

Digital platforms and the law: contested issues*

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1. Introduction

Any discussion of the legal issues raised by digital platforms faces at the outset two main difficulties. The first is the lack of a clear and widely shared definition of what a digital platform is. The second is the stark heterogeneity of the issues involved, which are not restrained to a single discipline, but lie at the interface of different branches of the legal system, like consumer law, competition law, administrative law, labor law, data protection, etc.

Digital platforms have been defined either broadly or narrowly¹. A broad definition has been proposed by the German Monopolies Commission, according to which platforms are all Internet businesses providing «intermediation services which allow for *direct* interaction between two or more distinct groups of users that are connected by *indirect network effects*»². Likewise, the European Commission defined an online platform as «undertaking operating in two (or multi)-sided markets, which uses the Internet to enable interactions between two or more distinct but interdependent groups of users so as to generate value for at least one of the groups»³. A paradigmatic example of a narrow definition is to be found in art. 1 of the Discussion Draft of a Directive on Online Intermediary Platforms, according to which digital platform is any «information society service accessible through the internet or by similar digital means which enables customers to conclude contracts with suppliers of goods, services or digital content»⁴.

The distinction between the two legal definitions parallels the dichotomy, arising out of the debate in economic theory, between two-sided *non-transactions* markets and two-sided *transactions* markets⁵. The critical element is whether or not digital platforms

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¹ J. Sénéchal, *The Diversity of the Services Provided by Online Platforms and the Specificity of the Counter-Performance of These Services – A double Challenge for European and National Contract Law*, in *Journal of European Consumer and Market Law*, 1, 2016, 39.

² BKartA, B6-113/15, *Working Paper – The Market Power of Platforms and Networks. Executive Summary*, June 2016, at 2.

³ *Public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy* (European Commission, 24 September 2015).

⁴ Research group on the law of Digital Services, *Discussion Draft of a Directive on Online Intermediary Platforms*, in *Journal of European Consumer and Market Law*, 4, 2016, 164, at 166; a similar stance is taken by C. Busch - H. Schulte-Nölke - A. Wiewiórowska-Domagalska - F. Zoll, *The Rise of the Platform Economy: A New Challenge for European Consumer Law?*, in *Journal of European Consumer and Market Law*, 1, 2016, 3.

⁵ L. Filistrucchi, *How many markets are two-sided?*, in *The CPI Antitrust Journal*, July 2010 (2); on the economics of digital platforms, see D.S. Evans - R. Schmalensee, *Matchmakers: The New Economics of Multisided Platforms*, Boston, 2016; J.C. Rochet - J. Tirole, *Platform Competition in Two-Sided Markets*, in *Journal of the European Economic Association*, 4, 2003, 990; A. Hagiu - J. Wright, *Multi-Sided Platforms*, in *International Journal of Industrial Organization*, 43, 2015, 162; M. Rysman, *The Economics of Two-Sided Markets*, in *Journal of Economic Perspectives*, 23, 2009, 125.

enable customers to order goods, services or digital content in exchange for payment. Each option has its own advantages, as well as shortcomings. If one opts for a narrower definition, emphasizing the transactional element, several typologies of platforms - like general Internet search engines, rating websites and social networks - would be left aside. On the other hand, adopting a broader construction of the notion of digital platforms, the scope of the analysis would be significantly widened as to include socially important phenomena, but at the cost of making the identification of a common legal framework significantly more difficult.

This paper has mainly an informative character, being aimed at providing a short overview of the legal treatment of digital platforms under Italian law, rather than proposing a structured theoretical framework. Therefore, it seems preferable to opt for a broader definition of digital platforms, including «all software-based facilities that actively encourage the interaction between providers and users of content, goods or services»⁶. Accordingly, the regulation of a wide range of activities should be considered, such as «online advertising platforms, marketplaces, search engines, social media and creative content outlets, application distribution platforms, communications services, payment systems, and platforms for the collaborative economy»⁷.

As to the second point, focusing only on the private-law aspects of digital platform contracts would lead to a partial assessment of the wide-ranging social and economic impact of digital platforms. Indeed, this new form of business, favored by the convergence of a series of «disruptive technologies»⁸, is altering the economic structure of many sectors of the Italian economy (first of all transportation and accommodation services)⁹, and as a result is seriously challenging the traditional regulatory framework¹⁰. Therefore, it would be unwise not to take into account a broader range of issues, also of a non-contractual nature, in relation to which legal controversies have arisen or seem like to arise under Italian law.

As to the applicable legal sources, it is worth emphasizing that in Italy there is no general law on digital platforms. Actually, an ambitious and interesting bill is pending in Parliament, but it has very few chances of being passed before the end of the leg-

⁶ E.I. Obergefell - A. Thamer, *(Non-) Regulation of Online Platforms and Internet Intermediaries: The Facts: Context and Overview on State of Play*, in *Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil*, 2017, 201, 202.

⁷ *Ibid.*

⁸ N.K. Katyal, *Disruptive Technologies and the Law*, in *The Georgetown Law Journal*, 102, 2014, 1685; see also V. Hatzopoulos - S. Roma, *Caring for Sharing? The Collaborative Economy Under EU Law*, 54 *Common Market L. Rev.* 81 (2017).

⁹ According to the preliminary study attached to the Bill 3564 on The Sharing Economy (see below, note 11), in 2015 there were about 186 collaborative platforms, out of which 69 dealt with crowdfunding, 22 with transportation, 18 with consumer sales, 17 with tourist services.

¹⁰ Such an impact is obviously not limited to Italy: see C. Twigg-Flesner, *Disruptive Technology – Disrupted Law? How the Digital Revolution Affects (Contract) Law*, in A. De Franceschi (ed.), *European Contract Law and the Digital Single Market. The Implications of the Digital Revolution*, Cambridge-Antwerp-Portland, 2016, 21.

islature¹¹. As a result, the discipline is fragmentary and the provisions applicable to the digital platforms are scattered in various parts of the legal system, and namely in the Civil code, the Consumer code, the Code of Data Protection, various statutes aimed at fostering competition among businesses, local regulations and bylaws, etc.¹² Given the lack of an organic and comprehensive regulatory framework, courts and administrative agencies have played in the last decade an important role in filling the gaps of statutory law, or at least adapting it to a rapidly changing social environment.

This paper will provide an overview of the most important developments, focusing in particular on three main themes: *a)* unfair competition; *b)* consumer protection; *c)* privacy and data protection. Despite the artificial division among the sections, it shall be clear at the outset that the issues involved are strictly related and many of them turn around the questions most frequently debated within the international literature on digital platforms¹³. Among them are the following:

what is the platform operator's role: mere facilitator, broker or supplier of integrated services?

what are the duties of platform operators vis-à-vis consumers and suppliers?

what are the limits of private autonomy in terms of consumer protection and data privacy principles?

