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The use of big data as a risk for individual self-determination and the implementation of competition law in the digital market - A comparative approach between the European Union and the United States of America[72]

SUMMARY: 1. Introduction - 2. Human dignity as a fundamental right – 3. The fundamental rights to privacy and to data protection – 4. A short comparison between the European Union and the United States on data protection – 5. Digital and data-driven economy: elements of a same phenomenon – A brief overview on the EU Digital Single Market – 6. Competition law and the control over market power dynamics in digital markets – 7. Conclusions

1. This paper aims at studying two main fundamental rights, namely, the rights to human dignity and to the protection of personal data which, throughout their analysis in the digital context, will be found to be affected by the use of new technologies and the mechanisms of digital economy.

In order to carry out the said analysis the first two paragraphs will investigate the origins and the meaning of the right to human dignity in its sense of self-determination, and to privacy in its narrower notion of personal data protection and will try to demonstrate that both these rights that are currently recognised and protected by the Charter of Fundamental Rights of the European Union (the "Charter" or "CFR") initially took origin from the studies of US scholars and from the interpretive activity of the Supreme Court of the United States ("SCotUS").

The third paragraph will briefly offer some observations on the comparison between the two legal systems of the EU and the US concerning privacy protection.

The fourth paragraph will consider the framework of data driven economy which forms an important part of the digital economy and will particularly play an imperative role in the development of the EU digital single market as craved by the 2020 objectives set out by the European Commission, in order to increase commercial transactions inside and outside the EU economic area.

The final paragraph will explore the possibility to apply competition law (at least, EU competition law – insofar as the EU single market is concerned) with the view to increase competition between firms operating in the digital context and in the meantime to reduce market power of the biggest digital firms. In the concluding paragraph, some remarks on the analogies and differences between the EU and the US legal systems will be made and some solutions to prevent the infringement of the right to self-determination will be suggested.

2. Over the years, human dignity has been differently denoted. Starting from its consideration as an absolute (sometimes even a relative) value[73], it eventually obtained an official

72 This text has been conceived and drafted for the purposes of the participation in the Seminar *Big Data and Public Law: new challenges beyond data protection*, organised by the University of Milan and held in Gargnano (Italy), on 15-17 October 2018. This paper was introduced within Panel 1 – *Big Data and Public Law.*

73 D. SHULZTINER, G. E. CARMI, *Human Dignity in National Constitutions: Functions, Promises and Dangers,* in *The American Journal of Comparative Law*, 2014, p. 470; S. Lieto, *Dignità e "valore" tra etica, economia e diritto,* in *RDPE*, 2013, pp. 163 ff.; M. DÜWELL, *Human dignity: concepts, discussions, philosophical perspectives*, in

recognition as a human right[74]. However, the common ground between its consideration either as a mere value or as a right is represented by its fundamental nature. To be precise, although philosophers and scholars initially estimated it as a non-legal value, dignity was never denied a universal and essential importance, insofar as it was related to the context of human relationships[75]. According to these views, human dignity mainly relates to the individual as observed in his moral relationships with other individuals belonging to the same community he belongs to, and its notion could be easily associated to a concept of «relational dignity»[76].

Starting from this perspective, academics noted that human dignity could manifestly play the role of founding value of any human right[77], even as a sort of a so-called «fundamentally fundamental right»[78]. *Inter alia,* this version has finally been confirmed by the interpretation of human dignity as the unifying trait between the main international documents protecting human

M. DÜWELL, J. BRAARVIG, R. BROWNSWORD, D. MIETH (eds.), *The Cambridge Handbook of Human Dignity*, Cambridge, 2014, p. 29; F. POLITI, *Il rispetto della dignità umana nell'ordinamento europeo,* in S. MANGIAMELI (ed.), *L'ordinamento europeo – i principi dell'Unione*, Milan, 2006, pp. 4 ff.

74 First and foremost through its official recognition in the Preamble of the Charter of the United Nations (1945 – see http://www.un.org/en/charter-united-nations/) and in article 1 of the Universal Declaration of Human Rights (1948 – see http://www.un.org/en/universal-declaration-human-rights/). The philosophical and doctrinal wave which interpreted human dignity as a human right stemmed from the violent events occurred during the II World War, which called for urgent legal measures to the benefit of the individuals. Simone Weil and Hannah Arendt belonged to the said doctrinal wave (see also S. WEIL, *La personne et le sacré*, 1957, cit. in S. Lieto, *Dignità e "valore" tra etica, economia e diritto*, in *RDPE*, 2013, p. 179; S. RODOTÀ, *Il diritto di avere diritti,* Rome, 2012; C. MENKE, *Dignity as the right to have rights: human dignity in Hannah Arendt*, in M. DÜWELL, J. BRAARVIG, R. BROWNSWORD, D. MIETH (eds.), *The Cambridge Handbook of Human Dignity*, cit., p. 332; S. BAER, *Dignity, liberty, equality: a fundamental rights triangle of constitutionalism*, in *University of Toronto Law Journal*, 2009, p. 443; C. DUPRÉ, *The Age of Dignity*, London, 2015, pp. 37 ff.).

75 Worth to be mentioned are some of the theories on human dignity supported by Aristotle, according to whom any individual is endowed with dignity, although all individuals may not be equally respectable depending on the fact that they make actions to the benefit of other people (U. VINCENTI, *Diritti e dignità umana*, Bari-Rome, 2009, pp. 7 ff. in C. SCOGNAMIGLIO, *Dignità dell'uomo e tutela della personalità*, in *Giustizia Civile*, 2014, pp. 67 ff.). This perspective had partially been adopted by the Romans, who considered human dignity as a natural gift (P. BECCHI, *Il principio dignità umana*, Brescia, 2009, in C. SCOGNAMIGLIO, *Dignità dell'uomo e tutela della personalità*, cit., pp. 67 ff.) and later by Kant who based his concept of dignity upon his analysis of the «*moral law*» allowing the human being to be considered never simply as a means but always at the same time as an end [I. KANT, *The Metaphysics of Morals (II. Metaphysical first principles of the doctrine of virtue*), Cambridge, 1996].

76 F. SCARAMELLA, *La dimensione relazionale come fondamento della dignità umana*, in *Rivista di filosofia del diritto*, 2013, pp. 305-320; B. MALVESTITI, *La dignità umana dopo la "Carta di Nizza". Un'analisi concettuale*, Naples-Salerno, 2015; K. T. GALVIN, L. TODRES, *Dignity as honour-wound: an experiential and relational view*, in *Journal of Evaluation in Clinical Practice*, 2015, pp. 410-418.

