1995) (stating that it is not efficient to apply conflict of interest principles in a mechanical fashion to class actions); G.H. Curry, 'Conflicts of Interest Problems for Lawyers Representing a Class in a Class Action Lawsuit' 24 *Journal of the Legal Profession*, 397 (2000).

Italy has not developed a deep experience about conflict of interests in class actions, since the question has been faced only in one case: Tribunale di Firenze 15 July 2011, *Foro italiano*, I, 1910, with note by A. Palmieri and A.D. De Santis.

[18] That could occur and could be relevant, especially in the light of the relation between plaintiff and class members if described as legal representation (see, for example, A.D. De Santis, *La tutela* n 10 above, 709).

[19] See, with specific reference to the consumer class action, A. Motto and S. Menchini, 'Art. 140-*bis*' *judicium.it*, 23 June 2010.

only to economic and financial capacity,[20] but to subjective qualities of the plaintiff and of his attorney.

An important innovation has been introduced by Art 840-*ter*, para 6, Code of Civil Procedure, which states that 'if the inadmissibility is declared according to para fourth, letter a), the plaintiff can bring a new suit only in case of new facts or new law issues'.

The article lays down an innovative *res judicata* effect of the order of inadmissibility in case of clear groundlessness and diversifies the rule compared to other reasons of inadmissibility.

One of the most remarkable innovations in the civil procedure *panorama* consists in the provision of Art 840-*quinquies*, para 3, Code of Civil Procedure, that states 'the duty to advance expenses for the technical consultant is charged to the defendant, unless the Tribunal ascertains the existence of specific reasons'.

The intention to facilitate bringing class action for damages seems clear, especially when the determination of the suffered harms is grounded in scientific or technical requirements or evidence that can determine huge costs.

The power of the Tribunal to base its decision on statistics or presumptions should help the plaintiff to demonstrate the causation between tort and suffered harms, especially when the action is promoted by an organization that did not suffer any damages.[21]

[20] See Tribunale di Cagliari 19 February 2014, *Rivista giuridica sarda*, I, 75 (2015) which stated that the admissibility of a class action is conditioned by existence of requirements of Art 140-*bis*, para 6, Consumer Code, and especially of plaintiff adequacy of representation; the plaintiff can fulfil this requirement only if he is able to efficiently protect interests of future ones of class members, considering his organization and financial resources at the moment of the admissibility evaluation; Tribunale di Napoli 9 December 2011, n 16 above, 1909, expressing the principle that voluntary representation given to a consumer association, enrolled in the list ruled by the *Ministero dello sviluppo economico*, fulfil the requirement of admissibility of the claim, consisting in the plaintiffs' adequacy of representation; Corte d'Appello di Torino 23 September 2011, n 16 above, 3422, expressing the following principle: the class action is admissible if filed by consumers that, even if unable to pay costs of such an expensive lawsuit, have given representative powers to a consumers association who is able to adequately represents class interests; Tribunale di Torino 28 April 2011, *Foro italiano*, I, 1888 (2011) considered that the plaintiff whose financial resources are not sufficient to face costs of a class action, with specific reference to notice costs, cannot be an adequate class representative.

The question of the class action lawsuit's costs (see E. Ferrante, 'La nuova "azione di classe" in Italia' *Contratto e Impresa Europa*, 10 (2011)) has also been analysed considering the German *Verbandsklage* (collective action filed by association) by N. Trocker, 'Interessi collettivi e diffusi' *Enciclopedia giuridica* (Roma: Treccani, 1989), XVII; M. Cappelletti and B. Garth, 'The Protection of Diffuse, Fragmented and Collective Interests in Civil Litigation', in W. Habscheid ed, *Effektiver Rechtsschutz und verfassungsmäßige Ordnung. Die Diskussionsberichte zum VII. Internationalen Kongreß für Prozeßrecht* (Würzburg: Taschen, 1983), 158; see, in the US case law, for example, *Eisen* v *Carlisle & Jaqueline* 417 US 156 (1974), whose motivation is also entirely reported by V. Vigoriti, *Interessi collettivi e processo – La legittimazione ad agire* (Milano: Giuffrè, 1979), 291, and analysed by G. Costantino, *Contributo allo studio del litisconsorzio necessario* (Napoli: Jovene Editore, 1979), 14; see also A. Giussani, *Studi sulle "*class actions*"* (Padova: CEDAM, 1996), 224.

