EUROPEAN PRIVATE LAW INTEGRATION THROUGH TECHNOLOGY: THE CONSTITUTIONAL DIMENSION*

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SOMMARIO*: 1. Two great explorers and the story of a long trip. – 2. The Constitutional Trajectory of Private Law. – 3. Technology beyond Public-Private Law divide: facing Private Powers. – 3.1. De facto Powers. – 3.2. No Money, Just Data: a Constitutional issue. – 4. The EU Regulatory Approach: an "Epistemological Obstacle"? – 4.1 About GDPR and Copyright Directive. – 4.2 About Competition Law: digital monopolists thanks to the market. – 5. Conclusions for an Epistemological Disruption.*

ABSTRACT. Il contributo ricostruisce il percorso della cosiddetta costituzionalizzazione del diritto privato, con particolare riferimento alla regolamentazione europea della tecnologia. In tale ambito, infatti, vengono in rilievo plurimi diritti costituzionali. Pure al livello costituzionale si colloca la regolamentazione del fenomeno, che avviene essenzialmente a livello europeo. Le relazioni giuridiche che si realizzano nell'ambiente digitale sono sempre più caratterizzate da un grande squilibrio: da una parte i nuovi poteri privati digitali, padroni degli algoritmi più potenti del mondo, dall'altra il consumatore digitale, che "aliena" i propri dati personali in cambio di prodotti e servizi apparentemente gratuiti. Si osserva che l'odierno paradigma regolatorio europeo è condizionato da una sorta di "ostacolo epistemologico", dato dalla riproposizione – anche nell'ambiente digitale – dei tradizionali diritti del consumatore. Al riguardo, occorre chiedersi se sia sufficiente a riportare in equilibrio i rapporti privati digitali, ad esempio, elevare il livello di informazione del consumatore. O ancora quale grado di effettività di tutela assicurino il consenso "granulare" al trattamento dei dati personali e concetti come l'autodeterminazione informativa. Anche sul piano del diritto antitrust emergono analoghe criticità, avendo l'idea di "benessere del consumatore" consentito la formazione di veri e propri monopoli nei mercati digitali. Il contributo conclude con alcuni spunti per una "disruption" epistemologica della regolamentazione europea della tecnologia.

The essay follows the path of the so-called constitutionalization of private law, with particular reference to the European regulation of technology. In this context, in fact, several constitutional rights come into relevance. Also at the constitutional level is the regulation of the phenomenon, which takes place essentially at European level. The legal relations that take place in the digital environment are increasingly characterized by a great asymmetry: on one side the new private digital powers, masters of the most powerful algorithms in the world, on the other side the digital consumer, who "alienates" his personal data in exchange for products and services apparently free of charge. It should be noted that today's European regulatory paradigm is conditioned by a sort of "epistemological obstacle", given by the re-proposition - even in the digital environment - of traditional consumer rights. In this regard, we need to ask ourselves whether, for example, raising the level of consumer information is sufficient to bring private digital relationships back into balance. Or what degree of effective protection is provided by "granular" consent to the processing of personal data and concepts such as informational self-determination. Similar critical issues emerge in the field of antitrust law, since the idea of "consumer welfare" has allowed the formation of real monopolies in digital markets. The essay concludes with some suggestions for an epistemological "disruption" of European technology regulation.

1. Two great explorers and the story of a long trip.

Giuseppe Vettori and Hans Micklitz are well known for having illuminated the path towards the constitutionalisation of European private law. And in doing so, they focused not only on the protection of subjective legal situations (and in particular those involving consumers), but also on the greatest transformations that characterized the last 50 years of private law. Its constitutionalisation in particular[1].

This has been done, it must be said, bravely. And with the courage to cross the borders of private law to reach as far as the territories of public and constitutional law. Then they brought something back, back to private law.

This cannot be taken for granted. Traditionally, the dialectic between 'public' and 'private' represents a milestone in the legal systems of civil law. Norberto Bobbio, in the "*public/private"* entry written for the Einaudi Encyclopaedia in 1981, speaks about a *"great dichotomy":* a distinction capable of *"dividing the universe into two spheres, jointly exhaustive [...] and mutually exclusive"*[2].

Also for one of the most important private law scholars, Cesare Massimo Bianca[3], private law was the *"law that regulates the common relations between the citizens"*: i.e. the law of people and the economy. Whilst, the author continues, public law should have been the *"law of special authoritarian relations":* i.e. those relations in which are expressed special positions of supremacy (and in particular that of the State).

For a long time, the border drawn between the two territories was considered "virtually impassable", except for a few skillful explorer[4]. However, today this rigid distinction does not seem to stand up to modernity. And, as we will see, this is especially true with reference to the technological paradigm, which has definitively "mixed" private autonomy and constitutional rights[5].

Also, it should be said that for some decades private law stopped being the "happy place" of self-determination (if it ever was). Notwithstanding this, it is equally true that with the advent of the era of data and algorithms, *de facto* inequalities[6] arose. What is more, such inequalities have grown so exponentially that the equal bargaining power of the parties (which is the assumption of their contractual autonomy) is nothing more than a remembrance[7].

The already mentioned thought and the works of Giuseppe Vettori and Hans Mickliz have accompanied step by step the long trip towards discovering the "constitutional potential" of private

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[1] Just to mention some of the most fundamental contributions: H.-W. MICKLITZ, *Constitutionalization of European Private Law*, Oxford, 2014; ID., *The Visible Hand of European Regulatory Private Law. The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation*, in *Yearbook of European Law*, 28, 2009, 1, p. 3; G. VETTORI, *Il contratto europeo fra regole e principi*, Torino, 2015; ID., *Diritto privato e ordinamento comunitario*, Milano, 2009; ID., *Contratto e Costituzione in Europa. Convegno di studio in onore del prof. Giuseppe Benedetti, Firenze 26 novembre 2004*, Padova, 2005.

[2] N. BOBBIO, *Pubblico/privato*, in *Enciclopedia*, vol. XIII, Torino, 1981, now in ID., *Stato, governo, società. Per una teoria generale della politica*, Torino, 1985, p. 3, cit. in B. SORDI, *Verso la grande dicotomia: il percorso italiano*, in G.A. BENACCHIO, M. GRAZIADEI, *Il declino della distinzione tra diritto pubblico e diritto privato, atti del IV Congresso nazionale SIRD, Trento, 24-26 settembre 2015*, Napoli, 2016, p. 3. Going backwards, Federico Carlo di Savigny, reviewing *"the whole law"* affirms, in his *System of actual Roman law*, that two branches are distinguished in it: the *Staatsrecht* and the *Privatrecht*. The first *"has as its object the State"*, the second *"the set of legal relations, in which each individual carries out his or her own life"*; Immanuel Kant, in the same way, divides his metaphysical principles of the doctrine of law between private law, which governs possession, acquisition and contract, and public law, which includes the law of the State, the law of peoples and cosmopolitan law. And so on, *"without substantial changes"* (N. Bobbio, again), we come to Ulpiano, according to which *"Huius studii duae sunt positiones, publicum et privatum. Publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem pertinet", Dig*. I, 1,1,2. *Inst*., I, 1, 4.

[3] C.M. BIANCA, *Trattato di diritto civile*, Vol. I, Milano 2002, p. 35-37.

[4] G. VETTORI, *Diritto dei contratti e costituzione europea. Regole e principi ordinanti*, Milano 2015; H.-W. MICKLITZ, *The Many Concepts of Social Justice in European private Law*, Cheltenham, 2011; S. RODOTÀ, *Ipotesi sul diritto privato*, in ID., *Il diritto privato della società moderna*, Bologna, 1971, p. 9 ff.

[5] A. SIMONCINI, *Sovranità e potere nell'era digitale*, in T.E. FROSINI, O. POLLICINO, E. APA, M. BASSINI, *Diritti e libertà in internet*, Firenze, 2017, p. 19 ff.; G. DE MINICO, *Towards an Internet Bill of Rights*, in *Loy. L.A. Int'l & Comp. L. Rev.*, 37, 1, 2015, p. 27 ff.; ID., *Internet. Regola e anarchia*, Napoli, 2012, p. 191ff.; F. MODUGNO, *Diritti dei consumatori come diritti di terza generazione?*, in G. COCCO (ed.), *Diritti dell'individuo e diritti del consumatore*, Milano, 2010, p. 53 ff.; S. RODOTÀ, *Tecnologie e diritti*, Bologna, 1995, p. 122 ff.

[6] A. SIMONCINI, *L'algoritmo incostituzionale: intelligenza artificiale e il futuro delle libertà*, in *BioLaw Journal – Rivista di Biodiritto*, n. 1/2019, p. 63 ff.; on the relationship between digital (or intangible) economy and inequalities, see also J. HASKEL, S. WESTLAKE, *Capitalism without Capital. The Rise of Intangible Economy*, Princeton-Oxford, 2018.

[7] F. MEZZANOTTE, *I poteri privati nell'odierno diritto dello sviluppo economico*, in *Politica del diritto*, 3, 2018, p. 508.

law, as well as its close implications for fundamental rights and freedoms. Further, their thought also represents the basis for addressing the challenges of modernity with a holistic approach.

2. The Constitutional Trajectory of Private Law.

From an accurate reflection on this theme, it emerges that the existence of an integration process of European private law is *per se* a constitutional issue. And this is due to the *de facto* constitutional nature of the European Legal order.

As is known, the supremacy clause plus the direct effect doctrine, as interpreted and enforced by the European Court of Justice[8], practically "transformed" Europe (to recall the famous J.H.H. Weiler's article) from a classical international-law organization to a "*Sonderweg*" constitutional legal order[9].

We could sketch the trajectory as follows: as soon as some private (or sometimes civil)[10] law principles become part of the European Law – via judicial activity or via legislation – they become equally constitutional (or quasi-constitutional) principles within the European member States[11].

It is the culmination point of the phenomenon of the Constitutionalisation and neo-Constitutionalisation of private law[12] that we want to concisely summarise.