What is the legal regime of "gratuitous contracts" in the digital environment?

2. Competition law

Competition law is an important laboratory to test the legal treatment of digital platforms. Italian courts and administrative agencies have been frequently called upon to decide cases concerning the violation of antitrust law and the law on unfair competition.

As to former, proceedings have been brought, for instance, against online travel agencies, such as Booking and Expedia, on the ground of vertical restrictions¹⁴. In par-

¹¹ *Disciplina delle piattaforme digitali per la condivisione di beni e servizi e disposizioni per la promozione dell'economia della condivisione (Law on digital platforms aimed at the sharing of goods and services and provisions to encourage the sharing economy)*, Atti Camera n. 3564, 27 January 2016. On the policy choices involved in the regulation of the sharing economy see S.R. Miller, *First Principles for Regulating the Sharing Economy*, in *Harvard Journal on Legislation*, 53, 2016, 147.

¹² See for a detailed overview A. De Franceschi, *The adequacy of Italian law for the platform economy*, in *Journal of European Consumer and Market Law*, 1, 2016, 56.

¹³ See, for instance, M. Colangelo - V. Zeno-Zencovich, *Online Platforms, Competition Rules, and Consumer Protection in Travel Industry*, in *Journal of European Consumer and Market Law*, 2, 2016, 75; V. Zeno-Zencovich - G. Giannone Codiglione, *Ten Legal Perspectives on the 'Big Data Revolution'*, in *Concorrenza e mercato*, 2016, 29; C. Busch - H. Schulte-Nölke - A. Wiewiórovska-Domagalska - F. Zoll, *The Rise of the Platform Economy: A New Challenge for European Consumer Law?*, cit., 5-9.

¹⁴ On this see in particular G. Colangelo, *Big data, piattaforme digitali e antitrust*, in *Mercato concorrenza e regole*, 2016, 425; G. Pitruzzella, *Big data, competition and privacy: a look from the antitrust perspective*, in *Concorrenza e mercato*, 2016, 15; M. Colangelo - V. Zeno-Zencovich, *Online Platforms, Competition Rules, and Consumer Protection in Travel Industry*, cit.

ticular, the Italian Competition Authority (*Autorità garante della concorrenza e del mercato*, hereinafter ICA) challenged the “most favorite nations” clauses – clauses obliging hotels and other undertakings not to apply better price and conditions in relationships with other OTAs and channels of distribution – frequently included in standard-form contracts with the suppliers. According to the authority, such vertical agreements unlawfully distorted the competition in the relevant market of online reservation systems, as – among other considerations – they limited the possibility for new entrants to compete by lowering the agency fees and obtaining a cheaper final price for the rooms offered to consumers. As a result of the investigation, both Expedia and Booking decided to eliminate or substantially alter such clauses and therefore the ICA dropped the proceedings on April 2016¹⁵. The solution favored by the competition authority was eventually translated into formal law: the new art. 1, al. 166 of the Law 4 August 2017, n. 124, provides that MFN clauses are null and void, irrespective of the national law applicable to the contract¹⁶.

Similarly to the experience of other European countries, some of the most important legal issues concerning digital platforms have arisen in Italy as a result of the rapid diffusion of the Uber application¹⁷. This has led to intense litigation¹⁸, to various (and up to now unsuccessful) attempts to regulate the matter, to the rise of protest movements and generally to a heightened public debate about the promises and risks of digital platforms. The main chapters of this tale have been carefully recalled by Alberto De Franceschi¹⁹; therefore, I will limit my remarks to the essential elements of the litigation and to its most recent developments.

The services offered by Uber through its applications UberPop and UberBlack have been challenged on the basis of various legal provisions, but mainly on the ground of the violation of the provisions on unfair competition, and namely art. 2598 of the civil code.

UberPop, in particular, has been in the eye of a thunderstorm since 2015, when the Court of Milan issued an interim injunction on its use over the entire national terri-

¹⁵ ICA, decision 23 March 2016, n. 25940, in *Bollettino*, 11 April 2016, 5.

¹⁶ See art. 1, al. 166, Law 4 August 2017, n. 124, *Legge annuale per il mercato e la concorrenza*: «è nullo ogni patto con il quale l'impresa turistico-ricettiva si obbliga a non praticare alla clientela finale, con qualsiasi modalità e qualsiasi strumento, prezzi, termini e ogni altra condizione che siano migliorativi rispetto a quelli praticati dalla stessa impresa per il tramite di soggetti terzi, indipendentemente dalla legge regolatrice del contratto».

¹⁷ For a comparative overview, see M.J. Sørensen, *Private law perspectives on platform services: Uber – a business model in search of a new contractual legal frame?*, in *Journal of European Consumer and Market Law*, 1, 2016, 15; E. Terryn, *The sharing economy in Belgium: A case for regulation?*, in *Journal of European Consumer and Market Law*, 1, 2016, 45; N. Rampazzo, *Rifkin e Uber. Dall'età dell'accesso all'economia dell'eccesso*, in *Diritto dell'informazione e dell'informatica*, 2015, 957.

¹⁸ See, lastly, the important decision of the UK Employment Appeal Tribunal, of 10 November 2017, in the case of *UBER BV et al. v. Aslam, Ferrar, Dawson and oths.* (qualifying Uber drivers as “workers” under the local regulatory scheme).

¹⁹ A. De Franceschi, *The adequacy of Italian law for the platform economy*, cit., 58-61.

tory²⁰. Its main competitors, the holders of cab licenses, claimed that Uber was guilty of an infringement of Italian competition law, since it made profits by not complying with state law provisions regulating public transportation services. Uber tried to argue that it was not competing in the same market, since it was merely a supplier of a digital interface, which could be freely used by customers and drivers, depicted as members of a community, and not a transport enterprise. The court rejected such arguments and granted the interim injunction. At this point Uber sued the original claimants – individual taxi drivers, associations of cab holders, radio-taxi companies, trade unions, etc. – before the Court of Turin in order to obtain a declaratory judgment affirming the lawfulness of the service at issue and overturning the preliminary injunction. The Court of Turin ruled on March 2017 against Uber²¹. Its main findings are the following: Uber is not simply a digital intermediary or the provider of a service of the information society within the meaning of Directive 2000/31/EC. By contrast, it is a transport undertaking. Indeed, it selects, recruits and instructs drivers, who are contractually bound to Uber. The fare for the ride is unilaterally determined by Uber, which adopts the surge pricing technique and keeps 20% of the amount paid by the customers. Shortly, Uber is not simply providing the technical means to low down the transaction costs and establish a direct communication between members of a virtual community, but is directly structuring and organizing a transportation service on a large scale. As the Advocate General Szpunar recently observed in *Asociación Profesional Elite Taxi v. Uber Systems Spain*, a case brought before the European Court of Justice, the application provided by Uber «does much more than match supply to demand: it created the supply itself»²². From a functional point of view, the Court concludes, Uber is not that different from the old (and much less efficient) radio taxi undertaking: it is an organizer of transport services.