77 E. DUBUOT, *La dignité dans la jurisprudence de la Cour de justice des Communauteés européennes*, in L. BURGUOGUE-LARSEN (ed.), *La dignité saisie par les juges en Europe,* Brussels, 2010, p. 82; S. PEERS, T. HERVEY, J. KENNER, A. WARD (eds.), *The EU Charter of fundamental rights: A commentary,* London, 2014, pp. 21-23.

78 This expression is used by Burkhert for the right to privacy, but could be used by analogy for defining the right to human dignity in the sense intended by Dupré and Ruggeri. See H. BURKHERT, *Dualities of privacy – An Introduction to 'Personal Data Protection and Fundamental Rights'*, in M. V. PEREZ ASINARI, P. PALAZZI (eds.), *Challenges of Privacy and Data Protection Law*, Brussels, 2008; C. DUPRÉ, *The Age of Dignity,* cit.*;* A. RUGGERI, *Alla ricerca del fondamento dell'interpretazione conforme*, in *Forum di Quaderni costituzionali Rassegna,* available at http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/paper/0056_ruggeri.pdf.

rights, until the value at stake has been included, in 2009, as a formal and first fundamental right recognised and protected by the CFR[79], so underlining its leading importance.

For the first time in the history of existing legal systems human dignity has explicitly been proclaimed as a right and was given an absolute inviolable nature: in other words, in principle, this right could not be limited by the exercise or the protection of other – even fundamental – rights[80]. Nevertheless, at least in the European Union, the express provisions of article 1 of the Charter did not allow its interpreters to concretely and easily safeguard the concerned right by directly applying its precept, by reason of the circumstance that the norm is quite general and indefinite. As a matter of fact, by stating that *«[h]uman dignity is inviolable. It must be respected and protected»*, the Charter only foresees a passive behaviour to respect the individuals' exercise of the right to human dignity and an active conduct in taking any action to protect individuals from potential threats in the exploitation of the above right[81].

However, by doing so, human dignity is not defined and remains a vague notion[82]. As occurred for its inclusion in the Universal Declaration of Human Rights, in the CFR human dignity has not been defined. For this reason, scholars use to affirm that legislators did not specified it intentionally so as to confer dignity with a general concept that could be fit for any necessary practical meaning[83]. Indeed, in line with this theory, the notion of dignity could be articulated into different meanings and forms with the view to protect different practical situations, but above all to include all the other fundamental rights within the wide boundaries of the right that protects them. This would then be possible in the light of its *omnibus* connotation as founding right of the other fundamental rights.

However, on the other side of the Atlantic Ocean human dignity is not expressly embedded in the Constitution. Nonetheless, the United States have a longstanding tradition in protecting dignity through the interpretative activity of the SCotUS which is familiar with including such a value under the framework of the so-called "mother rights"[84]. Such essential rights may not result in being expressly protected by the US Constitution, but they obtain judicial safeguard thanks to the construction granted by the supreme judges who are vested with the power to create binding precedents according to the *stare decisis* doctrine. Some of the manifest cases where the SCotUS recognised a right as being a mother-right (notwithstanding the fact that it was not expressed in the

79 Article 1 of the Charter of Fundamental Rights of the European Union, OJ 2012, C 236 (see https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12016P/TXT&from=EN).

80 In this sense, see the judgment of the ECJ of 14 October 2004, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbeurgermeisterin der Bundesstadt Bonn*, C-36/02, ECLI:EU:C:2004:614 (see http://curia.europa.eu/juris/showPdf.jsf?text=&docid=49221&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=660433). However, in weighting conflicting fundamental rights, article 52 of the Charter, which provides for the so-called "safeguard clause", always needs to be taken into account. For an in-depth analysis, see S. RODOTÀ, *Il diritto di avere diritti,* Rome, 2012, pp. 31 ff.

81 In this sense and concerning the right to privacy, see H. BURKHERT, *Dualities of privacy – An Introduction to 'Personal Data Protection and Fundamental Rights',* cit.

82 See also F. POLITI, *Il rispetto della dignità umana nell'ordinamento europeo,* cit., p. 58.

83 D. SCHULZTINER, G. E. CARMI, *Human Dignity in National Constitutions: Functions, Promises and Dangers,* in *The American Journal of Comparative Law*, 2014.

84 See also, S. BAER, *Dignity, liberty, equality: a fundamental rights triangle of constitutionalism,* cit.

Constitution) specifically concerned the right to privacy, which thus got an acknowledgment at a constitutional level[85]. In the light of these precedents and according to the doctrine which reconnects dignity to the general category of the right to liberty – under which also the right to privacy falls[86] –, even human dignity as acknowledged by the US judges may be construed as a founding value. In *Lawrence v. Texas*[87], which is a peculiar case of the US jurisprudence, the SCotUS went through the notion of dignity even more markedly, justified it in relation to the concept of privacy and held that dignity may also be articulated into its meaning of one's freedom to decide autonomously and, thus, in one's freedom of choice and self-determination[88].

This is the reason why some scholars tend to state that the American notion of dignity resembles to a value, whereas its EU concept is now undisputedly recognised as a fundamental right and should benefit from a greater protection[89]. The same goes for the protection of the right to privacy and to data protection which is not part of US Constitution (and is therefore safeguarded by judicial interpretation), whilst in the EU it is formally acknowledged and implemented as a fundamental and inviolable right.

Regardless of the above-mentioned theory, it is however important to admit that the US have a strong tradition of human rights judicial protection and that some of the most important rights which have then been included in the respective legislative acts, even in the EU, took origin from US conceptions of the same rights. This is all the more true when the right to privacy is concerned, as it will be shortly analysed below.

3. As anticipated in the first paragraph, the right to privacy is a patent example of how American case-law and scholars have had an impact on the recognition and the implementation of fundamental rights which then influenced their notion in the EU. As a matter of fact, the concept connected to the general right to privacy was created in early 1890 by the two eminent American scholars Warren and Brandeis who basically defined privacy as *«the right to be let alone»*[90]. This doctrine takes its cues from the distinction between privacy – *i.e.* the legal asset needing to be

85 *Ex multis,* see cases *Roe v. Wade*, 410 USA, 113 (1973), *Griswold v. Connecticut*, 381, USA 479 (1965).

86 A. BARAK, *Human Dignity: The Constitutional Value and the Constitutional Right,* in C. MCCRUDDEN (ed.), *Understanding Human Dignity,* Oxford, 2013, p. 186.

87 539 US 558 (2003).

88 N. RAO, *On the use and abuse of dignity in constitutional law,* in *Columbia Journal of European Law,* 2008, p. 240.

89 G. BOGNETTI, *The concept of human dignity in European and US constitutionalism*, in G. NOLTE (ed.), *European and US Constitutionalism*, Cambridge, 2005; ; D. SHULZTINER, G. E. CARMI, *Human Dignity in National Constitutions: Functions, Promises and Dangers,* cit., pp. 470 ff.