For a long time, the relationship between private law and the Constitution was characterised by a rigid division of the legal space, which also divided legal practitioners and scholars[13]. For example, this has meant that in Italy until 1970, the Constitution was seen only as a limitation for the legislator. By contrast, private law has developed independently, with its own logic and principles[14], having as a "polar star" much more the Civil Code than the Constitution.

This approach has been suitable for positivist and formalist legal systems in which judges do not strive to orient interpretation towards constitutional values and principles[15].

The consequence of this has been the laborious search, inside the text of the Constitution, for "rules" as directly applicable as possible. And this was when the well-known doctrine of the *Unmittelbare Drittwirkung* emerged as a result. Broadly put, according to this theory constitutional rights should be directly applied against – or brought by - private parties in front of the Courts[16].

More exactly, *Drittwirkung* stemmed from the creativity of German case law[17] and was later taken up also by the ECtHR in some of its judgments.[18]

[8] Since the historical decision *Van Gend & Loos*, 5th february 1963, case C 26/62, principle of Direct Effect has made a decisive contribution to the construction of the European Union as we know it today. Altough neither Direct Effect nor Supremacy were at the time innovative doctrines under international law, we can say that this decision launched the process of constitutionalisation of European Law, establishing a new legal order. See J.H.H. WEILER, *Revisiting* Van Gend en Loos*: Subjectifying and Objectifying the Individual*, in *Van Gend and Loss 1963-2013, conference proceedings*, Luxembourg, 13th May 2013, available on https://curia.europa.eu/jcms/jcms/P_95693/en/. More recently, on Direct Effects, see ECJ, 5th december 2017, case C-42/17, *Taricco II*; Id., 8th september 2015 case C-105/14, *Taricco*; 5th december 2017, case C-42/17, *M.A.S. e M.B.*; Id., 5th June 2018, case C-612/15, *Kolev e a.*

[9] J.H.H. WEILER, *Federalism without Constitutionalism: Europe's Sonderweg*, in *The Federal Vision, Legitimacy and Levels of Governance in the United States and the European Union*, 56 (Kalypso Nicolaidis ed., 2001); T. GROPPI, *La primauté del diritto europeo sul diritto costituzionale nazionale: un punto di vista comparato*, in AA.VV., *Le fonti del diritto oggi. Studi in onore di Alessandro Pizzorusso*, Pisa, 2006.

[10] ECJ, 10th April 2008, in cause C-412/06, *Hamilton*.

[11] N. REICH, *General principles of European union civil law*, Cambridge, 2014; B. DE WITTE, *The nature of the legal order*, in P. CRAIG, G. DE BURCA (curated by), *The evolution of EU law*, Oxford, 1999, p. 177 ff.

[12] G. CONTE, *Il processo di neo-costituzionalizzazione del diritto privato. Notazioni sull'efficacia precettiva e sulle modalità applicative dei diritti e delle libertà fondamentali*, in G. ALPA, G. CONTE, *Diritti e libertà fondamentali nei rapporti contrattuali*, Torino, 2018, p. 601 ff.

[13] G. PINO, *Tre concezioni della costituzione*, in *Teoria e Critica della Regolazione sociale*, 2015, available on http://www1.unipa.it/gpino/Pino,%20Tre%20concezioni%20della%20costituzione.pdf.

[14] G. PINO, *Tre concezioni*, cit.

[15] L. FERRAJOLI, *Costituzionalismo principialista e costituzionalismo garantista*, in *Giur. cost.*, 3, 2010, p. 2793 ff.; G. CONTE, *Il processo*, cit., 607; V. CRISAFULLI, *La costituzione e le sue disposizioni di principio*, Milano, 1952, 11, where he argues that *"the constitution, like any other law, is first and foremost and always a normative act and therefore its provisions must normally […] be understood as normative provisions; […] real legal norms […]. In other words, a constitution must be understood and interpreted, in all its parts,* magis ut valeat, *because this is the way its nature and its function want it, which are and could not be, let us repeat, a normative act, intended to compulsorily regulate public and private conduct"* [the translation is ours].

[16] G. D'AMICO, *Problemi (e limiti) dell'applicazione diretta dei principi costituzionali nei rapporti di diritto privato (in particolare nei rapporti contrattuali)*, in *Giustizia Civile*, 2016, 3, p. 443 ff.; G. ALPA, *Il «diritto costituzionale» sotto la lente del giusprivatista*, in *Riv. dir. cost.*, 1999, 3, p. 15 ff.

[17] BVerfGE 7, 198, case *Lüth*, on the applicability between private individuals of the constitutional principle of freedom of expression. Cfr. E. NAVARRETTA, *Costituzione europea e diritto privato. Effettività e* Drittwirkung *ripensando la complessità giuridica*, Torino, 2017, p. 40 ff.

[18] ECHR, *X and Y c. Netherlands*, n. 91 (1985).

Additionally, it contributed to the transformation of certain areas of private law[19] (such as labour law)[20].

Further, and according to some, *Drittwirkung* has now re-emerged in some Court of Justice rulings recognising the horizontal direct effects[21] of the EU's Charter of Fundamental Rights (for example, on digital privacy[22]).

Overall, it is through the *Mittelbare Drittwirkung that* national and EU law constitutional rules[23] obtained greater pervasiveness,[24] (if not a totalizing dimension)[25] despite their less immediate force.

What this means in practice is that from that moment on courts were required to consider fundamental constitutional law principles when deciding private law cases (through interpretation[26] and concretization of general clauses[27]).

And this approach has favoured the process of *"writing and rewriting the rules"*, as Giuseppe Vettori explains[28]. The latter, in turn, led on the one hand to recognising the fundamental role of Judges in protecting rights[29]. Whilst on the other, it progressively eroded the canons of predictability and legal certainty[30].

In the field of private law, the problem of the application of constitutional principles and the protection of rights and liberties is substantiated by a 'balance'. This is a weighing exercise (basically left to judges) between the needs for 'private autonomy' and the needs for 'solidarity'. The former (autonomy) tends to reject the intrusion of everything that is extraneous to the *Will* of the contractual parties. Whilst the latter (solidarity) instead tends to intrude into the contractual relationship to correct its asymmetries or to protect rights[31].

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[19] G. ALPA, *Il «diritto costituzionale» sotto la lente del giusprivatista*, in *Riv. dir. cost.*, 1999, 2, p. 3; F. MACARIO, F. LOBUONO, *Il diritto civile nel pensiero dei giuristi*, Padova, 2010, p. 109 ff.

[20] G. D'AMICO, *Problemi (e limiti)*, cit., 448; O. CHEREDNYCHENKO, *Subordinating Contract Law to Fundamental Rights: Towords a Major Breakthrough or towords Walking in Circles?*, in S. GRUNDMANN, *Constitutional Values and European Contract Law*, Alphen aan den Rijn, 2008, p. 51; S. BARTOLE, *Interpretazioni e trasformazioni della Costituzione repubblicana*, Bologna, 2004, p. 166 ff.; S. PUGLIATTI, *La retribuzione sufficiente e le norme della Costituzione*, in *Riv. giur. lav.*, 1949/50, 1, p. 189; ID., *Ancora sulla minima retribuzione sufficiente ai lavoratori*, *ibidem*, 1951, 2, p. 175; R. NICOLÒ, *L'art. 36 della Costituzione e i contratti individuali di lavoro*, *ibidem*, 1951, 2, p. 5 ff.; R. SCOGNAMIGLIO, *Sull'applicabilità dell'art. 36 della Costituzione in tema di retribuzione del lavoratore*, in *Foro civ.*, 1951, p. 352 ff.; U. NATOLI, *Ancora sull'art. 36 della Costituzione e sulla sua pratica applicazione*, in *Riv. giur. lav.*, 1952, 2, p. 9 ff.; ID., *Limiti costituzionali all'autonomia privata nel rapporto di lavoro, I, Introduzione*, Milano, 1955, p. 19 ff.

[21] E. NAVARRETTA, *Libertà Fondamentali dell'U.E. e rapporti fra privati: il bilanciamento di interessi e rimedi civilistici*, in *Riv. Dir. Civ.*, 2015, p. 905 ff., now in F. MEZZANOTTE (curated by), *Le "libertà fondamentali" dell'Unione europea e il diritto privato*, Roma, 2016, p. 74 ff.

[22] ECJ, 24th September 2019, in cause C-507/17 *Google LLC c. Commission National de l'informatique et des libertés (CNIL)*; ECJ, 3rd October 2019, in cause C-18/18, *Eva Glawschischnig-Piesczek c. Facebook Ireland Limited*; ECJ, 13th May 2014, in cause C-131/12, *Google Spain SL and Google Inc. c. Agencia Espanola de Protecciòn de Datos (AEPD) and M. Costeja Gonzalez*. O. POLLICINO, *L'"autunno caldo" della Corte di giustizia in tema di tutela dei diritti fondamentali in rete e le sfide del costituzionalismo alle prese con i nuovi poteri privati in ambito digitale*, in *Federalismi.it*, 16 ottobre 2019; ID., *L'efficacia orizzontale dei diritti fondamentali previsti dalla Carta. La giurisprudenza della Corte di giustizia in materia di digital privacy come osservatorio privilegiato*, in V. PICCONE, O. POLLICINO (curated by), *La Carta dei Diritti Fondamentali dell'Unione Europea*, Napoli, 2018, p. 263 ff.

[23] For a distinction between *"strong indirect effect"* and *"weak indirect effect"*, see C. MAK, *Fundamental Rights in European Contract Law. A comparison of the impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England*, Alphen aan den Rijn, 2008, p. 55 ff.

[24] G. CONTE, *Il processo di neo-costituzionalizzazione*, cit., p. 615.

[25] M. KUMM, *Who's afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, in *German Law Journal*, 7, 2006, p. 341 ff., where the Author even suggests the idea to consider private law as *"applied constitutional law"*.

