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INTRODUCTION

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Citizenship is a fascinating word. Within legal studies, it identifies the individual's original or acquired affiliation to a given political community. In this sense, it corresponds to a juridical relationship. Which includes state responsibilities to protect those who are bound by such a relationship. However, its uses in social sciences are often inconsistent. [1] Citizenship is used among sociological and philosophical studies to pinpoint a bundle of civil liberties, political and social rights that justify the special bond connecting a state to an individual. [2] From such a viewpoint, the mere juridical relationship of belonging is empty if not filled with the substantive possession of rights. This is another way of saying that citizenship is meaningful when it entails a qualified connection between the individual and the State.

Linking rights and citizenship can lead to two different theoretical frames. The first one is the exclusionist frame, whereby citizenship is a device of segregation because those who cannot claim to be citizens are legitimately prevented from enjoying some rights. The second one is the participatory frame, whereby citizenship is the legal status that enhances democracy and fundamental rights by allowing engagement and participation.

To explain how the two frames play out, let us explore rapidly the debate on citizenship. In the late Nineteens, philosophical and socio-legal studies foresaw the

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[1] C. Romanelli Grimaldi, 'Cittadinanza', (1988) *Enciclopedia giuridica*, vol. VII, Roma, 2 and M. Luciani, 'Cittadini e stranieri come titolari di diritti fondamentali' (1992), *Rivista critica del diritto privato*, 203.

[2] D. Zolo, 'Cittadinanza. Storia di un concetto teorico-politico' (2000) *Filosofia politica*, 5 e G. Zincone, 'Cittadinanza: trasformazioni in corso, (2000) *Filosofia politica*, 71.

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'end of citizenship' in the crisis of national sovereignty. Their target, however, was citizenship *as* a legal instrument used to ascribe rights to the individual.[3] In contrast, the participatory nature of citizenship, nurturing the relationship between those who possess such a status and the State, was not questioned. Processes of supranational and international integration seemed to herald a cosmopolitan era where belongings would have lost their substantive meaning of the exclusion. Some scholars identified cosmopolitan entities with supranational legal systems such as the European Convention of Human Rights.[4] Others theorized the need to create global institutions or a global civil society advancing an ethic of inclusivity as opposed to the logic of exclusion inherent in the concept of national citizenship.[5] Transnational distributive justice theories developed this argument further. They maintained that justice and equality claims needed to be referred to the world as a whole and only derivatively to nation states. According to such an understanding, conditions of equality were to be established globally because individuals founded political communities, which exist only as territorial aggregations «initially acquired in legitimate ways by individuals.»[6]

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[3] See S. Vertovec & R. Cohen, *Conceiving Cosmopolitanism. Theory, Context, and Practice* (Oxford: Oxford University Press, 2003) 4 and R Fine, 'Cosmopolitanism and Human Rights' (2007) 1 *Law, Social Justice and Global Development*, 3. It must be emphasised that these arguments have also been put forward by philosophers who, starting from Rawlsian principles of justice, link the problem of global justice with that of the weak subjects in contemporary states and, in doing so, presuppose an ethic of care that is sensitive to all possible manifestations of social justice: see M C Nussbaum, Frontiers of Justice: Disability, Nationality, Species Membership (Cambridge: Harvard UP, 2006) 30, 230. With specific reference to the duties of material assistance applying on a global scale, see M C Nussbaum, 'Duties of Justice, Duties of Material Aid: Cicero's Problematic Legacy' (2000) 8 *Journal of Political Philosophy*, 176.

[4] A. Stone Sweet, 'A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe' (2012) 1 *Global Constitutionalism*, 53 and J.L. Cohen, 'Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism'

(Cambridge: Cambridge UP, 2010) xv.

[5] N. McCormick, 'Beyond the Sovereign State' (1993) 56 *Modern Law Review*, 17, who argues that integration among different legal systems should be interpreted as the creation of a plurality of institutional systems 'each of which has validity or operation in relation to some range of concerns, none of which is absolute over all the others, and all of which for most purposes can operate without serious mutual conflict in areas of overlap'.

[6] C.R. Beitz, 'International Liberalism and Distributive Justice: A Survey of Recent Thought' (1999) 51 *World Politics*, 283.

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Developments in human rights law added new challenges to the idea of national citizenship. While cosmopolitan and global theories relied on the idea of human rights as a minimum universal standard of legitimacy for social institutions, legal scholarship elaborated cosmopolitan claims by expanding the category of human rights to include legal situations traditionally connected to citizenship. Therefore, the notion of human rights came to embrace even social rights typically conditioned to a permanent link of belonging to a given political community.

European courts' case law contributed to reinforcing such an idea. There is no shortage of examples. In the late Nineties-early Two Thousand, the European Court of Human Rights interpreted Convention rights to recognize the right to social benefits to non-citizens.[7] According to the Court, once the State has decided to establish a given welfare benefit, any discrimination among beneficiaries based on nationality would violate the principle of equality. The argument goes as follows: given that the purpose of such benefits is to contribute to individuals' wellbeing, the only element that matters in terms of who can get the benefit is the actual existence of a situation of need. Consequently, any qualification requirement based on nationality is inconsistent with the purpose of the welfare benefit and therefore discriminatory. In the same years, the French *Conseil constitutionnel* maintained that social rights, once essentially connected to the bond of citizenship, are human rights, and therefore, non-citizens are equally entitled to their enjoyment.[8]

In recent years, cosmopolitan turns have been progressively opposed by the renaissance of nationalist and nativist claims, lately strengthened by populist movements. The latter contend that democratic legitimacy cannot be achieved without singling the *real* people out of *a)* multitude of individuals that demand protection from the State as well as of *b)* the élites that systematically disregard their needs. Internet-based technologies have often acted as sound boxes of such claims, reinforcing beliefs, spreading biased information, legitimizing opinions that would have been otherwise kept within a small crowd. At the same time, those technologies

[7] *Gaygusuz v. Austria*, 31 August 1996, paras 36-37 and 41 and *Azinas v. Cipro*, 20 June 2002, para 28.

[8] Dec. 89-269, 22 January 1990. See D. Schnapper, 'L'assistance est un droit de l'homme' (1992), *Pouvoirs locaux*, 18, who argues that those decisions are inconsequential because they transfer to local authorities, who often lack resources and political motivation, the responsibility to provide non-citizens with social benefits.

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have created *de facto* communities with political agendas based on strong forms of identification, which proved to be crucial to determine shifts of opinion or even political course of actions, as the assault to Capitol Hill has recently demonstrated.[9]

Against this backdrop, the idea of citizenship regained space in public debate. Its meaning swings from an inclusive to an exclusionary perspective. It has been used by political institutions when launching initiatives to tackle democratic legitimacy issues at the European level. Examples include the Conference for the Future of Europe or the platform for the review of European economic governance.[10] At the same time, it has been invoked by populist parties to justify restrictive migration policy and, more generally, claims of prioritizing nationals over foreigners in any political choice.[11] So one cannot use the term citizenship without being aware of the complicated universe of conceptualizations it can carry out. It is placed on the opposite spectrum of universalist claims, and yet it expresses the highest form of conscious and responsive participation in a political community.

In this scenario, one is left with the impression that citizenship is the center of historical tensions in contemporary democracies. Those tensions can be synthesized in the confrontation between two phenomena. The first one is the persistence of

[9] M. Scott, 'Capitol Hill riot lays bare what's wrong with social media', *Politico*, 7 January 2021, available at https://www.politico.eu/article/us-capitol-hill-riots-lay-bare-whats-wrong-social-media-donald-trump-facebook-twitter/.

[10] In the September 2021 State of the Union address, President von der Leyen announced that the Commission would launch a discussion on the Economic Governance Review, which is intended to build consensus on its future developments. The Commission has already clarified that this review will be carried out by fostering public debate on the economic governance framework among relevant stakeholders. The Commission, in turn, will "consider all views expressed during these debates," together with its assessment of the economic surveillance framework. Ursula von der Leyen, State of the Union address, 15 September 2021, available at https://ec.europa.eu/info/strategy/strategic-planning/state-union-addresses/state-union-2021-en. On a broader level, the Conference for the future of Europe represents an example of EU institutions attempting to connect with citizens by promoting debates and confrontations over some of the most urgent and controversial European issues, including economic governance. See Joint Declaration on the Conference on the Future of Europe, available at https://futureu.europa.eu/uploads/decidim/attachment/file/6/EN__JOINT_DECLARATION_ON_THE_CONFERENCE_ON_THE_FUTURE_OF_EUROPE.pdf.

[11] See M. Baldassari, E. Castelli, M. Truffelli, & G. Vezzani, 'Anti-Europeanism: Critical Perspectives Towards the European Union .'(Berlin: Springer, 2019).

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cosmopolitan claims stretching the concept of citizenship to the extent that it loses its original understanding and coincides with belonging to a borderless yet not institutionalized global community. The second is the emergence or the consolidation of national identities expressing forms of memberships to a 'community of destiny' designed to exclude 'the other'.

A good way to navigate this complexity is tackling the problem of citizenship from a multidisciplinary perspective. Thus, this special issue addresses citizenship by starting from its theoretical premises and its unsolved tensions with theories of human rights (Dimitri Kochenov). It goes on to investigate citizenship as a form of participation designed to build a democratic, values-oriented, borderless political community (Paul Blokker). It explores further this meaning of citizenship by analyzing challenges linked to the use of new technologies in political participation (Filippo Tronconi). It suggests that there is something like digital citizenship with robust egalitarian instances and disparate effects on bonds of alliance and recognition within a political community (Fulvio Costantino). Finally, the special issue looks at non-citizens and examines how technology can be an instrument strengthening an exclusionary logic (Simone Penasa). At the end of this journey, this work offers some provisional conclusions on the relevance of questioning citizenship in the context of momentous transformations of democratic states.

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CITIZENSHIP IN THE AGE OF CONCRETE HUMAN RIGHTS

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Abstract

The core contradictions this article dwells on are two. The first contradiction promoted by the concept of citizenship arises between an abstract claim of equality among those who 'belong' and citizenship's consequential nature in terms of the unequal distribution of rights and liabilities in the world, as citizenships vary radically in quality. More still, in a world where inequalities are spacialised and borders signify exclusion from opportunity and – as long as these are policed by citizenship – blood-based segregation between the haves and have nots, citizenship emerges as the core tool of exclusion of the racialized 'other', not belonging to the global aristocracy of the former colonizers, the 'super citizens'. The abstractness of citizenship is at the centre of the second contradiction that comes to light with renewed force today. This contradiction arises between citizenship and rights, which, in the age of human rights ideology, are, precisely, concrete and individualisable.

Indice Contributo

* Professor of Law at CEU Department of Legal Studies, Vienna; CEU Democracy Institute, Budapest. This article draws on my work produced during the fellowships at COMPAS, School of Anthropology, University of Oxford (Hilary term, 2021) and the Princeton School of International Affairs, Princeton University (Spring semester, 2020). I am grateful to Sophie Meunier and Madeleine Sumption for the kind invitations and draw on my COMPAS Working Paper no. 156 (2021), completed in this context.

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Keywords

Citizenship – Membership – Inequalities – Super citizens – Borders

1. Two contradictions at the heart of contemporary citizenship

Citizenship – whenever the concept is used – is taken to be part of our 'natural world':[1] living without it is unthinkable for many, no matter how many contradictions this legally-driven social construct actually entails. The core contradictions this article dwells on are two. The first contradiction promoted by the concept of citizenship arises between an abstract claim of equality among those who 'belong' and citizenship's consequential nature in terms of the unequal distribution of rights and liabilities in the world, as citizenships vary radically in quality.[2] More still, in a world where inequalities are spacialised and borders signify exclusion from opportunity[3] and – as long as these are policed by citizenship – blood-based segregation between the haves and have nots, citizenship emerges as the core tool of exclusion of the racialized 'other',[4] not belonging to the global aristocracy of the former colonizers, the 'super citizens'.[5] Citizenship is, thus, the defining element of the global (to a large

[1] John R Searle, *The Construction of Social Reality* (Free Press 1997).

[2] Dimitry Kochenov and Justin Lindeboom, 'Empirical Assessment of the Quality of Nationalities' (2017) 4 *European Journal of Law and Governance* 314; Dimitry Kochenov and Justin Lindeboom (eds), *Kälin and Kochenov's Quality of Nationality Index* (Hart Publishing 2020).

[3] Branko Milanović, *Global Inequality* (Harvard University Press 2016).

[4] Dimitry Kochenov, *Citizenship* (MIT Press 2019).

[5] Manuela Boatcă, 'Unequal Institutions in the Longue-durée: Citizenship through a Southern Lens', in Dimitry Kochenov and Kristin Surak (eds), *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging* (Cambridge University Press, 2022); Manuela Boatcă, 'Citizenship' in Olaf Kaltmeier, Anne

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extent race-based) segregation, the system, which I characterized elsewhere as 'passport apartheid'.[6] Not only is citizenship incompatible with equality. It is designed to deliver strict segregation.

While inherently rooted in a nation state, a 'citizen' is an abstraction defined by the status: a 'Pakistani' cannot be compared to a 'Frenchman'. The abstractness of citizenship is at the centre of the second contradiction that comes to light with renewed force today. This contradiction arises between citizenship and rights, which, in the age of human rights ideology,[7] are, precisely, concrete and individualisable. The deep cleavage between citizenship and human rights is thus an almost natural and clearly identifiable phenomenon, which is reinforced, as we shall see, by both the universalist claims of human rights, which are made through the vehicle of a 'person' – a relative newcomer to constitutional thought[8] – and through the jurisprudence of some international courts, most notably the European Court of Human Rights,[9] as

Tittor, Daniel Hawkins & Eleonora Rohland (eds), *Routledge Handbook to the Political Economy and Governance of the Americas* (Routledge 2020) 284.

[6] Dimitry Kochenov, 'Ending the Passport Apartheid' (2020) 18(4) *International Journal of Constitutional law* 1525.

[7] Günter Frankenberg, 'Human Rights and the Belief in a Just World' (201) 12 *International Journal of Constitutional Law* 35.

[8] Linda Bosniak, 'Persons and Citizens in Constitutional Thought' (2010) 8 *International Journal of Constitutional Law* 9.

[9] In particular, the rise of Art. 8 ECHR jurisprudence prohibiting, in numerous cases, deportations to the country of citizenship, has created something akin to a *de facto* 'personhood' nationality, altering the legal reality of 'citizenship' to a great degree. For one of the first notable examples, see the Concurring Opinion of Judge Martens in *Beldjoudi* (*Beldjoudi v France* No. 12083/86 (ECtHR Chamber, 26 March 1993); *Jeunesse v Netherlands* No. 12738/10 (ECtHR Grand Chamber, 3 October 2016). This trend, although markedly counter-orthodox in citizenship matters, and deeply empowering at the individual level, has been criticised in the literature (*e.g.* Daniel Thym, 'Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?' (2008) 57 International & Comparative Law Quarterly 87) and is not yet a mainstream position of the European Court of Justice: Stanislas Adam and Peter Van Elsuwege, 'EU Citizenship and the European Federal Challenge through the Prism of Family Reunification' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017). The trend definitely adds to the picture of the ongoing contestation of the normative foundations of citizenship and is observable also in the practice of the UN Committee on Human Rights (UNCHR), which is in tune with ECtHR practice: *Stewart v Canada*, UN Doc CCPR/C/58/D/538/1993 (1 November 1996) ('no one shall be arbitrarily deprived of the right to enter his own country' (quoting Article 12(4) of the International Covenant on Civil and Political Rights (ICCPR), GA Res 2200A (XXI), UN Doc

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well as, to a lesser extent, the European Court of Justice.10 These do not always accept an argument 'they are not a citizen' as a sufficient ground for dehumanization and exclusion from dignity, which this argument, by design, entails in the unequal racialized world where borders are militarized and passport apartheid is omnipresent.11 Not only is citizenship inherently at odds with human rights. It is designed to undermine human rights claims by the racialized barbarian (read 'foreign') 'others' – and the advent of the 'person' has little chance to change this, as we shall see.

2. Citizenship is a harsh caste enforcement tool to render equality moot

Distributed like prizes in a lottery where four-fifths of the world's population loses,[12] citizenship is clothed in the language of self-determination and freedom, elevating hypocrisy as one of the status's core features. Indeed, citizenship's connection to "freedom" and "self-determination" usually stops making any sense at the boundaries of the most affluent Western states. Citizenship, for most of the world's population, is thus an empty rhetorical shell deployed to perpetuate abuse, dispossession, and exclusion. All are divided by *ius sanguinis* and *ius soli* – essentially down bloodlines[13] –

A/6316 (December 16, 1966)). *See also* UNCHR, General Comment 27, Freedom of Movement (Article 12), UN Doc CCPR/C/21/Rev.1/Add.9 (November 2, 1999). According to the Committee, the scope of 'his own country' in the sense of Art 12 ICCPR is broader than 'his country of nationality' (at para 20).

10 Unlike its Strasbourg interlocutor, the Court of Justice seems to be building a case-law, which turns the human rights-inspired attention to the actual situation of the individual as a way to dismiss necessarily abstract, citizenship-based claims to rights. For an analysis, see, Dimitry Kochenov, 'Neo-Mediaeval Permutations of Personhood in the European Union' in Loïc Azoulai, Ségolène Barbou des Places and Etienne Pataut (eds.), 'Constructing the Person: Rights, Roles, Identities in EU Law' (Oxford: Hart Publishing, 2016), 133.

11 Cf. Mahmoud Keshavarz, *The Design Politics of the Passport: Materiality, Immobility, and Dissent* (New York: Bloomsbury Visual Arts, 2019).