90 This definition originated from a case involving Mr. Warren's wife and the publication of some of her pictures made by means of a newly-created Kodak camera. Mr. Warren's wife did not want to be affected from a reputational, social and personal damage, which would have been originated by the circulation of pictures allowed by the use of new technologies. For an in-depth analysis, see A. RENGEL, *Privacy in the 21st century*, Studies in Intercultural Human rights, Leiden-Boston, 2013; K. LACHANA, *Elements of convergence in the historical origins and ideological foundations of the US and European privacy law: the nexus between the "right to be let alone" and continental jurisdictions,* in M. BOTTIS (ed.), *Privacy and Surveillance, Current aspects and future perspectives,* Athene, 2013, pp. 24-44; L. MIGLIETTI, *Il diritto alla privacy nell'esperienza giuridica statunitense*, Naples, 2014, pp. 19 ff.; M. K. OHLHAUSEN, A. P. OKULIAR, *Competition, Consumer Protection, and The Right [Approach] to Privacy,* in *Antitrust Law Journal,* 2015, pp. 125 ff.

protected by the legal system – and the right to privacy – *i.e.* the legal tool by which the legal asset can be safeguarded[91].

In truthfulness, Warren and Brandeis were not the first ones to theorise the right to privacy, because in 1834 Justice Cooley, judge of the SCotUS, ruled over a case on tort law and – quite by chance – examined the matter of an individual's privacy by deeming that the *«right to one's person may be said to be a right of complete immunity: the right to be let alone»*[92]. However, it was only with Warren and Brandeis that privacy and its connected rights were considered in the perspective of the need for the individual to take some aspects of his life secret and confidential, with no intrusions from other people. Therefore, only 1890 could be universally considered as a "cut-off" date for the formal acknowledgement and recognition of the right to privacy[93].

Only afterwards, this brand new legal concept started to be exported to Europe and then to the European Union[94]. Scholars also began to analyse the level of a «*reasonable expectation of privacy*» which is useful for legislators and judges to identify a general and adequate definition of the right to privacy that could be valid for any individual, thus not associated with a subjective and personal perception of the need to be let alone[95]. Thanks to this doctrine, the European Convention on Human Rights included the right to privacy, as worthy to be safeguarded as a human right[96].

Nowadays, despite the quite negative meaning which some philosophers tried to give to privacy[97], it is nowadays widely accepted by scholars that the concept of privacy (and accordingly that of the relevant right to privacy), just like the one of dignity, is a sort of an «umbrella concept» embedding many definitions which generally refer to positive connotations identifying multiple details of an individual, that the latter wishes to preserve as confidential and not to disclose to others[98]. As a result, even the notion of the right to privacy may embrace different denotations and may be applied differently depending on the context it refers to.

91 A. RENGEL, *Privacy in the 21st Century*, cit., p. 31.

92 T. C. COOLEY, *A Treatise on the Law of Torts or the Wrongs which Arise Independent of Contract*, Chicago, 1879; R. B. STANDLER, *Privacy Law in the U.S.A.,* 1997, retrieved from http://www.rbs2.com/privacy.htm; N. LUGARESI, *Internet, Privacy e Pubblici Poteri negli Stati Uniti,* Milan, 2000, p. 49.

93 M. K. OHLHAUSEN, A. P. OKULIAR, *Competition, Consumer Protection, and The Right [Approach] to Privacy,* cit., p. 126.

94 See the commentary on article 8 of the CFR by Bassini and Pollicino. M. BASSINI, O. POLLICINO, IN S. ALLEGREZZA, R. MASTROIANNI, F. PAPPALARDO, O. POLLICINO, O. RAZZOLINI (eds.), *Carta dei diritti fondamentali dell'Unione europea*, Milan, 2017, p. 135.

95 J. L. MILLS, *Privacy the lost right*, Oxford, 2008, pp. 20 ff.; D. J. SOLOVE, *Understanding Privacy*, Cambridge, MA, 2008, pp. 71 ff. This tendency started from the well-known case *Katz v. United States* (389, US 347, 360, 1967) where Justice Harlan stated *«[a] person has a constitutionally protected reasonable expectation of privacy...[T]here is a two-fold requirement, first that a person have exhibited an actual [subjective] expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable" [...]».*

96 European Convention on Human Rights, signed in Rome on 4 November 1950 (see https://www.echr.coe.int/Documents/Convention_ENG.pdf).

97 For instance, the above cited Hannah Arendt held that the fact that the individual has privacy means that he is deprived of something. Therefore some definitions of privacy were provided with a negative connotation, instead of the positive attitude that the right to privacy attempts to underline. See D. J. SOLOVE, *Understanding Privacy*, cit., pp. 80 ff.

98 D. J. SOLOVE, *Understanding Privacy*, cit., p. 45; see also D. J. SOLOVE, *Nothing to Hide – the False Tradeoff between Privacy and Security*, New Haven, 2011, pp. 24 ff.; e J. E. COHEN, *What privacy is for,* in *Harvard Law Review,* 2013, p. 1908.

Worth to be particularly mentioned are two of the multiple definitions offered by academics. Namely, two American researchers, Westin and Solove, have studied the right to privacy more recently and confirmed that – indeed – it deals with a multifaceted and complex human perspective, so that it must be conceived at a general level in order to include all the possible concrete situations. However, both Westin and Solove believed that one of the most interesting and important aspects of the right to privacy deals with the protection of oneself's information, that is to say with the faculty to decide whether and how to disclose personal data to third parties and to which purposes[99]. The said doctrinal tendency, which has been developing almost simultaneously with the rise of new technologies (that let data flow easier and much quicker than before), led European judges to detect a separate fundamental right formally recognised for the first time by the Nice Charter[100], then replaced by the binding CFR in 2009[101]. Hence, to date the European Union seems the first legal system where the right to data protection is safeguarded as a fundamental right[102], moreover in a distinct manner as compared to the broader right to privacy.

Still, in spite of its narrower definition, even the right to data protection agrees to be articulated into various forms. One of the most interesting classification conceived by scholars involves the models of informational privacy, on the one hand, and of decisional privacy, on the other. The said division is reckoned to be derived from a passive and an active understanding of privacy. As a matter of fact, informational privacy would be approached to a rather passive behaviour of the data subject (the individual whose data may be disclosed[103]) and this would also be

99 D. J. SOLOVE, *Introduction: Privacy Self-Management and the consent dilemma*, in *Harvard Law Review,* 2013, p. 1882; D. J. SOLOVE, *Understanding Privacy,* cit.*;* A. WESTIN, *Privacy and Freedom*, in *Washington and Lee Law Review*, 1968.

100 Formally, the Nice Charter (see https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000X1218(01):IT:HTML) had exactly the same content as the Charter of fundamental rights, but acted as a soft law instrument until its entry into force and the entry into force of the Lisbon Treaty on 1st December 2009 (see https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2007:306:FULL&from=EN).