As an autonomous market player, Uber is not complying with the stringent requirements set by the Italian 1992 law on unscheduled public transport services, and namely the obligation for drivers engaging in such activity to pass an exam and obtain a certification of the driving abilities; to own or possess a car with specific safety requirements; to obtain a transport license by the territorial municipality; to have appropriate third-party liability insurance, etc.

By violating such public law provisions, Uber is artificially cutting its own costs, thereby managing to keep prices low and to gain increasing market shares, to the detriment of its “traditional” competitors. All of this amounts to acts of unfair competition, prohibited by art. 2598 of the Italian civil code.

Considering that both the Court of Milan and the Court of Turin – two influent courts

²⁰ Trib. Milano, sez. spec. impresa, ord. 25 May 2015, in *Corr. Giur.*, 2016, 356; the decision was confirmed by Trib. Milano, sez. spec. impresa, ord. 9 July 2015, *ivi*, 2016, 360, with a comment by S. Serafini, *La concorrenza sleale per violazione della normativa pubblicistica del trasporto urbano non di linea: il caso Uber*.

²¹ Trib. Torino, sez. spec. impresa, 22 March 2017, in *Diritto dell'informazione e dell'informatica.*, 2017, 284, with a comment by G. Resta, *Uber di fronte alle corti europee*.

²² See the Opinion of General Advocate Szpunar in the cases C-434/15, *Asociación Profesional Elite Taxi v. Uber Systems Spain SL*, par. 43; and in C-320/16, *Uber France SAS*.

– have reached the same result, one could reasonably assume that, if no statutory reform intervenes, Uber Pop will stay out of the Italian market for the next future. As regards Uber Black, by contrast, the situation is less clear-cut. Indeed, the Court of Rome, called upon to rule on the request for a preliminary injunction by various companies, associations of taxi drivers and car rentals, issued a nationwide ban on April 7, blocking the service across Italy²³. The ban was grounded on the unfair competition claims, and namely on the violation of the provisions of the 1992 law on unscheduled public transport services. The reasoning was similar to the one adopted by the Court of Turin. However, the same Court, on rehearing, lifted the ban on May 26 on a very specific ground: the temporary suspension by the Italian Parliament of some of the provisions of the 1992 law (a suspension that was functional, in the hope of the legislature, to the adoption of a systematic reform of the entire sector)²⁴. As a result, Uber Black is as of today operative in Italy. Although it will not be an easy step, given the type of interests involved, only a legislative reform seems to be able to bring back some clarity and certainty in this field.

3. Consumer protection

Although functionally different, the rules aimed at protecting the fairness of competition and consumer welfare tend to converge and systematically overlap in the context of European regulatory private law²⁵. Consumer law may be regarded as an essential component of the law of market regulation²⁶. It is not by chance that the Italian Competition Authority is at the same time in charge of the enforcement of antitrust law and of some of the key provisions of consumer protection law²⁷. In this capacity, the ICA has been recently faced with major consumer protection cases dealing with prominent digital platforms. Some of them deal with the directive 2005/29/EC on unfair business-to-consumer commercial practices; others with the directive 2011/83/EU on consumer rights and directive 93/13/EEC on unfair terms in consumer contracts. Defendants in these cases are some of the biggest digital platforms worldwide, such as Facebook, WhatsApp, Tripadvisor, Amazon.

The acquisition of WhatsApp by Facebook originated the first proceeding brought by the ICA against WhatsApp Inc. on the ground of the violation of the law prohib-

²³ Trib. Roma, sez. spec. imp., ord. 7 April 2017.

²⁴ Trib. Roma, sez. spec. imp., ord. 17 March 2017, r.g.n. 25857/2017.

²⁵ On this see, lastly, F. Mezzanotte, *Regulation of Business-Clients Relationships through 'Organisational Law'*, in *European Review Of Contract Law*, 13, 2, 2017, 131.

²⁶ M. Colangelo - V. Zeno-Zencovich, *La intermediazione on-line e la disciplina della concorrenza: i servizi di viaggio, soggiorno e svago*, in *Diritto dell'informazione e dell'informatica*, 1, 2015, 76; G. Colangelo - M. Maggiolino, *Data Protection in Attention Markets: Protecting Privacy Through Competition*, in *Journal of European Competition Law & Practice*, 2017, 363.

²⁷ The ICA is the authority entrusted with the implementation of Regulation 2006/2004/EC (see arts. 27 and 66 of the Italian Consumer Code).

iting unfair commercial practices²⁸. The critical point was represented by the planned sharing of customers' data by the two companies. One of the economic grounds for the acquisition was represented by Facebook's interest in accessing personal data of WhatsApp's customers; accordingly, WhatsApp unilaterally modified its terms and conditions, including its privacy policy, with the aim of obtaining consumers' consent to the planned data sharing.

According to the ICA, the procedure adopted to inform the consumers about the modification of the terms and conditions of service and obtain their authorization of sharing data with Facebook was seriously flawed and constituted an unfair commercial practice within the meaning of arts. 20, 24 and 25 of Consumer Code. Consumers, according to the ICA, were induced to accept the new terms of service, and namely the data sharing policy, by abusive means. Such a conclusion was reached on the following grounds²⁹: *a*) the holders of a WhatsApp account were notified that the consequence of a refusal to accept the conditions would have been the termination of the contractual relationship; *b*) although an option to opt out was formally guaranteed, despite the threatened interruption of service, the practical steps that had to be taken were such as to discourage any dissent: consumers could learn about this possibility only after clicking on the hyperlink "read terms and conditions" (placed under the mask "accept"), and the consent option was flagged as a default choice. As a result, consumers were induced to accept the new terms of service under the fear of having their account discontinued and by the lack of transparency with regard to the opt-out option. According to the ICA, this amounts to an unfair practice, since the data sharing policy is not essential to the use of WhatsApp and the threatened termination of service is not proportional to the aims pursued³⁰. Therefore, WhatsApp was fined with 3 million Euros.