[26] E. NAVARRETTA, *Costituzione europea e diritto privato. Effettività e* Drittwirkung *ripensando la complessità giuridica*, Torino, 2017, p. 211 ff.

[27] G. VETTORI, *La forza dei principi. Ancora un inizio*, in *Persona e Mercato*, 2019, 1, p. 4; P. PERLINGIERI, *Appunti sull'inquadramento della disciplina delle c.d. condizioni generali di contratto*, in AA.VV., *Condizioni generali di contratto e tutela del contraente debole*, Milano, 1970, p. 22.

[28] G. VETTORI, *La forza dei principi*, cit.; this produced a sort of circular interpretive dynamic that is well described: *"We are progressively shifting from a system of rules and structures requiring conformity, to a scenario where priority is given to internal constitutional principles and community principles. Norms, which often lack a situation required by law and which do not allow for a judgment of conformity to a given rule, require instead the balancing of different values (...), law is more and more written and re-written by different subjects: legislators, judges, Authorities, scholars, private powers"* [the translation is ours]; cfr. G. BENEDETTI, *Oggettività esistenziale dell'interpretazione. Studi di ermeneutica e diritto*, Torino, 2014, p. 85 ff.

[29] Since the historical decision of Italian Constitutional Court, 22nd October 1996, n. 356; cfr. V. ONIDA, *L'attuazione della costituzione tra magistratura e Corte costituzionale*, in *Scritti in onore di Costantino Mortati*, IV, Milano, 1977, p. 514 ff.

[30] See G. BENEDETTI, *Oltre l'incertezza. Un cammino di ermeneutica giuridica*, Bologna, 2020.

[31] G. VETTORI, *Libertà di contratto e disparità di potere*, in *Riv. dir. priv.*, 2005, p. 743 ff.; A. ZOPPINI, *Il contratto asimmetrico tra parte generale, contratti di impresa e disciplina della concorrenza*, in *Riv. Dir. Civ.*, 5, 2008, p. 515 ff.; V. ROPPO, *Contratto di diritto comune, contratto del consumatore, contratto con asimmetria di potere contrattuale: genesi e sviluppi di un nuovo paradigma*, in *R. d. priv.*, 2001, p. 769 ff.

For example – in Italy – the principle of good faith and fairness has been recognised in contract law as a corollary of the principle of solidarity enshrined within art. 2 of the Constitution[32]. However, this has led to some excesses and forcing, such as the declaration of nullity of contractual clauses for direct violation of the Constitution, which have caused particular concern to private law scholars[33]. In fact, it might be said that it is certainly appropriate for constitutional principles to act as a 'filter' between contracts and private relations. Yet, some would rebut that this would amount to a dangerous referral of questions over the 'validity' of legal transactions to judicial interpretation (however constitutionally oriented)[34].

With the "incorporation" of the EU's Charter of Fundamental Rights within the European Treaties[35], thus borrowing their legal force, (together with the increasing importance attributed by the courts of the member states to the EDU Convention[36]), the phenomenon of the "intrusion" of principles, rights and freedoms into private relations accelerated significantly. This is what is today called "neo-Constitutionalisation".[37] In this context, two factors are substantially enhanced.

Firstly, the enlargement of the catalogue of fundamental rights, affecting private relations (in addition to the national Constitutions)[38].

Secondly, the possibility of substantially diffuse models of constitutional review[39] through the instruments of interpretation[40] and disapplication; despite the objections by some Constitutional Courts[41].

On closer inspection however, the neo-Constitutionalisation process of private law does not simply follow a descending trajectory (more and more rights "falling" from European charters).

Rather, this process is characterised by a double movement (one descending and another ascending). Not only an increasing number of rights derive from European and international law, but also more and more subjective private legal situations are regulated at European level. Examples include the EU Treaties, regulations and directives with the consequence that rules traditionally placed at the level of primary sources such today are placed at the constitutional level. This has been especially the case, as we shall see, in the field of technology, in which the legislation of the European Union is a major player compared to the legislation of the Member States.

From a wide-ranging perspective we can at least assume that perhaps the failure in developing *expressly* the European Treaties into a Constitutional Treaty[42] boosted the idea that private-law flexible and conventional tools could have offered a second-best strategy to achieve the same objective. Paraphrasing a well-known saying,

[32] *Ex multis*, Cass., 27th May 1975, n. 2129, about *privacy*; Cass., 22nd June 1985, n. 3769, about *personal identity*; Cass., 31st May 2003, nn. 8827 and 8828; Cass., UU.SS., 11th November 2008, n. 26972; C. SCOGNAMIGLIO, *Principi generali, clausole generali e nuove tecniche di controllo dell'autonomia privata*, in A. D'ANGELO, V. ROPPO, *Annuario del contratto 2010*, Torino, 2011, p. 45 ff.

[33] See Italian Constitutional Court, ordd. 21st October 2013, n. 248 and 26th March 2014, n. 77, which, in direct application of Article 2 of the Constitution, grant the Judge the power to reduce the amount of the deposit of its own motion (in the event of manifest disproportion) and to find that the contractual clause providing for an excessively onerous deposit is null and void. See F.P. PATTI, *Il controllo giudiziale della caparra confirmatoria*, in *Riv. Dir. Civ.*, 2014, 685; G. D'AMICO, *Applicazione diretta dei principi costituzionali e nullità della caparra confirmatoria "eccessiva"*, in *Contratti*, 2014, p. 854 ff.

[34] Critically, see R. PARDOLESI, *Un nuovo superpotere giudiziario: la buona fede adeguatrice e demolitoria*, in *Foro it.*, 2014, I, p. 382 ff.; favorably, see P. GROSSI, *Presentazione al volume: Principi e clausole generali nell'evoluzione dell'ordinamento giuridico*, of G. D'AMICO, Milano, 2017, XIII.

[35] G. VETTORI, *La lunga marcia della Carta dei diritti fondamentali dell'Unione Europea*, in *Persona e Mercato*, 3 dicembre 2007, p. 1-14.

[36] D. TEGA, *Le sentenze della Corte costituzionale nn. 348 e 349 del 2007: la Cedu da fonte ordinaria a fonte "sub-costituzionale" del diritto*, in *Quaderni costituzionali*, 2008, 1, p. 133-136.

[37] G. CONTE, *Il processo di neo-costituzionalizzazione*, cit., p. 622 ff.;

[38] A. BARBERA, *La Carta dei diritti: per un dialogo fra la Corte italiana e la Corte di giustizia*, in *Rivista AIC*, n. 4/2017, p. 2 ff.

[39] A. ANOZON, *"Diffusione" del controllo di costituzionalità o "diffusione" del potere di attuazione giudiziaria della Costituzione?*, in E. MALFATTI, R. ROMBOLI, E. ROSSI, *Il giudizio sulle leggi e la sua diffusione. Verso un controllo di costituzionalità di tipo diffuso?*, Torino, 2002, p. 379 ff.

[40] Italian Constitutional Court nn. 49/2015, 200/2016; cfr. V. SCIARABBA, *La tutela dei diritti fondamentali nella Costituzione, nella Convenzione europea dei diritti dell'uomo e nella Carta dei diritti fondamentali dell'UE*, in *Rivista AIC*, 1/2017.

[41] We refer to Italian Constitutional Court n. 269/2017, in which the Court stated that, because of the essentially constitutional tone of the rights and freedoms affirmed in the EU Fundamental Charter, in case of conflict with an internal rule the judge, instead of disapplying, should raise the issue of constitutionality before the Constitutional Court in order to allow the annulment of the rule with erga omnes effect. Cfr. R. CONTI, *Qualche riflessione, a terza lettura, sulla sentenza 269/2017*, in *Riv. Dir. Comp.*, n. 1/2018; A. ANZON DEMMING, *La Corte riprende il proprio ruolo nella garanzia dei diritti costituzionali e fa un altro passo avanti a tutela dei "controlimiti"*, in *Forum di Quaderni Costituzionali*, 28 febbraio 2018.

[42] Because of the French and Dutch 2005 referendums.

to do "whatever it takes"[43] to preserve the super-constitutional scope of the EU Law that is best epitomised by the creation of the Single Market[44].

There are many clear examples of that "constitutional trajectory" of the European law integration's process. The most evident case is the antitrust discipline. Italy, for example, lacked free market's constitutional principles in its 1948 Constitution altogether. Actually, the opposite holds true insomuch as articles 41, 42 and 43 of the Italian Constitution allow for strong state intervention in the economy and the markets.

Based on this, it has been argued that the advent of the "European economic Constitution" has effectively deprived the "national economic Constitution" of its content[45].

In particular, it has been observed that mainly because of the direct application of Articles 101 and 102 TFEU by the Antitrust Authority and the courts, the internal system has been substantially bypassed. A top-down relationship between the Treaties and Italian constitutional law was thereby established.[46] In any case, and regardless of the fundamental source of competition law, no one would reasonably doubt about the constitutional *nature* of the antirust discipline today[47]. And the same holds true for other disciplines, from environmental protection and consumers' rights to data protection, public procurement and so forth.

All that being said, we must not forget that the neo-Constitutionalisation (both descendant and ascendant) of Private Law *through Europe*, is not a *neutral* process. There is a price to pay. And this clearly emerged from Hans Mickliz's research paper "*The Transformation of European Private Law: from Autonomy to Functionalism"*[48].

During the last decade, and from a Darwinian perspective, the evolution of the European legal order selected preferentially the most functional values and practices for reinforcing the core practical objective of the Union. That is, the creation of the Single Market. Two examples are particularly illustrative in this respect: the notion of "confident consumer"[49] and the transformation of the regulatory nature of European private law[50]. And in dealing with the latter we strongly rely on the studies of Hans Micklitz and Giuseppe Vettori.

Today private law – as law in general – both at national and European level must face a new disruptive[51] challenge: technology. As the latter deeply affects social relations, it stands to reason that its influence spreads also to cover legal relations[52]. And here the challenge will be whether old legal instruments can be adopted to solve new problems, or whether a real Kuhnian "paradigm shift" is needed.