101 Certainly, the right to data protection had expressly been included in Convention no. 108 (Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data – see https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680078b37) signed within the framework of the Council of Europe in 1981, entered into force in 1985 and currently ratified by 43 States. This Convention is said to have built a sort of «golden standard» as it sets out different rights connected to the right to data protection which are implemented also in the more recent legal acts for the safeguard of the individuals in exercising their right to the protection of personal information (see F. W. HONDIUS, *A quarter century of international data protection,* in *Hague Yearbook of International Law,* The Hague, 2005, p. 31).

102 Article 8 reads as follows *«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 and independent authority».*

103 «Data subject» is a definition taken from the newly entered into force EU GDPR, *i.e.* 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), OJ 2016, L 119, pp. 1-88 (see https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&qid=1543829083725&from=EN), in particular from its article 4, number 1, which reads as follows: *«"personal data" means any information relating to an identified or identifiable natural person ("data subject"); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors*

confirmed by US scholars after a series of judgments which needed to construe the fifth and the fourteenth amendments of the US Constitution and that ruled that it was convenient to differentiate the personal interest in preventing the disclosure of one's personal data from that to make decisions in a total autonomous manner[104]. This last connotation would call for a more active conduct – *i.e.* to independently take decisions – which is rather connected to the decisional nature of privacy. Then, whereas the informational privacy is clearly protected, for instance in the EU by the CFR, the decisional aspect of privacy cannot be asserted as an express fundamental right. It could however be recognised as an inviolable right by considering the right to data protection (and thus to privacy) together with the right to human dignity, and supposing that these two crucial rights are suitable to be melted into a single freedom which is the right to self-determination, while protecting one's own intimacy and identity. The freedom to self-determinate means the faculty to decide whether and how to disclose personal data, which kind of data to unveil and for which purposes[105].

In the end, the above theory caused legal interpreters to create a contemporary and innovative right represented by the so-called right to *informationnelle Selbstbestimmung* (or informational self-determination)[106]. This concept has been employed by the German *Bundesverfassungsgericht* in a judgment issued in 1983, where it was acknowledged as *«the power of the individual to decide in a substantial autonomous manner about the assignment and use of his personal data»*[107] thanks to the exploitation and interpretation of article 1 of the German Constitution which protects human dignity as an inviolable value. Henceforward, the original definition of informational self-determination is able to definitely confirm the direct connection between the right to human dignity and the right to privacy and data protection. Moreover, given that the above-mentioned concept has been developed due to the works of academics and jurisprudence across the American and the European continents, it should be useful to compare the two legal systems on the safeguard of the right to data protection, because some differences should be stressed in order to proceed in the analysis of data-driven economy carried out in the fifth paragraph.

4. In terms of protection of the rights to privacy and to data protection, the European Union and the United States tend to apply different principles in the light of, especially, the aspects outlined below.

Firstly, significant divergences are seen in their express recognition as fundamental rights. Indeed, in addition to have granted the two rights at hand a constitutional warranty, thanks to their

specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person».

104 See judgment in *Whalen c. Roe*, 429 U.S. 589, 598-600 (1977) where the SCotUS expressly referred to *«the individual interest in avoiding disclosure of personal matters, and [...] the interest in independence in making certain kinds of important decisions».* See H. BURKHERT, *Introduction. Dualities of Privacy – An Introduction to "Personal data Protection and Fundamental Rights"*, cit., pp. 20 ff.; N. J. King, *Fundamental Human Right Principle Inspires U.S. Data Law, but protections are less fundamental,* in M. V. PÉREZ ASINARI, P. PALAZZI (eds.), *Cahiers du CRID,* n. 31, *Défis du Droit à la Protection de la Vie Privée – Challenges of Privacy and Data Protection Law*, Brussels, 2008, pp. 79 ff.

105 N. J. KING, *ibidem.*

106 G. SARTOR, *Tutela della personalità e normativa per la "protezione dei dati"*, in *Informatica e diritto*, 1986, XII.

107 Courtesy translation. See G. SARTOR, *ibidem*.

inclusion in the CFR[108], the EU has recently adopted a unique legal framework (the General Data Protection Regulation – GDPR[109]) for the protection of personal data of any natural person, regardless of the fact that such a person is a EU citizen or not[110]. Being a regulation, the GDPR is directly applicable in the same manner in every Member State and thus guarantees the full harmonisation of its provisions within the EU[111], but data protection also benefits from other EU legislative acts adopted for being implemented in different contexts (*e.g.* criminal investigations[112]). Secondly, on the American side, the US Constitution does not formally provide for any right to privacy or to data protection, but these ones are basically protected through the interpretative work of the SCotUS, which has often been called to construe the fourth, the fifth and the fourteenth amendments with the purpose to protect individuals from harms to their privacy[113]. Thirdly, differently from the EU, the United States do not grant a uniform safeguard of individuals' privacy, because they cannot profit from a harmonised legal framework (this legislative sector is indeed characterised by a strong fragmentary nature, due to the fact that every legislative act concerns a different social, political or economic sector[114]). Fourthly, the main interesting discrepancy concerns

108 Article 6 of the Treaty on the European Union (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12016M/TXT&from=EN), as amended by the Lisbon Treaty, now provides the Charter with the same legal value as the founding Treaties.

109 See footnote 103 above.

110 Indeed, the GDPR applies regardless of the data subjects' origins when data is processed either in the EU or outside the EU when (i) the controller or the processor are anyway based in the EU, (ii) the processing made outside the EU handles data from EU citizens (article 3 of the GDPR). This is also known as the extraterritoriality principle of EU data protection. See, *ex multis,* J. P. ALBRECHT, *Uniform Protection by the EU – The EU Data Protection Regulation Salvages Informational Self-determination*, in H. HIJAMNS, H. KRANENBORG (eds.), *Data Protection Anno 2014: How to Restore Trust?*, Mortsel, 2014, pp. 122 ff.; F. FABBRINI, *Privacy and National Security in the Digital Age*, in *Tilburg Law Review, Journal of International and European Law*, 2015, p. 8; C. FOCARELLI, *La privacy. Proteggere i dati personali oggi*, Bologna, 2015, p. 146.

111 R. ADAM, A. TIZZANO, *Lineamenti di diritto dell'Unione europea*, Turin, 2010.

112 See Directive 2016/680 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 by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ 2016, L 119, pp. 89-131 (see https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L0680&qid=1543829334357&from=EN). Another important act which is now under the scrutiny of the Council of the EU for its adoption is the Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications – see https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017PC0010&from=EN) which will be meant to replace Directive 2002/58/EC on electronic communications that now seems quite obsolete for a complete protection of consumers' and individuals' personal data in their electronic communications and transactions (see https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002L0058&qid=1543829428945&from=EN). This regulation is also known as the «*e-privacy regulation*».