Two general aspects of the reasoning deserve to be specifically emphasized. First, the ICA maintained that the procedure adopted to obtain consumers' consent was technically a "commercial practice", despite the objection, raised by WhatsApp, that personal data have no economic value and the contract was a gratuitous one³¹. Expressly referring to the EU Commission's findings in the antitrust proceeding brought against Facebook/Whatsapp³², the ICA confirmed that personal data are a valuable economic resource and they are sought for by digital platforms both on the ground of network effects and of their possible uses in the advertising³³. Secondly, the ICA attributed particular importance to a behavioral law & economics perspective, in distinguishing the

²⁸ ICA, decision 11 May 2017, n. 26597, *WhatsApp – Trasferimento Dati a Facebook*, in *Bollettino* n. 18/2017, 57.

²⁹ *Ibid.*, pars. 18-31.

³⁰ *Ibid.*, pars. 27-66.

³¹ *Ibid.*, par. 54; on the relationship between "gratuitous" digital contracts and the Unfair Commercial Practices Directive see in particular M. Narciso, 'Gratuitous' Digital Content Contracts in EU Consumer Law, in *Journal of European Consumer and Market Law*, 5, 2017, 198, 201.

³² Merger procedure, Case No. COMP/M.7217 – *Facebook/WhatsApp*, 3 October 2014.

³³ ICA, decision 11 May 2017, n. 26597, cit., pars. 53-55. See likewise the recent decision 9 August 2017, n. 26729, *App Pokemon Go*, pars 32-34.

various ways of providing information and their consequences in orienting consumers' choices (so-called framing effect)³⁴.

The second major case also deals with WhatsApp's terms and conditions³⁵. Whereas the first proceeding was based on the law of unfair commercial practices, the second one mainly concerns the Directive 93/13/EEC on unfair terms, as implemented by arts. 33-38 of the Italian Consumer code. The case is obviously an important one, since the terms and conditions adopted by the biggest digital platforms tend to be standardized worldwide, being usually a quite literal translation of the original terms adopted under US law. In particular, they are informed to the so-called AYOR model, which tends to deny any serious engagement on the part of the service provider, shifting duties and burdens unilaterally on the consumer's shoulders³⁶. As a matter of fact, the ICA declared many of the key provisions of WhatsApp's standard terms incompatible with EU and Italian consumer law. In particular, 5 categories of clauses were specifically scrutinized, and namely those limiting the trader's liability, regulating the availability and termination of service, providing for the unilateral modification of contractual terms, solving jurisdiction and choice of law issues, and lastly those concerning the use of English language.

As to the first category, the trader tried to argue that the clauses limiting WhatsApp's liability were simply aimed at defining the object of the contract (nature of the service and remuneration scheme). However, the ICA rejected this argument, putting the emphasis instead on the serious imbalance between rights and obligations arising under the contract, to the detriment of the consumer. Whereas the consumer paid for the service received with his/her own personal data – valuable consideration in the opinion of the Authority³⁷ –, the trader discharged its liability for any kind of contractual breach, irrespective of its nature and source. Not only liability was excluded for acts of third parties, but also for interruptions of service or data-breaches due to the trader's negligent behavior. Also, whereas the customer could face unlimited liability, a compensation cap of 100 \$ was agreed upon in favor of the trader. This was clearly against art. 33, al. 1 and 2 of the Consumer Code, and indeed the ICA reproached WhatsApp for the imposition of a blanket exclusion of liability, irrespective of its responsibility for the non-performance³⁸.

Similarly, as regards the second category, the ICA found that the clauses granting WhatsApp an unlimited discretion in interrupting the service or parts of it, without legitimate grounds and without a period of delay, as well as terminating the contract, were radically incompatible with Italian consumer law, reflecting a serious imbalance

³⁴ ICA, decision 11 May 2017, n. 26597, cit., par. 60.

³⁵ ICA, decision 11 May 2017, n. 26596, *WhatsApp – Clausole Vessatorie*, in *Bollettino* n. 18/2017, 57, 73.

³⁶ On the so called AYOR (At Your Own Risk) model, see V. Mak, *Private Law Perspectives on Platform Services. Airbnb: Home Rentals Between Ayor and Nimby*, in *Journal of European Consumer and Market Law*, 1, 2016, 19.

³⁷ ICA, decision 11-5-2017, n. 26596, *WhatsApp – Clausole Vessatorie*, cit., pars. 62-63.

³⁸ *Ibid.*, pars. 67-72.

between contractual rights and obligations arising under the contract³⁹. Furthermore, the ICA pointed out a clause according to which, in case of termination, WhatsApp would have the discretionary power to transfer customers-related data to third parties, was in contrast with the very logic of termination of contracts under Italian law, considering in particular the huge monetary value of personal data⁴⁰.

WhatsApp enjoyed discretionary power also with regard to the modification of the terms of service. In particular, the contract provided that WhatsApp was not only free to unilaterally amend such terms, financial conditions included, but that it was also neither obliged to justify the exercise of such power, nor to previously inform the consumer about the reasons of the intended modification. According to the ICA, this was in contrast with the case law of the ECJ, which has frequently held that the *ius variandi* can be lawfully agreed upon only if it is subordinated to a legitimate ground detailed in the contract and the consumer is previously informed about reasons and effects of the modification⁴¹.

As to jurisdiction and choice of law issues, the standard terms included an international jurisdictional clause providing for the competence of Californian courts and for the applicability of the law of California. The ICA held them to be void, as in contrast with the Consumer Code (art. 33, c. 2, lett. u), as well as with EC Regulation 2008/593, “Rome I” (art. 6)⁴². Indeed, such clauses – which tend to be the same for most digital platforms⁴³ – prevent the consumer from availing herself of her natural forum, which is represented by home-state courts⁴⁴; furthermore, they run against the prohibition to deprive the consumer from the mandatory protection of the otherwise applicable law, which is the law of her country of residence.

As to the last category, the ICA found not acceptable the provision establishing the prevalence, in case of conflict, of the English version of the terms of service over the Italian translation. Despite no substantial divergence was found between the two, the ICA held that in case of doubt contractual terms have to be interpreted *contra proferentem* and in favor of the consumer, even if this interpretation would not be supported by the original version of the contract⁴⁵.

The other two cases that are worth recalling bring to the light the role played by the online intermediary vis-à-vis the general public and the consumers.

A few years ago, the ICA, and on rehearing the Administrative Court for Lazio, were called upon to decide a case brought by the Italian Association of Hotels against Tr-

³⁹ *Ibid.*, pars. 73-79.

⁴⁰ *Ibid.*, pars. 80-81.

⁴¹ *Ibid.*, pars. 84-91.

⁴² *Ibid.*, pars. 92-93.