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[43] We're referring to the expression used by the ECB President, Mario Draghi, in his famous speech of July 26th, 2012, *verbatim*, https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html.

[44] H.-W. MICKLITZ, *The Transformation of Private Law Through Competition*, in *European law journal: review of European law in context*, 2016-09, Vol. 22 (5), p. 627-643.

[45] S. CASSESE, *La nuova costituzione economica*, Roma-Bari, 2000; G. GHIDINI, E. AREZZO, *La prospettiva costituzionale della tutela della concorrenza*, in AA. VV., *Alle frontiere del diritto costituzionale. Scritti in onore di Valerio Onida*, Milano, 2011, p. 859 ff.

[46] G. PITRUZZELLA, *Diritto costituzionale e diritto della concorrenza: c'è altro oltre l'efficienza economica?*, in M. AINIS, G. PITRUZZELLA, *I fondamenti costituzionali della concorrenza*, Bari, 2019, p. 9 ff. The idea that the Italian economic Constitution has been bypassed by the European one is not actually unanimous. According to some comments, the national constitution would be "ready to intervene" in case of "excess of neoliberalism" at European level. Cfr. O. CHESSA, *La Costituzione della moneta. Concorrenza, indipendenza della banca centrale, pareggio di bilancio*, Napoli, 2016, p. 117 ff.

[47] Probably the first monography on the issue is from R. NIRO, *Profili costituzionali della disciplina antitrust*, Padova, 1994; Cfr. G. AMATO, *Antitrust and the Bounds of Power. The Dilemma of Liberal Democracy in the History of the Market*, Oxford, 1997; ID., *I fondamenti e i fini della concorrenza*, in F. DI CIOMMO, O. TROIANO, *Giurisprudenza e autorità indipendenti nell'epoca del diritto liquido*, Piacenza, 2018, p. 371-374.

[48] H.-W. MICKLITZ, *The Visible Hand of European Regulatory Private Law. The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation*, in *Yearbook of European Law*, 2009, p. 3-59.

[49] ID., p. 10, where the Author says: "*Consumer confidence is meant to justify the development of one coherent body of consumer law which supplants national consumer law. The concept of the confident consumer is (mis-)used to lower the standards of protection—in the name of the consumer"*.

[50] ID., p. 10, where the Author says that "*Private law was and is needed to elaborate the Internal Market; (...). However, it is not the private law one thinks of in national legal orders. Instead, this law shows a double face: it is regulatory in the sense that it is needed to constitute the Internal Market and it is competitive as the philosophy behind the regulatory measures relies heavily on market freedoms and competition*".

[51] C. GOANTA, *How Technology Disrupts Private Law: An Exploratory Study of California and Switzerland as Innovative Jurisdictions*, Stanford-Vienna *TTLF Working Paper* No. 38/2018, who observes that *"Law generally reacts to such developments only if there are circumstances (e.g. case law) showing how existing legal categories might not adequately accommodate these technological developments. While legal scholarship has contributed to the debates surrounding law and technology, most research found at this confluence deals with isolated questions. Consequently, there is a gap in the literature when it comes to the impact that technological disruptions have on private law as a whole"*. Available at SSRN: https://ssrn.com/abstract=3256196 or http://dx.doi.org/10.2139/ssrn.3256196.

[52] A. SIMONCINI, *Sovranità e potere nell'era digitale*, in T.E. FROSINI, O. POLLICINO, E. APA, M. BASSINI, *Diritti e libertà in internet*, Firenze, 2017; E. SCHMIDT, J. COHEN, *The New Digital Age*, London, 2013.

3. Technology beyond public-private law divide: facing the Private Powers.

3.1. *De facto* powers

From a legal point of view, what is most worrying in this passage of time is *the* concentration of technological power in the hands of some private entities.

These latter hold what are often called 'private powers' capable not only of acquiring full knowledge about their 'clients', but also of unilaterally affecting certain fundamental rights and freedoms, since their services have now become essential[53].

We are referring in particular to the powers of well-known digital platforms (eg Google, Amazon, Facebook) or other global economic players in the tech field (eg Apple and Microsoft: the so-called *Big Tech)*[54].

Without belabouring the specificities of each business model, we can say that these big tech activities follow a common pattern. Overall, the user (i.e. the digital consumer) benefits from a service (generally free) in exchange of his authorisation to process personal data[55]. Data which, in turn, not only are subjected to economic exploitation (e.g. through advertising)[56] in other markets. In fact, they also serve a company's purpose of extracting value to implement its services, predict consumer behaviour and collect more and more data[57]. This, in a very short time, is the "spiral" of the economy of personal data[58].

The phenomenon has been defined by economic theory as the model of *multi-sided markets.* That is in which the intermediary operates on several fronts, generating utility for himself and for other economic operators[59]. Amazon, for example, started out as a pure retailer, but over time it has approached the multi-sided platform model, allowing third-party sellers to trade directly with consumers on their website.

In multi-sided markets the main actors are certainly *digital platforms*[60]. It has been observed that they have the ability to create and shape new

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[53] See A. SORO, *Democrazia e potere dei dati: Libertà, algoritmi, umanesimo digitale*, Milano, 2019.

[54] See M. MOORE, D. TAMBINI, *Digital Dominance. The Power of Google, Amazon, Facebook and Apple*, New York, 2018.

[55] R. JANAL, *Fishing for an Agreement: Data Access and the Notion of Contract*, in LOHSSE, SCHULZE, STAUDENMAYER (curated by), *Trading Data in the Digital Economy: Legal Concepts and Tools*, Oxford-Baden Baden, 2017, p. 271.

[56] Basically, either by granting space to advertisers on the platform or by a real transfer of such information to third parties. See M. EDDY, *How Companies Turn Your Data Into Money*, 10th October 2018, on https://www.pcmag.com/news/how-companies-turn-your-data-into-money.

[57] The idea that such services are not 'free' actually has more of a precedent. Already in the *"Guidelines for the implementation/application of Directive 2005/29/EC on unfair commercial practices"* of 25 May 2016, the European Commission stated that *"personal data, consumer preferences and other user-generated content have a de facto economic value"*. The Italian Antitrust Authority itself, in accordance with EU guidelines, had sanctioned on May 11, 2017 with measure no. PS10601 an operator of "social networks" for unfair commercial practices towards its users, observing that the wealth of information consisting of user data and the profiling of users for commercial use and marketing purposes *"acquires, precisely because of such use, an economic value suitable, therefore, to configure the existence of a consumer relationship between the Professional and the user"* (par. 54 of the measure). Also in the decision of the European Commission of October 3, 2014 and published on November 19, 2014, which authorized the merger relating to the acquisition by Facebook of a *"social network"* operator, reference was made to the economic value of user data. Finally, the existence of consideration in contracts for the provision of "social media" services was also affirmed by the Consumer Protection Cooperation Network, established under Regulation 2006/2004/EC and now replaced by Regulation 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws. In addressing the issue of the possible contradiction of the Terms of Use of the Facebook platform to Directive 93/13/EEC on unfair terms in consumer contracts, the Network had the opportunity to state that this Directive *"applies to all contracts between consumers and professionals, regardless of the onerous nature of such contracts, including contracts where the content and profiling generated by the consumer represent the alternative consideration to money"* (p. 19 of the letter with the *Network's Common Position* of 9 November 2016 sent to Facebook).

[58] For all, S. ZUBOFF, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*, New York, 2019, *passim*. On the economic value of personal data, the literature is exterminated. According to the Osservatorio Big Data Analytics & Business Intelligence of the Politecnico di Milano, in Italy alone, Big Data reached a total value of 1.4 billion euros in 2018; press release of the Observatory, 11 December 2018, available at: https://www.osservatori.net/it_it/osservatori/comunicati-stampa/big-data-analytics-italia-mercato-2018. See also the free tool developed by the Financial Times, capable of calculating the commercial value of each individual user profile: http://ig-legacy.ft.com/content/f0b6edc0-d342-11e2-b3ff-00144feab7de#axzz2W4xIIvg9&from=Il+business+data+personal%3A+excco+the+us+price+for+the+marketing.

[59] J.C. ROCHET, J. TIROLE, *Platform Competition in Two Sided Markets*, in *Journal of the European Economic Association*, 2003, 1(4), p. 990; A. HAGIU, J. WRIGHT, *Multi-Sided Platforms*, in *International Journal of Industrial Organization*, Vol. 43, 2015, 162; M. RYSMAN, *The Economics of Two-Sided Markets*, in *Journal of Economic Perspectives*, 23, 2009, p. 125.

[60] Non-exhaustive set of examples: *Google's AdSense*, *DoubleClick*, *eBay* and *Amazon Marketplace*, *Google* and *Bing Search*, *Facebook* and *YouTube*, *Google Play* and *App Store*, *Facebook Messenger*, *PayPal*, *Zalando marketplace* and *Uber*.

markets inside or beside other markets, to challenge traditional ones, and to organise new forms of participation or conducting business based on collecting, processing, and editing large amounts of data. They operate with varying degrees of control over direct interactions between groups of users and they benefit from 'network effects', where, broadly speaking, the value of the service increases with the number of users. Finally, they often rely on information and communications technologies to reach their users, instantly and effortlessly. Thus they play a key role in digital value creation, notably by capturing significant value (including through data accumulation), facilitating new business ventures, and creating new strategic dependencies[61].

The phenomenon of the economic exploitation of data will be further accelerated with the advent of 5G. The latter in fact will allow the improvement of the so-called *Internet of Things*, in which virtually every object of daily experience will be able to collect and accumulate data: "intelligent" objects, interconnected with each other, which exchange information[62].

Nowadays, with their mastery in artificial intelligence systems, tech companies have become 'data sovereigns' that "bulldoze competition"[63] and markets. Oddly enough, consider Google or Amazon to see how such companies have become 'markets' themselves!