12 Ayelet Shachar, *The Birthright Lottery* (Harvard University Press 2009).

13 In the absolute majority of cases at least one parent of any '*ius soli* kid' is a citizen, which means that both *ius soli* and *ius sanguinis* come down to a shorthand for bloodline transmission of privilege: the preservation of the aristocracy of the high born in this global world where the majority of the population remain rightless plebs: Dimitry Kochenov, 'Policing the Genuine Purity of Blood: The

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into super-citizens,[14] i.e. a happy minority for whom the world is a friendly and open globalised playground – and citizenship's victims,[15] i.e. those miserable many who are caged within steep visa walls in 'their' blood spaces of no opportunity. In-between spaces are also possible, and the welcoming Dubai, where anyone can settle but not naturalise, comes to mind.[16] The story is thus not black and white: a whole spectrum of shades and hues of status quality emerges, as I have described elsewhere in detail together with Justin Lindeboom.[17]

This perspective on citizenship allows questioning the deeply unfounded harmful presumptions of what citizenship is, which are held by the UNHCR and many scholars.[18] This is particularly true of the premise that *any* citizenship is better than statelessness. In a context where the quality of citizenships varies to such a significant degree as we observe now across the world, it is often better to be stateless in a particular space of opportunity, i.e. Germany or France, rather than a victim of a particular citizenship.[19] In other words, presenting statelessness as the main problem in contemporary international citizenship law,[20] as opposed to the existence of the citizenship statuses which fail their bearers in every respect, is a mistaken perspective,

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EU Commission's Assault on Citizenship and Residence by Investment and the Future of Citizenship in the European Union' (2021) 25(1) *Studies in European Affairs* 33.

[14] Dimitry Kochenov, *Citizenship* (MIT Press 2019), 239.

[15] For the full version of this argument, please see my Oxford COMPAS Working Paper No 156 'Victims of Citizenship' (2021), on which these contribution entirely relies.

[16] Branko Milanović, *Global Inequality* (Harvard University Press 2016), 152.

[17] Dimitry Kochenov and Justin Lindeboom, 'Part I: Laying down the Base', in Kochenov and Lindeboom (eds) *Quality of Nationalities Index* (Hart Publishing, 2020).

[18] For a crucial exception, see Katja Swider, '*A Rights-Based Approach to Statelessness*' (PhD thesis, University of Amsterdam 2018).

[19] Katja Swider, 'The Quality of Statelessness' in Dimitry Kochenov and Justin Lindeboom (eds), *Kälin and Kochenov's Quality of Nationality Index* (Hart Publishing 2020).

[20] This approach reflects the dominant paradigm in international citizenship law and citizenship studies: Paul Weis, *Nationality and Statelessness in International Law* (Stevens and Sons 1956); Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014).

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bound to trigger erroneous policy and personal tragedies.[21] By fighting statelessness and making no distinction between a super-citizenship and the status of a victim of citizenship, pretending, quite absurdly, that being a Kyrgyz and being Swiss is roughly the same, contemporary international law reinforces the inequitable realities of cast segregation of the world population into the super-citizens and the rest. Pretending that assignment to a caste as such, rather than *which particular* caste one is assigned to is the crucial element in rooting out basic injustices related to contemporary citizenship or the lack thereof is as untenable as it is accepted by the UNHCR and UNHCR-friendly scholars.

Moreover, international law reinforces a reality where once imposed, this caste assignment is extremely difficult to object to: where statelessness as such rather that a sub-standard status of a victim of citizenship, is viewed as a problem, a sub-standard status becomes very difficult to get rid of as a result, no matter the circumstances. This development is relatively new, as before the Second World War, citizenship could be disposed of without acquiring a new one, benefiting plenty of people, from Nietzsche and Einstein, to countless others[22] for whom statelessness – sometimes only intermittent, but still – was a choice and a reflection of their deeply-held convictions and personal preferences. The international world-wide fight against statelessness thus oppresses the holders of second-rate citizenships deeply, undermining their position even further than the national legal systems do. In doing so, it amplifies the role of citizenship, globally, as an obligatory cast assignment against the interests of the majority of individuals and in direct contradiction with the idea that citizenship should be connected with rights, as a large share of citizenship's is not. The only consequence of holding them is to be turned into a deportable 'migrant' and render human rights claims less persuasive, if not dismissible.

The majority of the academic literature has seemingly taken upon itself to justify the *status quo*, if not actively to engage in co-creating the rightless victims of citizenship. As a result, it has laboured under an overwhelmingly Western – i.e. super-citizens' –

[21] Katja Swider, 'The Quality of Statelessness' in Dimitry Kochenov and Justin Lindeboom (eds), *Kälin and Kochenov's Quality of Nationality Index* (Hart Publishing 2020).

[22] Abraham Pais, *Subtle Is the Lord: The Life and Science of Albert Einstein* (Oxford University Press 1982) 41, 45; Sue Prideaux, *I am Dynamite! A Life of Friedrich Nietzsche* (Faber & Faber 2018) 46.

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perspective,[23] which is also, to agree with Linda Bosniak,[24] purely nationalist in essence, even if presented as seemingly neutral or even critical.[25] Given that, once again, the core *loci* of exclusion are the borders to the spaces in the world to which the victims of citizenship are assigned – as Branko Milanović convincingly teaches us[26] – addressing the plight of those who are already 'in' is not enough to prevent citizenship from shrinking the horizon of opportunities of its victims. Elimination of a large chunk of the resident victims of citizenship does not affect the normative inconsistencies at the status's core: a status of rights and liberty writ on a constitutional parchment, citizenship has emerged as a blood-based global tool for the distribution of inequalities and exclusion.

3. Citizenship is antithetical to the very idea of human rights

Citizenship sometimes comes with rights, one of which is for dominant: the right to enter the country of one's nationality and stay there. These rights include, but are not limited in the majority of jurisdictions to, the right to remain and work in the territory under the jurisdiction of the authority in question, the right not to be deported,[27] political rights (in the minority of jurisdictions in the world where there is a

[23] Cf. Kamal Sadiq, 'Postcolonial Citizenship' in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad and Maarten Vink (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017) 178.

[24] Linda Bosniak, *The Citizen and the Alien* (Princeton University Press 2006) 5–9; and further James Tully (ed), *On Global Citizenship: James Tully in Dialogue* (Bloomsbury 2014). See also crucially Christian Joppke's work, virtually all of which could stand as an illustration of this point.

[25] To promote a peculiar Western perspective as the only acceptable take on personhood in law, while ignoring its negative effects on innumerable populations worldwide has been one of the citizenship's signature features as a colonial project: James Tully (ed), *On Global Citizenship: James Tully in Dialogue* (Bloomsbury 2014); Willem Schinkel, 'Against "Immigrant Integration": for an End to Neocolonial Knowledge Production' (2018) 6(1) *Comparative Migration Studies* 1; Manuela Boatcă, *Global Inequalities beyond Occidentalism* (Ashgate 2015).

[26] Branko Milanović, *Global Inequality* (Harvard University Press 2016).

[27] Bridget Anderson, Matthew J Gibney and Emanuela Paoletti, 'Citizenship, Deportation and the Boundaries of Belonging' (2011) 15 *Citizenship Studies* 547.

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democracy[28]), and the entitlement to non-discrimination among citizens. One should not be mislead by such usual lists. In a world that is territorial, pretty much *all* rights depend on the authorities in charge of the place, where one happens to be. Against this background the absence of a human right to enter the *loci* where such rights are protected, meaning where they exist in practice amount to the denial of human rights. Given that citizenship is the most important tool of localizing the world population in space, making human rights inaccessible to the majority of the population of the world is citizenship's key feature as a concept. Citizenship is the enemy of the very idea of human rights *par exellence*.

Belonging, a legal fiction established by the sovereign (unrelated to your subjective feelings) is often cited among the elements of citizenship assumed to engender some justifying force – reinforce the concept of citizenship. In essence, it is entirely unnecessary, however, and on closer scrutiny, the recognition of belonging is a process strikingly similar to the one regulating the assignment of the status in the first place, however objective the sovereign pretends such belonging to be. No matter how much you think you belong, a change in the law can always make you an outcast and a foreigner, as so many experienced in Germany in 1935,[29] in Latvia and

Estonia in 1991,[30] in post-Yugoslav Slovenia[31] and, most recently, in the UK following Brexit:[32] demonstrating the exclusionary core of citizenship in action – shunting aside all the popular rhetoric of 'I am proud and I belong'. Those who are

[28] The Economist, 'The Economist Intelligence Unit's Democracy Index' (updated annually).

[29] Kristin Rundle, 'The Impossibility of an Exterminatory Legality: Law and the Holocaust' (2009) 59 *University of Toronto Law Journal* 65, 69–76.

[30] Richard C Visek, 'Creating Ethnic Electorate through Legal Restorationism: Citizenship Rights in Estonia' (1997) 38 *Harvard International Law Journal* 315.

[31] Jelka Zorn, 'Non-citizens in Slovenia: Erasure from the Register of Permanent Residents' in Caroline Sawyer and Brad K Blitz (eds), *Statelessness in the European Union: Displaced, Undocumented, Unwanted* (Cambridge University Press 2011) 195.

[32] Dimitry Kochenov, 'EU Citizenship and withdrawals from the Union: How Inevitable Is the Radical Downgrading of Rights?' in Carlos Closa (ed), *Troubled Membership: Dealing with Secession from a Member State and Withdrawal from the Union* (Cambridge University Press 2017); Martijn van den Brink and Dimitry Kochenov, 'Against Associate European Citizenship' (2019) 57 *Journal of Common Market Studies* 1366.

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proclaimed 'not to belong' are excluded from the territory controlled by the authority issuing citizenship regardless of what they themselves think: they cannot live and work there, unless a specific authorisation is granted. Near-total immunity to individual self-determination is what underpins citizenship's abstract totalitarian nature and helps it in its principled war against equality and human rights.

The absence of the non-citizens' automatic right to enter aside,[33] the interpenetration of citizenship rights and human rights has led to the relative – and necessarily welcome – trivialisation of the status of citizenship and growing attempts to theorise a more faithful correspondence between the actual society under the authority in question and the citizenry recognised under the same authority.[34] Once the rigidity of the citizens–non-citizens divide is questioned in terms of the corresponding rights and entitlements, abuses of power relying on this divide as their chief legal tool and only justification are made difficult. Of course, history knows plentiful examples of such unfortunate deployment of the status of citizenship. Think, for instance, of the Nurnberg laws inspired by the US racism of the day,[35] which excluded Germany's Jewry from the full status of citizenship as a way to justify their formal exclusion from its key rights.[36] South-African *apartheid* 'homelands', designed to distribute citizenships of non-recognised all-black puppet states, like Bophuthatswana and Transkei,[37] to grant minorities 'full rights abroad'[38] are equally good examples. More recently, the Latvian and Estonian policies of humiliating Russian, Ukrainian and Jewish

[33] But see: Joseph Carens, 'Aliens and Citizens: The Case for Open Borders' (1987) 49 *Review of Politics* 251.

[34] Christian Joppke, 'Citizenship by Investment as Instrumental Citizenship', in Dimitry Kochenov and Kristin Surak (eds), *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging* (Cambridge University Press, 2022).

[35] James Q Whitman, *Hitler's American Model* (Princeton University Press 2017).

[36] Ingo Müller, *Hitler's Justice* (Harvard University Press 1991).

[37] At some point the hive mind of Wikipedia un-ironically included Nelson Mandela among the 'notable citizens' of this 'state', which is not legalistically incorrect, *per se*.

[38] See e.g. South African, Bantu Homelands Citizenship Act, 1970, which instituted the denaturalisation of the black majority during *apartheid*. Cf. John Dugard, 'South Africa's Independent Homelands: An Exercise in Denationalization' (1980) 10 *Denver Journal of International Law and Policy* 11.

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minorities, based precisely on the same strategy of denying citizenship to supply a justification for the exclusion of people from key rights did not work as well: under pressure from the international institutions, the majority of former 'citizenship' rights were extended to the minorities as 'human' rights.[39] These examples were efforts *de facto* to turn 'non-citizenship' statuses into racist second-rate citizenships reserved for minority members only.[40] That they are challenged by human rights-based reasoning is to be welcomed. In other words, 'they are not citizens' is no longer an automatically accepted pretext to abuse settled resident populations – it works everywhere, but at least it does not come unquestioned.

The proclamation of equal rights at the inception of citizenship was precisely the ideological tool that facilitated the *de facto* socioeconomic exclusion and legitimation of the authority in charge of the preservation of the *status quo*, solidifying inequalities and paralysing social change as TH Marshall explained.[41] The same applied to political, sexual and racial exclusion, which were core aims of citizenship at its inception, ensuring that it worked as an efficient governing tool without producing any significant risks of challenging the elites.[42] Classical modern citizenship thus did not even remotely overlap with the actual reality on the ground, as James Tully has wonderfully described:[43] it endowed with rights as opposed to empty proclamations only a radical minority in any society – usually white males able to pass the property census. Women counted for so little that their very legal being as citizens could be retained only as long as they did not marry a foreigner or a stateless person.[44] Passing on citizenship to their own kids was out of reach for them: granting citizenship was a

[39] Pritt Järve, 'Sovetskoje nasledije i sovremennaja ètnopolitika stran Baltii' in Vadim Poleshchuk and Vladimir Stepanov (eds), *Ètnopolitika stran Baltii* (Nauka 2013).

[40] Dimitry Kochenov and Aleksejs Dimitrovs, 'EU Citizenship for Latvian Non-Citizens: A Concrete Proposal' (2016) 38 *Houston Journal of International Law* 1.

[41] Thomas H Marshall, 'Citizenship and Social Class' in Thomas H Marshall, *Citizenship and Social Class* (Pluto Press 1992).

[42] Dimitry Kochenov, *Citizenship* (MIT Press 2019).

[43] James Tully (ed), *On Global Citizenship: James Tully in Dialogue* (Bloomsbury 2014).

[44] Cf. e.g. Patrick Weil, *The Sovereign Citizen* (University of Pennsylvania Press 2012).

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male-only affair.[45] The gradual extension of human rights brought the reality on the ground closer to the initial rhetorical ideal, also empowering further contestations of exclusions within the ambit of citizenship: consider for instance the sexual citizenship story,[46] queer citizenship[47] or the ongoing animal citizenship debate.[48] This resulted, ultimately, in the gradual disappearance of the rigid divide between citizenship rights and human rights for those in the territory of the authority. The same did not apply to those who were kicked out or remained outside, since entry to a territory – the most sacred right of citizenship – alongside its double – the right not to be deported from the territory – remained the direct offspring of citizenship status par excellence, largely unaffected by human rights thinking. Indeed, there is no human right to enter any state of your choosing, we are told[49] – even if the arguments to support the contrary position are attractive and sound, as Joseph Carens has demonstrated.[50] Moreover, the dismissal of such sound arguments in international law is very new, as Sir Richard Plender's research shows.[51]The residue of pre-human rights thinking, predating the tectonic shifts in the understanding and practice of citizenship, still

[45] Jamie R Abrams, 'Examining Entrenched Masculinities in the Republican Government Tradition' (2011) 114 *Virginia Law Review* 165.

[46] Ŭladzislau Belavusaŭ, 'EU Sexual Citizenship: Sex Beyond the Internal Market' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017) (and the literature cited therein).

[47] Dimitry Kochenov, 'On Options of Citizens and Moral Choices of States: Gays and European Federalism' (2009) 33 *Fordham International Law Journal* 156; Uladzisłaŭ Belavusaŭ and Dimitry Kochenov, 'Federalizing Legal Opportunities for LGBT Movements in the Growing EU' in Koen Slootmaeckers, Heleen Tourquet and Peter Vermeersch (eds), *The EU Enlargement and Gay Politics: The Impact of Eastern Enlargement on Rights, Activism and Prejudice* (Palgrave Macmillan 2016) 69.

[48] Sue Donaldson and Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford University Press 2011); William A Edmundson, 'Do Animals Need Citizenship?' (2015) 13 *International Journal of Constitutional Law* 749.

[49] Which fact renders the proclaimed right to leave entirely ephemeral too: Dimitry Kochenov, 'The Right to Leave Any Country' (2012) 28 *Connecticut Journal of International Law* 43.

[50] See, for a magisterial treatment: Joseph Carens, *The Ethics of Immigration* (Oxford University Press 2013).

[51] Sir Richard Plender's seminal work: *International Migration Law* (Leiden: A.W. Sijthoff, 1972 and Kluwer, 1988 (2nd ed.)).

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persist and could explain, *inter alia*, the backlash apparent in the regulation of access to the status of citizenship.

Naturalisations are increasingly made dependent on elaborate *rites de passage* in the form of 'culture' and 'values' tests, which settled foreigners are required to pass to acquire the formal status of citizenship, however absurd the 'neutral' premise of this approach might be, as Willem Schinkel and Adrian Favell explain.[52] This 'integration' rationale is now deployed in novel contexts, sometimes to increase the othering of citizens with immigrant backgrounds and of the poor, as well as to undermine the functioning of European citizenship as a status based on non-discrimination on the basis of nationality, as Sarah Ganty has shown.[53]

The assumption behind such tests is as problematic as it is commonplace: cultures located beyond our borders are a barbarian non-equivalent of our own.[54] Implementing this assumption in practice is even more difficult than embracing it rationally, as the proclaimed core legal value of any liberal democracy today is tolerance.[55] Tolerance is what all the 'specificity testing' is necessarily bound to come down to.[56] In this sense testing the specificity of the highly unique Danish culture and of an even more unique Swiss one amounts, in fact, to testing one and the same thing.

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[52] Willem Schinkel, 'Against "Immigrant Integration": for an End to Neocolonial Knowledge Production' (2018) 6(1) *Comparative Migration Studies* 1; Willem Schinkel, 'The imagination of "society" in measurements of immigrant integration' (2013) 36(7) *Ethnic and Racial Studies*; Adrian Favell, 'Integration: Twelve Propositions after Schinkel' (2019) 7 *Comparative Migration Studies* (Art No 12); See also Dimitry Kochenov, '*Mevrouw de Jong gaat eten*: EU Citizenship and the Culture of Prejudice' [2011] EUI Working Paper RSCAS 2011/06.

[53] Sarah Ganty, *L'intégration des citoyens européens et des ressortissants de pays tiers en droit de l'UE* (Larcier 2021).

