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Fukouka, 2018
M. Graziadei, Foreword                   VII
S. Ferreri, G.M. Ajani, Comparative law and multicultural legal classes: challenge or opportunity?  1
M. D’Alberti, Commons and land grabbing  25
A. Veneziano, E. Finazzi Agrò, The use of the Unidroit principles in order to interpret or supplement national contract law  39
E. Ioriatti, Internationalization and bilingual legal education in Italy: a methodology in transition  63
A. De luca, Compensation schemes for damages caused by healthcare and alternatives to court proceedings in Italy  89
G.A. Benacchio, Information et transparence dans la protection des consommateurs: une réalisation difficile 113
M.A. Lupoi, Optional choice of court agreements in Italy  151
A. Bonfanti, Corporate social responsibility and corporate accountability: the Italian private international law perspective  169
M. Graziadei, Control of price related terms in standard form contracts: the Italian experience  193
D. Corapi, D. Benincasa, The Italian law of groups of companies  219
M. Ricolfi, Security rights over intellectual property in Italy  241
M. Magnani, The role of collective bargaining in Italian labour law  275
L. Gradoni, L. Pasquet, Failing to protect basic human rights: the fight against poverty and the right to development in Italy’s legal practice  295
T. Groppi, *Formal and informal constitutional amendments in Italy* 323

O. Pollicino, V. D’Antonio, *The right to be forgotten* 349

F. Prina, *Le procès des mineurs en Italie: trente ans d’application du code de procédure pénale des mineurs* 363

M. Ceresa Castaldo, *Confidentiality of correspondence with counsel as a requirement of a fair trial* 405

V. Zeno-Zencovich, *Data protection in the internet* 431

M. Tomasi, C. Casonato, *Regulating genetic data in insurance and employment: the Italian “upstream” way* 441

B. Pozzo, *Climate change and the individual* 459

M. Serio, *Conditions of the recognition of the civil status of transgender people* 473

*List of Authors* 493
1. Premise. – 2. Specific features and differences of Italian data protection.

Data protection in EU countries has been to a great extent harmonized for over the last 20 years (Directive 1995/46 and subsequent amendments).

Data protection on telecom networks has been to a great extent been harmonized for over 15 years (Directive 2002/22 and subsequent amendments).

Data protection has become a central aspect of EU external policy though a great number of decisions of the Court of Justice of the European Union (Transfer of PNR to the US\(^1\); Google Spain\(^2\); Schrems\(^3\); PNR agreement with Canada\(^4\)).


\(^2\) CJEU 13 May 2014 in Case C-131/12, Google Spain v. Costeja holding that processing of personal data is carried out in the context of the activities of an establishment of the controller on the territory of a Member State, within the meaning of that provision, when the operator of a search engine sets up in a Member State a branch or subsidiary which is intended to promote and sell advertising space offered by that engine and which orientates its activity towards the inhabitants of that Member State.

\(^3\) CJEU 6 October 2015 in Case C-362/14, Schrems v. Data Protection Commissioner (Ireland) holding that the Commission Decision 2000/520/EC of 26 July 2000 pursuant to Directive 95/46 on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce, by which the European Commission finds that a third country ensures an adequate level of protection, does not prevent a supervisory authority of
This is also the result of the “constitutionalization” of data protection which is expressly affirmed by Articles 7 and 8 of the European Charter of Fundamental Rights which has the same value as the two Lisbon Treaties (Treaty on the European Union and Treaty on the Functioning of the European Union).

In May 2018 the General Data Protection Regulation (2016/679) will have come fully into force, together with Directives 680 and 681 concerning processing of personal data for contrast of terrorist and serious criminal activities.

In the pipeline is the Draft regulation on data protection on the Internet.

As for Italy, after the first data protection law (n. 675 of 1996) since 2003 it has enacted a lengthy 186 article long “Privacy Code” (Legislative Decree 2003/196) to which are attached over fifteen equally long schedules which discipline data protection in various areas (workplace, genetic data, historical and research purposes, associations, news gathering et cetera).