In sum, tech companies have taken on multiple functions. What is more, public authorities themselves are increasingly looking to tech companies to take up the slack, as digital platforms are nowadays engaged in some areas of public benefit utilities and service provision.

Seen from this perspective, it follows that the technological sector sometimes might even satisfy constitutionally guaranteed social rights.

For instance, in the midst of the Covid-19 pandemic, consider the role of Google and Apple. It is fair to say that their contribution to the development of contact-tracing apps to help health authorities in tracking infected contacts has been crucial[64]. Also, think of the role of social networks in politics, the latter being increasingly dependent upon the former.

Again, videoconference platforms (Zoom, Webex, Microsoft Teams, GMeet) played a pivotal role in guaranteeing the right to education, reaching a wide audience of online students forced at home due to the pandemic. And the list goes on, also including the role of technology *vis-à-vis* the right to work, the administration of justice, and so on[65].

In short, everyone, including the State, has relied on digital platforms.

However that might be, this digitalization process has been only accelerated (and not determined) by the recent pandemic.

Based on this analysis, legal experts need necessarily to deal with the phenomenon. Some questions posit: such as which is the legal regime of

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[61] EUROPEAN COMMISSION, *Communication from the commission to the European Parliament, the Council, the European economic and social committee and the Committee of the regions. Online Platforms and the Digital Single Market Opportunities and Challenges for Europe*, 25th May 2016, COM (2016) 288 final. Cfr. M. MOORE, D. TAMBINI, *Digital Dominance*, cit.

[62] The term Internet of Things is believed to have been first formulated in 1999, with reference to RFID (Radio Frequency Identification) devices, by English engineer Kevin Ahston, co-founder of the Massachusetts Auto-ID Center; see K. ASHTON, *That 'Internet of Things' Thing*, in *rfidjournal.com*, 22 June 2009. The IoT applies to almost every sector of the economy: today we talk about smart agriculture (i.e. the monitoring of micro-climatic parameters in support of agriculture in order to improve product quality, reduce resources used and environmental impact), smart cars (i.e. the connection of cars to communicate information in real time to the consumer, connection between vehicles or between them and the surrounding infrastructure for accident prevention and detection), smart cities (i.e. the monitoring and management of public services in a city, such as public transport, urban hygiene, public lighting, and the surrounding environment to improve liveability, sustainability and competitiveness), smart home (i.e. solutions for the automatic and/or remote management of systems and related objects in the home, in order to reduce energy consumption and improve the comfort, safety of the home and people), smart metering (i.e. meters connected to measure the consumption of electricity, gas, water, heat, and for their correct billing and remote management), and smart factory (i.e. the connection of machinery, operators and products to activate new production management logic); cfr. *Osservatorio Big Data Analytics & Business Intelligence of Politecnico di Milano on https://blog.osservatori.net/it_it/cos-e-internet-of-things*.

[63] This expression was used by Sen. Elisabeth Warren, who was a candidate for the democratic primaries until March 2020, when she withdrew her candidacy. In her famous speech she said: "*Today's big tech companies have too much power — too much power over our economy, our society, and our democracy. They've bulldozed competition, used our private information for profit, and tilted the playing field against everyone else. […] To restore the balance of power in our democracy, to promote competition, and to ensure that the next generation of technology innovation is as vibrant as the last, it's time to break up our biggest tech companies"*. The full speech is available at this link: *https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c*.

[64] E. CREMONA, *Contact Tracing. Governance pubblico-privata e primi problemi di tutela dei diritti fondamentali*, in *Ianus – Diritto e finanza, Forum sull'emergenza Covid-19*, 21 maggio 2020.

[65] See M. SCOTT, *Coronavirus crisis shows Big Tech for what it is – a 21st century public utility*, on www.politico.eu, 25th March 2020; W. LIU, *Coronavirus has made Amazon a public utility – so we should treat it like one*, on *The Guardian*, 17th April 2020.

these 'private powers', what is the nature of their activity, what is the dimension of their freedom of enterprise, and what is the (public?) function they hold in modern society.

A purely "private-law" approach, even one aimed at correcting structural information asymmetries, will not be enough. Remarkably, as early as 1977, C.M Bianca came to this conclusion. Already at that time he wrote about *"de facto authoritarian powers"* that he described as centers *"of socio-economic strength" imposing their "decisions by making use of the common legal positions of freedom and autonomy equally belonging to private individuals"*[66]. Also, he highlighted the problems of an approach purely in terms of *laissez-faire*: this would appear to be at least simplistic in relation to the demands that emerge from social reality and that find a specific cue in the constitutional principle of effective equality, as a principle that *"legitimates in general the aspiration not to be subject to de facto and de jure authority"*[67].

3.2. No Money, Just Data: a Constitutional issue.

The key success factor of these digital corporations is that the services that they provide are largely free. Or so it seems.

Google, for example, provides – for free – a constellation of services ranging from its well-known search engine to email services, entertainment and navigation platforms (via Youtube and Gmail, respectively). Again, the list just goes on and on.

Similarly, also Apple offers thousands of apps with a wide range of features at no cost, or at a very low price.

Facebook, which controls Instagram and Whatsapp, makes its services available to billions of people. And apparently this is achieved without requiring users to pay any fee.

Amazon, which aggregates the offer of an immense amount of goods, makes worldwide shipments – often for free – in a very short time. Recently it has become also the world leader in the public cloud market.

Despite their services being almost free, all of them are top companies with the highest market capitalisations[68]. Further, they are increasingly expanding their range of action, ultimately embracing even the most traditional prerogatives of sovereign State. Namely, the coining of currency[69] and the establishment of their own oversight authorities (thus dispensing with state courts)[70].

Therefore, many people have begun to doubt the costlessness of these services, given that users almost always offer their personal data and traces of their behaviour on the web[71] as a "compensation" for the use of the service.

Always keeping a broad perspective, we can observe a decisive distinguishing trait: the "price"[72]

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[66] C. M. BIANCA, *Le autorità private*, Napoli, 1977, p. 56.

[67] *Ibidem*.

[68] *Microsoft*, in first place, reached a capitalization of 779.81 billion dollars in 2018, *Apple* of 748.54 billion, *Amazon* of 734.42 billion, *Alphabet* (holding company of various *Google* companies) of 723.47 billion. Always operating in the tech sector, follow the Chinese *Tencent*, in sixth place, with a capitalization of 379.12 billion dollars, *Facebook*, in seventh place, with 376.73 billion, *Alibaba*, in eighth place, with 352.53 billion. Data processed by *Il Sole24Ore* and available on https://lab24.ilsole24ore.com/aziende-top/.

[69] In 2019, Facebook, along with other private giants, launched *Libra*, a crypto currency created to circulate within a payment system that works worldwide. Starting in July 2019, the source code of the currency was published, with the launch scheduled for 2020. Libra can be used both for peer-to-peer value exchange and for online transactions and purchases. See https://libra.org/en-US/.

[70] On 6th May 2020, Facebook announced that it has established an Oversight Board, which will be entrusted with the task of *"exercise independent judgment over some of the most difficult and significant content decisions"*. Facebook says that it will implement the Board's decisions *"unless it can violate the law"* and that the Board *"will not be able to listen to all cases"*, without anticipating its access criteria. The Board will have the task of *"setting precedent and direction for content policy at Facebook"*, according to a common law approach. And in the long term, the Board aims to become a *"springboard"* for similar approaches to content governance in the online environment. The press release can be found at the following link: *https://about.fb.com/news/2020/05/welcoming-the-oversight-board/*.

[71] These are known as *cookies*, i.e. small text strings that sites visited by users send and record on their computer or mobile device to be retransmitted to the same sites the next time they visit. The purpose of cookies is to remember the user's actions and preferences, such as the language of navigation, so that it does not have to be indicated again when the user navigates between pages of the same site or returns to it at a later time. Cookies are also used to authenticate, monitor browsing sessions and store information about user activities for statistical or advertising purposes. Most browsers allow - automatically - the use of cookies, but if the user decides to configure his browser differently, he will risk not having access to some content.

[72] In this regard, it is worth mentioning the Lazio Regional Administrative Court's ruling (Tar Lazio, Sez. I, 18 dicembre 2019 – 10 gennaio 2020, n. 260) in the appeal brought by Facebook against the Antitrust Authority for the annulment of the sanctions issued by the latter in relation to unfair commercial practices, including that of displaying the notice *"Facebook is free"*, on the login page, *"And always will be"*. The appeal was not upheld by the Lazio Regional Administrative Court, which stated instead that personal data *"can be considered an "asset" available in the negotiating sense, susceptible to economic exploitation and, therefore, suitable to assume the function of "counter-performance" in the*

for service provision by digital private powers generally corresponds to the act of some individuals to dispose (alienate) of their personality rights. More exactly, by 'personality rights' we refer to the confidentiality of personal data[73], protected by article 8 of EU's Fundamental Rights Charter[74]. The crux of the matter is that such acts of disposal become an issue of both constitutional and private law.

There is a broad debate about the 'authorizing' or 'contractual' nature of the act allowing digital platform to know and process personal data. The two hermeneutical options move from distinct premises.

Those in support of the 'authorising' nature of the act would maintain that personal data, unlike individual fundamental rights (such as the right to privacy and personal identity) cannot be considered a 'bargaining chip'[75]. Conversely, the 'contractual' thesis moves from the assumption that personal data might be given up only after careful consideration of their owners' freedom of consent and informational self-determination[76].

Textual divergences between the European Commission's draft directive on the supply of digital content[77] and the text definitively approved are revealing of the complexity of the debate[78].

As such, Recital No. 13 of the proposal thus reads *"in the digital economy, information about individuals is often and increasingly seen by market participants as having a value comparable to money. Digital content is often supplied not in exchange for a price but against counter-performance other than money i.e. by giving access to personal data or other data"*[79].

technical sense of a contract". So the practice to say that *"Facebook is free"* was considered unfair.