⁴³ V. Zeno-Zencovich - G. Giannone Codiglione, *Ten Legal Perspectives on the ‘Big Data Revolution’*, cit., 49.

⁴⁴ See art. 15, Regulation 2001/44, Brussels I Regulation.

⁴⁵ ICA, decision 11 May 2017, n. 26596, cit., pars. 97-98. For a similar case involving the use of English without translation in the language of the consumer, see KG Berlin, 8 April 2016, in *Multimedia und Recht*, 2016, 601.

ipadvisor⁴⁶. The controversy was not very different from the more famous Expedia case decided by the Paris Tribunal de Commerce on the basis of claims brought by the French Association of Hotel Restaurants and Cafés⁴⁷. In particular, it was debated whether the publication of such hosts' authored reviews of hotels and restaurants, without a prior check on their accuracy or truthfulness, might amount to an unfair commercial practice, prohibited by art. 18 of the Italian Consumer Code. In the proceedings before the Competition Authority, two issues gained particular importance: *a*) the role of Tripadvisor, as a trader or as a host provider; *b*) the standard of care.

As to the first point, the ICA rejected the argument, advanced by Tripadvisor, according to which it had to be considered merely a host provider, and as such not responsible (under art. 18 of the Directive 2005/29/EC) for the comments and reviews posted autonomously by individual users⁴⁸. Tripadvisor, in other words, tried to downsize its role as that of a mere intermediary, providing the technical means to collect and further diffuse information about third parties' commercial activities. The ICA found this argument unconvincing and hold instead that Tripadvisor was a “trader” for the purpose of the Consumer code, not limiting itself to the mere storage of information, but actively engaging in the classification and systematization of the information⁴⁹. Furthermore, Tripadvisor's business model was based on the sale of advertising spaces and of business profiles, the assemblage and diffusion of third parties' comments being only the superficial element of a more structured activity⁵⁰. As a trader, Tripadvisor was under the duty not to engage in unfair commercial practices. In fact, such a duty was contravened insofar as Tripadvisor actively advertised its services as being based on serious and truthful reviews issued by actual travellers or customers. However, the investigation made clear that many reviews were unsubstantiated and sometimes had no relation with the reality. The systems of control adopted by Tripadvisor proved to be ineffective, which is not surprising given that Tripadvisor's employees in charge with the checking of the online content were 5 in the entire Europe, out of whom only one could speak Italian. Therefore, Tripadvisor was sanctioned by the ICA – with a fine of 500,000 Euros – for the violation of the law on unfair commercial practice. This ruling – which is convergent with other decisions on the extra-contractual liability

⁴⁶ ICA, decision 19 December 2014, n. 25237, *Tripadvisor-False recensioni online*, in *Bollettino*, n. 50/2014, 86.

⁴⁷ M. Colangelo - V. Zeno-Zencovich, *Online Platforms, Competition Rules, and Consumer Protection in Travel Industry*, cit., 86.

⁴⁸ ICA, decision 19 December 2014, n. 25237, cit., par. 81.

⁴⁹ *Ibid.*, pars. 87-88.

⁵⁰ *Ibid.*, par. 87.

of Tripadvisor for defamatory reviews⁵¹ – was challenged before the Administrative Court for Lazio⁵². The Court confirmed the qualification of Tripadvisor as a trader, but came to a different conclusion with regard to the negligence in organizing and supervising its review system. According to the Administrative Court, the structure of the site and the presentation of the ratings did not foster the perception of factual accuracy and truthfulness of the reviews. The consumers dealing with such reviews could easily ascertain the nature of subjective evaluations and not of assertion of facts; furthermore, Tripadvisor never advertised the existence of a system of fact checking. As a result, one could not conclude that Tripadvisor misled the consumers, and on this basis the ICA's ruling was overturned⁵³.

The second case concerns one of the most famous multi-sided digital platform: Amazon Marketplace⁵⁴. The proceeding brought by the ICA against Amazon EU Sarl and Amazon Services Europe Sarl focuses, once again, on the role of the digital intermediary within the triangular relationship between customer, supplier and platform. One of the main issues consisted in the applicability of pre-contractual information duties (arts. 49-51 Consumer Code) to the digital intermediary. In particular, consumers claimed that they had been misled when they purchased goods advertised and offered for sale on the Amazon platform, but that were actually sold by third parties. They also pointed out the ineffectiveness of Amazon's post-sale guarantees. The investigation led by the ICA confirmed the seriousness of such claims, finding that consumers were often influenced in their decision to purchase a good by the false impression that Amazon was the immediate supplier, and learnt about the actual seller's identity only after the purchase. They also found a serious lack of transparency as regards the origins of the goods, the right of withdrawal, the legal guarantee of conformity of goods under art. 49 Consumer Code. Therefore the ICA sanctioned Amazon for unfair commercial practices and for the violation of the pre-contractual information duties.

⁵¹ Trib. Venezia, ord. 24 February 2015, in *Corr. Giur.*, 2016, 78, with a comment by R. Gelli, *False recensioni su Tripadvisor: accolta l'azione inibitoria promossa dal ristoratore diffamato*. The owner of a restaurant in Venice claimed that the harshly negative reviews written by an anonymous client were completely unfounded in fact and defamatory in nature. Tripadvisor tried to argue that its role was that of a mere host provider, and as such it was exempted from liability on the basis of art. 14 E-Commerce Directive. The Court rejected this argument, giving weight to the fact that Tripadvisor advertised its activity as the source of reliable advices and ratings, which are based on the "actual experience of true travellers", and fostered the impression of seriousness and professionalism (impression strengthened by the existence of a system of double checking administered by Tripadvisor). As a result, the exemption of liability provided for by the E-Commerce Directive was held not applicable to the case at issue and Tripadvisor, being negligent for omissions on the basis of the general tort clause of art. 2043 c.c., was obliged to remove the defamatory posts.

⁵² T.a.r. Lazio, sez. I, 13 July 2015, n. 9355, in *Diritto dell'informazione e dell'informatica*, 2015, 494.

⁵³ For further remarks on this case see M. Colangelo - V. Zeno-Zencovich, *La intermediazione on-line e la disciplina della concorrenza: i servizi di viaggio, soggiorno e svago*, cit., 86-87.

⁵⁴ ICA, decision 9 March 2016, n. 25911, *Amazon-Marketplace-Garanzia legale*, in *Bollettino*, n. 11/2016, 38.