[21] Moreover, the possibility that the defendant bring statistics against the plaintiff ones

Furthermore, Art 840-*quinquies* Code of Civil Procedure provides special rules concerning disclosure of documentary evidence; this rule is clearly inspired by Art 3 decreto legislativo no 3/2017, (that transposed the European Parliament and Council Directive 104/2014/EC of 26 November 2014 on the antitrust private enforcement),[22] but with only one inexplicable difference consisting in the exclusion of any power of the court to order disclosure to third parties.

V. Collecting Class Members. The Opt-In Solution

The technique used to collect in one lawsuit all the claims grounded on homogenous individual rights is the adhesion to the class action.

Each class member who wants to enter the class has to lodge his statements within mandatory dates.

Those dates are connected to two 'time windows'; the class member doesn't need the service of an attorney and by lodging his (only electronic) statements he:

- produces all the effects of the document instituting proceedings;
- states all the facts grounding his subjective right;
- provides for documentary evidence (oral evidence are not allowed);
- gives an anomalous representative power to a representative administrator that is going to be nominated by the tribunal;
- does not become a party, but can access the file of the Office and receives all the communications from the clerk;
- can watch the progress of the proceedings in case of adhesion in the first 'window';
- has the power to pursue the proceedings, in case of dismissal of the plaintiff;
- takes part into the adversarial procedure consisting in the third phase of the proceedings, which is opened after the adjudication;
- has the power to revoke the representation given to the representative administrator and to determine the ineffectiveness of his adhesion, and so to regain the right to sue through an individual suit;
- has the power to revoke the adhesion until the decree delivered by the judge deciding on his claim does not become definitive;
- aims to get a favourable decision, contained in the decree, which can be appealed only by the representative administrator;
- maintains the right to claim – but it is not clear how – for the part of damages that the judge has not liquidated.

should not weaken the effectiveness of this tool, considering that the tribunal has the power to order a technical consultancy to verify which statistics are more reliable.

[22] See G. Finocchiaro, 'La disciplina dell'esibizione delle prove nei giudizi riparatori per violazione delle norme antitrust in attuazione della dir. 2014/104/Ue' *Nuove leggi civili commentate*, 413 (2018), as well as A. Fabbi, 'La "esibizione" istruttoria nel private enforcement del diritto antitrust', in B. Sassani ed, *Il private enforcement antitrust dopo il d. lgs. 19 gennaio 2017, n. 3* (Pisa: Pacini Editore, 2017), 169.

There is no coordination between terms to appeal and terms to adhere, which could give rise to several practical problems if, for instance, someone appeals the order of admissibility or the sentence: the lack of any provision stating any form of stay of terms to adhere appears such a serious gap in the law.

It is difficult to understand the reasons why the Italian legislator has preferred to insist on the opt-in choice rather than building an opt-out class action, but probably that's because it finds hard to stir off the imagine of 'American Stuff', that, in the main European Law systems, appears already passed.[23]

It is not the first that the openness of the Italian jurisprudence[24] has helped the legislator to increase the class action deterrent effect.

After ten years of consumer class action, it should be clear that the class action, conceived as a mere, more or less efficient, alternative to individual suits, gives rise to more problems than it solves and that the real *ratio* to adopt such a refined, powerful and terrible tool (defined legalized blackmail),[25] consists in solving all the controversies arising from a mass tort, achieving the result of increasing the fairness of habitual parties.[26]

Adherents are not parties, but filing a suit, having some of the powers of the parties, must bring about the burden of proof, suffer decays and estoppels.

If the judgement is favourable to the plaintiff, the Tribunal nominates the judge and the representative administrator.

Once the date assigned to bring adhesions has expired, a new proceeding starts, finalized to establish class members' rights; this phase is ruled by the nominated judge and is characterized by the opposition between class members and defendant, with the representative administrator playing a less sided role.

Adherents, defendant and representative administrator take part into the written cross examination proceedings and in case of unspecific objections the fact can be considered admitted.