[54] However nasty, this assumption seems to be 'natural': Melvin J Lerner, 'The Justice Motive: Some Hypotheses As to Its Origins and Forms' (1977) 45 *Journal of Personality* 1, 29. For the whole picture, see, Melvin J Lerner and Susan Clayton, *Justice and Self-Interest* (Cambridge University Press 2011).

[55] Dimitry Kochenov, *Citizenship* (MIT Press 2019), 196. Contrast the mantras of tolerance with the virtually official Islamophobia practiced in Europe today: Christian Joppke, *Citizenship and Immigration* (Cambridge University Press 2010).

[56] This presents traditional accounts of citizenship in a radically new light: Linda Bosniak, 'Citizenship Denationalized' (2000) 7 *Indiana Journal of Global Legal Studies* 447. See also Mikko Kuisma, 'Rights or Privileges? The Challenge of Globalization to the Values of Citizenship' (2008) 12 *Citizenship Studies* 613; Kim Rubinstein and Daniel Adler, 'International Citizenship: The Future of Nationality in a

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Officially, however, citizenship stands to promote the idea of a 'good citizen', someone who fully respects the local law and is loyal to whatever state or political system he or she was born into: a much glorified meekness ideal, aiming to make

the society most governable and frowning both at the indifferent and those who want to overturn the regime or introduce deep changes into the core aspects of the legal system/ society in question.[57] Being a 'good citizen', i.e. approving of all the official mantras underpinning the public authority claiming that person at any given moment, is thus the core duty of citizenship today – just as it was a hundred years ago.[58] The concept of a 'good citizen' is agnostic to human rights.

4. Bringing in the 'person' does not redeem citizenship

In the light of the considerations above, it is possible, very broadly, to outline the core functions of citizenship as a legal-political concept which the normative core of the notion seeks to achieve. As is clear from the outset these do not overlap in any way with the objectives, which the idea of human rights aims to reach. In this sense a 'person' – the creature of individual safeguards of human rights – is in direct opposition to the idea of a 'citizen'. This is so, since the core functions of citizenship amount, chiefly, to three elements:

1. Providing legalistic reasons for exclusion viewed as desirable and expedient by the public authority at a given moment;
2. Ensuring complacency, societal uniformity and popular legitimation of the powers that be – regardless whether they are democratic and no matter who is in power;

Globalised World' (2000) 7 Indiana Journal of Global Legal Studies 519; Ronnie D Lipschutz, 'Members Only? Citizenship and Civic Virtue in a Time of Globalization' (1999) 36 *International Politics* 203.

[57] Dimitry Kochenov, *Citizenship* (MIT Press 2019), 159–196.

[58] ibid.

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3. Inter-generational perpetuation of the *status quo* between the affluent and the poor societies globally, by locking the victims of citizenship out of the spaces of opportunity.

All the three are obviously and clearly antithetical to human rights.

Quite naturally, the successful operation of citizenship today means one thing: a thoroughgoing exclusion of the racialized victims of citizenship from the world. Should they wish to escape such exclusion, then naturalisation into a super-citizen – the acquisition of an elite status in one of the richest democracies in the world – is

an absolute must. Again, just as in antiquity, when a slave could buy freedom, a victim of citizenship must invest time, talent and money to acquire a 'compensatory citizenship', as Yossi Harpaz explains in detail in his scholarship.[59] This is where selling citizenship to its victims comes to the fore.

The most fundamental normative evolution which has been unfolding in the world of citizenship over the last decades is a direct consequence of the key developments briefly described above: the extension of meaningful rights to those not in possession of the formal status of citizenship. That is, the 'citizen' is being gradually replaced by a '*person*' in the global constitutional parlance and theorising, as Linda Bosniak has also underlined.[60] This is no small feat: changing a single word signals a radical rethinking of the basics of modern constitutional systems marked by the intense penetration of the social facts in the legal realities, overturning established constitutional underpinnings. This fundamental transformation draws entirely on the unsustainability – in the context of the human rights-aware democratic constitutionalism – of the traditional core normative assumptions informing citizenship, which are unsurprisingly being rethought. Analysed together, the above considerations have thus very far-reaching effects on citizenship's role in the context of legitimising the governing authority: that is, its key tasks and its key normative predestination. Its role in the narrative of self-governance and democracy is thus not

[59] Yossi Harpaz, 'Citizenship and Residence Rights as Vehicles of Global Inequality', Dimitry Kochenov and Kristin Surak (eds), *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging* (Cambridge University Press, 2022).

[60] Linda Bosniak, 'Persons and Citizens in Constitutional Thought' (2010) 8 *International Journal of Constitutional Law* 9.

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the same as it had been previously. What remains unchanged, however, is its ability to produce the victims of citizenship and ignore their plight.

The core issue here is very basic and has to do with the traditional approaches to the core aspects of legitimacy in a political community: the justification of violence and of the obligation to submit to violence inflicted by the authority in charge, as a necessary element of being 'free,' which harks back to Jean Bodin[61] and is rooted in the Christian soteriology of the day.[62] If only citizens and no one else are counted as the constituents of the community from whom legitimacy officially emanates – call it the *demos*, the nation or the political community – then the picture of what the state and necessarily the law is about is quite different to a situation where all humans under the same authority are counted, non-citizens included. Indeed, why not establish humans as the basis of the *demos*, the nation or the political community? While legal and social truths are bound to overlap for the law to be effective[63] – and knowing the bio-power of the contemporary state in shaping life itself to the whims of the fashion of the day[64] – making citizens is still much easier than acknowledging humans.

Making a citizen is an ideology-inspired legal exercise, implying a choice among the available bodies capable of being useful, or not, to the achievement of the authority's goals at any given time, whatever those might be. Those bodies which are perceived less useful are simply excluded from rights bearing status, inexistent in the eyes of the law. Exclusions can be on any basis. They can be on geographic place of origin, race, religion, education, language, time – you name it and a legal-historical example will be found. Citizenship's capacity to exclude is its core function, which means that in the 'golden days' of citizenship – the mythical days of the concept's unquestioned

[61] Cf. Julian H Franklin, *Jean Bodin and the Sixteenth-Century Revolution in the Methodology of Law and History* (Columbia University Press 1963), discussed in detail in Keechang Kim, *Aliens in Mediaeval Law: The Origins of Modern Citizenship* (Cambridge University Press 2000) 193.

[62] Keechang Kim, *Aliens in Mediaeval Law: The Origins of Modern Citizenship* (Cambridge University Press 2000) 193.

[63] Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *Hastings Law Journal* 805, 814.

[64] Mark L Flear, 'Developing Bio-Citizens through Migration for Healthcare Services' (2007) 14 *Maastricht Journal of European & Comparative Law* 239.

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authority – exclusion at the level of the *legal status* could only rarely be questioned, if at all: equality is *among* citizens, remember? As a consequence, the authority that works with 'citizens' enjoys an almost universal *carte blanche*: you create ethnic electorates,[65] you assign the status of those who are not white enough to suit your preference to the 'ancestral homelands' referred to above,[66] and you declare those you send away as ideologically[67] or racially deficient and therefore, non-citizens.[68] The long history of fragrant discrimination is rich and diverse. Under this paradigm, the core question before looking at rights, entitlements, duties and equality claims is *who* is a citizen in this society? Those who are not citizens are entitled to nothing and this is legally and politically right, even if frequently also morally unjust.

Such reasoning cannot hold with persons: recognising the person as the figure of importance for the purposes of constitutional law, as a component part of the *demos*, however humble this relative innovation can seem, actually revolutionises the legal understanding of our society, because it exposes for criticism and legal contestation the status assignment decisions which cannot, in the majority of cases, be contested under the citizenship paradigm. Moreover, it also flips the sequence of status-rights interactions. The core question here is *why* this person is not entitled to a particular right. A simple 'she is not a citizen' response will no longer suffice under the personhood paradigm: a substantive analysis will clearly be required. It goes without saying that the distinction between the 'status' and 'rights' taken for granted by lawyers is artificial and is not justifiable on all occasions. This development is in line with a

[65] Richard C Visek, 'Creating Ethnic Electorate through Legal Restorationism: Citizenship Rights in Estonia' (1997) 38 *Harvard International Law Journal* 315.

[66] John Dugard, 'South Africa's Independent Homelands: An Exercise in Denationalization' (1980) 10 *Denver Journal of International Law and Policy* 11.

[67] Lesley Chamberlain, *The Philosophy Steamer: Lenin and the Exile of the Intelligentsia* (Atlantic Books 2006).

[68] Kristen Rundle, 'The Impossibility of an Exterminatory Legality: Law and the Holocaust' (2009) 59 *University of Toronto Law Journal* 65.

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broader shift in constitutionalism, marking a departure from what Cohen-Eliya and Porat branded 'the culture of authority' in favour of the 'culture of justification'.[69]

Once humanity and personhood, not the formal legal status of citizenship, emerges as the key factor behind rights assignment, the relevance of the formal status of citizenship as such is fundamentally reinvented, if not outright diminished, as can already be seen in the Article 8 ECHR jurisprudence of the European Court of Human Rights. Those who are French *in fact* on the basis of how their lives are lived and their social world is constructed – even if not recognised *de jure* as French, and even those bearing foreign citizenships – will remain in France protected by the ECHR.[70] Under this logic, a place in the nation is not 'deserved' through a random act of birth in particular circumstances or by passing humiliating tests of knowledge of the non-existent cultural uniqueness of their place of residence, but by *being part of a society* – Bauböck's stakes. The threat of the loss of rights, then, assessed in the context of a concrete life project, becomes the key factor of importance for the courts to consider, not the legal status of citizenship. Moreover, the harsh consequences of the loss of rights can even prevent the state from denaturalising a person:[71] a blending of legal and social reality unheard of before the twenty-first century.[72]

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[69] Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press 2013).

[70] See also the discussion in note 9 *supra* of ECtHR *Beldjoudi v France* No. 12083/86 (ECtHR Chamber, 26 March 1993); *Jeunesse v Netherlands* No. 12738/10 (ECtHR Grand Chamber, 3 October 2016).

[71] The European Court of Justice case of *Rottmann* is the best example, probably: Case C-135/08 *Janko Rottman v Freistaat Bayern* ECLI:EU:C:2010:104. The absolute majority of commentators have ignored the fundamental point granting this case overwhelming importance: it is a decision about the status which is based on the rights this status is associated with, an impossibility in the classical citizenship world, as the border line between the legal and social reality, which is the fundamental starting point of pretty much all citizenship theorising, simply disappeared in the court's reasoning, illustrating the shift we are discussing very well. Cf. Dimitry Kochenov, 'The Right to Have *What* Rights? EU Citizenship in Need of Clarification' (2013) 19 *European Law Journal* 502.

[72] Betty de Hart, 'Regulating Mixed Marriages through Acquisition and Loss of Citizenship' (2015) 662 The Annals of the American Academy of Political and Social Science 170; Betty de Hart, 'The Morality of Maria Toet: Gender, Citizenship and the Construction of the Nation-State' (2006) 32 Journal of Ethnic and Migration Studies 49.

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These two logics are in stark contradiction, but help the victims of citizenship equally little, as we shall see. Their cleavage separates reasoning which starts from legal facts, from that which starts with social facts. The result is the legal recognition of social facts in a growing array of contexts which pushes personhood as such, not necessarily connected to the formal status of citizenship, to prominence, with far-reaching implications for the relevance of the classical normative picture of citizenship which we know from political theory textbooks.

How far can personhood help address the plight of the victims of citizenship who are not 'here' and who will never be permitted to build any 'stakes' in 'our society' – the majority of those punished by citizenship? The critiques of stakeholder approaches to citizenship show that personhood, which is directly connected to the stakeholder approaches, is no panacea. In fact, if it is accepted as a starting point for the distribution of rights in a jurisdiction, it permits the rights and dignity of all the victims of citizenship whom the status of citizenship effectively keeps at bay to be swept away. Ultimately it appears that whether personhood or citizenship are taken as a starting point makes little difference, from the perspective of those victims of citizenship who are *outside* of the jurisdiction in question. Personhood thus potentially emerges as a counterpart of citizenship –traditionally the key legal tool for sanctioning the erection of a border dividing 'us' from 'them' based on entirely contingent considerations of political convenience,[73] while also creating legally and socially meaningful racial, cultural and linguistic groups – what Bourdieu characterised as the 'practical activity of "worldmaking"'.[74]

5. Citizenship's continued prestige in the world of human rights

Citizenship is at a crossroads now: the sub-standard dominant narrative that the global equality of human beings can be assured within states is in reality eroding. Different

[73] On the invention of the foreigner as a legally-meaningful concept see, Keechang Kim, *Aliens in Mediaeval Law: The Origins of Modern Citizenship* (Cambridge University Press 2000).

[74] Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *Hastings Law Journal* 805, 838.

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citizenships are not equal, and the allocation of citizenship rights worldwide is neither logical nor clear.

At the macro level, citizenship enables the perpetuation of rigid pre-modern caste structures. The son of an American is an American, and the son of a brahman is a brahman. We do not ask ourselves whether this is just. The idea of citizenship is under tremendous pressure, which could in theory endanger the concept's very survival. Contemporary law and politics are built on the ethical base of equal human worth and the idea of deserving and achievement: The world has officially moved far away from the caste structures of the past. Children in every school are taught to realize their potential by studying hard and taking control of their future into their own hands. The core idea of fairness informing the contemporary understanding of law and politics is inspired by Enlightenment reason and is centered on the belief that the individual is in charge and the authority is able and willing to back its decisions with recourse to valid reasons and clear arguments.

Tragically for citizenship, any appeal to this concept is nothing but shorthand for the denial of all such foundational positions. Worse still, adapting its essence so that contemporary fairness can be incorporated into the story of citizenship is absolutely impossible. Citizenship *is precisely about* mass caste assignments in a context where individual agency and all the personal characteristics of the bearers are dismissed by definition. It is an abstract totalitarian status struggling to survive in a world where all it has ever cherished and promoted is untenable in principle even if it survives in practice, once it is taken beyond the context of a particular group endowed with the same status. As the realization of this simple fact grows, the prestige of citizenship is bound to diminish very steeply: in the battle between citizenship and human rights the latter is more likely to harness sufficient appeal to question significantly the continued prestige of the former.

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POLITICAL PARTICIPATION AND NEW TECHNOLOGIES

Filippo Tronconi*

Abstract

Digital technologies have deeply affected the way people think and act politically, as it has happened in many other aspects of individual and social life. This has led many scholars to update and reconsider some consolidated visions on political participation, starting from the definition of political participation itself. In this article I review the main findings of research on e-participation with respect to different types of activism, from individual acts to activities taking place in collective settings, like those of social movements and political parties. Finally, I reflect on the consequences of new digitally-driven forms of participation for the health of democracy, considering three specific aspects: participation inequality, the effectiveness (or lack thereof) of digital activism, polarization. As we will see, each of these fields shows a lively ongoing debate among observers.

Indice Contributo

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Keywords

Political participation – Activism – Citizens journalism – Social movements – Political parties - Democracy

1. Introduction

Like many aspects of individual and social life, political participation has been profoundly reshaped by the emergence of digital technologies. Acts like supporting a candidate or a party in an election, funding their campaign, rallying for a political or social cause, signing a petition, or simply keeping up with the news on the current political debate have now a different meaning compared to thirty years ago. They involve different skills and resources, provide different and increased opportunities for the mobilisation of political actors, imply a different division of labour in political organisations. In the early stages of the internet revolution many observed these changes with optimism, highlighting the possibilities "for 'liberation technologies' to expand the horizons of freedom" [1]. In recent years, however, it is common to read dark and gloomy forecasts on the future of democracy, supposedly on a "road to digital unfreedom" [2]. In this article I will review the main scholarly efforts to understand to what extent and how new technologies have transformed the way citizens engage with politics, and whether they have strengthened or weakened democracy. The article has three sections. The first one revises the concept of political participation (or political activism) in the "old world". The second section explores

[1] Larry Diamond and Marc F Plattner, *Liberation Technology: Social Media and the Struggle for Democracy* (JHU Press 2012).

[2] Ronald J Deibert, 'The Road to Digital Unfreedom: Three Painful Truths About Social Media' (2019) 30 Journal of Democracy 25.

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the impact of new technologies on a variety of forms of political participation, and especially for individual actions, for social movements and for political parties. The third section considers the consequences of new digitally-driven forms of participation for the health of democracy. As we will see, many controversies are still open and many questions remain unsolved on this point.

2.What is political participation

According to a widespread definition, political participation, or political activism, refers to the wide range of voluntary activities aimed to influence political decisions. This may happen directly, by affecting the process of formation and implementation of public policies, or indirectly, by affecting the selection of the people that take political decisions in their representative or governmental roles.

The first studies of political participation were uniquely concerned with activities connected to the selection of policymakers. Milbrath [3] considered political participation as a unidimensional pyramid of involvement, going from "easy" activities (e.g. voting, taking part to an electoral rally) carried out by many citizens, to more demanding activities (e.g. being elected to some representational role) carried out by a tiny minority of people, and particularly by professional politicians. The following generation of studies [4] expanded the conceptualization of political participation. A decade of intense protest movements spreading through all major Western democracies made it impossible to ignore that citizens' involvement in politics could take forms different from the act of voting and other election-related activities [5]. Thus, the repertoire of political participation was expanded to include contentious forms of action, taking place outside, or even against, political institutions and a distinction was introduced between *conventional* and *unconventional* participation.

[3] *Political Participation: How and Why Do People Get Involved in Politics?* (Rand McNally 1965).

[4] Samuel Henry Barnes and Max Kaase, *Political Action: Mass Participation in Five Western Democracies* (Sage Publications 1979); Sidney Verba, Norman H Nie and Jae-on Kim, *Participation and Political Equality: A Seven-Nation Comparison* (University of Chicago Press 1987).

[5] Charles Tilly and Sidney G Tarrow, *Contentious Politics* (Second revised edition, Oxford University Press 2015).