Since 1997, when the Italian Data Protection Commissioner (Garante per la Protezione dei Dati Personal) was created, thousands of deci-
sions have been taken on the basis of individual request or _ex officio_ procedures.

A certain number of these decisions have been appealed in front of the courts. One can therefore rely on also on a significant body of case-law even of the Italian Court of Cassation.

The role of Italian practices in the formation of EU data protection cannot be under-estimated. Professor Stefano Rodotà, the first Italian data protection Commissioner was the drafter of Article 7 the ECFR. Giovanni Buttarelli, for ten years the Secretary general of the Italian Garante, is presently the European Data Protection Supervisor. Many of the issues tacked with by the Article 29 [of Directive 1995/46] Working Group were set by the Italian Garante which has been regularly liaising with other European Commissioners.

2. The normative system of data protection is – on its black-letter – mostly harmonized, and it is uselessly _pointilliste_ to detect minor changes in the words used.

What changes is the general legal, ideological, social and economic context in which such norms are immersed and with which they interact. One therefore has to look more outside data protection laws to compare systems and understand the differences between them.

Only “data protection radicals” see data protection as the sun around which all the other legal institutions rotate. A more realistic approach brings us to consider how, owing to external factors, same-worded rules may be applied differently in nearby jurisdictions within the European Union.

_a) Data protection as a personality right_

Even before data protection laws were enacted the right to data protection has been qualified as a personality right (such as reputation, image, name). In particular both the first data protection law (n. 695/96) and the Privacy code has connected data protection to the right to privacy and to personal identity.

This approach is generally followed by the courts (see for one of the first decisions Cassazione 30 June 2001, n. 8889) and by legal doctrine. This implies that data protection is generally qualified as a fundamen-
tal right protected under Article 2 of the Italian Constitution (see Cassazione 19 July 2016, n. 14694) and is of a non-patrimonial nature. This qualification is relevant for what will be said further on under letter f).

b) Countervailing interests: Data retention for police and judicial investigations

There has always been an open conflict between the Italian Garante and Parliament and Government as to the maximum time for data retention for police and judicial investigations. The reasons are related to the strong need to contrast criminal organizations which are deeply rooted in certain regions (the Mafia and similar organized crime).

The Privacy Code (article 132) sets a rather short period for data retention of data concerning telephone traffic (two years) and of computer traffic (one year). However these deadlines have constantly been prolonged up to six years for the needs of police and criminal investigations.

At any rate the discussion on the actual length of data retention in Italy appears to be belittled by the sweeping powers given to police and judicial authorities to analyse and match all sort of data in order to contrast terrorist and serious crimes suspects (Directives 680 and 681/2016).

c) Countervailing interests: Rights of workers

Since 1970 in Italy has enacted stringent rules on surveillance of workers while at work. At those time the main concern was video-surveillance in factories and offices. Digital apparatuses were unknown of. Article 4 of the “Statuto dei lavoratori”11 states that forms of remote control can be introduced only for organizational reasons and to protect safety of workers and of working premises. Such devices can be introduced after negotiation with the trade unions.

It is clear that such regulation makes little sense in a digitalized context, in which workers are constantly connected with their employer’s platform on which they perform many of their tasks.

The Garante was attempted to discipline the processing of sensitive data (i.e. data which require a specific written authorization by the interested person) through specific guidelines issued in 2006 and still in force12.

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9 Published in Guida al diritto 2016, pp. 43, p. 66.
10 See above fn. 6 and 7.
12 Deliberazione n. 53 del 23 novembre 2006 “Linee guida in materia di trattamento
However the most controversial area has been, and still is, that of the use of data stored by the employer as evidence of the workers violation or his or her duties, such as to justify the termination of contract.

The main elements one can extract from the rich case-law are related to the right for the employer to inspect the e-mails sent or received by the employee on the firm’s e-mail account (in favour Cassazione 23 February 2012, n. 2722).