The defendant power to counterclaim or to file suits against third parties is not mentioned; there is a huge gap in the law, as this exigence of defence could rise during this phase for the first time, regarding an individual relation between a class member and the defendant.

Probably, this limitation to the defendant's defence rights can be explained

[23] See A.D. De Santis, 'L'azione di classe a dieci anni dalla sua entrata in vigore' n 9 above, 2176; see also critical consideration to the opt-in rule as provided by Art 140-*bis* Consumer Code expressed by C. Consolo, 'È legge una disposizione sull'azione collettiva risarcitoria: si è scelta la via svedese dello "*opt-in*" anziché quella danese dello "*opt-out*" e il filtro ("L'inutil precauzione")' *Corriere giuridico*, 5 (2008).

[24] See Tribunale di Milano 25 October 2018, *Foro italiano*, I, 2162 (2019), with note by A.D. De Santis, that has recognized as applicable and enforceable in Italy an order that certified a class action settlement, reached before a New York District Court.

[25] See M. Landers, 'Of Legalized Blackmail and Legalized Theft: Consumer Class Action and the Substance-Procedure Dilemma' 47 *Southern California Law Review,* 842 (1973-1974).

[26] See M. Galanter, 'Why the «haves» come out ahead: speculations on the limits of legal change' *Law & Society*, 95 (1974).

considering the *ratio* of the class action for damages and the kinds of cases treated.

The obvious respect to due process of law principles should impose to permit the defendant any right of defence in individual lawsuits, without any form of estoppel.

In the adhesion proceedings any oral evidence is expressly excluded, with only one, partial, exception, consisting in a new – for the Italian law system – form of *affidavit*, that only adherents can lodge.

The role played by the representative administrator is enigmatic.

It is not clear if he can be considered an officer of the court – and in this case the procedural rules concerning, for instance, recusal, should apply – or if he is a party, having a special *legitimatio ad processum*, or if he is a hybrid party, whose framework is going to be built, also in the light of his quality of public officer, stated by law.

Moreover, the coexistence, in the adhesion proceedings, of class members and the representative administrator will lack both in the appeal proceedings against the decree containing the decision on adherents' rights, because the representative administrator has just the standing to file it, and in the collective enforcement proceedings, because there is no standing for them, only for the representative administrator.

The adhesion proceedings can end in three ways:

- the judge rejects the claim brought by the adherent;
- the judge admits the claim totally;
- the judge admits the claim partially.

In the last two cases, the judge emits an enforceable decree for each class member.

In case of collective enforcement or collective settlement, the judge can deliver a motivated decree that a) authorizes the distribution of the money collected by the representative administrator, in order to pay it to all the adherents or b) can declare the impossibility to achieve a reasonable compensation in favour of the class, also considering costs of the proceedings and dismissing the case.

The decree contains the liquidation of attorneys' fees, and, if the class members have adhered without an attorney, it's not clear if the judge has to provide for costs liquidation, at least to refund them the amount of expenses payed to adhere.

The decree provides for money relief and this permits to deny that adherents can invoke any other kind of judicial order, such as ordering something to do or not to do, delivery or eviction.

VI. The Appeal

Arts 840-*decies* and 840-*undeciesdecies* Code of Civil Procedure rules the

appeal, and the regulation appears so full of questions that these can be only hinted.[27]

It is reasonable that, lacking more specific rules, Arts 323-338 Code of Civil Procedure should apply.

Art 840-*decies*, para 2, Code of Civil Procedure states that the decision can be appealed for annulment by the adherents in cases provided by Art 395 Code of Civil Procedure, or if it is the result of collusion.

It seems confirmed that only the plaintiff, and not the class members, can file an appeal against the decision, so that before the Court of Appeal third parties' joinder is considered forbidden.

Art 840-*undecies* Code of Civil Procedure rules the opposition to the decree delivered by the judge by the end of the third phase.

New evidence is not allowed so that the *thema decidendum* and the *thema probandum* cannot be wider than in the first instance.

Only the defendant, the representative administrator and the attorneys of the plaintiff (but only to object the liquidation of their fees) have standing to file opposition.