[73] The topic is widely studied by the doctrine, which seems oriented towards a reconstruction of the phenomenon of the negotiation of personal data in terms of 'authorizing act'; cfr. S. BOSA, *Art. 6 del Regolamento UE 2016/679*, in E. GABRIELLI, A. BARBA, S. PAGLIANTINI (edited by), *Commentario del codice civile UTET. Modulo delle persone. Vol. II*, Vicenza, 2019, p. 124-125. In particular, G. OPPO, *Sul consenso dell'interessato*, in V. CUFFARO, V. RICCIUTO, V. ZENO-ZENCOVICH, *Trattamento dei dati e tutela della persona*, Milano, 1998, p. 123, argues that that the act of disposition by the data subject would not relate to personal data *"which in fact can hardly be regarded as an object of law which can be disposed of for the benefit of others. What is certain, however, is that personal data are elements of the sphere (if not necessarily, or not all, of confidentiality, at least of identity), of the subject and belong to him/her without it being necessary to establish whether the title is "owner" or not. This belonging cannot be considered replaced - as has been argued in the past - by a mere "right of access" and is sufficient to configure the act being discussed as an act of disposition; an act of disposition that admits others into the personal sphere of the disposer"*. See also F. BRAVO, *Il "diritto" a trattare dati personali nello svolgimento dell'attività economica,* Padova, 2018, p. 123, which states that it should be considered preferable to reconstruct that *"recognises that consent for the protection of personal data is not of a nature that can be traced back to the traditional categories, but that it can nevertheless be compared to the concept of 'authorisation' in the broad sense: not in the sense of an act of disposition of a right or power "of one's own" in favour of the recipient of the authorization, of which it is originally lacking, but in the sense of an act (revocable with effectiveness ex nunc) [...] aimed at removing an "obstacle preventing" the exercise of a "power" which is already in the hands of the recipient and which with the authorization act - aimed at ascertaining the merits of the interest in the circulation of data - becomes legitimately and validly exercisable"*.

[74] Article 8 of Nice Charter provides that: *"1. Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. 3. Compliance with these rules shall be subject to control by an independent authority"*. It is also relevant Article 7 (*Respect for private and family life*), which provides that *"Everyone has the right to respect for his or her private and family life, home and communications"*. For a summary of the debate on horizontal effect of these two norms, see O. POLLICINO, *L''autunno caldo" della Corte di giustizia in tema di tutela dei diritti fondamentali in rete e le sfide del costituzionalismo alle prese con i nuovi poteri privati in ambito digitale*, in *Federalismi.it*, 16 ottobre 2019. Cfr. R. ALEXY, *Teoria dei diritti fondamentali*, Bologna, 2012, p. 570 ff.

[75] For a complete reconstruction of emerging issues, see G. VERSACI, *Personal Data and Contract Law: Challenges and Concerns about the Economic Exploitation of the Right to Data Protection*, in *European Review of Contract Law*, 2018; 14(4), p. 374–392; S. RODOTÀ, *Persona, riservatezza, identità. Prime note sistematiche sulla protezione dei dati personali*, in *Riv. crit. dir. priv.*, 1997, p. 583 ff.; see also G. ALPA, *Diritti della personalità emergenti: profili costituzionali e tutela giurisdizionale. Il diritto all'identità personale*, in *Giur. merito*, 1989, p. 464 ff.

[76] G. RESTA E V. ZENO-ZENCOVICH, *Volontà e consenso nella fruizione dei servizi in rete*, in *Riv. trim. dir. proc. civ.*, 2018, p. 411-440; A. METZGER, *Data as Counter-Performance: What Rights and Duties Do. Parties Have?*, in *Journal of Intellectual Property, Information Technology and Electronic commercial law*, 2017, 8, p. 5; S. THOBANI, *Diritti della personalità e contratto: dalle fattispecie più tradizionali al trattamento in massa dei dati personali*, Milano, 2018, p. 164.

[77] *Proposal for a Directive of the European Parliament and the Council on the aspects concerning contracts for the supply of digital content*, COM (2015) 634 final, 9th December 2015, see *Recital n. 13*.

[78] 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.

[79] Continues Recital n. 13 of the Proposal: *"Introducing a differentiation depending on the nature of the counter-performance would discriminate between different business models; it would provide an unjustified incentive for businesses to move towards offering digital content against data. A level playing field should be ensured"*.

But in the final drafting of Directive 2019/770, the Commission's 'realistic' perspective put forward in its draft seems to have been set aside.

In fact, Recital 24 states: *"Digital content or digital services are often supplied also where the consumer does not pay a price but provides personal data to the trader. […] While fully recognising that the protection of personal data is a fundamental right and that therefore personal data cannot be considered as a commodity, this Directive should ensure that consumers are, in the context of such business models, entitled to contractual remedies"*[80].

The above wording is obviously softer and does not directly admit the nature of the data as a counter-performance.

This notwithstanding, it should be pointed out that the Directive does not obviate the issue over the 'secondary' processing of personal data (on different markets). In fact, the Directive simply provides different legal regimes depending on whether the processing of data is necessary for the performance of a contract or it serves different purposes[81].

4. The EU Regulatory Approach: an "Epistemological Obstacle"?

At this point, it can be said that today's European regulatory approach to technology has to reckon with what Gaston Bachelard would call an *"epistemological obstacle"*[82].

In the 1930s, the philosopher used this concept to indicate a theory of accuracy or approximate truth in the path towards knowledge. To get closer to the truth, the argument goes, limits and thresholds should be overcome; and such limits are not simply factual, but more precisely, epistemological.

The latter adjective, in turn, indicates a cluster of assumptions that hinder the transformation of certain theoretical frameworks and the opening of new perspectives. In other words, admonishes Bachelard, a "pre-comprehension" can hinder or impede "comprehension" of a particular phenomenon, whether new or already known.

And this seems to be the case of a European Union that approached the regulation of the digital environment with old instruments and old conceptual categories. Three examples above all: (1) the same 'functionalisation' of the regulation of the (digital) single market; (2) the concept of informed consent of (digital) consumer and (3) the emphasis on contractual remedies.

Our core argument here is that within the area of technology (and specifically of Information and Communication Technology) the European Private Law integration has followed a very similar pattern to the one we have described above.

The super-constitutional driver is still the same: the Single Market (although this time around is declined in terms of an appealing *Digital Single Market*)[83].

And here Hans Micklitz inspires us again; in the same way private law was made functional for creating (and constitutionalizing) an internal single

[80] Continues Recital n. 24 of the Directive: *"This Directive should, therefore, apply to contracts where the trader supplies, or undertakes to supply, digital content or a digital service to the consumer, and the consumer provides, or undertakes to provide, personal data. The 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 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. This Directive should apply to any contract where the consumer provides or undertakes to provide personal data to the trader. For example, this Directive should apply where the consumer opens a social media account and provides a name and email address that are used for purposes other than solely supplying the digital content or digital service, or other than complying with legal requirements. It should equally apply where the consumer gives consent for any material that constitutes personal data, such as photographs or posts that the consumer uploads, to be processed by the trader for marketing purposes. Member States should however remain free to determine whether the requirements for the formation, existence and validity of a contract under national law are fulfilled".*

[81] See Recital 25 and Article 3 of Directive 2019/770/EU.

[82] G. BACHELARD, *Le nouvel esprit scientifique*, Paris, 1934; ID., *La formation de l'esprit scientifique*, Paris, 1938. For the philosopher, the path of knowledge coincides to a large extent with this continuous overcoming of the "obstacles" that scientific knowledge from time to time recognizes and which, however, always remain widespread in common knowledge.

[83] EUROPEAN COMMISSION, *Communication from the commission to the European Parliament, the Council, the European economic and social committee and the Committee of the regions. A Digital Single Market Strategy for Europe*, 6.5.2015, COM (2015) 192 final: *"A Digital Single Market is one in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence. Achieving a Digital Single Market will ensure that Europe maintains its position as a world leader in the digital economy, helping European companies to grow globally"*. Digital Single Market strategy has definitely been one of the more successful stories of the Juncker Commission; 28 out of 30 original legislative proposals have been effectively approved.

market, similarly, the new ICT private law was adjusted to create a *single digital market* along with a new European constitutional framework for Private Powers.

The scope of the digital single market is quite broad. Overall, it includes e-commerce, data protection, intellectual property, consumers contract law (in general), big data and Ai regulation. Further, its scope is extremely wide. It aims to achieve: (i) a better access for consumers and businesses to digital goods and services across Europe; (ii) better conditions and a common playing field to facilitate the flourishing of digital networks and innovative services, maximising the growth potential of the digital economy.

A clear evidence of this is a recent spate of EU regulatory provisions. Example include the regulations on supply of digital content and digital services[84]; on e-commerce[85]; on online intermediation services[86]; on copyright[87]. Ultimately, worthy of mention are also the regulation on the protection and free movement of data in the European Union (GDPR)[88] and the actual draft proposal for a regulation on e-privacy[89].

Taken together, all these regulatory acts highlight the effort of the EU to create the *Digital Single Market* from a consumer-oriented perspective. This is the objective that, for example, is mentioned in Recital 1 of the EU Directive 2019/770 on contracts for the supply of digital content and digital services. More exactly, this provision identifies its goals in the insurance of *"better access for consumers to digital content and digital services"* and in *"making it easier for businesses to supply digital content and digital services"* in order to *"contribute to boosting the Union's digital economy and stimulating overall growth"*.

The "scheme" followed by the European legislator is the usual one that is adopted for the well-known Consumer Rights Directive[90]. In practice, the Union adopts measures, pursuant to article 26 TFEU, *"with the aim of establishing or ensuring the functioning of the internal market"* and in order to promote *"the interests of consumers and to ensure a high level of consumer protection"*, according to article 169 TFEU. Nothing is apparently different between consumer protection in the Single Market and digital consumer protection in the Single Digital Market.