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Since the seventies the opportunities for citizens' involvement in politics have constantly increased, thanks to the increasing information and resources available to them (education in particular). The diffusion of digital forms of participation represents a further leap in that direction. Academic definitions have since struggled to keep pace with such expanding repertoire of action. In first place it is difficult to set clear boundaries of *political* participation. Sharing an article on social media, displaying a sticker advocating for some environmental campaign on the back of the car, boycotting a company for ethical reasons, giving money to an NGO as an appreciation for its praiseworthy social activity are all low-intensity forms of engagement. However, it is disputable, in first place, that they have an impact on the political system. Activities such as preferring a certain brand of coffee over another, fund-raising for a local school, volunteering for an NGO (that have been labelled as "consumer politics" or "lifestyle politics") have traditionally been associated with the economic or social spheres; their impact on the political agenda is at most indirect. Second, they pose a problem of conceptual stretching. Following this ever-expanding definition of political participation, almost every conceivable nonprivate activity can be thought to be politically relevant. However, if everything is political participation, the specific meaning of political participation is lost.

A useful map to keep track of the evolving forms of political participation without losing sight of the different impact of each type of activities is presented by Kitschelt and Rehm [6]. They consider three *contexts or arenas* of participation; and for each of them different degrees of *intensity*. The three arenas are the community (ranging from the local community to public opinion at large); the policy makers in the institutions (members of parliament and members of the government, but also representatives and rulers at local level); the selection of representatives. For each context, different levels of personal involvement are possible: in the first context, for instance, participation may involve taking part to a rally or donating to some NGOs, mobilizing friends and neighbours to participate to a certain campaign, creating and personally running an association and thus become a public leader at local or national or even international level. As it can be seen, each level of personal engagement requires increasing resources (time, education, knowledge). Similarly, in the second arena,

[6] 'Political Participation' in Daniele Caramani (ed), *Comparative politics* (Fifth Edition, Oxford University Press 2020).

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one's effort can be limited to signing a petition to an elected representative or become a full-time professional activity, as it can be that of a leader of a national trade union. Finally, in the third context activities can range from voting for a candidate or party to being elected to high national offices. When participation takes place as a coordinated effort, instead of being a merely personal fact, it usually takes the form of social movements in the first context, of interest groups in the second and of political party in the third. These are in fact the most diffused agencies of political activism in contemporary societies.

Kitschelt and Rehm [7] also point out that different levels of *riskiness* are associated with different levels and types of activism. Not only political participation can take the form of legal or illegal actions (with some grey areas between the two), but its riskiness heavily depends on the type of regime in which it occurs. Taking part to a rally organized by an opposition party is a safe activity in a liberal democracy, but can lead to costly personal consequences in an authoritarian country.

The answer we give to the question "What is political participation?" is not just a matter of conceptual clarity. From a normative standpoint, it involves different ideas of democracy and different evaluations of the state of democracy in a country [8]. A Schumpeterian vision of democracy, mostly focused on the electoral process, leads to consider only election-related participation as relevant. Those who embrace this perspective are likely to have a pessimistic vision of the present state of democracy: many citizens are more and more sceptic of party politics and feel increasingly distant from representative political institutions [9]. Others, following the footsteps of Tocqueville, advocate a "participatory" vision of democracy, where citizens are

[7] ibid 319–321.

[8] Jan W van Deth, 'What Is Political Participation?', *Oxford Research Encyclopedias* (2016) 1; Pippa Norris, 'Political Activism: New Challenges, New Opportunities', *The Oxford Handbook of Comparative Politics* (2009) <https://www-oxfordhandbooks-com.ezproxy.unibo.it/view/10.1093/oxfordhb/9780199566020.001.0001/oxfordhb-9780199566020-e-26> accessed 7 December 2021.

[9] Ingrid Van Biezen, Peter Mair and Thomas Poguntke, 'Going, Going, . . . Gone? The Decline of Party Membership in Contemporary Europe' (2012) 51 European Journal of Political Research 24; Peter Mair, *Ruling the Void: The Hollowing of Western Democracy* (Verso Books 2013); Marc Hooghe and Anna Kern, 'The Tipping Point between Stability and Decline: Trends in Voter Turnout, 1950–1980–2012' (2017) 16 European Political Science 535.

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extensively engaged in community level, decentralized political activities, between and beyond election days [10]. This leads to place a strong emphasis on unconventional forms of participation and possibly to conclude that citizens are sceptical of the most *traditional* democratic practices, but have discovered and are routinely engaged in new forms of political participation. Thus, in most countries democracy is today more lively than it has ever been, because politics enters the lives of citizens in ways and in a measure that was unknown to previous generations.

The internet and related applications have deeply affected the way people think and act politically, as it has done in many other aspects of individual and social life. This has led many scholars to update and reconsider some consolidated visions. How has the internet changed the way ordinary citizens take part in politics? Which technologies, devices, platforms, languages have been most successful or innovative? Have they expanded the possibilities of citizens to be active in politics? Have they changed the social profiles of activists, bringing unequal advantages and disadvantages across social groups? And overall, has the quality of democracy improved as a consequence of such changes? To these questions I will turn my attention in the following sections.

3. New technologies and political participation

The issue of new technologies and political participation has considerably grown in recent years, in parallel with the growth of the role of technology (online technology in particular) in every day's life, to the point that it is now conceivable as an autonomous field of research [11]. New (or renewed) forms of participation have emerged, restarting the debate about the definition of participation in the context of online platforms and devices [12]. Once again, much of this debate revolves around the

[10] Benjamin R Barber, *Strong Democracy: Participatory Politics for a New Age* (University of California Press 1984).

[11] Andrew Chadwick and Philip N Howard (eds), *Routledge Handbook of Internet Politics* (Routledge 2009); Shelley Boulianne, 'Twenty Years of Digital Media Effects on Civic and Political Participation' (2020) 47 Communication Research 947.

[12] Christina Ruess and others, 'Online Political Participation: The Evolution of a Concept' [2021] Information, Communication & Society 1; Rachel Gibson and Marta Cantijoch, 'Conceptualizing and

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quantum of activity that is necessary to define a certain behaviour as activism. In its updated version, this old conceptual issue is made more salient by the fact that online technologies expand the possibilities for new forms of low-intensity participation (e.g. signing an online petition, sharing some content on the social media) that some see as a form of *communication* more than a form of participation [13]. Gibson and Cantijoch [14] propose an integrated perspective on offline and online activism, that focus on the degree of personal effort involved in each of nine categories of action: (Active) *Participation*, thereby, is composed of (1) voting, (2) party/campaign activities, (3) protest activities, (4) contacting, (5) communal actions, and (6) consumerism, while so-called *passive engagement* consists of (7) news attention, (8) discussion, and (9) the expressive mode.

I propose here a different (but somehow complementary) perspective, classifying activism on the basis of the effort put in the coordination of individual political activism, ranging from individual acts to activities taking place in the context of highly institutionalised settings, like those of political parties.

3.1. Varieties of digital participation: From individual to collective activism

On the one extreme of this continuum we find forms of political activism that are totally individual, meaning that they do not involve any form of coordination, nor rely on institutionalised rules and procedures. Think for instance of someone writing a letter to a newspaper to raise a problem to the attention of the newsroom and the readers; or someone chaining themselves up to a tree to protest against the cutting of a forest. In the new online context, individual forms of participation are readily

Measuring Participation in the Age of the Internet: Is Online Political Engagement Really Different to Offline?' (2013) 75 The Journal of Politics 701; Marta Cantijoch and Rachel Gibson, 'E-Participation' in Marta Cantijoch and Rachel Gibson, *Oxford Research Encyclopedia of Politics* (Oxford University Press 2019) <http://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-580> accessed 21 December 2021.

[13] Lindsay H Hoffman, 'Participation or Communication? An Explication of Political Activity in the Internet Age' (2012) 9 Journal of Information Technology & Politics 217.

[14] (n 12).

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available and much easier: they require less effort and only a minimum of technical equipment and knowledge. Social networks, for instance, allow direct connections and interactions between elites and ordinary citizens. It is common to see politicians managing social media accounts not only as a top-down form of communication, but also engaging in discussions with their followers [15]. This form of communication is especially relevant for underdog or emerging politicians, who do not have an easy access to mainstream media, or unconventional and extreme messages, such as those often conveyed by populists [16]. It is of course disputable the extent to which the potential for a real interactive communication is exploited, as this requires extensive resources on the side of the politician and in many cases a dedicated staff. In fact, it is rare for social networks to radically transform the top-down nature of elite-citizens communications [17]. More generally, it is questionable that the internet and social networks in particular have increased transparency and accountability of individual politicians and political institutions [18].

Citizens journalism, or participatory journalism, is another phenomenon linked to individual activism. The term has been coined to describe the increased role ordinary citizens play in news collection, organisation and dissemination through blogs and

[15] Raffael Heiss, Desiree Schmuck and Jörg Matthes, 'What Drives Interaction in Political Actors' Facebook Posts? Profile and Content Predictors of User Engagement and Political Actors' Reactions' (2019) 22 Information, Communication & Society 1497.

[16] Nicole Ernst and others, 'Favorable Opportunity Structures for Populist Communication: Comparing Different Types of Politicians and Issues in Social Media, Television and the Press' (2019) 24 The International Journal of Press/Politics 165; Michael Hameleers and others, 'Interacting with the Ordinary People: How Populist Messages and Styles Communicated by Politicians Trigger Users' Behaviour on Social Media in a Comparative Context' (2021) 36 European Journal of Communication 238.

[17] Jennifer Stromer-Galley, 'On-Line Interaction and Why Candidates Avoid It' (2000) 50 Journal of Communication 111; Roman Gerodimos and Jákup Justinussen, 'Obama's 2012 Facebook Campaign: Political Communication in the Age of the Like Button' (2015) 12 Journal of Information Technology & Politics 113.

[18] Andrea Ceron, *Social Media and Political Accountability: Bridging the Gap between Citizens and Politicians* (1st ed. 2017, Palgrave 2017).

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social media [19]. This has contributed to redefine the landscape of (professional) information, while the distinction itself between producers and consumers of news has become blurry [20].

We have until now considered *individual* forms of political participation. In large polities, such as nations-states, such forms have often little impact on decision making processes. It is no surprise, then, that people invest energy in coordinating their *collective* actions to reach social or political goals. Social movements and political parties are the most common vehicles of collective political activism in modern societies. The former employ non conventional forms of action ("street politics") in pursuit of a collective goal, outside or against institutions, while the latter participate in electoral competition with the goal of placing their candidates in the legislative or executive bodies of government. In social movements, the coordination effort is minimal, connections between members are often informal and fluid, the duration of the mobilization is sometimes ephemeral or in any case unpredictable. On the other side, parties are sometimes very complex and long-lasting organisations, with internal rules and hierarchies, a well defined division of labour, many tasks delegated to professionals, systematic connections with other political actors and institutions. These differences in goals and organisational formats explain why new technologies have been employed differently, and with varying impact.

3.2. Networked social movements

For social movements the internet and particularly social media represent in first place a strong organisational tool. Solving problems of coordination among loosely connected members has always been a challenging task for collective actors like social movements, lacking a solid centralised organisation. Internet-mediated

[19] Shayne Bowman and Chris Willis, 'We Media: How Audiences Are Shaping the Future of News and Information' (The Media Center at The American Press Institute 2003) <https://www.hypergene.net/wemedia/download/we_media.pdf>.

[20] James Stanyer, 'Web 2.0 and the Transformation of News and Journalism' in Andrew Chadwick and Philip N Howard (eds), *Routledge Handbook of Internet Politics* (Routledge 2009); Stuart Allan and Arne Hintz, 'Citizen Journalism and Participation' in Karin Wahl-Jorgensen and Thomas Hanitzsch (eds), *The Handbook of Journalism Studies* (2nd edn, Routledge 2020).

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communication makes this task easier. Its polycentric and horizontal nature is well suited to mimic the non-hierarchical nature of these communities. Beyond its instrumental use in the organisation and logistics of demonstrations, it is useful to reinforce the identity and feeling of belonging of the participants [21]. Not only social networks facilitate organisational communications within the movement, but also help reaching the general public, another challenging task for actors often promoting issues that are excluded from the agenda of mainstream media, if not explicitly censored. It has often been claimed, for instance, that online communication tools have been critical in starting revolutionary movements like the 2011 Arab spring in Tunisia and Egypt [22]; others have underlined the relevance of social networks in the organisation of anti-austerity movements following the Great Recession of European economies [23].

The previous examples, however, should not overshadow the "dark side" of social media use to spread information and foster political participation. As other communication and networking tools of the previous eras, online networks are instruments that can have different uses, more or less inclusive, more or less committed to nourish democratic institutions and practices. The internet and social

[21] Donatella della Porta and Lorenzo Mosca, 'Global-Net for Global Movements? A Network of Networks for a Movement of Movements' (2005) 25 Journal of Public Policy 165; Manuel Castells, *Networks of Outrage and Hope: Social Movements in the Internet Age* (Second edition, Polity Press 2015); Anastasia Kavada, 'Creating the Collective: Social Media, the Occupy Movement and Its Constitution as a Collective Actor' (2015) 18 Information, Communication & Society 872; Dustin Kidd and Keith McIntosh, 'Social Media and Social Movements' (2016) 10 Sociology Compass 785.

[22] Philip N Howard and Muzammil M Hussain, *Democracy's Fourth Wave?: Digital Media and the Arab Spring* (Oxford University Press 2013).

[23] Donatella della Porta and Alice Mattoni, 'Social Networking Sites in Pro-Democracy and Anti-Austerity Protests: Some Thoughts from a Social Movement Perspective' in Daniel Trottier and Christian Fuchs (eds), *Social Media, Politics and the State. Protests, Revolutions, Riots, Crime and Policing in the Age of Facebook, Twitter and YouTube* (Routledge 2014); Mauro Barisione and Andrea Ceron, 'A Digital Movement of Opinion? Contesting Austerity Through Social Media' in Mauro Barisione and Asimina Michailidou (eds), *Social Media and European Politics* (Palgrave Macmillan UK 2017) <http://link.springer.com/10.1057/978-1-137-59890-5_4> accessed 13 January 2022.

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media have indeed helped extremist groups [24] and populists [25] to emerge and expand their support. Also, misinformation and conspiracy theories have often been associated to these online tools [26]. However, it is worth reminding that such phenomena have always been present in mass politics (and possibly earlier). All the most careful empirical research warns in fact not to interpret this association as evidence that online media promote conspiracy beliefs or fosters the electoral success of extremists. These phenomena are most likely the result of complex interactions, where the support for extremist ideas and false perceptions of reality is antecedent to – and not driven by – an intense use of new communication technology. Social media might help to magnify dubious beliefs, but they do so because they exist in our societies, as they used to do when political communication mostly happened through newspapers and TV screens.

3.3. The rise of digital parties

Political parties, the most distinctive form of organisation of modern politics, have not been exempt from the transformations brought by the internet revolution. For the sake of simplicity, we can distinguish here two stages of evolution of parties in the internet era, corresponding to different stages of evolution of new information and communication technologies. Since the mid-nineties, parties have started to crowd the online environment. In those days, sometimes referred to as the internet 1.0, the most common online presence of individuals and organisations was in the form of static webpages, used as digital notice boards [27]. There, parties could profit from an affordable tool to make their platforms, candidates, activities visible to a wide public. This was, and still is, particularly valuable for small and emerging parties, which have

[24] Manuela Caiani and Linda Parenti, *European and American Extreme Right Groups and the Internet* (Routledge 2016) <https://www.taylorfrancis.com/books/e/9781315580845> accessed 13 January 2022.

[25] Paolo Gerbaudo, 'Social Media and Populism: An Elective Affinity?' (2018) 40 Media, Culture & Society 745.

[26] Adam M Enders and others, 'The Relationship Between Social Media Use and Beliefs in Conspiracy Theories and Misinformation' [2021] Political Behavior <https://link.springer.com/10.1007/s11109-021-09734-6> accessed 13 January 2022.

[27] Helen Margetts, 'Cyber Parties' in Richard S Katz and William Crotty (eds), *Handbook of Party Politics* (Sage Publications 2006).

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little chances to appear on mainstream media. The main innovation, at this stage, was the possibility to autonomously create linkages with the general public without having to refer to established media outlets like TV channels or newspapers. In addition, a quick and cheap way to disseminate informative material (leaflets, posters, campaign material, leaders' interviews and public statements) from the centre to the periphery of the organisation itself was available through the website and mailing lists.

The internet revolution started at a moment when parties were facing the challenge of a declining legitimisation and attractiveness. Parties reacted to this crisis by expanding the range of options to keep contact with their affiliates. Beyond traditional members and activists, parties started connecting with potential supporters through new forms of light membership. Some parties established a list of "party friends" or "party sympathisers", normally excluded from being a candidate for internal leadership positions, but sometimes allowed to vote in intra-party decisions. Others created special registers of "virtual-" or "cyber-members" for people recruited through the official party's web page. Websites were clearly a prerequisite for establishing these new membership categories, and mailing lists were often used to reach these supporters and inform them about party initiatives and activities. In the following years, social networks like Twitter and Facebook allowed to expand the list of contacts further, and the same networks were – and are – heavily used by individual leaders and representatives as well. All these new opportunities, coupled with a steep decline of traditional membership, created what have been labelled as "multi-speed membership" parties [28]. In these organisations, the border between members and non-members is less clear than it was in the past: "Today's Party Friend may never become a full-fledged party member, but she may serve as a digital ambassador, for instance by forwarding Twitter messages to her friends, sharing a link to a partisan YouTube video, or letting her Facebook friends know that she 'likes' her party and its leader. She might even be inspired to make a one-time donation by text message, making her a Sustainer, even if she never pays regular membership dues" [29].

[28] Susan Scarrow, *Beyond Party Members: Changing Approaches to Partisan Mobilization* (Oxford University Press 2015).

[29] ibid 32.