It seems very anomalous, for the class members, the lack of standing to file the opposition, because the judge has decided on their rights and they, even if they are not parties, have some of the powers of the parties themselves.

Joinder of third parties who are interested in the suit is permitted until the date for the first delivery of defendant's pleadings but it does not seem to be enough to heal the *vulnus* to the right of action and defence of adherents, whose only chance to draw on the appeal proceedings could consist in revoking their adhesion.

The defendant could suffer a huge violation of his rights, at least considering costs and fees, because he could lose any chance to recover them from the adherents, once they have released themselves from the bonds of the proceedings; there is only one possibility to save these rules from the doubt of unconstitutionality, and it consists in qualifying the fund – that each class member has to feed – as a warranty for recovering costs and fees in case of revocation of adhesion.

VII. Settlement, Enforcement, Costs and Fees

Under the United States federal class action, settlements represent a crucial element that determines the outcome of the litigation.[28] The defendants aim to settle, once the class action is certified, not only to avoid the risk to pay huge amounts of money, in addition to attorneys' fees and punitive damages, but also because trial is hard and efficient (as well as the enforcement), discovery is

[27] See R. Donzelli, 'Le impugnazioni della sentenza e del decreto', in B. Sassani ed, *Class action* n 1 above, 199.

[28] See, for example, R.G. Bone, *The Economics of Civil Procedure* (New Tork: Thomson West, 2003) 69-108.

invasive and accompanied by duties of disclosure, and, last but not the least, being condemned by a Court plays a moral and social disvalue.[29]

The inefficient opt-in choice and the predictable ability of defendants to manage and to take advantage of many gaps of procedural law (also considering the difficulties to enforce the titles), let suppose they will not be much interested in settling class actions.

Art 840-*quaterdecies* Code of Civil Procedure provides for two forms of class conciliation before the Tribunal,[30] so that, considering the other form ruled by Art 840 *bis*, para 6, Code of Civil Procedure,[31] the suit can be settled in three different ways.

The first one concerns the conciliation occurring during the simplified proceedings and it stems from the Tribunal proposal.

Para from 3 to 9 Art 840-*quaterdecies* Code of Civil Procedure rules terms and forms of conciliation occurring during the trial.

The settlement authorized by the judge and reached between the representative administrator and the defendant is enforceable and also title to take out a mortgage; moreover, the representative administrator has to certify signatures of each class member accepting the settlement.

Art 840-*terdecies* Code of Civil Procedure states that, in case of incompliance of the decree, only the representative administrator can enforce it, while adherents are not able to.

So, only the representative administrator and the plaintiff's attorney have standing to enforce the decree to get their money fees.

The whole amount of money from the enforcement of the decree is deposited in a fund, according to enforcement judge orders, and the representative administrator has to pay each class member according to a pre-approved project of division and the judges' decree.

Concerning costs and fees, the new class action provides for economic incentives for the attorneys (specifically, for the plaintiff attorneys, as well as for the adherents ones) and for the representative administrator; also, costs are reduced, considering, for instance, the forms of public notice.[32]

[29] See A. Giussani, 'La transazione collettiva per i danni futuri: economia processuale, conflitti d'interesse e deterrenza delle condotte illecite nella disciplina delle «*class actions*»' *Foro italiano*, IV, 175 (1998); L.S. Mullenix, 'Class Action Settlements in the United States', available at https://tinyurl.com/vdwmz5l (last visited 30 December 2019); N. Andrews, 'Multi-Party Proceedings in England: Representative and Group Actions', available at https://tinyurl.com/wsp67mm (last visited 30 December 2019).

[30] See A. Giussani, 'Le composizioni amichevoli della lite nella nuova disciplina dell'azione di classe', in B. Sassani ed, 'Class action' n 1 above,149.

[31] The rules states that if the parties (plaintiff and defendant) reach a settlement, the tribunal gives a deadline to class members that, just in this single case, can pursue the proceedings. It is a naive provision, since in Italy parties reach settlements out of the proceedings, and, once settled the case, they do not show up in court (two consecutive hearings) and the judge, who is never informed about the settlement, has to dismiss the proceedings.