However, this set of regulatory acts does not simply give new rights and remedies tailored to the new digital environment. Instead, what is at stake is an even larger process; one concerning the very essence of European private law as well as its constitutional dimension.

At this point, we could now turn to consider other two important pieces of EU legislation: the 2016 General Data Protection Regulation and the 2019 Directive on Copyright in the Digital Single Market.

Both are considered (and particularly by non-European countries) bright examples of the European Rule of Law Model that add up to the Human-Rights-centered community and its institutional system (*Grundrechtsgemeinshaft*). Overall, these models are contrasted with either the super individualistic US free-market model or the super communitarian Chinese monopolistic party-State model.

4.1. About GDPR and Copyright Directive

Both The 2016 General Data Protection Regulation and the 2019 Directive on Copyright in the Digital Single Market formally aim at protecting rights, i.e. personal data and intellectual property rights.

Nevertheless, it is only by looking deeper and beyond their texts that their contradictions and inconsistencies emerge.

[84] 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.

[85] Directive (EU) 2019/771 of the European Parliament and of The Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC.

[86] Regulation (EU) 2019/1150 of the European Parliament and of The Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

[87] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

[88] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation).

[89] 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 2002/58/EC (Regulation on Privacy and Electronic Communications).

[90] Directive (EU) 2011/83/ of the European Parliament and of The Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

To begin with, the GDPR[91] has been generally welcomed as a real turning point adjusting the old and ineffective privacy directive to the new digital age.[92]

"*Stronger rules on data protection mean people have more control over their personal data*" was Commission' motto and now in its website GDPR is defined *"an overall success"*[93].

Also, it should be recalled how many anxious private companies and public administrations hastened to appoint DPO's and ask for advice, fearing the tsunami impact of this new self-executing regulation.

This notwithstanding, two years later, the question still remains: has the GDPR substantially changed something about privacy rights? In other words, is the relationship between individuals and Facebook or Google effectively more human-rights-centered?

Overall, outside Europe, answers would appear to be generally optimistic. Take the US for instance, whose "wild-west-style" deregulation made easier to consider the GDPR as an ideal point of reference, leading in fact some states to adopt GDPR-style legislations[94].

Conversely, in Europe, current legal literature seems to be less optimistic. Understanding this requires consideration of the key legal value in the new European Private law of technology: i.e. the role of the *individual consent* in technology contracts.

Individual informed consent is one of the super-principles of the new European private constitutional law. The idea is that when someone consents to something, then everything can happen in the digital market. No matter whether this might involve health, privacy or bio-rights[95].

This concept of informed consent is thus a distortion of the constitutional principle of private autonomy. It thereby becomes the backbone that private powers leverage to attain their goals[96]. This sounds more like a Hobbesian consent whereby individuals accept to abdicate their rights in favour of an absolute authority (the Leviathan)[97], than a Kantian duty to obey the laws that one would prescribe for himself[98].

The consensus provided in digital environments is in fact another distinguishing profile of digital private powers.

On the end of the day, it is well known that the use of digital services is hardly accompanied by a careful reading and conscious acceptance of their terms and conditions. It follows that users generally "lie" and claim to have read what they have not actually read.

Be that as it may, whenever consumers intentionally use digital services, their mere acceptance is thought to be perfected *a priori.* And

[91] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

[92] See *What does the GDPR mean for business and consumer technology users*, on *gdpr.ue*: *"the Facebook-Cambridge Analytica scandal was just one prominent episode among a series of revelations in recent years. Uber, Google, Apple, and other companies large and small have systematically invaded the privacy of millions of people. And even where companies have been honest and transparent in their handling of data, their protection of data has been tragically flawed. Virtually every major corporation has suffered a data breach. Large leaks make the headlines, but small- and medium-sized enterprises are the preferred target of cyber criminals because their defenses are usually weaker. The rate of cyber attacks increases annually, with about 400 new threats every minute"*. So *"If the web is the Wild West, then the EU's General Data Protection Regulation (GDPR) is the sheriff"*.

[93] See https://ec.europa.eu/info/law/law-topic/data-protection/eu-data-protection-rules/gdpr-fabric-success-story_en.

[94] California, for instance, adopted the California Consumer Privacy Act (entry into force: Jan. 1st, 2020). See S. RAY, *California Begins Enforcing Broad Data Privacy Law*, 1st July 2020, on *Forbes.com*; see also the report of an interesting meeting at the University of Florence with the american professor Mark Rotemberg, president of EPIC: E. CREMONA, *Un convegno su Intelligenza Artificiale e diritti fondamentali*, in *Rivista trimestrale di diritto pubblico*, 2019, 2, p. 611 ff.

[95] EUROPEAN COMMISSION, *When is consent valid?*, available on https://ec.europa.eu/info/law/law-topic/data-protection/reform/rules-business-and-organisations/legal-grounds-processing-data/grounds-processing/when-consent-valid_en.

[96] A different trend seems to follow the judgment of the European Court of Justice of 16 July 2020 in Case C-311/18, which declared Commission Decision 2016/1250 on the adequacy of protection afforded by the Privacy Shield, the EU-US shield for the protection of personal data transferred to the United States, invalid. The judges invalidated the Privacy Shield on the grounds that it does not provide European citizens with sufficient safeguards against US surveillance and privacy laws. According to the Court, *"under the General Data Protection Regulation (GPSD) the transfer of such data to a third country may in principle only take place if the third country concerned guarantees an adequate level of protection for such data"*.

[97] *"I authorise and give up my right of governing myself to this man, or to this assembly of men, on this condition; that thou give up, thy right to him, and authorise all his actions in like manner. This done, the multitude so united in one person is called a Commonwealth; in latin, Civitas. this is the generation of that great Leviathan, or rather, to speak more reverently, of that mortal god to which we owe, under the immortal God, our peace and defence"*; T. HOBBES, *Leviathan*, The Second Part: *Of Commonwealth*, Chapter 17: *Of the Causes, Generation, and Definition of a Commonwealth*, available on https://old.taltech.ee/.

[98] J. HUBER, *Legitimacy as Public Willing: Kant on Freedom and the Law*, in *Ratio Juris*, 32, 1, p. 102-116.

this comes at the expense of their contractual self-determination.

The answer to this GDPR-dilemma is markedly consumerist; and from this perspective one could speak of an "epistemological obstacle".

To understand what this means in practice consider this scenario.

On the one hand, there is need for placing higher information burdens on data controllers and requesting them the so-called 'granularity of the consent of the data subject'[99] (i.e. to make consent as specific as possible[100]).

Yet, on the other, such an approach could be also detrimental to digital consumers themselves. As such, and needless to say, once flooded with formation, flags, checkboxes, "accept" clicks and so on, the risk (or the certainty) is that consumers end up being even less aware than before[101].

In a similar fashion, this is what also happens during the automated process of personal data.

One of the most important new fundamental rights introduced by Article 22 of the GDPR is the *"right not to be subject to a decision based solely on automated processing, including profiling"*.

At this point, it becomes easy to see how important this principle can be in the age of algorithmic decision-making.

Some would go further and claim that it might even be considered a clear and well-reasoned justification for the Constitutionalisation of a European Private law principle[102].

This notwithstanding, such prescription can be easily bypassed when an individual right-holder gives his/her consent. Human dependency upon technology combined with disproportionate tech company/consumers asymmetries, means that 'freedom to consent' boils down to a mere fiction. Rather, this 'freedom' morphs into an exemption that shields companies from regulations.

Based on this analysis, one could however argue that since individuals are totally free to deny their consent, they can easily quit digital services (that, by the way, are totally free of charge).

This is rather a simplistic solution.

One should consider that a Hobbesian-like 'giving-up-all-rights' consent is at odds with concepts such as "privacy by design" and "by default", which tries to internalize values as fundamental rights protection since the early creation of the algorithms themselves.

The effort to anticipate the threshold of protection of personal data is necessary because as soon as those services are out, it becomes too late to protect people from their addictive power.

Also, from a reading of article 22 GDPR, its first paragraph apparently contains an empathic recognition of the right to be free from algorithmic decisions. Yet, when moving to consider the all-encompassing exceptions under paragraph 2, questions arise about whether the main goal is effectively data protection or rather the promotion of a well-functioning *Single Digital Market* neatly cutting all transaction costs.

In the second scenario we also have the same impression. And several discussions on the new directive on Copyright[103] in the Digital Single Market support this remark.

On the whole, this Directive has been touted as another strong pillar of the European private law of technology protecting copyright and intellectual property against exploitation by Big Tech Platforms. For that reason, it was harshly criticised by Google, Facebook and other Apple lobbyists in Bruxelles, along with several free Internet supporters.

One of the key articles (Art. 17) requires online content-sharing service providers to obtain an explicit authorisation or licensing from the

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[99] See G. RESTA, V. ZENO-ZENCOVICH, *Volontà e consenso nella fruizione dei servizi in rete*, in *Riv. trim. dir. proc. civ.*, 2018, p. 411-440. Cfr. Italian Cass., I, 11th May – 2nd July 2018, n. 17278.

[100] Article 4 (11), Art. 6, (1) lett. b), Article 7 and Recitals 32, 42, 43 of the GDPR. Cfr. Italian Data Protection Authority Measure No 130 of 21 June 2019.

[101] European Commission, *When is consent valid?*, cit. For consent to be informed, *"the individual must receive at least the following information: the identity of the organisation processing data; the purposes for which the data is being processed; the type of data that will be processed; the possibility to withdraw the given consent (for example, an unsubscribe link at the end of an email) where applicable the fact that the data will be used for solely automated-based decision-making, including profiling; if the consent is related to an international transfer, the possible risks of data transfers to third countries which are not subject of a Commission adequacy decision and where there are no appropriate safeguards"*.