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In the last decade, a new kind of political organisation has emerged, linked to the revolution brought by the diffusion of social media and other online platforms that rely on user-generated content. The so-called digital party, or platform party, mimics (some aspects of) the organisation of digital companies like Facebook or Amazon. This includes the collection of a vast amount of data from users, a free membership model, the reliance on free labour of members [30]. Online platforms allow a sharp reduction of salaried staff – even for companies that are gigantic in terms of market size – and the elimination of the mediators that represented the interface between users and companies in pre-existing organisations. For example, Facebook users can publish their thoughts on their own page without the need of any intermediator, instead of sending a letter to the local newspaper and hoping to be published after the intermediation of an editor.

Digital parties adopt similar solutions. The organisational backbone is here represented by online platforms, allowing members to have a non-mediated role in the internal life of the party. As in online companies, for these parties membership is free and easy, as it only requires a few clicks on a webpage; the heavy bureaucracy of salaried staff of mass parties is replaced by a limited number of IT specialists, members are profiled through their online activity; many decisions are taken via online referenda. Without the intermediation of cadres and local bosses, digital parties promise a new opening of political participation for members and unprecedented levels intra-party democracy.

The Pirate Parties, based on the LiquidFeedback voting platform, were the first example of parties heavily relying on online tools for organisational – not only communication – purposes. Though they have generally achieved a limited electoral success, they have paved the way for more relevant experiments, like those of Podemos in Spain and the Five Star Movement in Italy [31]. These parties developed their own platforms (Plaza Podemos and Rousseau), through which a number of organisational tasks were performed, among which the selection of leaders and

[30] Paolo Gerbaudo, *The Digital Party: Political Organisation and Online Democracy* (Pluto Press 2018) 70.

[31] Filippo Tronconi, 'The Italian Five Star Movement during the Crisis: Towards Normalisation?' (2018) 23 South European Society and Politics 163; Marco Lisi, 'Party Innovation, Hybridization and the Crisis: The Case of Podemos' (2019) 49 Italian Political Science Review / Rivista Italiana di Scienza Politica 245.

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candidates, expulsion of members, decisions over government pacts, parliamentary alliances and motions of no confidence. The frequent use of online consultations, however, does not equate to a higher quality of internal democracy [32]. Far from being just a neutral instrument for deliberation, platforms are in fact a powerful tool for controlling and steering decisions in ways that are anticipated by the party leadership, which retains the control of the subject, framing and timing of the voting procedures [33]. The low number of active participants confirms that most members do not feel their voice is actually heard through the platform [34]. Furthermore, the limited possibilities for horizontal interactions among ordinary members lead to an atomized participation, which in turn limits the occasions for challenging the leadership. Party platforms are presented by their promoters as a revolutionary tool for a decentralised, inclusive form of democracy; in reality, they have possibly brought a new generation of citizens close to party politics, channelling the anger and disillusion toward traditional political actors; however they have done so favouring a new centralisation of power within parties and lowering the quality, if not the quantity, of participation.

4. New technologies and political participation: Good or bad for democracy?

In the previous pages we have reviewed the main forms of online activism. New technologies seem to offer new opportunities for participation at individual level and for weakly structured collective action (social movements), and thus expand the repertoire of non conventional forms of participation. The effects are instead unclear

[32] Marco Deseriis and Davide Vittori, 'Platform Politics in Europe | The Impact of Online Participation Platforms on the Internal Democracy of Two Southern European Parties: Podemos and the Five Star Movement' (2019) 13 International Journal of Communication 19; Paolo Gerbaudo, 'Are Digital Parties More Democratic than Traditional Parties? Evaluating Podemos and Movimento 5 Stelle's Online Decision-Making Platforms' [2019] Party Politics 1; Katharine Dommett and others, 'Are Digital Parties the Future of Party Organization? A Symposium on *The Digital Party: Political Organisation and Online Democracy* by Paolo Gerbaudo' [2020] Italian Political Science Review/Rivista Italiana di Scienza Politica 1; Fabio García Lupato and Marco Meloni, 'Digital Intra-Party Democracy: An Exploratory Analysis of Podemos and the Labour Party' [2021] Parliamentary Affairs 1.

[33] Deseriis and Vittori (n 32) 5705.

[34] Lorenzo Mosca, 'Democratic Vision and Online Participatory Spaces in the Italian Movimento 5 Stelle' (2020) 55 Acta Politica 1.

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for conventional party politics. In this case it is questionable that online tools have broadened the pool of participants; furthermore, parties that have pushed the experiment of online platforms farther, have by and large failed to improve the quality of intra-party democracy.

After this (selective) overview, it is now time to go back to the question raised in the first section of this paper. What are the normative implications of the new forms of political participation? Overall, are they good or bad for democracy? I will explore these questions in their relation with three specific aspects: participation inequality, the effectiveness (or lack thereof) of digital activism, polarization. As we will see, each of these fields shows a lively ongoing debate among observers.

The first answer to the question on the normative implications of new forms of participation comes from the analysis of the demographic and socio-economic profiles of participants. We know from a vast literature that political participation has never been evenly distributed among citizens of any given polity [35]. People located at the "centre" of society (educated, wealthy, living in urban areas, belonging to ethnic majority, etc.) tend to be disproportionately active in politics, as they have more cognitive and economic resources and easier access to the people and institutions where relevant political decisions are taken. It remains to be seen whether the internet has narrowed or widened this inequality. Since the first years of the century, many studies have demonstrated that access to the internet is not equal among the population. The phrase "digital divide" is often employed to highlight the difference in access to the digital infrastructure (that is, the possession of a device and the availability of an efficient internet connection). In economically advanced countries, this condition has been achieved, or will soon be achieved, by a large majority of the population. Still, unequal opportunities persist between those who have the necessary skills to use the internet for political purposes, and those who do not. The general conclusion of these studies is that digital participation continues to reflect the

[35] Verba, Nie and Kim (n 4); Sidney Verba, Kay Lehman Schlozman and Henry E Brady, *Voice and Equality. Civic Voluntarism in American Politics* (Harvard University Press 1995).

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traditional social stratifications and inequalities. Online tools are a new weapon of the strong [36].

This pessimistic view, however, could be softened in at least one aspect. Young citizens, traditionally less engaged in politics than older people, are more likely to be comfortable with digital technologies and online tools. Is this making their voice louder? Are they more easily heard by decision makers? The jury is still out on this point. While it is certain that younger generations are among the most active online, it remains to be seen if they are among the most *politically* active. It seems safe to state that, if technologies are used for non-political purposes, they are unlikely to help reducing inequalities in political participation [37]. However, even people who do not use digital devices for political purposes can have, and do have, *accidental* encounters with politics. Valeriani and Vaccari [38] show that accidental exposure to political information on social media contributes to citizens' online political participation, and more so among the less interested in politics, suggesting that social media are likely to reduce the gap in online engagement between citizens with high and low interest in politics. Digital and social media are used by most people for recreational activities or to keep in touch with friends, not for political purpose. However, it is possible – and indeed probable – that some contacts of these unengaged users are active in politics and share political news and opinions from time to time. This produces the accidental exposure the authors talk about, and expands the possibility for less involved citizens to come across political messages that would not reach them through legacy media. Repeated accidental exposure to political messages may lead to the development of a political identity eventually leading to political activism [39].

[36] Kay Lehman Schlozman, Sidney Verba and Henry E Brady, 'Weapon of the Strong? Participatory Inequality and the Internet' (2010) 8 Perspectives on Politics 487.

[37] Eva Anduiza, Marta Cantijoch and Aina Gallego, 'Political Participation and the Internet' (2009) 12 Information, Communication & Society 860.

[38] 'Accidental Exposure to Politics on Social Media as Online Participation Equalizer in Germany, Italy, and the United Kingdom' (2016) 18 New Media & Society 1857.

[39] Homero Gil de Zúñiga, Logan Molyneux and Pei Zheng, 'Social Media, Political Expression, and Political Participation: Panel Analysis of Lagged and Concurrent Relationships' (2014) 64 Journal of Communication 612.

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Another point on which the debate is open among researchers is related to the effectiveness of online activism. New technologies have made participation easier, lowering its costs. Some forms of participation, possibly the most diffused ones, just involve sharing some political news on a social media, or "liking" a political opinion. This form of low-cost participation has sometimes been labelled as "slacktivism" or "clicktivism" and defined "the ideal type of activism for a lazy generation" [40]. Slacktivism, the argument goes, may serve to reinforce the self esteem and social identity of the performer, but hardly has any political consequence. The counter argument is that online activism, even in its most elementary forms, should be considered as one step only in a multitasking environment. E-participation should be considered as one of multiple activities that take place through different channels, online and offline, and contribute to shape the personal experience of political engagement. For example, people sometimes watch political events on television, while commenting on them on social media. This practice of "dual screening" has been shown to produce, in some occasions, spill-over effects leading to further forms of political participation [41].

A third point of concern is the possibility that new media increase activism only among a subset of citizens, namely those with extreme views. Polarization, the fact that extremist views spread among parties and citizens, and that people increasingly dislike or even loathe their political opponents, is known to be a danger for citizens' trust in political institutions and ultimately for democratic stability. Social media can be the perfect environment for the spread of extremist, emotionally charged messages through two distinct mechanisms. One is the overload of information, available through multiple channels 24 hours per day, 7 days per week. Social media users, in order to cope with this intractable amount of news, resort to cognitive shortcuts, turning to sources that are in line with their pre-existing opinions. Second, the algorithms of social networks themselves guide users to find only the kind of information they like and feel comfortable with. This creates "echo chambers" or

[40] Evgeny Morozov, 'The Brave New World of Slacktivism' (*Foreign Policy*, 19 May 2009) <https://foreignpolicy.com/2009/05/19/the-brave-new-world-of-slacktivism/> accessed 20 January 2022.

[41] Cristian Vaccari, Andrew Chadwick and Ben O'Loughlin, 'Dual Screening the Political: Media Events, Social Media, and Citizen Engagement' (2015) 65 Journal of Communication 1041.

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bubbles, where people are less and less likely to encounter non-aligned views, and where political opponents are always and only depicted in negative terms. The spread of bots and fake accounts to reinforce partisan views and disinformation is part of the problem, a problem that social media companies are rarely willing to face, as long as that their core business is gathering subscribers [42]. While some studies lend support to these pessimistic claims [43], others maintain that echo chambers are nothing new in politics. Vaccari and Valeriani [44], based on a large nine-country survey, demonstrate that extremist views are not boosted by social media activism. The concept itself of echo chamber has been criticised, as it does not consider accidental exposure to opposing opinions and fails to take into account the complexity of current media landscape. Even if echo chambers can be detected in the behaviour of users on a single platform, that does not necessarily imply that users are unable to search for alternative sources of information on other online and offline outlets. Individuals tend to use multiple media to access political information. In this high-choice media environment, it is important to consider the whole range of different options citizens use to build their own media consumption habit [45].

[42] Deibert (n 2).

[43] Yphtach Lelkes, Gaurav Sood and Shanto Iyengar, 'The Hostile Audience: The Effect of Access to Broadband Internet on Partisan Affect' (2017) 61 American Journal of Political Science 5.

[44] *Outside the Bubble: Social Media and Political Participation in Western Democracies* (Oxford University Press 2021) 166.

[45] Elizabeth Dubois and Grant Blank, 'The Echo Chamber Is Overstated: The Moderating Effect of Political Interest and Diverse Media' (2018) 21 Information, Communication & Society 729.

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PARTICIPATORY CITIZENSHIP, CONSTITUTIONAL REFORM, AND THE CONFERENCE ON THE FUTURE OF EUROPE

Paul Blokker[1]

Abstract

The paper discusses a broader tendency towards participatory citizenship as an intrinsic part of a wider development of rethinking democracy. The focus is on participation in constitutional reform - as a core dimension of reimagining democracy - in a variety of manifestations and intensities. It will also briefly discuss various stages of constitutional reform processes in which participation may be considered, using a number of examples of reform processes. The Conference on the Future of Europe (CoFoE) in the EU is discussed, which, while not a constitutional reform process in strict terms, may be understood as a pre-constituent endeavour with broad involvement of citizens, and with a more or less broad reform mandate. As such, the CoFoE may provide a highly promising and complex case-study. In the concluding part, some of the benefits as well as pitfalls of participatory citizenship in constitutional reform will be discussed.

Indice Contributo

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Keywords

Citizenship - Conference on the Future of Europe - Constitutional reform Participation

1. Introduction

Liberal, representative democracy appears to be in a dire state. It suffers from augmenting citizen distrust in politicians, political parties, and institutions, a structural decline in citizen participation in elections, increasing voter volatility, a weakening of traditional representative political parties, high volatility in terms of the formation of new political movements and parties, and increased polarization and radicalization of the political landscape. According to many observers, democracy needs to be reinvented or at least prominently renovated. One core problem, also indicated by citizens themselves,[2] appears to be a lack of meaningful and effective input by ordinary citizens in the democratic decision-making process. Also in an attempt to counter populist forces which often have undermining effects on democratic checks and balances, pluralism and human rights, a good part of the solutions endorsed for

[2] As for instance indicated in the Special Eurobarometer Survey 500 "Future of Europe" (FoE) of March 2021, p. 25.

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the current predicament of liberal democracy lie in the area of participatory citizenship.

Very broadly speaking, the participation of citizens takes two forms: the participation in deliberative fora and assemblies (with only a small, and sometimes even tiny, part of the citizenry included) or the direct participation of citizens through referenda (with the potential inclusion of the whole of society). The involvement of citizens in recent years has been occurring around substantive themes with a high level of interest for citizens (such as climate change, see the French *Convention Citoyenne pour le Climat*), but more frequently citizen participation has been related to matters that tend to appeal less (such as electoral rules, as in the cases of citizens' assemblies in British Columbia, the Netherlands, and Ontario). It is striking nevertheless that the most comprehensive forms of participation seem to emerge after moments of deep societal crisis, as in the cases of Iceland and Ireland after the deep financial and economic crisis, or in recently in Chile, after widespread protests and a broad rejection of the existing constitutional rules of the game (still based on the 1980 Pinochet Constitution).

This paper discusses participatory citizenship in the context of fundamental reforms related to constitutional change. Even if constitutional rules are often understood as a highly technical, expert type of issue, in some precise ways lay citizens may bring a specific, non-advocacy, more reflexive and less instrumental approach to constitutional matters (while experts, politicians, and stakeholders tend to be closely wedded to specific positions). Furthermore, broad citizen inclusion in the drafting of changes and of constitutional documents may enhance the democratic legitimacy of the changes themselves and make them part of a larger constitutional culture.[3]

Despite the optimism of some on the potential of participatory citizenship (in the form of direcct voting, deliberation in citizen assemblies, crowdsourcing, or consultation), the participation of citizens is not without important hurdles and insecurities. One broad but complex problem is how to effectively and systematically include participation into the existing democratic institutional context. This includes more specific problems such as how to relate the intense deliberative experiences of

[3] Cf. P. Blokker, *New democracies in crisis?: a comparative constitutional study of the Czech Republic, Hungary, Poland, Romania and Slovakia* (Routledge, 2013); K.L. Scheppele, 'The social lives of constitutions', in P. Blokker and C. Thornhill (eds.), *Sociological Constitutionalism* (Cambridge University Press, 2017).

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mini-publics (as in citizens' assemblies) to the larger maxi-public.[4] This involves issues of publicity and communication towards the wider citizenry, but it also raises questions of whether it is possible to allow for some form of deliberation and collective learning possible on the macro-level. And even the deliberative standards of mini-publics are not always fully guaranteed, due to constraints of time, money, and political will. A further issue is the effective involvement of citizens in the design of and choices made in participatory processes and their transparency.[5] Also, the issue of representation remains a cumbersome matter. The electoral representativeness of parliamentarians is of a very different kind than the descriptive representation of randomly selected citizens. The latter also begs the question of whether different political viewpoints and understandings are to be understood as related (or reduced) to demographic, educational, and socio-economic criteria, or whether representation should more robustly involve ideological differences and distinct political subjectivities. In relation to random selection, there is equally the issue of possible exclusion of minorities.

The paper will discuss the broad tendency towards participatory citizenship as an intrinsic part of a broader development of rethinking democracy. The focus is on participation in constitutional reform - as a core dimension of reimagining democracy - in a variety of manifestations and intensities. I will also briefly discuss various stages of the reform process in which participation may be considered, using a number of examples of reform processes. Subsequently, I will discuss the recently concluded Conference on the Future of Europe (CoFoE) in the EU. The CoFoE is, strictly speaking, not a constitutional reform process, but may be understood as a pre-constituent endeavour with broad involvement of citizens, and with a more or less broad reform mandate.[6] As such, the CoFoE may provide a highly promising and complex case-study. In the concluding part, I will indicate some of the benefits as well as pitfalls of participatory citizenship in constitutional reform.

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[4] S. Suteu and S. Tierney, 'Squaring the circle? Bringing deliberation and participation together in processes of constitution-making, in Ron Levy, Hoi Kong, Graeme Orr, Jeff King, a cura di, *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press, 2018), pp. 282-294.

[5] Cf. H. Landemore, 'Inclusive constitution-making: The Icelandic experiment' (2015) *Journal of Political Philosophy* 23(2), 166-191.

[6] In fact, many of the recommendations of European citizens made in the so-called Citizens' Panels but also on a digital platform indicate a call for intense reform and not merely the calibration of existing policies and institutions.