4. Data protection

As emerged also from the previous discussion, in the world of big data any transaction is in itself a source of economic value not only because it allows for the exchange of goods and services to people who value them most, and this at a very low cost, but also because it is itself the source of a new, invaluable resource: personal data⁵⁵. The commodification of personal information is one of the most important phenomena of contemporary society and it has an enormous impact on the categories of private law⁵⁶. For the limited aims of this paper, it is sufficient to point out two issues, which are strictly connected: *a)* the rise of gratuitous contracts as a leading business model of the data driven economy; *b)* the growing intersection between the law of consumer protection and the law of data privacy.

(a) Access to many key-services of the platform economy – from the search engines, to email accounts, to social networks – is nowadays offered “for free”. This scheme is coherent with the logic of multi-sided platform economy, since the policy of low or no-prices offered to one side of the market is compensated by the benefits received, as a result of the network effect, from the other side of the market⁵⁷. Its implementation relies on a marketing strategy and on a legal strategy: the former consists of increasing the total amount of customers by hiding the actual costs of the transaction and by fostering the perception that the trader is the only party that loses something⁵⁸; the latter is aimed at taking advantage of the common law framework, on which most standard-form contracts are built, by combining the absence of consideration for the user and the non-binding effect for the supplier⁵⁹. Furthermore, nobody would doubt that such services, despite the appearances, are not actually offered “for free”. Indeed, they are rewarded very generously, albeit not transparently, since they are paid for by personal data involved in the transaction⁶⁰. Personal data are collected, used and sold not only for direct advertising purposes, but also because they allow traders to engage

⁵⁵ See A.-A. Wandtke, *Ökonomischer Wert von Persönlichen Daten. Diskussion des ‘Warencharakters’ von Daten aus persönlichkeits- und urheberrechtlicher Sicht*, in *Multimedia und Recht*, 2017, 6; H. Zech, *Data as a Tradeable Commodity*, in A. De Franceschi (ed.), *European Contract Law and the Digital Single Market. The Implications of the Digital Revolution*, cit., 51.

⁵⁶ See generally C. Prins, *Property and Privacy: European Perspectives and the Commodification of Our Identity*, in L. Guibault - P.B. Hugenholtz, *The Future of the Public Domain. Identifying the Commons in Information Law*, Alphen aan den Rijn, 2006, 223, 253; and with specific regard to the legal architecture of the digital single market, C. Wendehorst, *Consumers and the Data Economy*, in *Journal of European Consumer and Market Law*, 1, 2017, 1; S. Lohsse - R. Schulze - D. Staudenmayer, *Trading Data in the Digital Economy: Legal Concepts*, in *Journal of European Consumer and Market Law*, 3, 2017, 97.

⁵⁷ See generally J.C. Rochet - J. Tirole, *Platform Competition in Two-Sided Markets*, cit., 1017-1020; G. Colangelo, *Big data, piattaforme digitali e antitrust*, cit., 435; R. Podszun - S. Kreifels, *Digital Platforms and Competition Law*, in *Journal of European Consumer and Market Law*, 1, 2016, 33, 35.

⁵⁸ J. Sénéchal, *The Diversity of the Services Provided by Online Platforms and the Specificity of the Counter-Performance of These Services*, cit., 43.

⁵⁹ V. Zeno-Zencovich - G. Giannone Codiglione, *Ten Legal Perspectives on the ‘Big Data Revolution’*, cit., 40.

⁶⁰ G. Colangelo, *Big data, piattaforme digitali e antitrust*, cit., 426-427; see also M. Bisges, *Personendaten, Wertzuordnung und Ökonomie*, in *Multimedia und Recht*, 2017, 301.

in dynamic pricing⁶¹. It is not surprising that data are becoming a dominant currency in the digital economy⁶². They have been valued in total at over 300 billion Euros, according to the European Data Protection Supervisor⁶³. Furthermore, the standard-form contracts of many digital platforms, such as Facebook and Twitter, provide that the supplier acquires an unlimited and not exclusive license on all content uploaded by the consumer on the platform – from images and sounds to reviews and ratings -, and this of course greatly increases the value of the data involved in the transaction⁶⁴.

Such a scheme of remuneration challenges the traditional regulatory environment, which was built on the assumption that products or services are typically traded by one provider to a multitude of consumers in exchange for money. It raises consequently various legal issues, pertaining to competition law, contract law and consumer law⁶⁵. Indeed, it has been recently debated whether: *a*) big (personal) data may be the source of concentration and abuse of market dominance and can be regarded as essential facilities; *b*) the zero-pricing policy prevents the qualification of the relationship as a contract; *c*) consumer law applies to gratuitous contracts.

The competition law issue recently attracted the attention of the Italian Competition Authority, which launched a joint investigation together with the Italian Telecommunications Authority and the Data Protection Authority⁶⁶. As regards the question sub *b*), Italian contract law is not based on the common-law logic of consideration and therefore has no difficulty in accepting that a promise might be binding even in the absence of a counter-performance⁶⁷. Finally, as regards the last issue, it can be hardly doubted that when personal data are treated as counter-performance for a “free” service, the remedies afforded by consumer law should be applicable⁶⁸. This, indeed, is the solution fostered in principle by the EU Commission’s Proposal for a Directive on certain as-

⁶¹ P. Rott, *Data Protection Law as Consumer Law – How Consumer Organisations Can Contribute to the Enforcement of Data Protection Law*, in *Journal of European Consumer and Market Law*, 3, 2017, 113.

⁶² C. Langhanke - M. Schmidt-Kessel, *Consumer Data as Consideration*, in *Journal of European Consumer and Market Law*, 6, 2015, 218.

⁶³ 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, 8, 9.

⁶⁴ V. Zeno-Zencovich - G. Giannone Codiglione, *Ten Legal Perspectives on the ‘Big Data Revolution’*, cit., 41.

⁶⁵ See in particular the important papers by C. Langhanke - M. Schmidt-Kessel, *Consumer Data as Consideration*, cit., 218; C. Wendehorst, *Of Elephants in the Room and Paper Tigers: How to Reconcile Data Protection and the Data Economy*, in R. Schulze - D. Staudenmayer - S. Lohsse (eds.), *Trading Data in the Digital Economy: Legal Concepts and Tools*, Oxford - Baden-Baden, 2017, 327.

⁶⁶ ITA, decision 30 May 2017; ITA, decision n. 217/17/Cons, 30 May 2017; see also <http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/6441412>.

⁶⁷ For a reference to the common law perspective see C. Twigg-Flesner, *Disruptive Technology – Disrupted Law? How the Digital Revolution Affects (Contract) Law*, cit., 41; on the dichotomy between the two approaches see M. Narciso, *‘Gratuitous’ Digital Content Contracts in EU Consumer Law*, cit., 199.