113 K. LACHANA, *Elements of convergence in the historical origins and ideological foundations of the US and European privacy law: the nexus between the "right to be let alone" and continental jurisdictions*, p. 29; L. MIGLIETTI, *Il diritto alla privacy nell'esperienza giuridica statunitense,* cit., p. 27; A. RENGEL, *Privacy in the 21st Century,* cit.

114 Some of the most known US legislative acts on privacy issues are the *Freedom of Information Act - FOIA* (1966), the *Privacy Act* (1974 – see https://www.gpo.gov/fdsys/pkg/USCODE-2012-title5/pdf/USCODE-2012-title5-partI-chap5-subchapII-sec552a.pdf), the *Computer Matching and Privacy Protection Act* (1988), the *E-FOIA* (1996 – see

an academic achievement which relates to the circumstance that the US tend to exclusively protect the privacy of their own residents. Conversely, the EU provides for privacy safeguard for any individual, given that it includes the relevant right in the Charter and, therefore, grants to any natural person and not exclusively to its citizens[115]. Simultaneously, scholars began to think that, for the above said reason, the rights to privacy and to data protection in the EU would be directly connected to the protection of human dignity, recognised in favour of any human being. On the other hand, commentators believed that the US cover privacy needs in a manner that is instead associated to the implementation of liberties[116].

This peculiar achievement reached by legal researchers represents an important milestone in this brief analysis, because dignity will henceforth be considered as aimed at protecting any and all individuals, even regardless of their economic and market role. To the contrary, by referring to liberty, a considerable role would be deemed to be played by market structure where only consumers – who are natural persons[117] – seem to be protected.

According to scholars, the foregoing would probably mean that the EU legal system would better protect individuals than the US one, because in principle, the EU worries more about individuals, whereas the US tend to mainly care about markets, profits and, thus, consumers, mostly disregarding individuals that are neither consumers, nor American citizens[118]. However, from a political perspective, this would not be completely correct, because the previous observations emerge from a European point of view, in the light of which Europe has traditionally been built not only upon economic liberties, but also on the compliance with human rights. Conversely, such a theory starts from social and political needs different from those which led to the development of the US legal system that, in any case, must be recognised as safeguarding human rights, although their definitions could vary if compared to their respective denotations in the EU. Nonetheless, such a divergence would not necessarily mean that a legal system is superior to the other one[119]. Suffice it to say that also freedom to conduct a business is recognised by the CFR and may sometimes require a balancing with other fundamental rights, since it may contrast with individuals' and, in particular, consumers' rights[120].

Without going further into detail in the analysis of the comparison between the EU and the US on this issue, Susan Baer's theory on the constitutional triangle should be evoked, as it could give precious hints for the development of this research. As a matter of fact, the above legal model makes an attempt in maintaining that, in most legal systems, a constitutional triangle of values may

https://www.justice.gov/oip/freedom-information-act-5-usc-552 and also https://www.foia.gov) and the *Patriot Act* (2001 – see https://www.congress.gov/107/plaws/publ56/PLAW-107publ56.pdf). For an in-depth analysis see *inter alia*, L. MIGLIETTI, *Il diritto alla privacy nell'esperienza giuridica statunitense,* cit.; U. PAGALLO, *La tutela della privacy negli Stati Uniti d'America e in Europa*, Milan, 2008; A. RENGEL, *Privacy in the 21st Century,* cit.

115 M. MILANOVIC, *Human rights treaties and foreign surveillance: Privacy in the digital Age*, in *Harvard International Law Journal*, 2016, *inter alia,* pp. 100 ff.

116 J. Q. WHITMAN, *"Human dignity" in Europe and the United States: the social foundations*, in G. NOLTE (ed.), *European and US Constitutionalism*, Cambridge, 2005.

117 However, it is necessary to specify that not every individual could be a consumer.

118 G. BOGNETTI, *The concept of human dignity in European and US constitutionalism*, cit.

119 See J. Q. WHITMAN, *"Human dignity" in Europe and the United States: the social foundations,* cit., p. 124.

120 For the sake of clarity, for in the EU, consumers are granted with the inviolable right to profit from a high level of protection – article 38 of the Charter.

be identified. The values upon which the said triangle is built are dignity, liberty and equality, even if they can be conflicting. In any case, none of these three values could be disregarded by the concerned triangle, because there are three angles and each one of them is ideally filled with one of the above clarified values. What is subject to change is the flexibility of the inclination of the angles that, if legally translated, may vary according to the bigger importance recognised to dignity or to liberty or, still, to equality[121]. Eventually, the foregoing would mean that dignity could be underestimated in favour of liberty or of equality or *vice versa*, but in no event one of the values could be expunged to benefit the other two. Then, according to the above view, the EU and the USA legal systems could be based upon different constitutional triangles and give more relevance either to dignity or to liberty. But the two of them[122] are forced to implement such a triangle in any social, political or economic context.

Baer's theory allows us to introduce the final part of this research concerning the issue of data-driven economy, insofar as the above specified principles bearing the constitutional triangle theory should equally be applied in the digital context, despite the fact that digital economy has potentially no territorial and legal boundaries. It will be understood how the principle of extraterritoriality enshrined by the EU GDPR will come to the aid of the reader.

5. The 2020 Europe Strategy envisaged by the European Commission in early 2010 includes the Digital Agenda[123] among its seven main pillars. By the end of 2020, the said Agenda should largely be implemented thanks to the expansion and the increase of the Digital Single Market, basically retracing the building principles of the European Single Market because of which, *inter alia*, original Member States agreed the constitution of the European Communities.

Not only the EU economy, but also global economy is nowadays facing the challenges brought by the web. In particular, keeping on developing through it, digital economy could be said to be mostly functioning by means of the ceaseless flow of data. Such data is mainly represented by personal information belonging to web users. In this respect, it is no secret that in the last years the European digital market has lived a boost largely thanks to the flow and the processing of web users' and non-users' personal data and this is also the reason why the EU legislator believed to take even deeper steps in the regulation of individuals' data flows and processing with the new GDPR: not surprisingly, even the title of the GDPR demonstrates that it is specifically addressed to simplify the free movement of personal data[124].

It is strongly believed among academics that personal data is the raw material upon which most part of global economy currently works, but it also is a sort of currency that can be given in exchange for other services or goods that are apparently free[125]. Nonetheless, although data has

121 S. BAER, *Dignity, liberty, equality: a fundamental rights triangle of constitutionalism,* cit.

122 Actually, three of them if considered with equality.

123 See Digital Agenda website (see https://ec.europa.eu/digital-single- market/en/europe-2020-strategy) and the objectives of the Digital Single Market (see https://ec.europa.eu/commission/priorities/digital-single-market_en).