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2. Participatory citizenship and constitutional reform

A recent tendency in in democratic systems in the last decades is a 'participatory turn', meaning that citizens are becoming increasingly involved in politics beyond the electoral dimension of representative democracy. A very distinctive - and less studied dimension of participatory citizenship - is the involvement of citizens in constitutional change.[7] This may regard the formulation of recommendations as the result of citizen deliberation, which may in turn lead to constitutional amendment. It also may involve the crowdsourcing of ideas that result in the drafting of a new document. More generally, in recent times, constitutional politics and reform witnesses an increased emphasis on popular participation in the reforming of constitutional orders by means of a range of innovative instruments such as digital platforms, deliberative fora and citizens' assemblies, and crowdsourcing.[8] There are now quite some examples in the world where constitutional revision and amendment has been orchestrated in such a way as to include the active participation of citizens. A transversal set of arguments in these projects of constitutional revision is that they provide an explicit response to civic discontent, structural democratic deficiencies. There is a growing awareness that reforms can only be successful if citizens and/or civil society are able to participate. In recent years, examples of projects of reform with significant citizen involvement in Europe include Iceland, Ireland, the Netherlands, Romania, and, on the transnational level, the Convention on the Future of Europe. Also in the (post-Brexit) United Kingdom proposals have been made to set up a Constitutional Convention that is to include citizens, while in that same country, two decades of constitutional reform included allusions to democratizing the constitutional order. Outside of Europe, Colombia, Chile, Egypt and Tunisia are amongst important examples.[9]

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[7] J. Blount, 'Participation in constitutional design', in T. Ginsburg and R. Dixon, a cura di, *Comparative constitutional law* (Edward Elgar Publishing, 2011); Suteu and Tierney 'Squaring the circle?'.

[8] A. Abat i Ninet, *Constitutional Crowdsourcing: Democratising Original and Derived Constituent Power in the Network Society* (Edward Elgar, 2021).

[9] Abat i Ninet 2021; J. Couso, 'Chile's "Procedurally Regulated" Constitution-Making Process'. (2021) *Hague Journal on the Rule of Law*, 13(2), 235-251; S. Verdugo and M. Prieto, 'The dual aversion of Chile's constitution-making process' (2021) *International Journal of Constitutional Law*, 19(1), 149-168.

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The tendency towards recourse to the people is curious in a number of ways. First of all, arguably the main tendency in many constitutional orders since 1945 has been a turn away from the people, towards a form of 'juristocracy' in what has been called 'new constitutionalism'.[10] Second, in the European context, while the most significant constitutional changes in the postwar period were in important respects about the re-establishment of self-government, in most if not all cases of post-authoritarian systems, in particular in the building of post-communist constitutional orders, the emphasis has been on legalistic, rigid and entrenched constitutions in which there is an only relatively weak attention for civic democratic engagement.[11] Third, the emergence of constitutionalism beyond the state – arguably most developed in the European context – appears to involve an unbalanced emphasis on legalistic understandings of constitutionalism, which emphasizes aspects of the rule of law and a regulative dimension, but generally complicates relations with democracy and self-government. In this regard, many scholars appear to 'theorize away' the problem of democratic legitimation in post-national regimes.[12]

While citizen involvement in constitutional politics is hence adverse to longer term structural tendencies, it seems at the same time difficult to deny that some form of counter-tendency to 'apopular constitutionalism' or 'counter-constitutionalism' is increasingly part of process of change.[13] This counter-trend is related to democratic innovation and legitimacy as well as to the contestation of purely technocratic

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[10] R. Hirschl, 'The political origins of the new constitutionalism' (2004) *Indiana Journal of Global Legal Studies* 11(1), 71-108. A. Stone Sweet, 'Constitutions and judicial power' (2008) *Comparative politics*, 218. T. Gyorfi, *Against the New Constitutionalism* (Edward Elgar, 2016); G. Martinico, *Filtering Populist Claims to Fight Populism: The Italian Case in a Comparative Perspective* (Cambridge University Press, 2021).

[11] See Blokker *New democracies in crisis?*.

[12] Cf. S. Besson, 'The European Union and human rights: Towards a post-national human rights institution?' (2006), *Human Rights Law Review*, 6(2), 323-360. P. Dobner, 'More law, less democracy? Democracy and transnational constitutionalism', in P. Dober and M. Loughlin, a cura di, *The twilight of constitutionalism*, (Oxford University Press, 2010), pp. 141-2; see, for examples, M. Kumm, 'Beyond golf clubs and the judicialization of politics: Why Europe has a constitution properly so called' (2006) *American Journal of Comparative Law*, 54, 505. G. Teubner, *Constitutional fragments: societal constitutionalism and globalization* (Oxford University Press, 2012).

[13] The term is Richard Albert's, R. Albert, 'Counterconstitutionalism' (2008) *Dalhousie Law Journal*, 31, 1.; Suteu and Tierney 'Squaring the circle?'.

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governance, and is part and parcel of various constitutional reform projects around the globe.

3. Different dimensions of citizen participation in constitutional reform

Even if there is persistent and growing attention to constitution-making and constitutional reform in scholarly debates, few studies engage in a comprehensive, comparative assessment of modes of constitutional amendment and reform in relation to citizen participation.[14] This seems particularly true with regard to recent innovations and participatory forms. In particular the latter processes are often set up outside or in parallel to existing formal amendment rules (such as in the cases of Iceland and Ireland), and in some cases consist of complex, multi-stage processes. Constitutional reform processes involve different 'modes of representation', based on either elite appointment, direct election, or indirect selection of constitutional reform bodies.[15] Modes of representation can be related to different understandings of democracy and tend to increasingly involve direct forms of citizen participation. In a rudimentary sense, processes of reform can be understood as either open or closed, that is, open (and pluralistic) when citizens and/or other actors have the right, and are allowed, to participate, and closed when the reform is taking place 'behind-closed-doors'. A further consideration can be made regarding modes of legitimacy, including 'elite adoption', when it is politicians ratifying a reform, 'institutional ratification', when institutions such as Parliament or the Constitutional Court are involved, and popular ratification, when a reform is finalized with a constitutional referendum.

Regarding the role of citizens in constitutional reform, in political science and comparative constitutionalism literature, only recently a more sustained interest in modes and practices of constitutional reform and civic engagement in reform has

[14] D.S. Lutz, 'Toward a Theory of Constitutional Amendment' in S. Levinson (ed.), *Responding to Imperfection. The Theory and Practice of Constitutional Amendment* (Princeton University Press, 1995), pp. 237-74.

[15] J. Wheatley and F. Mendez (eds, *Patterns of Constitutional Design: The Role of Citizens and Elites in Constitution-Making* (Routledge, 2007).

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emerged.[16] A few recent works have made important steps towards a more comprehensive analysis of citizen participation in constitutional reform process. In the work of Eisenstadt et al.,[17] the authors make a useful distinct between different phases of potential citizen involvement in reform processes. They distinguish between the phases of convening, of debating, and of ratification of reform. The phase of convening consists of 'activities in the constitution-making process related to selecting those actively and directly involved in the crafting of the constitution's content'. The debating stage 'explores how decisions were made about content and retentions and omissions from the text'. The ratification stage entails 'procedures for approving the constitution and making it binding for all citizens, including those who did not participate in its creation'.[18] Regarding the reform process, the authors further distinguish between 'imposed' constitutions, in which elites are in control of a non-transparent process, with little or no external consultation; 'mixed modalities', in which there is some form of interaction between elite control and bottom-up influence; and 'popular participation', when there are 'extensive and meaningful opportunities for broad sections of the public to directly shape constitution-making processes'.[19]

Antoni Abat i Ninet in his excellent book *Constitutional Crowdsourcing* equally distinguishes between different forms of citizen engagement in constitutional reform, or, as Abat i Ninet puts it, the engagement of constituent power.[20] The participation of the people may be reduced to zero or non-existent, as was the case in the early moments of the emergence of modern constitutionalism at the end of the 18th century. This is clearly a form of elite control, where the drafters were an 'enlightened

[16] T. Bustamante and B.G. Fernandes (eds), *Democratizing Constitutional Law* (Springer, 2016); X. Contiades and A. Fotiadou (eds), 'Participatory Constitutional Change: The People as Amenders of the Constitution' (Routledge, 2016); T.A. Eisenstadt, A.C. LeVan, and T. Maboudi, *Constituents before assembly: Participation, deliberation, and representation in the crafting of new constitutions* (Cambridge University Press, 2018); M. Reuchamps and J. Suiter, *Constitutional Deliberative Democracy in Europe* (ECPR Press, 2016); Suteu and Tierney 'Squaring the circle?'.

[17] Eisenstadt, LeVan, and Maboudi, *Constituents before assembly*.

[18] Eisenstadt, LeVan, and Maboudi, *Constituents before assembly*, p. 28.

[19] (Eisenstadt, LeVan, and Maboudi, *Constituents before assembly*, pp. 28-9.

[20] Abat i Ninet *Constitutional Crowdsourcing*, p. 94.

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group of citizens (white, rich, male) arguing, typing, and deciding for the people'.[21] A more extensive involvement of citizens is when they get to opportunity to give their view on the changes drafted by others (elites, experts). In this, citizen involvement can be realized in an only ex-post ratification of constitutional changes by means of a constitutional referendum (particularly widely diffused after the Second World War). Finally, in the meaning that is closest to today's 'participatory turn', citizen involvement may consist in a constituent process which originates in popular and grassroots movements.[22]

Practice is however not easily grasped by means of conceptual distinctions as we see a series of muddled and mixed practices.[23] Formal constitutional reform is predominantly initiated by specific political actors, that is, parliaments, the President (as, for instance, in Chile), and only in few cases may be initiated by a number of citizens (e.g. in the case of Romania). As comparative research and case-studies however show, different modes of constitutional revision and of inclusion of the citizenry are available and have been used in different reforms. For comparative purposes, James Fishkin has proposed a useful diversification. Fishkin is one of the few scholars who has attempted to look at constitutional reform from a perspective of different democratic models. These models provide analytical hold over formal constitutional reform, while equally shedding light on the place and form of citizen engagement in reform processes. Fishkin – not unlike Abat i Ninet's suggestion of a kind of continuum between non-participation on one end and extensive participation on the other - elaborates four relevant models: competitive democracy, elite deliberation, deliberative democracy, and participatory democracy[24] (see table 1).

[21] Abat i Ninet *Constitutional Crowdsourcing*, p. 94.

[22] Abat i Ninet *Constitutional Crowdsourcing*, p. 95.

[23] Cf. Landemore, 'Inclusive constitution-making'; Suteu and Tierney 'Squaring the circle?'.

[24] J. Fishkin, *When the people speak: Deliberative democracy and public opinion* (Oxford University Press, 2009); J. Fishkin, 'Deliberative democracy and constitutions' (2011) 28:1 *Social Philosophy and Policy*, pp. 242-260.

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Table 1 Citizen involvement in constitution-making[25]

<table>
<tr><th>Form of citizen involvement</th><th colspan="2">Democratic models</th></tr>
<tr><td rowspan="2">Indirect, representation</td><td>Elite deliberation
Governmental committees
Conventions (delegates)
Expert committees</td><td>Competitive democracy
Constituent assemblies</td></tr>
<tr><td colspan="2">Parliamentary committees</td></tr>
<tr><td>Direct participation</td><td>Participatory democracy
Confirmatory referenda
Constitutional initiatives</td><td>Deliberative democracy
Citizen assemblies
Citizen conventions</td></tr>
</table>

Fishkin's first two models, that of competitive democracy and of elite deliberation, put an emphasis on representation and elite-driven constitutional processes, in this allowing for an indirect role of citizens in constitutional reform. Competitive democracy emphasizes the role of elected representatives and the competitive struggle

[25] Source: Fishkin, *When the people speak*, Fishkin, 'Deliberative democracy and constitutions'; based on an elaboration in P. Blokker, 'The Romanian Constitution and Civic Engagement' (2017) *ICL Journal*, 11(3), pp. 437-455.

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between parties. Constitutional reform from the perspective of competitive democracy may take the form of a constituent assembly, with elected members from a range of political forces.[26] Elite deliberation prioritizes public reason of a high cognitive standard and favours small elite bodies that deliberate on matters of justice and the common good on behalf of the people. A clear-cut example is the Philadelphia Convention of 1787, the members of which were appointed by state legislatures. Further examples of elite-driven reform are expert commissions and negotiations between political leaders.[27] A hybrid example of constitutional reform following both the ideals of competitive democracy and elite deliberation is that of parliamentary committees. Fishkin's participatory and deliberative models include innovative and experimental forms of constitution-making that foresee a more direct involvement of citizens in constitutional revisions.[28] Participatory democracy is frequently understood in terms of the referendum instrument, which aggregates individual votes into a majority. In case of constitutional revision, referenda often take the form of *ex post*, confirmatory referenda on a finalized proposition for constitutional reform. Stephen Tierney has pointed to three main problems or dangers with the referendum instrument, in particular in the context of constitutional reform:[29] the elite control syndrome (the danger of elite manipulation of referenda), the deliberation deficit (the 'mere aggregation of individual wills'), and the majoritarian danger (the marginalization of dissenting individuals and minorities). A general danger is that political leaders turn directly to the voters for approval, claiming in this a sincerer form of democracy, but without providing effective voice to citizens (Tierney 2012). Participatory democracy can, however, equally be designed in more engaging ways, not least in the form of legislative (constitutional) initiatives, which allow citizens to mobilize in favour of a self-designed constitutional amendment. Experimentation in recent constitutional reform regards deliberative democracy and frequently takes the form of citizens' assemblies. Such assemblies form deliberative

[26] The Chilean Assembly elected in 2021 shows that such an Assembly does not necessarily need to be an expression of forces of the political establishment, but may anyhow involve a range of societal forces, such as ethnic minorities and political forces emerging out of the protest movements.

[27] A. Renwick, 'After the referendum: options for a constitutional convention' (2014) The Constitution Society.

[28] C. Zurn, 'Democratic Constitutional Change: Assessing Institutional Possibilities', in T. Bustamante and B.G. Fernandes (eds), *Democratizing Constitutional Law* (Springer, 2016).

[29] S. Tierney, *Constitutional referendums: The theory and practice of republican deliberation*, Oxford University Press, 2012).

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fora, which may include citizens, alongside political representatives (as in the case of the Irish Constitutional Convention, 2012-13, where citizens were randomly selected), citizens and experts or scholars (as in the Romanian Forum Constitutional in 2013) or may even consist exclusively of citizens (as in the case of Iceland in 2011, the French Climate Convention, or the Citizens' Panels in the CoFoE). Citizens' assemblies ordinarily have a consultative function. In both participatory and deliberative democracy, active and direct citizen engagement in constitutional politics is prioritized.

If we turn to some of the more significant cases of citizen involvement in constitutional reform, we find combinations of the models discussed in action. In the case of the constitutional reform attempt in Iceland (2010-12), both civil society associations and the Socialist Party pushed for comprehensive, citizen-driven constitutional reform. Two one-day deliberative fora were set up, in which circa 1,000 citizens participated, while a Constitutional Council, consisting of 25 independent citizens elected at the end of 2010, was responsible for producing a draft constitutional revision in four months (April - July 2011). The draft produced, consisting of a fully new constitution, emphasized amongst others a range of important participatory institutions, while the drafting itself has often been hailed as highly innovative in its usage of social media in soliciting comments and suggestions from citizens. In the fall of 2012, a referendum with 6 questions was put to the population.[30] In the case of Ireland, on one hand, two major political parties – Fine Gael and the Labour Party – endorsed inclusive constitutional reform, and on the other, academics as well as civil associations pushed for participatory and deliberative reform, in particular through the organization *We The Citizens*. At the end of 2011, a one-year Constitutional Convention was started in which 66 citizens (selected by lot) deliberated together with 33 politicians over constitutional reforms. One of the results of this process was the (successful) May 2015 referendum on same sex marriage. In Romania, a *Forum Constituţional* was set up (March – July 2013), a collaboration between the civic organization *Asociaţia Pro Democraţia* (APD) and the Romanian Parliament (a similar endeavour took place in 2002). The Forum consisted of

[30] B. Bergsson and P. Blokker, 'The Constitutional Experiment in Iceland', in E. Bos and K. Pocza (ed.), *Verfassunggebung konsolidierten Demokratien: Neubeginn oder Verfall eines politischen Systems* (Nomos Verlag, 2014); Z. Elkins, T. Ginsburg and J. Melton, 'A Review of Iceland's Draft Constitution' (2012) available at: https://webspace.utexas.edu/elkinszs/web/CCP%20Iceland%20Report.pdf.; Landemore, 'Inclusive constitution-making'.

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deliberative events, including citizens, scholars, and politicians, organized in major Romanian cities as well as the gathering of citizens' comments on an online platform.

Moving out of the European context, in the case of Chile, it was the huge social uprisings from October 2019 onwards that ultimately resulted in the call for a new Constitution.[31] Social and political pressure eventually made President Piñera surrender to the demand for a new Constitution.[32] The subsequent Chilean process has been likened to Andrew Arato's model of post-sovereign constitution-making,[33] due to the insistence of legal continuity with the existing Constitution[34], rather than disruption[35], and the fact that the process is grounded in a multi-party consensus and respects a limited, non-revolutionary mandate for the Convention.[36] The process started with a consultative referendum in order to verify citizens' endorsement and their preferences regarding the set-up of the Assembly. Subsequently, a Constitutional Convention was elected by general vote. Finally, a ratification of the new Constitution is foreseen in a confirmatory referendum. While the process itself does not foresee intense citizen participation in the form of deliberative fora, and the Convention seems grounded in a logic of 'competitive democracy', throughout the process there are various moments in which citizens directly participate. The Convention's regulations foresee public hearings, a digital platform, and popular initiatives which allow civil society, indigenous peoples and youth to present proposals, which need to be treated at the same level as proposals by Convention delegates when gathering minimally 15,000 signatures from at least 4 regions.[37]

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[31] Couso, 'Chile's "Procedurally Regulated" Constitution-Making Process', p. 242.

[32] Couso, 'Chile's "Procedurally Regulated" Constitution-Making Process', p. 243.

[33] Verdugo and Prieto, 'The dual aversion'.

[34] In conscious differentiation from the disruptive nature of the 'Bolivarian' forms of constitution-making in Venezuela, Ecuador and Bolivia (Couso 2021: 244).

[35] Couso, 'Chile's "Procedurally Regulated" Constitution-Making Process', p. 244.

[36] Verdugo and Prieto, 'The dual aversion', p. 13.