⁶⁸ See above, par. 3, with specific regard to the Unfair Commercial Practices Directive. For a general assessment of the legal treatment of gratuitous digital contracts from the various branches of EU consumer law, see M. Narciso, *‘Gratuitous’ Digital Content Contracts in EU Consumer Law*, cit., 200-202; M.B. Loos, *Standard terms for the use of the Apple App Store and the Google Play Store*, in *Journal of European Consumer and Market Law*, 1, 2016, 10.

pects concerning contracts for the supply of digital content⁶⁹.

(b) But this raises a further issue, and namely how consumer law, and more generally contract law, relates to the law of data protection⁷⁰. It is worth pointing out at the outset that the protection afforded by the law of data privacy is based on the logic of “status” and not of “contract”: the fundamental right to informational self-determination is granted to everybody as a human being (see also art. 8 European Charter of Fundamental Rights) and is not dependent on the subjective role played in a specific contractual relationship; it cannot be waived nor forfeited, even as a result of individual negotiations; any interference in the personal sphere is constructed by the law as inherently precarious, since the data subject’s consent can always be withdrawn, unlike the consumer’s *ius se poenitendi*, which has to be exercised within a short delay. Data privacy law has therefore a wider scope, whereas consumer protection is narrower and more specific⁷¹.

The two branches of the law frequently overlap in the platform economy, and their implementation, given the different *ratio*, should not be regarded as alternative, but cumulative. Not all data subjects are consumers, according to EU law; but many consumers in the digital economy are indeed data subjects. If this is the case, then consumer law might enrich and strengthen the protection afforded by data protection law.

The paradigmatic example is represented by the case law on unfair contract terms and privacy policy⁷². The Italian Data Protection Authority, since its very first 1997 decision, has openly referred to the law of unfair contract terms to declare invalid a blanket consent included in a bank’s standard terms and lacking the prerequisites of information and specificity⁷³. Likewise, the German courts have in many occasions held that not transparent and unfair terms of digital platforms’ privacy policy are invalid as against the law of unfair terms⁷⁴.

At the same time, the different rationale of the two areas of the law might well lead to a divergent assessment of the same phenomenon. This is illustrated by the hypothesis of personal data as counter-performance. Whereas from the perspective of consum-

⁶⁹ COM (2015) 634, art. 3.1: «This Directive shall apply to any contract where the supplier supplies digital content to the consumer or undertakes to do so and, in exchange, a price is to be paid or the consumer actively provides counter-performance other than money in the form of personal data or any other data». For a detailed analysis (and a critical assessment) of the Proposal, with specific reference to the issue of gratuitous digital contracts, see M. Narciso, ‘Gratuitous’ Digital Content Contracts in EU Consumer Law, cit., 203-206; G. Spindler, *Verträge über digitale Inhalte – Anwendungsbereich und Ansätze - Vorschlag der EU-Kommission zu einer Richtlinie über Verträge zur Bereitstellung digitaler Inhalte*, in *Multimedia und Recht*, 2016, 147, 150.

⁷⁰ On this see P. Rott, *Data Protection Law as Consumer Law – How Consumer Organisations Can Contribute to the Enforcement of Data Protection Law*, cit.; H. Zech, *Data as a Tradeable Commodity*, cit.

⁷¹ See also C. Langhanke - M. Schmidt-Kessel, *Consumer Data as Consideration*, cit., 219.

⁷² On this issue see lastly C. Wendehorst - F. Graf von Westphalen, *Das Verhältnis zwischen Datenschutz-Grundverordnung und AGB-Recht*, in *Neue Juristische Wochenschrift*, 2016, 3745.

⁷³ Data Protection Authority, decision 28 May 1997, doc.web n. 40425, in *Corr. giur.*, 1997, VIII, 915-917, with a comment by V. Zeno-Zencovich, *Il “consenso informato” e la “autodeterminazione informativa” nella prima decisione del garante*.

⁷⁴ For a detailed analysis P. Rott, *Data Protection Law as Consumer Law – How Consumer Organisations Can Contribute to the Enforcement of Data Protection Law*, cit., 114-115.

er law the existence of a *quid pro quo* is a signal of the reciprocity of the contractual obligations, and is therefore regarded as a manifestation of consumer choice, for the law of data protection the very idea of data as counter-performance immediately casts some doubts about the freedom and spontaneity of the declaration of consent⁷⁵. Indeed, the Italian Data Protection Code, anticipating the solution adopted by the General Data Protection Regulation, provides that consent is valid only if it is “freely given” (art. 23, c. 3, d.lgs. 196/2003).

The first problem that has to be solved, therefore, is to clarify whether a declaration of consent to the processing of personal data issued in consideration of a counter-promise or counter-performance is valid under the law of data protection. Can such a consent be considered “freely given”? It is worth noting that the above-mentioned requirement has been interpreted in three alternative ways⁷⁶: *a*) consent is free if it has been given on the basis of specific and comprehensive information; *b*) consent is free if it is informed and has not been given under pressure (and namely with the aim of obtaining access to a service which the data subject regards as essential); *c*) consent is free if it has not been given under monetary pressure, and namely as a counter-performance for the benefits received. The case law of the Italian Data Protection Authority seems to suggest that solution *b*) is the most frequently adopted. Indeed, faced with cases of data gathering for advertising purposes and the creation of profiles, the DPA has repeatedly stated that the access to a service offered by the data controller cannot be made dependent on consent to the processing of data unrelated to the service rendered (so-called *linkage prohibition*)⁷⁷. That is to say, a provider cannot subordinate the performance of the main obligation to data subject’s consent to commercial advertising, the creation of profiles, or generally the sharing of data with third parties⁷⁸. This

⁷⁵ See European Data Protection Supervisor, *Opinion on the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content*, n. 4/2017, contesting the assumption that personal data could «be compared to a price, or money» (7), since personal information «is related to a fundamental right and cannot be considered as a commodity»; therefore the Opinion criticizes the use of the notion – adopted by the proposed Digital Content Directive – of personal data as “counter-performance”.

⁷⁶ See S. Thobani, *I requisiti del consenso al trattamento dei dati personali*, Rimini, 2016, 43; Ead., *La libertà del consenso al trattamento dei dati personali e lo sfruttamento economico dei diritti della personalità*, in *Europa e diritto privato*, 2, 2016, 513, 519.