124 See also, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Building a European data economy*, 10 January 2017, COM(2017) 9 final, p. 5 (see https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0009&from=EN).

125 *Inter alia,* see F. PANAGOPOULOU-KOUTNATZI, *Facebook as a challenge to privacy*, in M. BOTTIS (ed.), *Privacy and Surveillance, Current aspects and future perspectives*, Athene, 2013, p. 217; A. ACQUISTI,

gained a monetary value, it always has a personal intimate value of the person to whom it belongs to[126]. Such a personal significance is however subject to the risks of unsolicited and undesired intrusions by third parties of which concerned data subjects are either unaware or not well informed. Indeed, through the collection of single personal data, or of even small sets of personal information, and by means of the automated mining and combination of such information, huge amounts of personal details may be directly or indirectly made available to third parties, that can ultimately use them for economic purposes. These massive groups of data are currently named as "Big Data" and are created by the combination of single pieces of information, collected and generally used to derive predictive information on single individuals and social groups[127]. They are well-known for being easy to collect and combine and for being characterised by the so-called 3Vs (Volume, Velocity and Variety)[128].

Therefore, Big Data constitutes the biggest innovation of this decade, because it can serve the "customisation" function useful to adapt any service or product to the specific needs of any single individual, whose data is collected, processed, analysed and combined[129]. This option is mostly used in real or virtual market dynamics, and holders of such data do have a decisive impact on consumers' choice if they use them or make someone other use them to drive sales and consumptions. It is not forcedly a negative impact, because consumers could get more benefits from buying something that is more coherent with their personal needs. However, consumers may also be concerned by the fact that their information is collected, then combined and maybe assigned to third parties, regardless of an express and completely conscious consent in that regard[130], to the detriment of their self-determination.

Moreover, data-driven economy also raises some issues concerning the possible commercial deals that see personal data as their main object. It is hereby referred to possible data transactions between interested parties, which basically confirm the nature of personal data as economic assets that can be subject to assignments for free or as a result of a sale. Since these are significant concerns especially felt by data subjects (whether they are individuals or consumers), public institutions should address users' worries in a fair manner taking into consideration both the data subjects' need to be protected in their intimacy and the demands of the market for more information

J. GROSSKLAGS, *What Can Behavioral Economics Teach Us About Privacy?,* in *Digital Privacy: Theory, Technologies and Practices,* 2007, retrieved from https://www.heinz.cmu.edu/~acquisti/papers/Acquisti-Grossklags-Chapter-Etrics.pdf; M. J. BECKER, *The consumer data revolution: The reshaping of industry competition and a new perspective on privacy,* in *Journal of Direct, Data and Digital Marketing Practice,* 2014; N. M. RICHARDS, *The dangers of surveillance,* in *Harvard Law Review,* 2013, p. 1938; C. J. HOOFNAGLE a.o., *Behavioural Advertising: the offer you cannot refuse,* in *Harvard Law and Political Review*, 2012, pp. 273-279.

126 F. COSTA CABRAL, O. LYNSKEY, *Family Ties: The Intersection between Data Protection and Competition in EU Law,* in *CMLR,* 2017, pp. 12 ff.

127 See, *ex multis*, C. FOCARELLI, *La privacy. Proteggere i dati personali oggi*, cit., p. 45; A. MANTELERO, *Competitive value of data protection: the impact of data protection regulation on online behaviour*, in *International Data Privacy Law,* 2013, p. 231.

128 N. P. SCHEPP, A. WAMBACH, *On Big Data and Its Relevance for Market Power Assessment,* in *Journal of European Competition Law & Practice,* 2016. Some scholars held that another "V" should be added and would stand for their «added Value» compared to a single piece of information (see, Focarelli, *La privacy. Proteggere i dati personali oggi*, cit.).

129 *Ibidem.*

130 *Ibidem.*

in the light of its free movement, provided that data is legitimately collected[131]. Accordingly, the foregoing justifies the duty for public authorities to keep on monitoring market players so that, first, they comply with data protection rules and, second, they act in the framework of completely fair market conditions.

6. One of the goals of this paper is to demonstrate that competition law could play a bigger role in the protection of web users' and consumers' personal data. Indeed, according to what has been pointed out in the previous paragraph, it may seem evident that market players and fair functioning of market dynamics are of an utmost importance even for digital economy based on the continuous flow of personal data. This is all the more clear for the two observations described below.

Firstly, one of the main targets of competition law is consumers' protection (that, as already underlined, has also been upgraded to a fundamental right by the CFR)[132] and pursuant to the definition given by EU law to a consumer, this is *«any natural person who [...] is acting for purposes which are outside his trade, business or profession»*[133]. This essentially means that any consumer is, at the same time, an individual benefitting from inviolable rights, who could also be a web user and a consumer in his digital economic transactions, although such transactions are characterised by the mere exchange of personal data for services which are only apparently free of charge. At any rate, the said exchange has a considerable economic significance that is often imperceptible to the user[134] and this is also the reason why data holds quite an immeasurable competitive value to the market for the market players using it[135].

Secondly, another goal of competition law is to monitor market dynamics in order to create fair and competitive conditions for any undertaking, which means that at the end of any economic process, consumers can profit from better economic conditions. The abovementioned targets of competition law are equally applicable to the digital market where real firms operate in an electronic context to make profits and increase their turnovers.

As mentioned before, digital market is more and more characterised by the huge phenomenon of data collection. Suffice to remind the case of two-sided or multi-sided markets[136] or of search engines, which let suppliers and consumers keep in touch more easily and make the

131 As stated by the European Commission in its Communication of 2014, *Towards a thriving data-driven economy*, SWD(2014) 214 final (see https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0442&from=FR).

132 F. COSTA CABRAL, *The Preliminary Opinion of the European Data Protection Supervisor and the Discretion of the European Commission in Enforcing Competition Law,* in *Maastricht Journal,* 2016, pp. 495-513; A. BARENGHI, *Diritto dei consumatori,* Milan, 2017, pp. 3 ff.

133 Article 2, paragraph 1, letter b), directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993, L 95, pp. 29-34 (see https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31993L0013&qid=1543829645563&from=EN).

134 According to a recent survey, personal data is given a very insignificant economic value by its "owners", in spite of the greater monetary value it has for third parties collecting and combining it. That research has been carried out by the Financial Times and its results have been later published on Sole24Ore on 14 June 2013, in the article *Big data: tre profili a confronto sul valore dei dati personali* (see http://www.ilsole24ore.com/art/tecnologie/2013-06-14/data-profili-confronto-012622.shtml?uuid=AbTdmq4H).