Such activity of data processing has been considered lawful when put into place by the employer for the protection in court of rights which have been challenged (Cassazione 11 July 2013, n. 17204).

d) Countervailing interests: Media reporting

The main area of conflict that has arisen over the last 20 years is between data protection – mostly seen in its privacy aspect – and journalistic activity.

The Garante, already in 1998, attempted to immunize the press from the application of data protection laws, especially under the requirement of consent of the interest person. This brought to a Code of self-regulation which actually has a binding nature, but in only one direction, in the sense that it is generally applied to exclude liability of the media. This has not prevented a great number of cases being brought in front of both the Garante and the courts.

The problem – from a strictly legal point of view – is that data protection has to been see as one of the legal reactions against the growing invasion of the individual sphere by technologies and by enterprises. One needs to, constantly, set the balance between competing values and needs.

Although it may be said that, in general, the result is in favour of the media, which is mostly exonerated from complying with the innumerable data protection regulations which vex all other enterprises, there
are still areas in which the equilibrium is unstable, although this can be decided only on a case-by-case approach.

The most significant cases have been decided by the Garante who, time by time, has forbidden the publication by the press of highly sensitive data, mostly concerning health conditions or sexual conduct (e.g. Garante decision 7 February 2002, n. 46079 on person affected by Creutzfeldt-Jakob disease; Garante decision 13 November 2013, n. 2749736 on persons allegedly involved in child prostitution investigation).

e) Counteracting interests: Right to be forgotten

The right to be forgotten has been recognized – albeit in a not complete form – by the CJEU decision in the Google Spain case. It should be noted however that already in 2012 the Corte di Cassazione (decision 5 April 2012, n. 5525) on the basis of data protection laws had stated that news archived in a journalistic data base had to be updated with more recent information, if any; and that individuals had a right that news related to decades before should fall in oblivion.

The principle has been repeatedly affirmed in decisions by the Garante, who has ordered, as remedy, that of de-indexing the news so that it may not be ordinarily found through search engines.

f) Counteracting interests: transparency of economic activity

Following an European trend, both the Garante and the courts have recognized ample exceptions to data protection legislation when data is processed by public credit reporting agencies. In particular it has been considered compliant with data protection principles both the availability of data concerning the bankruptcy of companies, and the names of its chief officers (Cassazione 14 June 2017, n. 19761) or concerning the creditworthiness of individuals who in the past had defaulted (Cassazione 25 January 2017, n. 1931: available remedy is removal of name improperly inserted in database).

g) New fields: “Data consumers”

The dominant – both in case law and in legal doctrine – view that

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16 Published in Il diritto dell’informazione e dell’informatica, 2012, p. 452 (with note by Frosini at p. 911).

17 Published in Foro italiano 2017, I, 2989 (with note by Pardolesi). The case was decided after a referral to the CJEU (decision 9 March 2017 in Case C-398/15, Manni v. Camera di Commercio Lecce).

18 Published in Responsabilità civile e previdenza, 2017, p. 837 (with note by Foglia).
Data protection is a non-patrimonial personality right, has overshadowed the very clear economic dimension of data-driven industries.

These aspects have been gradually emerging not through the Garante, but through decisions taken by the Italian Competition Authority (Autorità Garante per la Concorrenza ed il Mercato – AGCM) which is empowered also with consumer protection.

In the Samsung decision (PS 10207 of 27 January 2017\textsuperscript{19}) the AGCM fined Samsung €3 mln for unfair commercial practices consisting in omitting to inform consumers that the special prices for the purchase of handsets included compulsory registration on the Samsung platform and provision of personal data for marketing purposes.

In the WhatsApp I case (CV154, 12 May 2017\textsuperscript{20}) practically all the standard clauses in the WA general terms and conditions were struck down as unfair inasmuch they conferred unlimited rights to WA on user data. And in the WhatsApp II case (PS10601, 12 May 2017\textsuperscript{21}) WA was fined €3 mln for having transferred without notice all the data concerning its users to its controlling company, Facebook.

The cases show an increasing relationship between data protection and consumer protection, which has a distinctive economic nature. Such a patrimonial approach is bound to increase if the Draft Directive on the provision of digital content will be voted. Such a Directive recognizes finally! – that in the digital world users enter in contracts with service providers paying, as valuable consideration, with their data.