⁷⁷ DPA, decision 28 May 1997, www.garanteprivacy.it, doc. web n. 40425; decision 28 July 1997, doc. web n. 40057; decision 8 September 1997, doc. web. n. 1055101; decision 22 October 1997, doc. web. n. 1055346; decision 10 June 2003, doc. web n. 29836; decision 3 February 2005, doc. web n. 1109503; decision 12 October 2005, doc. web n. 1179604; decision 3 November 2005, doc. web n. 1195215: «la capacità di autodeterminazione non è assicurata quando si assoggetta in blocco l'accesso ai servizi alla previa autorizzazione a trattare i dati conferiti per i medesimi servizi allo scopo di perseguire una finalità diversa ed ulteriore, qual è l'invio di comunicazioni commerciali [...] Non è quindi conforme alla disciplina di protezione dei dati personali la scelta di Aspi di raccogliere il consenso per la finalità di *marketing* all'interno delle condizioni generali di contratto, non potendosi definire detto consenso 'libero'»; decision 9 March 2006, doc. web n. 1252220; decision 25 September 2014, doc. web n. 3457687; decision 24 January 2013, doc. web n. 2433614; decision 4 July 2013, doc. web. n. 2542348; decision 8 January 2015, doc. web n. 3857003. For a detailed analysis of the stance taken by the DPA, see S. Thobani, *La libertà del consenso al trattamento dei dati personali e lo sfruttamento economico dei diritti della personalità*, cit., 530-540.

⁷⁸ On the linkage prohibition see C. Langhanke - M. Schmidt-Kessel, *Consumer Data as Consideration*, cit., 221.

approach has been now validated by art. 7, al. 4 of the GDPR, where it is provided that: «when assessing whether consent is freely given, utmost account shall be taken of whether, inter alia, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract».

Once the linkage prohibition is respected (one might think at the simple hypothesis of a reduction of the insurance premium in exchange for the installation of a data device in the car), and the data-subject has received extensive and clear information⁷⁹, no further objection can be raised against the use of consent as a counter-performance. In particular, it cannot be argued that this amounts to a “monetary pressure”, which prevents the consent from being considered “freely given”⁸⁰. To adopt such a perspective would mean to transplant into the law of data protection a principle of “market-inalienability” which is expressly limited by art. 3 of the European Charter of Fundamental Rights to the field of body parts and tissues, and is justified by the direct implication of the principle of respect for human dignity⁸¹.

The second issue concerns the relationship between the (unilateral) act of consent and the contractual agreement⁸². Also from this point of view one might talk about a clash of the underlying logic. The consent to data processing, as a specific exercise of the right to informational self-determination, should be considered inherently precarious

⁷⁹ It is worth noting that the issue of information preliminary to the person’s consent obtains enormous importance not only from the perspective of data protection law, but also from those of competition and consumer law. Indeed, the lack of transparency concerning the structure of costs and the nature of contract may distort competition and unduly influence the consumers’ transactional decisions. Behavioral studies have demonstrated that by presenting an offer for free, traders blind consumer to the actual (non-monetary) costs and artificially induce them to enter into the contractual relationship (EDPS, *Privacy and Competitiveness in the Age of Big Data: The Interplay Between Data Protection, Competition Law and Consumer Protection in the Digital Economy (Preliminary Opinion)*, Brussels, 2014, 32). Indeed, consumers are not always aware of what they are giving when paying with data rather than with money (*Opinion on the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content*, n. 4/2017, 9). Therefore one might argue that the zero-cost model, if not supported by adequate information, might materially distort the economic behavior of the consumer or at least of specified groups of consumers. Technically, it could amount to an unfair or misleading commercial practice within the meaning of the Consumer Code, since the lack of information is specifically related to «the price or the manner in which the price is calculated, or the existence of a specific price advantage» (arts. 21-22). Privacy policies are not an answer, since in most cases they are vague and do not clarify the value and uses of personal data. Therefore, one could probably make a case for a specific duty to inform concerning the value and proposed uses of personal data as an offspring of both data protection and consumer law (see in part. art. 6 Consumer Rights Directive; on this issue see the detailed analysis by A. De Franceschi, *Digitale Inhalte gegen Personenbezogene Daten: Unentgeltlichkeit oder Gegenleistung?*, in M. Schmidt-Kessel - M. Kramme, *Geschäftsmodelle in der digitalen Welt*, Sipplingen, 2017, 113, 125-131).

⁸⁰ For a more detailed discussion of the criticized stance see S. Thobani, *La libertà del consenso al trattamento dei dati personali e lo sfruttamento economico dei diritti della personalità*, cit., 519-521.

⁸¹ On this see G. Resta, *Autonomia contrattuale e diritti della persona nel diritto UE*, in *Digesto Discipline Privatistiche - Sezione Civile, Ottavo aggiornamento*, Torino, 2013, 92-106; Id., *La disponibilità dei diritti fondamentali e i limiti della dignità (note a margine della Carta dei Diritti)*, in *Rivista di Diritto Civile*, 6, 2002, 801-848.

⁸² On this issue see for a dogmatic assessment, D. Messinetti, *Circolazione dei dati personali e dispositivi di regolazione dei poteri individuali*, in *Rivista critica del diritto privato*, 1998, 339; more recently A. De Franceschi, *Digitale Inhalte gegen Personenbezogene Daten: Unentgeltlichkeit oder Gegenleistung?*, cit., 120.

(as it is the consent to the publication of the image); by contrast, the contract binds the parties for the future, it has *force de la loi*. Should contract law trump data protection? Or is the opposite true?

This issue has been starkly debated under Italian law⁸³. The majority of the scholars opted for the recognition of a right to withdraw the consent even if this was given in exchange for a counter-performance⁸⁴. The GDPR has brought some clarity on this field: art. 7, al. 3, provides that the «data subject shall have the right to withdraw his or her consent at any time». Whereas the same provision makes clear that the withdrawal has no retroactive effect, it is still unclear whether the data controller might have any resulting claim. It seems reasonable to assume that the withdrawal of consent enables the other party to terminate the contract, in relation to which consent to data processing was an essential pre-requisite⁸⁵. By contrast, it is more controversial whether the data controller might claim damages for non-performance, at least within the limits of the reliance interest⁸⁶.

⁸³ G. Resta, *Revoca del consenso ed interesse al trattamento nella legge sulla protezione dei dati personali*, in *Rivista critica del diritto privato*, 2000, 299.

⁸⁴ S. Thobani, *La libertà del consenso al trattamento dei dati personali e lo sfruttamento economico dei diritti della personalità*, cit., 554-555.

⁸⁵ But see, for a more detailed discussion, A. De Franceschi, *Digitale Inhalte gegen Personenbezogene Daten: Unentgeltlichkeit oder Gegenleistung?*, cit., 134-135.

⁸⁶ On this problem see G. Resta, *Revoca del consenso ed interesse al trattamento nella legge sulla protezione dei dati personali*, cit., 322-333.