[37] I. Aninat, 'A Balancing Act: Public Participation, Decision-Making, and Freedom of Speech at the Chilean Constitutional Convention' (2021) ConstitutionNet, available at: https://constitutionnet.org/news/balancing-act-public-participation-decision-making-and-freedom-speech-chilean-constitutional.

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Returning to the European context, the recently concluded transnational CoFoE (to be further discussed in section 3 below) is not the result of a direct response to a specific crisis, nor is it the result of spontaneous, bottom-up calls for change. The process has been started from the top-down, has been initiated by the EU institutions and is largely controlled by these. In this regard, the process is very much reflecting the models of competitive democracy and of elite deliberation. The CoFoE did involve innovative (multi-lingual, multi-level) forms of citizen participation, in the Digital Platform, the Citizens' Panels, and the Plenary (see table 2 below). Among other things, the CoFoE suffered however from a lack of transparency and citizen input in the organization, as well as a lack of clear objectives and follow-up, also with regard to the process of ratification of possible reforms recommended.

Table 2 Citizen involvement in the Conference on the Future of Europe[38]

Organization CoFoE			
Elite/institutional control	Common Secretariat Responsibility for material process; methodology		Executive board Final decision-making power; representation of three EU institutions/ the 'constituent' forces
Direct citizen participation	Digital platform Information provision;	Citizens' Panels 4 thematic deliberative	Conference Plenary

[38] Source: own elaboration.

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	possibility for European citizens to suggest ideas	assemblies with 200 randomly selected citizens each National panels/events[39] (variegated)	20 ambassadors per panel represent their panels and function as Plenary members; 27 additional national panel members

4. Participatory Citizenship in the Conference on the Future of Europe

The attempt to adopt a political constitution for the European Union in the early 2000s left constituent power - *de facto* - in the hands of constituted powers. The constitution-making process was dominated by political elites and institutional actors, whereas wider civil society and citizens were only involved to a limited extent.[40] Similar arguments have been made regarding the earlier Convention on the Charter of Fundamental Rights.[41] The European Union's attempt to adopt an explicit, political constitution was largely an elite affaire. The main consultation of citizens took place *ex post*, in the subsequent referendums, the stage of ratification. These, however, led to the Constitution's failure. As Andrew Arato states,

[c]ertainly neither one or the other [the draft Constitution and the Lisbon Treaty] was the work of any European people, nor was it the product of a primarily participatory

[39] For instance, in the Netherlands, the *Kijk op Europa* project included surveys, consultations, dialogues with citizens.

[40] M. Patberg, *Constituent Power in the European Union* (Oxford University Press, 2020), p. 215.

[41] J. Schönlau, *Drafting the EU Charter: rights, legitimacy and process* (Springer, 2005).

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process. Neither could be seen as the final version that European institutions should take, especially as neither would have brought the masters of the treaties under the constitution of a genuinely "constitutional" amendment rule based on majorities of some kind.[42]

But the question of a European Constitution has not disappeared. Constituent dimensions have particularly been stimulated by the 'poly-crisis' which developed over the last two decades (in terms of financial and economic matters, European solidarity, as well as crucial matters for which pan-European coordination appears unavoidable, such has migration, health, and the rule of law; the war in the Ukraine has made radical reform even more difficult to avoid). In other words, the constitutional deficit has disappeared neither in the form of specific dimensions to be constitutionalized (e.g. economic and fiscal policy, social policy, citizen participation), nor in the sense of the creation of genuinely constitutional and democratic rules of political operation.

The CoFoE, which started in the summer of 2021, potentially indicates a (partial) return to a constituent dimension in European politics. Even if the Council has denied the Conference's status of a *convention*, the endeavour nevertheless echoes the *Convention* on the Future of Europe of the early 2000s in name, but also in its set up (the Conference was led by three co-chairs of the EU institutions and aimed – at least in rhetoric - at the inclusion of civil society and citizens).[43]

The need for structural reform of the EU is undeniable, not least as many of the EU's responses to recent crises have seen ad hoc and unfinished legislative reactions, regarding inter alia migration policy, health policy, and the banking union. Even more important is the open question of selection of EU leaders and the ongoing weaknesses in democratic legitimacy.

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[42] A. Arato, 'Europe, European Constitution' in "Why Europe Needs a Constitution", in H. Brunkhorst, R. Kreide e C. Lafont, a cura di, *The Habermas Handbook* (Columbia University Press, 2018), pp. 437-38). Hence, the constituted powers or institutions have the formal ability to revise the constitutional norms of the EU, but have not done so in a manner that has led to the constitutional limitation of the revision of such norms (and hence a form of European constitutionalism). Indeed, in article 48 TEU, 'consensus' and 'ratification by all member states' are crucial.

[43] N. von Ondarza, And M. Ålander, 'The Conference on the Future of Europe. Obstacles and Opportunities to a European Reform Initiative That Goes beyond Crisis Management' (2021) SWP Comment 2021/C SWP, p. 4.

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The CoFoE was originally put forward in 2019, originating in an idea of Emanuel Macron.[44] In a joint non-paper on the Conference on the Future of Europe, France and Germany suggested a 'strong involvement of our citizens' and a 'bottom-up process', with 'EU-wide participation of our citizens on all issues discussed'. The plan was subsequently adopted by the Von der Leyen Commission, which put strong emphasis on the involvement of citizens, civil society, and European institutions as 'equal partners' and indicated, as remarked above, an initial willingness to consider Treaty change. The EP presented two documents on the CoFoE in 2020, inter alia proposing the idea of citizens' agoras. While the Council - representing the sovereign Member States - endorsed the idea of a Conference, it clearly demonstrated (and demonstrates) hesitance towards citizen involvement as well as towards Treaty change. Core issues with regard to citizen involvement and empowerment concern: the effective influence citizens might have through the CoFoE (in terms of the actual translation of citizens' views in policy-making and reform), the mobilization of EU-wide participation amongst citizens, and the willingness of institutions and member states to consider clear legislative follow-up to citizens recommendations and to consider structural reform.

The experience of the CoFoE is of direct relevance for participatory citizenship in several ways. First, *procedurally*, the operational process of the Conference (which was an ad hoc process not foreseen in the EU Treaties and was hence not supposed to follow the Convention method of Art. 48 TEU) was to significantly allow for citizen participation, deliberation, and input. It hence was to provide a form of input-oriented legitimacy (allowing voice for citizens), relating civic participation to political and legislative processes. The fabrication of citizens' recommendations have seen potential suggestions for constitutional change, as for instance in the first two sets of recommendations produced by Panels in December 2021 and January 2022.[45] Second, the CoFoE can only have any real efficacy if it addressed the level of the *political*, that is, if it mobilizes a political will to indicate structural reforms with regard to the *democratic functioning* of the EU and to the rule of law, including on the constitutional/treaty level (the process is still playing out as we speak). As the citizens who participated in European Citizens' Panel 2 on democracy, the rule of law, human

[44] S. Fabbrini, 'Differentiation or federalisation: Which democracy for the future of Europe?' (2021) *European Law Journal*. First published: 06 May 2021.

[45] See https://reconnect-europe.eu/blog/the-future-of-europe-are-citizens-taking-over/; A. Alemanno and K. Nicolaidis, 'Citizen Power Europe: The Making of a European Citizens' Assembly', in: A. Alemanno and P. Sellal, *The Groundwork of European Power* (2021) *Revue Européenne du droit* 3.

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rights, and security, have recommended, one important outcome of the CoFoE ought to be the institutionalization of a permanent citizens' assembly (recommendation 39). Such a view has been echoed in endorsements by European civil society organizations as well as by scholars, and is now further elaborated in policy-oriented proposals by experts.[46] One report, co-authored by Niccolò Milanese, founder of the transnational civil society coalition European Alternatives (Cooper et al. 2021; cf. Patberg 2020), called for permanent forms of citizen participation:

Create a permanent European Citizens Assembly: Recent experiences with citizens assemblies in Ireland, in Belgium, in France, in Germany and elsewhere have shown that a sortition-based format of citizen participation can create social consensus for change, can build social trust, and can reinvigorate politics. A European Citizens Assembly would be a pioneering transnational experiment which should be led by independent civil society, with a view to providing a permanent space in which the European Union can fulfil its obligations of dialogue with citizens and civil society under Article 11 of the Lisbon Treaty.[47]

Let us now turn the participatory process of the CoFoE. Following Eisenstadt et al.'s and Abat i Ninet's stages and/or modalities of participatory citizenship in constitutional reform, different issues may be observed with regard to the (recently concluded) Conference.[48] For a start, the Conference was clearly not the result of bottom-up pressure and spontaneous societal calls for radical change (as was, for instance, the case in Iceland or Chile), but the outcome of elite and institutional propositions, first by Emanuel Macron (who launched the idea in 2019), to be taken

[46] Conference on the Future of Europe Observatory, 'Conference on the Future of Europe:

What worked, what now, what next?', High-level advisory group report, 22 February, 2022, available at: https://conference-observatory.eu/wp-content/uploads/2022/03/High_Level_Advisory_Group_Report.pdf; Gabriele Abels, Alberto Alemanno, Ben Crum, Andrey Demidov, Dominik Hierlemann, Anna Renkamp, Alexander Trechsel, 'Next level citizen participation in the EU Institutionalising European Citizens' Assemblies', BertelsmannStiftung, available at: https://cor.europa.eu/en/events/Documents/Future-of-Europe/Next_Level_Citizens_Participation_in_the_EU.pdf.

[47] L. Cooper et al., 'The Rise of Insurgent Europeanism. Mapping Civil Society Visions of Europe 2018-2020' (2021) LSE Ideas Report.

[48] I had the privilege to be invited as an expert in the second, online session of Citizens' Panel 2 (on democracy, the rule of law, security, and human rights), as well as observer and expert in the third session held at the European University Institute in Florence.

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over by the head of the Commission Ursula Von der Leyen. The whole process was notably delayed due to political infighting over whom was to preside over the event and what its functions were to be.

The convening stage of the CoFoE, which relates to the design, organization, and implementation of the Conference,[49] was entirely elite- and institution-driven. The Common Secretariat was run by representatives of the three main EU institutions (the Commission, the Parliament, and the Council), and was responsible for the day-to-day operation of the Conference. Main decisions regarding the Conference were made by the Executive Board, headed by three co-chairs, representatives of the main institutions (Guy Verhofstadt for the EP, Dubravka Šuica for the EC, and a representative from the rotating Presidency of the Council). In the final instance, choices on organization seemed to be restrained by a reticent attitude of Council.[50] The operation of the Secretariat and Executive Board has in many ways shown to be top-down, non-transparent, and not receptive to external influences in any transparent fashion. While this was to a significant extent due to the intricacies of the inter-institutional culture of the EU, in practice it has meant that the organization gained a certain Byzantine, opaque, and unpredictable flavour. What is more, the selected citizens, or wider European society for that matter, did not have any input on the way the Conference has been set up, on its agenda-setting, nor how it has been executed.

It is the debating stage where citizens were prominently included in the process, providing some ground for labelling the whole CoFoE process a 'new, experimental

[49] For an extensive discussion of the whole process, see A. Alemanno, 'Unboxing the Conference on the Future of Europe: A Preliminary View on its Democratic Raison-d'être and Participatory Architecture' (2021) HEC Paris Research Paper.

[50] This has become more than clear in the hostile position of the Council with regard to any kind of Treaty reform (in fact, the Council has not taken up the EP's resolution of 8 June in its Summit at the end of the same month). It has, however, also come through in more specific choices on the methodology of the Conference. For instance, over the summer of 2021, the Common Secretariat organized an online brainstorming session with some 60-70 experts to lay down major questions to be discussed in the Citizens' Panels. However, this whole exercise has subsequently been set aside, allegedly because of resistance from specific (right-wing, conservative) forces in the Council. The latter insisted on a tabula rasa approach. While on the one hand, this has left the citizens entirely free to decide what themes and topics they want to discuss, on the other, it has arguably led to an excessive broadness and quantity of themes to be discussed by the deliberating citizens, rendering deliberation in practice highly cumbersome.

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democratic ecosystem'.[51] As argued above, the contours – in terms of organization, methods, selection of facilitators/moderators, venues, and experts – were in the hands of the EU institutions. Nevertheless, in processual terms, the design allowed for direct citizen participation in the Conference in three different ways.

First, a Digital Platform, set up to allow all European citizens to suggest ideas and recommendations, to be discussed in the Citizens' Panels (which hosted some 800 randomly selected European citizens) and the Conference Plenary, has been gathering numerous ideas from a wide range of European actors.[52] The core participatory dimension was to be found, however, in the second dimension, the Citizens' Panels as an instantiation of citizens' assemblies. Four thematically driven panels were set up, hosting 200 randomly selected citizens each, and meeting in three deliberative weekends (a first one in Strasbourg, a second one online, and a third one in one of four European cities: Florence, Natolin, Maastricht, and Dublin). If compared to the standards indicated by Eisenstadt et al. and Abat i Ninet regarding participatory processes, a few dimensions of the European Citizens' Panels (EPCs) stand out. To start, the citizens' influence on the actual set-up and design of the deliberative process in the Panels was highly limited. The execution of the ECPs could be partially labelled as 'imposed' if following the definition by Eisenstadt et al. It is largely top-down, driven by the institutions and executed on the ground by a number of professional organizations with well-developed deliberative and participatory methods, which did not, however, allow citizens to co-design the process. Such influence could consist, for instance, in having a say in the selection of experts or in priority choices in agenda-setting or for the deliberation of specific themes. Also, citizens had difficulty in taking control due to the fact that they received notifications on procedure and methodology very late in the process (admittedly, complicated by the pandemic situation)[53], and they had limited time to actually engage in the exchange of viewpoints and deliberation. In addition, the deliberation of the Panel was in part taken over by aggregation, in terms of voting and rationalization (for instance, in the form of

[51] Alemanno and Nicolaidis, 'Citizen Power Europe, p. 6.

[52] Although if related to the overall number of European citizens, the citizens participating on the platform and the number ideas fed into it remains highly modest. In addition, it remains unclear or non-transparent how these ideas are effectively feeding into the citizens' debates within the Conference.

[53] Many of the problems – including last minute changes - seem to stem from eleventh-hour interventions into the processes by the EU institutions.

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expressing preferences for specific recommendations in a kind of 'market of ideas', not unlike the process found on social media such as Facebook in the form of 'likes'), rather than in-depth deliberative practices or the identification of divergent opinions and positions.

But, in other ways, citizens clearly did have influence on the process, as they formed an integral component of the discussion on the future of Europe (by formulating ideas in the form of orientations) and were collectively responsible for the recommendations produced. In this regard, Eisenstadt et al.'s 'popular participation' definition is relevant too. The recommendations formulated by the different Panels were the outcome of an interactive, participatory process[54]. And while at the start of the Conference the role of citizens in the Plenary was not yet defined, ultimately citizens' representatives - so-called ambassadors - become part of the Conference Plenary too, together with inter alia politicians, representatives of the institutions, and of civil society,

This was indeed the third part of the debating stage where citizens play a role, the Plenary of the CoFoE. The recommendations formulated by the ECPs were to be taken up and carried forward in the Plenary. The Plenary was itself populated by political actors (local and regional authorities, national and European members of parliament; Council, Commission, and Committee of the Regions representatives), social partners, civil society organizations and the citizens themselves (80 'ambassadors', selected from the Citizens' Panels as well as 27 representatives of national panels or events).[55] The Plenary's task was to 'debate and discuss the recommendations from the national and European Citizens' Panels, and the input gathered from the Multilingual Digital Platform, grouped by themes, in full respect of the EU's basic principles and the Conference Charter, without a predetermined outcome and without limiting the scope to pre-defined policy areas. After these

[54] As already indicated, different problems have emerged in this process. It has to be admitted, though, and as is abundantly discussed in the literature on deliberative democracy, many similar innovative participatory experiences have faced identical issues.

[55] The composition of the Plenary – if understood as some form of deliberative forum - is unprecedented in its inclusion of multiple levels of governance. The mixing of politicians and citizens (as well as other stakeholders) constitutes according to some authors a recent trend in deliberation (one instance is the Irish Constitutional Convention, see K.J. Strandberg, J. Berg, T. Karv and K. Backstroem, 'When Citizens met Politicians: The Process and Effects of Mixed Deliberation According to Status and Gender' (2021) Working Paper No. 12/2021 ConstDelib, available at: https://constdelib.com/wp-content/uploads/2021/10/WP12-2021-v.2-CA17135.pdf.).

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recommendations have been presented by and discussed with citizens, the Plenary will on a consensual basis put forward its proposals to the Executive Board' (Rules of procedure, article 17). In fact, on 9 May 2022, the plenary's final report with 49 proposals and some 320 measures was presented.

The citizens' ambassadors (the 80 representatives of the ECPs) played a double role in the Plenary: they were both representatives of the ECPs and full members of the Plenary. This means they both needed to articulate and present the recommendations formulated by the Panels and constituted deliberating members of the Plenary as such.[56] This appeared to involve some form of citizen empowerment. It needs, however, to be recognized that the ultimate recommendations formulated by the Plenary were adopted 'on a consensual basis' by EU institutional and political representatives, that is, those actors recognized as 'constituent' forces by art. 48 TEU.[57] The citizens (but not the other stakeholders or civil society representatives) did have some form of right to a 'dissenting opinion'.[58]

Regarding the follow-up of the process or forms of ratification (to render 'fixed' (*ratus*) or to validate the outcomes), it remains unclear what will come out of the Conference. According to article 23 of the Conference regulations, the 'final outcome of the Conference will be presented in a report to the Joint Presidency. The three institutions will examine swiftly how to follow up effectively to this report, each within their own sphere of competences ad in accordance to the Treaties'. The final report has indeed been presented on 9 May 2022. This process has left little room for explicit ratification by European citizens, although an evaluation meeting with the citizens involved is to take place in October 2022. A core issue has become the mater of Treaty change. Some political actors have indicated the need for a full-blown Convention for Treaty change. In particular the European Parliament has called for a Convention by means of a resolution adopted on 9 June.[59] Whether the idea of a Convention is a more widely shared view amongst EU Member States remains to be seen, even if the rapidly

[56] Alemanno, 'Unboxing the Conference, p. 26.