135 A. MANTELERO, *Competitive value of data protection: the impact of data protection regulation on online behaviour*, in *International Data Privacy Law,* 2013, pp. 229-238.

supply and demand process quicker, at the same time collecting great amounts of personal data both from suppliers and from consumers. Digital platforms – like search engines or digital markets – are usually owned and managed by big digital companies and, in view of the number of users they attract and of their reputation, such companies may have questionable positions on the EU market (that is hereby mainly object of analysis) in the light of competition law. In the recent past, this branch of law – which in the US is more known as antitrust law[137] – has however served to detect potential infringements on the digital market by big digital companies such as, *inter alia,* Google, Facebook, Microsoft or Yahoo!. In fact, it is no coincidence that these giant multinational companies gained important market shares all over the world thanks to the permanent growth of their users.

But alongside with the increase of the number of users, there has also been a bigger availability of personal data that allowed these companies holding a greater competitive value than less notorious or smaller companies.

As a consequence, in the last years, antitrust authorities have shed a light on potential antitrust conducts and, not surprisingly, investigations involved the same undertakings even in the different legal systems of the EU and of the USA[138]. Most of these investigations concerned merger cases[139], where the European Commission and the US Federal Trade Commission were asked to

136 G. LUCCHETTA, *Is the Google Platform a two-sided market?*, retrieved from http://ssrn.com/abstract=2048683. Moreover, it is important to stress that this kind of digital platforms increase their incomes and activities day-by-day only thanks to the so-called positive «*feedback loop*» created by their users, when they use the service of the platforms and they give a public positive feedback about the supply they received. On "feedback loops", see also N.P. SCHEPP, A. WAMBACH, *On Big Data and Its Relevance for Market Power Assessment,* in *Journal of European Competition Law & Practice,* 2016, pp. 121 ff.

137 It is however to be reminded that scholars strongly recognise the origins of EU competition law in US antitrust law, which supplied the basic models to identify illegitimate conducts on the market by undertakings, such as non-allowed cartels or abuses of dominant position on the market, as well as problematic mergers between companies. See J. KLEIN, P. M. RAO, *Competition and consumer protection in the cyberspace marketplace,* in *20th ITS Biennal conference: The Net and the Internet – Emerging Markets and Policies*, Rio de Janeiro, 2014, pp. 4 ff.

138 It is hereby convenient to only mention some of the cases opened by the EU and the US antitrust authorities (respectively, the European Commission and the Federal Trade Commission). For the EU, see case COMP/M.5727 *Microsoft / Yahoo! Search Business* (see *https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1543829834283&uri=CELEX:32010M5727*), case COMP/M.7217, *Facebook /Whatsapp* (see https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1543829865420&uri=CELEX:32014M7217), case COMP/M.6281, *Microsoft/Skype* (see https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1543829888874&uri=CELEX:32011M6281), case COMP/M.4731, *Google/DoubleClick* (only available in summary – see https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC0722(03)&from=EN). For the US, see FTC file no. 071/0170, case *GoogleDoubleClick* (see https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf), for the merger Facebook/WhatsApp, see FTC Notifies Facebook, WhatsApp of Privacy Obligations in Light of Proposed Acquisition, 10 April 2014 (see https://www.ftc.gov/news-events/press-releases/2014/04/ftc-notifies-facebook-whatsapp-privacy-obligations-light-proposed), and EPIC press release of 25 August 2016, *Facebook to Collect WhatsApp User Data, Violating FTC Order and Privacy Promises* (see https://epic.org/2016/08/facebook-to-collect-whatsapp-u.html).

139 Other sensitive issues may concern illegitimate agreements between undertakings or abuses of dominant position on the market, which are respectively regulated by articles 101 and 102 of the Treaty on the functioning of the European Union ("TFEU" – https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12016E/TXT&from=EN). Article 101 sets out that *«1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between*

previously verify the feasibility of such mergers in view of their compliance with antitrust law. Nevertheless, in none of these cases antitrust authorities deemed necessary to stop mergers by reason of the market shares held by the buyer and by the purchased company. At any rate, the European Commission has recently levied Facebook with a 110 euro million fine for not having provided complete and correct information during the investigation phase since 2014. This information concerned the fact that Facebook was already able to automatedly match Facebook and WhatsApp users' accounts in 2014, but it declared the opposite to the European Commission when submitting its request for verification[140]. This did not have any impact on the decision allowing their merger, but the fine was however imposed because of the incompleteness of the information provided.

Although antitrust cases in the EU and in the US did not directly concern the protection or the availability of personal data by these undertakings, the investigations carried out are able to confirm that more and more interest is growing around such digital companies[141], because greater

Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void. 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of: - any agreement or category of agreements between undertakings, - any decision or category of decisions by associations of undertakings, - any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question». Article 102 TFEU reads as follows: *«Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts».* For a detailed study on this articles, see J. F. BELLIS, I. VAN BAEL, *Il Diritto Comunitario della Concorrenza,* Turin, 2009; B. CORTESE, F. FERRARO, P. MANZINI, *Il Diritto antitrust dell'Unione europea,* Turin, 2014; B. CORTESE (ed.), *EU Competition Law. Between Public and Private Enforcement*, Amsterdam, 2013; F. GHEZZI, G. OLIVIERI, *Diritto Antitrust,* Turin, 2013.

140 See European Commission press release of 18 May 2017 (see http://europa.eu/rapid/press-release_IP-17-1369_en.htm).

141 On 19 December 2017, the German competition authority issued to Facebook its preliminary assessment on an alleged abuse of dominant position in the market sector of services provided by social networks and especially through infringements of data protection law, because the company collects data from users that surf third-party websites or apps thanks to an embedded application programming interface that is the so-called "Like-Button". Moreover, users are not aware of this huge collection of data and this is why the authority believes that they had not properly consented to the collection of their data (see the complete press release at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/19_12_2017_Facebook.html). Besides, for instance, on 30 August 2018, Bloomberg announced that Google would have set an agreement with

concerns have been raised by the applicability of the EU GDPR in view of the extraterritoriality principle pointed out above. This regulation paves the way for a greater protection of personal data of users, consumers and individuals in general, that needs to be complied with also by these digital multinational holdings, usually been established under US law. However, despite being normally based in the United States, they are also used to setup subsidiaries in Europe for their own businesses. Notwithstanding this, the GDPR equally applies to them insofar as they have the said subsidiaries in the EU and they collect and process Europeans' personal information. Besides, the GDPR sets out detailed provisions for transborder data flows and for a better data subjects' protection. Yet, much has still to be done in terms of monitoring the implementation of the GDPR for EU public authorities, but also in terms of real compliance with it when it comes to controllers' and processors' duties.

Nonetheless, when considering the context of the – especially EU – digital market, as outlined in this paragraph, according to a vast majority of scholars and to the European Data Protection Supervisor, competition law could serve as another useful legal instrument to prevent companies from behaving in an illegitimate manner from the point of view of data protection law[142].