[32] See G. Mazzaferro, 'Le spese e le sanzioni', in B. Sassani ed, 'Class action' n 1 above, 163.

The legislator clearly aims to realize more attractive proceedings in order to promote the class action litigation.[33]

In fact, the plaintiff attorneys can get more fees in respect to what the tribunal states if the third phase ends with a favourable decree for class members.[34]

Also, class members' attorneys can get fees whose amount will be determined by a specific administrative decree enacted by the *Ministero della Giustizia* and the *Ministero dello sviluppo economico*.

All the representative administrator's credits are considered privileged (the measure of this unspecified privilege is seventy-five percent) on all the goods foreclosed.

A special economic incentive consists in the defendant duty to advance expenses for technical consultant.

VIII. The Class Action for Injunctive and Declaratory Relief

The first and most important aspect of the new Art 840-*sexiesdecies* Code of Civil Procedure consists in an enlargement of standing to sue, which is extended to individuals, who are interested in filing an injunction against the defendant.

Also, non-profit organizations and associations have standing, but they have to be enrolled in a list kept by the *Ministero della giustizia* and to meet some financial conditions.

There are two forms of class action for injunctive relief: the first one can be filed by non-profit organizations; the second one can be filed by individual persons whose interests are coincident to collective ones, so that physiologically the plaintiff has to claim for an injunction that can be useful for an entire class.

The injunctive class action can be filed only against enterprises or public

[33] As explained by R.G. Bone, *The Economics of Civil Procedure* n 28 above 260, 'the complexity of the class action stems mainly from the large number of actors involved and wide range of strategic opportunities the device opens up. In a large class action, there are lots of interested persons, including: (1) representative parties, (2) class attorneys, (3) absent class members with interests that may differ from one another, (5) defendants, and (6) the judge. All these persons have their own particular interests in the class action and the conflict and competition among them can produce high social costs'.

The economic analysis of the device shows that the main key of class action success consists in avoiding to file the so called hybrid class actions, ie class actions embracing both cost-justified and non-cost-justified individual suits.

Regarding third party funding, Italy has not developed a significative experience yet (see E. D'Alessandro ed, *Prospettive del* third party funding *in Italia/Perspectives on Third Party Funding in Italy* (Milano: Ledizioni, 2019)).

In Italy, the class actions deterrent effect (see for example C. Engel, 'Does Class Action Have a Deterrent Effect?' 172(1) *Journal of Institutional and Theoretical Economics (JITE)*, 104-107 (2016)) has paradoxically regarded plaintiffs, since it has not produced any results regarding defendants' misconducts; the deterrent effect does not stem from litigations costs but from the extreme complexity of the rules, also related to the inefficiency of the opt-in system.

[34] No success fee would be up to the plaintiff's attorney in case of class settlement.

authorities or entities managing public services, in case of illicit conducts connected to their activities.

The remedy can be considered general – in fact it is inserted in the Code of Civil Procedure – so that it will be necessary to coordinate it with other specific class actions for injunctive relief provided by special laws (eg Art 37 Consumer Code, Art 28 legge 20 May 1970 no 300 (*Statuto dei Lavoratori*), Art 28 decreto legislativo 1 September 2011 no 150).

The suit can be filed to receive a judicial order against illicit commission or omission, so that the order could consist in a specific *facere*;[35] this is a very innovative choice from the legislator.

The trial is ruled by Arts 737-739 Code of Civil Procedure[36] and the *Pubblico Ministero* is a necessary joinder; also Art 840-*quinquies* Code of Civil Procedure applies.

The enforcement of the judicial order is ruled by Art 614-*bis* Code of Civil Procedure, whose field of application excludes labour lawsuits, and that is defined 'also applicable beyond its limitations'; the real meaning of this locution is not clear, but one of the possible interpretations consists in considering the indirect enforcement rule applicable also in labour litigation.

[35] See G. Basilico, *La tutela civile preventiva* (Milano: Giuffrè, 2013), 217; D. Amadei, *L'azione collettiva inibitoria. Sistema, tutele ed attuazione* (Torino: Giappichelli, 2018).

[36] Those articles rule the *procedimenti in camera di consiglio*, which is a special form of simplified proceedings.