[102] A. SIMONCINI, *L'algoritmo incostituzionale: intelligenza artificiale e il futuro delle libertà*, in *BioLaw Journal*, 2019, 1, p. 67; C. CASONATO, *Costituzione e intelligenza artificiale: un'agenda per il prossimo futuro*, in *BioLaw Journal*, Special Issue 2, 2019, p. 711 ff.; R. BIFULCO, *Intelligenza artificiale, internet e ordine spontaneo*, in F. PIZZETTI, *Intelligenza artificiale, protezione dei dati personali e regolazione*, Torino, 2018, p. 393 ff.; See also Council of Europe, *Recommendation 2012 (2017), 28th April 2017*, on *Technological convergence, artificialintelligence and human rights*: G. MALGERI, G. COMANDÈ, *Why a Right to Legibility of Automated Decision Making Exists in the General Data Protection Regulation*, in *International Data Privacy Law*, 2017, 7, IV.

[103] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

intellectual property right-holders before using their contents.

In consequence, over-the-top platforms reacted by setting up filter mechanisms that have a clear adverse impact on freedom of expression. Commenting on this, artist and lawyer Ephrat Livni writes *"paradoxically, the new law will likely end up consolidating the power that major tech companies already have on the internet, rather than just making them more responsible. Giants like Google, which will have to create a filtering algorithm, will end up selling their filtering services to smaller platforms that can't afford to develop their own. And that means big companies will end up being the European internet's de facto intellectual property police and will have access to even more data than ever before"*[104]. And this consideration is valid not only for the Copyright Directive[105].

Here is another example of a "formally" fundamental-right oriented legislation revealing its hidden DNA: a human-right oriented approach in disguise that *de facto* lowers transaction costs to "lubricate" (borrowing from Ronald Coase's famous expression[106]) the Digital Single Market.

4.2. About Competition Law: Digital Monopolists thanks to the Market

Similar considerations can be briefly made with respect to European competition law. Also in this context, the epistemological obstacle of the consumerist approach has prevented effective regulation. It has become quite clear that such regulation was not able to prevent the formation of genuine natural (*rectius* digital) monopolies within the market[107].

As already seen, Amazon morphed from being a retail company into a marketing platform; a delivery and logistics network; a payment service; a credit lender; an auction house; a major book publisher; a TV shows producer; a fashion designer; a hardware manufacturer; and a leading host of "cloud" space. And in almost all these fields it holds either a dominant or a monopolistic position.

Although Amazon has clocked staggering growth, nevertheless it generates meagre profits. In fact, it chose instead to price below-cost and expand widely[108].

And with this strategy the company has positioned itself at the center of e-commerce, now serving as an essential infrastructure[109] for uncountable other businesses that depend upon it. In essence, like other big techs, Amazon is both an infrastructure and a competitor itself[110].

It has been argued that the current antitrust framework - and specifically its pegging competition to "consumer welfare" defined as short-term price effects – is unequipped to capture the market power's architecture in the modern economy. And this is because conventional wisdom measures competition via price and output. By doing so, the risk is to under-appreciate predatory pricing strategies and overlook when integration across distinct business lines may prove uncompetitive. The reason why such concerns are heightened when it comes to online platforms is twofold.

First, the economics of platform markets incentivise companies to pursue growth over profits. Thus, under these conditions, predatory pricing becomes highly rational.

Second, because online platforms serve as critical intermediaries, integration among business lines allows digital platforms to control the essential infrastructure on which their rivals depend. Online platforms' dual role (intermediary/competitor)

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[104] E. LIVNI, *The EU copyright directive will consolidate big tech's power*, 4th March 2019, available in https://qz.com/1564495/the-eu-copyright-directive-will-boost-big-tech-companies/.

[105] J. PHELAN, *Google and Facebook Will Just Get Stronger if Regulators Get Their Way, Europe's Experience Shows*, on www.fee.org, 27th August 2019. In the paragraph *"How Regulatory Costs Help Big Firms"* he argues that GDPR has been a sort of a competitive advantage for the Big Tech: *"Big firms can bear the costs of complying with regulations more easily than small firms. If a set of regulations takes one person full time to keep on top of, this will fall as a share of employment the more people the company employs; their salary will be a smaller share of a big company's revenues than a small one's. This makes regulations a source of competitive advantage for the big firms lobbying for them, such as Facebook"*. The full article is available ai this link: https://fee.org/articles/google-and-facebook-will-just-get-stronger-if-regulators-get-their-way-europe-s-experience-shows/.

[106] R.H. COASE, *The Problem of Social Cost* in *Journal of Law & Economics*, 1960, n. 3, p. 1.

[107] See F. DUCCI, *Natural Monopolies in Digital Platform Markets*, Cambridge, 2020, p. 36 ff.; S. MANNONI, G. STAZI, *Is Competition a Click Away? Sfida al monopolio nell'era digitale*, Napoli, 2018.

[108] L. M. KHAN, *Amazon's Antitrust Paradox*, in *The Yale Law Journal*, 2017, p. 710 ff.

[109] See E. CREMONA, *La responsabilità sociale delle grandi piattaforme digitali*, in L. VIOLANTE, *Pandemia e democrazia*, in course of publication.

[110] In July 2020 has started an inquiry by the House Judiciary Committee about whether tech companies take advantage of their dominant positions in the market to enhance their bottom lines. See C. ALBANESIUS, M. KAN, *Tech Execs Face Congress: 9 Big Takeaways*, 29th July 2020, on https://www.pcmag.com/news/apple-amazon-bezos-google-pichai-zuckerberg-facebook-house-judiciary-antitrust.

enable them to collect data from rival companies to be exploited and used against the latter [111]. With the paradoxical conclusion that it is the market itself (generally oriented towards consumers' well-being) that allows this to happen.

5. Conclusions for an epistemological disruption.

Based on the above discussion on European Law integration and technology from a constitutional theory viewpoint, it is now possible to recap our arguments and conclude by reference to one of the 'mantra' words in the technological debate: disruption.

More exactly, and borrowing again from Bachelard, it would be more appropriate to speak of an 'epistemological disruption'.

Taken together, disruption induced by technology usually means that new technical resources deeply change our well-established way of thinking. Originally, it means that some old well-established businesses suddenly become weak while some new ideas – apparently weak and unlikely – becomes stronger and stronger.

We think that technology is somehow inducing a disruptive process within European Private Law that is weakening some old established principles and strengthening new ones. On the weakness side, we could put all fundamental values derived from the Constitutionalisation of European Private Law.

Think about *Antitrust law, Consumers' rights, Data protection*. All those new Euro-National constitutional values today are extremely weak (if not simply useless) as far as we face Big Tech companies. We have already said something about the paradoxes of Consumers and Data protection, or about competition law and enforcement institution. To wit: they are simply ineffective given the size and the global dimension of the new technology main players.

The multi-billion sanctions issued by the European or US Antitrust Agencies against Facebook or Google – considered the highest sanctions ever in the competition law history – are "peanuts" for corporations that are happily reaching and surpassing the 1 trillion market value.

On the strengths side we put those new private powers. We do not think of the topic of *private powers* as a new topic. Just think of Teubner studies on Civil Constitutions or the debate about the international law responsibility for private multinational companies.

The disruption induced by technology simply accelerates and exponentially strengthens this trend. In a very famous interview Marc Zuckerberg said: *"In a lot of ways Facebook is more like a government than a traditional company. We have this large community of people, and more than other technology companies we're really setting policies"*.

The most promising research path to follow is one in which technological companies think of themselves as if they were "States"[112] (as we put it previously). In their self-awareness, they exert "public powers" intended not simply as societal powers, but as super-individual powers. Also, they are more "community builders" than "service providers". They are not actors *in* the market (neither monopolists, technically) but they are *the* market itself.

A new kind of *power* that – in their self-awareness – does not stem from agreements or contracts. It does not even derive from one's own consent, despite what is written in their terms of service. Rather, it derives from the ownership of the technological infrastructure that makes the community possible. In sum, tech companies' force relies – as in the pre-modern times – on the "excommunication" power.

So they resemble more a *sovereign* power than a service provider available for charge. They are not just social media facilitating relations among people, as they can and do actually shape such relations in a *certain* way.

In fact, they're not neutral in framing the social media community. For example, they love enormously to know people's preferences. And they collect their data trodding the path of new business models promoted by the so-called "surveillance capitalism".

Today "surveillance" is a function that is paradoxically empowered by a legislation that makes tech companies quasi-legal enforcement institutions. And consequently, by looking at the contractual structure of these platforms, it clearly emerges how they tend to expand, including a long list of policies they supervise. Consumers might benefit from General Terms of Service, but they also have to subscribe specific "Privacy policies" and "Cookies policy".

Subscription is also required with respect to what are now called "Community standards" or "Principles of design" (among many others) that are usually self-enforced by private Oversight Boards.

[111] L. M. KHAN, *Amazon's Antitrust Paradox*, cit.

[112] It is interesting that also Ronald Coase in his Nobel Prize winner article thinks that *"the Government is, in a sense, a "super-firm (but of a very special kind)"*; R.H. COASE, *The problem of social cost*, cit., p. 17.

This is how technological disruption of European Private law is transforming our Constitutional euro-national values. In consequence, this change of scenery requires transformation of "epistemological disruption" into a new "epistemological insight". And this is going to be one of the most exciting, but also worrying, puzzles our times.

That is the reason why we desperately need the contribution of scholars like Hans and Giuseppe. 140 years sound as quite a long time but we need time not to be captured by short-sighted visions.

In times of careless "fast-forward" we need intellectual "slow-motion" to capture the exact moment in which change happens. And in that precise moment we need to be focused and equipped, if we want to express the "good old" value of human freedom in a comprehensible contemporary language.

Going back to Tomas Eliot words: we need "wisdom more than information" or, to re-evoke a meaningful image of Paolo Grossi image, we need scholars able to catch the line rather than the single point, and to put the point within the line.

Nobel prize laureate Bob Dylan wonderfully expressed this need, saying: "*may you have strong foundation when the winds of changing shift*". This is the reason why we do really hope to keep enjoying their contribution to legal scholarship, in those *"times they are a' changin"*.