7. As outlined in the previous paragraphs, it can be stated that the rights to privacy and to data protection are closely connected to the right to human dignity.

This may be confirmed by the fact that the assignment (even for free) of one's personal data implies the exercise of one's self-determination in order to protect one's own intimacy and identity. Self-determination is a clear expression of human dignity, *i.e.* the need for the individual to have the full control of what he wants others to know about him. Once the individual founds himself limited in exercising his right to his informational self-determination, his consent to the collection and processing of his personal data may not be totally consciously given and his rights both to data protection and, accordingly, to human dignity, may turn out to be infringed.

Nevertheless, within the European Union, any of the said rights is currently protected as being fundamental and inviolable by virtue of the Charter of fundamental rights. This would mean

Mastercard, in order to verify if its users paying with the Mastercard system would have bought products or services that Google itself advertises to them, by analysing their credit card payment data released by Mastercard. (M. BERGEN, J. SURANE, *Google and Mastercard Cut a Secret Ad Deal to Track Retail Sales*, 31 August 2018 – available at https://www.bloomberg.com/news/articles/2018-08-30/google-and-mastercard-cut-a-secret-ad-deal-to-track-retail-sales).

142 F. COSTA CABRAL, *The Preliminary Opinion of the European Data Protection Supervisor and the Discretion of the European Commission in Enforcing Competition Law,* cit.; F. COSTA CABRAL, O. LYNSKEY, *Family Ties: The Intersection between Data Protection and Competition in EU Law,* cit.; F. ZUIDERVEEN BORGESIUS, *Behavioural Sciences and the Regulation of Privacy on the Internet*, in A. ALEMANNO, A. SIBONI (eds.), *Nudge and the Law*, London, 2015, pp. 179-207; N. P. SCHEPP, A. WAMBACH, *On Big Data and Its Relevance for Market Power Assessment,* in *Journal of European Competition Law & Practice,* 2016, pp. 120-124; P. R. PRABHAKER, *Who owns the online consumer?*, in *Journal of Consumer Marketing,* 2000, pp. 158-171; R. PODSZUN, *The Digital Economy. Three Chances for Competition Law,* in *Maastricht Journal,* 2016, pp. 747-751; W. KERBER, *Digital Markets, Data, and Privacy: Competition Law, Consumer Law, and Data Protection,* retrieved from http://ssrn.com/abstract=2770479; J. KLEIN, P.M. RAO, *Competition and consumer protection in the cyberspace marketplace,* cit. See also EDPS, Preliminary opinion on *Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy,* March 2014 (see https://edps.europa.eu/sites/edp/files/publication/14-03-26_competitition_law_big_data_en.pdf).

that, in principle, no other lower right or economic interest may overcome them. In practice, however, this does not always occur and both chronicle cases[143] and scholarly concerns demonstrate that personal data breaches are increasing, rather than being kept under control. This mostly happens because of the huge economic interests disguising behind the use of the web, which are even more fuelled by the flow and the availability of personal data allowing companies to have higher turnovers thanks to customised and targeted advertising activities, which let them save money that would otherwise be invested on market researches.

In view of the foregoing, not only are data protection laws important to safeguard data subject's moral integrity and dignity, but also competition law could come to the aid of consumers – who at the same time are individuals and data subjects – by ensuring that big companies do not make an illegitimate use of the massive amount of data they hold or of their market power, consequent to the availability of such data.

This paper focussed on a condensed comparative scrutiny between the European Union and the United States of America in terms of safeguard of dignity, protection of personal data and implementation of competition law in the digital market, by giving few hints on the issues arisen from the processing of personal data by US holding companies that should fall under the scope of the EU GDPR. The said processing raises concerns above all for EU citizens insofar as they feel being less protected under US data protection laws. And such a feeling might have been consolidated by some scholarly beliefs, based on the traditional theory of the supremacy of the EU over the US in the protection of fundamental rights.

Although it would be difficult to assess which one of the two legal systems would be better in this respect for the reasons outlined in the fourth paragraph, Baer's theory of the so-called «constitutional triangle» could be adopted in order to accept that different legal systems may recognise more importance to dignity and to the bundle of human rights connected thereto, alternatively to liberty and to the associated economic freedoms. Nevertheless, the greater relevance given to dignity or to liberty does not exclude the other from the triangle (together with equality), thus the two sets of values cannot be excluded one with another and must receive at least a minimum level of protection. This could be a reasonable explanation for different warranty levels in the EU and in the US. As a matter of fact, it cannot be said that the US do not protect human rights as the birth of the fundamental rights concerned in this paper are proved to be occurred thanks to American case-law and doctrine. Since EU competition law as well imitates the previous US antitrust model, the European Union may be said to have developed US legal traditions into more vigilant models. In an era where internet technologies are of everyday common use for professional or personal reasons and allow the entertainment of transnational relationships, in order to cope with personal data breaches, a wider multilateral approach would be preferred, both under data protection and competition laws. However, since it would not be easy to synchronise the activities

143 See, for instance, the recent datagate involving Facebook and a professor from Cambridge University, which let Cambridge Analytica have direct access to millions of Facebook users' personal data, so that the data mining company could combine and analyse data, in order to build political profiles of users around the world and try to persuade them in the exercise of their voting rights. See some of the many articles released on The Guardian and the New York Times at https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election; https://www.theguardian.com/news/2018/mar/26/the-cambridge-analytica-files-the-story-so-far; https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html.

of EU and US privacy and antitrust enforcement authorities, because of considerable differences in their regulatory frameworks, much could be done by the same multinational companies, even by adopting – for instance – codes of conduct that would also increase their commercial reputation among consumers, by which they could grant adequate standards of protection for their consumers' personal data. In addition, they could also offer services and products designed in consideration of the most recent developments in privacy by design and privacy by default progresses, to make consumers feel more at ease with the technologies they use. Conversely, in the absence of a voluntary adaptation and compliance of at least the biggest firms, the European Union would reveal an added value when compared to the US legal system, by reason of its legal structure. As a matter of fact, at least the advantage of having harmonised data protection and competition laws for all Member States, as well as national and central enforcement separate authorities both for privacy and competition matters grants, it a more efficient approach in the protection of dignity and fundamental rights.

Outside its boundaries, the protection of EU citizens' dignity and data protection could be ensured thanks to the innovations brought by the GDPR, such as the extraterritoriality principle and the circumstance that, having recognised more rights relating to personal data, data subjects would be more aware of the risks to be avoided and of the remedies suitable to be employed for protecting their inviolable rights.

As the GDPR is applicable since a few months, scholars and case-law will be able to analyse its practical developments in the future and some precautions could still potentially be embedded in the proposal for the e-Privacy regulation, which is now under the scrutiny of the EU legislator.

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