This, however, creates a conflict between technological practices over the Internet, where services are provided on the basis of data collecting devices (typically cookies), and the GDPR which requires that consent for data processing be given “freely”, a term which many – such as the EU Data protection Supervisor – interpret as “without economic incentives”\textsuperscript{22}.

\textsuperscript{19} Published on the AGCM www.agcm.it/component/joomdoc/allegati-news/PS10207_chiusura.pdf/download.html
\textsuperscript{20} Il diritto dell’informazione e dell’informatica, 2017, p. 371 (with note by Gian-none Codiglione).
\textsuperscript{21} Il diritto dell’informazione e dell’informatica, 2017, p. 390 (with note by Gian-none Codiglione).
\textsuperscript{22} EDPS, Opinion on the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content, n. 4/2017, p. 9. See also EDPS, Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the digital economy, Brussels, 2014, p. 8 ff.
h) New fields: Commodification of data

There is a growing conflict (also in Italy) between data protection laws and contract law. The bone of content is the conflicting notion of “consent” as expressed in data protection laws and in decisions by the Italian Garante\(^{23}\), and “consent” as it has historically been developed in contractual theory. The former is construed in a very strict and formalistic way, significantly limiting the possibilities to use and transfer data legitimately collected. The latter sees data as a commodity that can be legitimately be transferred to third parties, normally on the basis of an adequate consideration represented by the services one receives when using on-line services.

This interpretative clash might lead to a “tragedy of the anti-commons” by which fragmentation of rights over data could determine a paralysis in their exploitation, particularly necessary in a “Big data” environment\(^{24}\).

i) Damages

Directive 1995/46, and with it ensuing Italian legislation, establishes strict liability for unlawful protection, in the sense that the burden of proof of lawful treatment is upon the data holder. This has brought to considerable amount of litigation concerning not the existence of an unlawful treatment, generally considered \textit{in re ipsa} – but on the liquidation of damages arising from the tortious act.

Flooded by trivial litigation mostly raised in front of justices of the peace, the Cassazione (decision 16 July 2014, n. 16133\(^{25}\)) first set on the plaintiff the burden of proving actual damage suffered from the unlawful processing of data, and subsequently fined the plaintiff for frivolous litigation (Cassazione 8. February 2017, n. 3311: the complaint concerned ten unsolicited e-mails)\(^{26}\).

It would therefore appear that the preferred remedies in the field of personal data are more of specific performance nature (injunctions, de-indexing, removal etc.) than of a compensatory nature.


\(^{25}\) Published in \textit{Foro italiano} 2015, I, c. 120.

\(^{26}\) Published in \textit{Diritto & Giustizia} 2017, 9.2.2017 (with note by Valerio).
Abstract

The Report points out that in a uniformed legal environment, such as the EU, the differences in data protection practices depend on the general context in which those norms are inserted. The areas in which one can register significant divergences are: data protection as a personality right; data retention for police and judicial investigations; data processing and rights of workers; media reporting; right to be forgotten. The Report also highlights new areas of interest: the complex relationship between data protection and consumer protection; the commodification of data; damages for loss of data and unlawful processing.

Il contributo mira ad evidenziare come nel caso della protezione dei dati personali, a fronte di una disciplina positiva uniformente in tutti gli stati membri dell’UE le differenze applicative dipendono dal contesto nel quale essa è inserita e da specificità del sistema. In tale ottica si analizzano alcune aree nelle quali si registrano divergenze applicative: i dati personali quali diritti della personalità; l’uso dei dati per finalità giudiziarie e di polizia; i diritti dei lavoratori; l’attività giornalistica; il diritto all’oblio; la trasparenza dell’attività economica. Inoltre si mettono in luce alcune nuove prospettive: il rapporto fra disciplina sui dati personali e tutela del consumatore; l’uso dei dati come corrispettivo in rapporti contrattuali; il risarcimento del danno per illecito tratta mento e perdita dei dati.