[57] Alemanno, 'Unboxing the Conference, p. 28.

[58] Alemanno, 'Unboxing the Conference, p. 28.

[59] See https://www.europarl.europa.eu/doceo/document/TA-9-2022-0244_EN.html. See further P. Blokker, 'Experimenting with European Democracy. Citizen-driven Treaty change and the Conference on the Future of Europe', *Verfassungsblog*, available at: https://verfassungsblog.de/experimenting-with-european-democracy/.

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changed geopolitical context (the Ukraine war) seems to have stimulated more propensity towards Treaty change.

5. Conclusions: participatory citizenship and constitutional reform

In general, representative democracy is facing a trend of democratization by means of participation. In terms of fundamental reforms or changes in the 'rules of the game', we can speak of popular engagement being a 'trend in constitutional practice'.[60] There is no solid, general design of how to instil citizen participation in constitutional reform processes. Different processes or experiments have indicated significant benefits but also formidable hurdles and obstacles. Benefits seem undeniable. Political deadlocks on sensitive ethical issues have been overcome due to citizen deliberation and direct participation. More broadly, the recognition that constitutional norms need to be socially embedded confirms the necessity of extensive citizen engagement with the reform of fundamental norms or even the drafting of a new constitution. It is difficult to imagine modern-day democracy without an actual involvement of the demos. Various kinds of elite and expert knowledge are being contested in the name of popular knowledge. More philosophically, in current times the democratic imaginary seems be shifting from a broad consensus on representative politics to an acknowledgement of the need for direct forms of bottom-up involvement (the populist wave seems to be part of this shift).[61]

Modern democracy in the 2020s seems to be severely affected by a kind of belated sting of the 1968s scorpions' tail of anti-paternalist and anti-establishment societal sentiment. To some extent, the Conference on the Future of Europe fits this *Zeitgeist* of an inevitability of taking recourse to the citizens' voice. Examining the Conference, also in the comparative context of other global participatory processes, reveals a number of complex questions. One clear problem is the unwillingness of political institutions to diminish hold on organizational and design dimensions and to share some political sovereignty with citizens. This often results, in counterproductive fashion, in limited citizen input into the organization of specific and often ad hoc

[60] Suteu and Tierney 'Squaring the circle?', p. 282.

[61] See P. Blokker, 'Human Rights, Legal Democracy, and Populism', in: N. Doyle and S. McMorrow (eds.), *Marcel Gauchet and the Crisis of Democratic Politics* (Routledge, 2022), pp. 157 – 175.

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participatory processes. As discussed, this becomes clear in the convening as well as deliberative phases of the CoFoE. The same attitude also, however, prevents institutions from imagining any structural inclusion of citizens participation in the broader democratic constellation[62].

Part of the problem in the European context is the lack of public pressure on the EU institutions from below (something which surely does happen in domestic settings; think of the *gilets jaunes* in France[63]). The Conference is lacking the dimension of a societal 'constitutional moment' (in Bruce Ackerman's terms), not least due to a great lack of broad public awareness of the process.[64] In a related sense, a key problem – which I did not consider explicitly in the discussion above, but which is clearly an acute issue – is how to connect relatively well-designed and innovative micro-level deliberation to broad societal, macro-level debate. The absence of a micro-macro linkage results in inexistent pan-European public debate and greatly compromises any durable beneficial effects in terms of the generation of democratic and societal legitimacy, and a broadly shared acknowledgement of being part of a political community-shaping process.

In sum, the great challenge of the participatory turn is how to effectively and durably institutionalize participatory citizenship, in the face of all odds.[65] In the case of the CoFoE, various voices have raised the idea of a permanent citizens' assembly, in some cases imagined also with constitutional initiative in terms of Treaty reform.[66] The

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[62] An exemplary comment from the Greek former deputy prime minister and former minister of finance and of foreign affairs Evangelos Venizelos: 'It would be, …, harmful for the Conference on the Future of Europe to give the false impression that the state and prospect of European integration is a soft issue of consultative democracy that can be solved as long as we are discussing it. This can be a dangerous institutional illusion', see https://verfassungsblog.de/the-conference-on-the-future-of-europe-as-an-institutional-illusion/.

[63]See Ulrike Liebert, 'Seven lessons on citizen participation for CoFoE' (2021) available at: https://blogs.eui.eu/transnational-democracy/seven-lessons-on-citizen-participation-for-cofoe/.

[64] Nevertheless, also in the Chilean Convention, surely the result of large-scale citizen upheaval, citizen input is ultimately limited.

[65] G. Smith, 'The European Citizens' Assembly', in: A. Alemanno and J. Organ (eds.), *Citizen Participation in Democratic Europe: What Next for the EU* (ECPR Press, 2021), pp. 204)

[66] (see Cooper et al. 2021). The Citizens Take over Europe coalition of civil society organizations has launched this idea inter alia on the Digital Platform, see

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permanent inclusion of participatory citizenship into an existing institutional environment remains one of the core challenges of modern democracy.

https://futureu.europa.eu/processes/Democracy/f/6/proposals/7627?component_id=6&locale=en&participatory_process_slug=Democracy.

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CITIZENSHIP AND MEMBERSHIP: THEORY AND CHALLENGES IN TIMES OF GLOBAL CRISES. DECISION MAKING AND ALGORITHM. THE EUROPEAN UNION'S PROPOSAL

Fulvio Costantino*

Abstract

Human beings all over the world are today more "post-national" thanks to technology, which is able to create even more intense bridges and bonds between people far away from the world than those close to us, and therefore on the one hand often makes it difficult understanding or accepting which law is applicable to a specific case, on the other hand, suggests treating subjects who use the same tools in the same way, beyond their formal citizenship. With the digital citizenship notion, we mean a set of rights and duties of citizens defined within the Internet. The following appear to be involved: the need for inclusion, as forms of exclusion may arise from the refusal or the impossibility of using technologies; the need for skills, above all technical and legal, to deal with the digital context; the need for participation, so that digitization can fully deploy its social and civic benefits. On the other hand, however, digitization can even lead to the situation in which men are deprived of the human rights guaranteed by citizenship and therefore find themselves without any rights. All these aspects are intended to be discussed in this paper.

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Indice Contributo

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1. The notion of cd. digital citizenship

Human beings all over the world are today more "post-national" thanks to technology, which is able to create even more intense bridges and bonds between people far away from the world than those close to us, and therefore on the one hand often makes it difficult understanding or accepting which law is applicable to a specific case, on the other hand, suggests treating subjects who use the same tools in the same way, beyond their formal citizenship[1].

With the digital citizenship notion, we mean a set of rights and duties of citizens defined within the Internet[2]. In this sense, it is defined as an extension of "traditional" citizenship, possible thanks to information and communication technologies (ICT)[3]. It would therefore be a new and further typology of citizenship, not an alternative or opposite to the classic one, whose content can be considered aimed at simplifying the relationship between citizens, businesses and public administration.

Institutional documents refer to digital citizenship: the Council of Europe[4] defines a digital citizen as "a person who masters the competences for democratic culture in order to be able to competently and positively engage with evolving digital technologies; participate actively, continuously and responsibly in social and civic activities; be involved in a process of lifelong learning (in formal, informal and non-

[1] An interesting case of digital citizenship concerns Estonia. Since 2014, Estonia offers an "electronic residency" program, thanks to which one can digitally sign documents, pay taxes online, open a bank account, start a business, services generally available to its citizens. Estonia has one of the largest stateless populations in Europe, due to naturalization laws passed after the fall of the Soviet Union which required members of ethnic groups from the Soviet Union to reapply for citizenship. Many have not applied for or obtained citizenship and are subject to many forms of discrimination. https://www.e-resident.gov.ee/. See Taavi Kotka, Carlos Ivan Vargas Alvares del Castillo, 'Kaspar Korjus, Estonian e-Residency: Benefits, Risk and Lessons Learned' in E. Francesconi (ed.), *Electronic Government and the Information Systems Perspective. EGOVIS 2016. Lecture Notes in Computer Science*, Springer, 2016, https://doi.org/10.1007/978-3-319-44159-7_1.

[2] Karen Mossberger, Caroline. J. Tolbert, Ramona S. McNeal, *Digital Citizenship: The Internet, Society, and Participation* (Cambridge US, 2007).

[3] https://epale.ec.europa.eu/is/node/109784.

[4] Recommendation CM/Rec (2019) 10 of the Committee of Ministers to member States on developing and promoting digital citizenship education.

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formal settings) and be committed to defending continuously human rights and dignity"[5]. According to the European Union[6] "Digital citizenship is a set of values, skills, attitudes, knowledge and critical understanding citizens need in the digital era. A digital citizen knows how to use technologies and is able to engage competently and positively with them".

From these documents emerges the ideal of a citizen who knows how to orient himself in the new digital context. There is no doubt that this scenario carries within it a strong egalitarian instance (for example, access to the Internet for all), and proposes to citizens new forms of economic initiative, work, professional training and cultural expression. In particular, with reference to relations with public authorities, it facilitates citizens' access to issues of general interest, greater interactivity with institutions and disintermediation, greater information symmetry with public authorities, greater pluralism and circulation of dissent.

The following appear to be involved: the need for inclusion, as forms of exclusion may arise from the refusal or the impossibility of using technologies[7]; the need for skills, above all technical and legal, to deal with the digital context; the need for participation, so that digitization can fully deploy its social and civic benefits.

On the other hand, however, digitization can even lead to the situation in which men are deprived of the human rights guaranteed by citizenship and therefore find themselves without any rights[8]. All these aspects are intended to be discussed in this paper.

[5] And "Digital citizenship" is the capacity to participate actively, continuously and responsibly in communities (local, national, global, online and offline) at all levels (political, economic, social, cultural and intercultural).

[6] Council conclusions on digital education in Europe's knowledge societies (2020/C 415/10), §10.

[7] See Gerard Doppelt, 'Equality and the Digital Divide' (2002) 24 *Hastings COMM. & ENT. L.J.* 601.

[8] See Hannah Arendt, *The origins of Totalitarianism* (first published 1951, The World publishing Company 1958), chapter 9, 267 and 287.

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2. Citizenship rights promoted by technologies

El Growing digitalization has an impact on the exercise of political, civil and social rights, on the legal situations recognized to citizens and businesses, in particular towards the public authorities[9]. Access to services provided by the administration on a platform can ensure a better result in terms of time and costs; digitization can have positive effects on education, health, social services, the conduct of economic activities; more legal guarantees can be recognized.

In this context, the notion of digital citizenship can be useful[10]. Among the main legal profiles involved, we can identify: among the rights, the right to digital identity[11], i.e. the availability of a unique digital identity assigned to citizens by administrations; the protection of personal data[12]; digital access and inclusion[13]; training for the acquisition of digital skills[14]; the information and use of public digital content[15]; citizen

[9] Caroline Fischer, Moritz Heuberger, Moreen Heine, *The impact of digitalization in the public sector: a systematic literature review*, 14 2021, 1-21, https://www.researchgate.net/publication/351216766_The_impact_of_digitalization_in_the_public_sector_a_systematic_literature_review.

[10] Arne Hintz, Lina Dencik, Karin Wahl-Jorgensen, *Digital citizenship in a datafied society* (Wiley, 2018); Giovanni Pascuzzi, *La cittadinanza digitale. Competenze, diritti e regole per vivere in rete* (Mulino, 2021).

[11] Clare Sullivan, 'Digital citizenship and the right to digital identity under international law' (2016) 32/3 *Computer Law & Security Review*, 474.

[12] Adam Thierer, 'The Pursuit of Privacy in a World Where Information Control Is Failing. Privacy, Security, and Human Dignity in the Digital Age (2013) 36/2 *Harvard Journal of Law & Public Policy*, 409.

[13] Clare Sullivan, 'Digital Citizenship and the Right to Identity in Australia', (2013) 41/3 *Federal Law Review*, 557.

[14] Viviane Devriesere, 'La Citoyennete Numerique' (2019) *Revista Universitara de Sociologie*, 82.

[15] Karen Mossberger, 'Towards digital citizenship: Addressing inequality in the information age' in Andrew Chadwick and Philip N. Howard (eds), *Routledge Handbook of Internet Politics* (Routledge, 2009), 173.

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participation in political decision-making[16]; the daily use of the benefits of digital technologies[17]. The responsibilities include respecting the rules of the web and sharing one's digital content[18].

The rights related to digital identity and digital domicile are necessary for the dialogue between citizens and public authorities. Digital identity is used to access services safely. The digital domicile allows you to receive communications, send requests or documents, make payments. The digitization of proceeding implies the right to digitally access services and to submit files through online portals through accessible technology.

These are instrumental rights with respect to underlying claims, such as starting an economic activity, enrolling in school services, booking medical examinations, etc., which however deserve protection. A further effect is uniformity, as conditions and requirements must be the same throughout the national territory[19].

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[16] Jorge Francisco Aguirre Sala, '*Citizenship.com 2.0: A Link to Participative Democracy (The Evolution of Citizenship in a Project Instrumentalized by New Media)*', (2014) 11/4 *US-China Law Review*, 461.

[17] *Ibidem*.

[18] Clare Sullivan, 'Digital Citizenship and the Right to Identity in Australia*', cit.*

[19] In Italy there is a regulatory text of reference for digital rights, the Digital Administration Code (Legislative Decree 82/2005 - CAD) which entitles Section II of Chapter I the "Digital Citizenship Charter". It affirms the right to use technologies (art. 3), the right to digital identity and digital domicile (art. 3-bis), the right to make payments using computerized methods (art. 5), to communications between businesses and public administrations (art. 5-bis), simple and integrated online services (art. 7), computer literacy of citizens (art. 8), connectivity to the Internet network in offices and public places (art. 8-bis), to electronic democratic participation (art. 9). The Italian Constitutional Court (Sentence 251/2016) has framed digital rights in the category of essential levels of services (l.e.p.) concerning civil and social rights, to be guaranteed uniformly throughout the national territory. See R. Cavallo Perin and D. U. Galetta (eds), *Il diritto dell'amministrazione digitale* (Giappichelli 2021). In Spain, a Digital Rights Charter was launched, which provides for many rights for citizens and indications for the public authorities, even if it is a non-binding act. Tools have also been put into operation that try to make inclusion effective. For example, the Barcelona digital platform Decidim! aims to encourage citizen participation through the management of citizens' involvement activities in democratic processes in political institutions, businesses and associations. The same platform in Italy is used by the Department of Public Administration and the Department for Institutional Reforms to develop the «ParteciPa» platform, which manages consultation processes on certain issues of public interest and is taken into consideration by Italian movements and parties. The platform commits the user to sign a "social contract". Pablo Aragón et al., 'Deliberative Platform

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3. The centrality of data transparency

Digitization has its fuel, which is data[20]. Digital citizenship implies the right to transparency of that data as a prerequisite[21].

Data is a tool for producing knowledge and wealth. Just as the principle of transparency is an expression of the democratic principle, an instrument of guarantee of individual and collective freedoms, of civil, political and social rights, of good administration. It allows to implement the principles of equality, impartiality, good performance, integrity, responsibility, optimal use of public resources[22].

Design: The Case Study of the Online Discussions in Decidim Barcelona', Giovanni Luca Ciampaglia, Afra Mashhadi and Taha Yasseri (eds), (2017) 10540 *Social Informatics. SocInfo 2017. Lecture Notes in Computer Science* (Springer 2017). See also *Advancing civic participation in algorithmic decision-making*, which examines the impact it has already had and which institutions such as Citizens assemblies, citizens juries, participatory budgeting (https://datajusticelab.org/wp-content/uploads/2021/06/PublicSectorToolkit_english.pdf).

[20] The centrality of data is clear in the 2016 French law on the so-called République Numérique, which contains provisions for the modernization and digitization of public administration and to strengthen the protection of citizen-consumers in the digital space. It has established that public administrations must mutually make the data in their possession available to each other, in order to exercise the public functions assigned by law more easily and more quickly, streamlining and speeding up the administrative investigation. It is envisaged that the data may be the subject of an access request submitted by private individuals pursuant to the local transparency law (Code des relations between the public and the administration). The establishment of a new office, dependent on the Prime Minister, Commissioner for digital sovereignty, is envisaged (art. 29), with the aim of guaranteeing "the exercise, in cyberspace, of national sovereignty and of individual rights and freedoms and collective that the Republic protects. " It provides (art. 48) the right to "data portability" and the right to access the content of the user profile. It also provides (art. 63) a discipline of "digital successions", ie the right of the interested party, for the time following his death, to decide on the data entered in online platforms and services and the right for the heirs of the interested in accessing the same data. Philippe Mouron, 'La loi pour une République numérique', 2017 *Revue européenne des médias et du numérique*, 15. See Giovanni Comandè, 'The Fifth European Union Freedom', Hans Micklitz (ed.), *Constitutionalization of European Private Law*, XXII/2, (Oxford, 2014) https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780198712107.001.0001/acprof-9780198712107-chapter-3

[21] It is precisely from the aforementioned French law that not only the centrality of data is evident, but also the importance of data transparency.

[22] See art. 2, of the Italian d. lgs. 33/2013.

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Based on the principle of transparency, public authorities are required to make data, documents and procedures accessible. Accessibility and transparency equalize the relationship between citizens and administrations. The knowledge of times, costs, formalities, the provision of uniform forms, help citizens who deal with public authorities.

The data and documents to access services and services, or to obtain the necessary consents to start a business, should be available in an open format, unless there are reasons to justify a licensing or to protect privacy or particularly relevant interests. The data should be complete, provided in real time, remotely accessible and free of charge.

4. Citizenship rights put at risk by technologies: algorithms

After all, data are essential for governing, making decisions, intervening quickly and efficiently, as well as for communicating with citizens. To this end, the public authorities are making an increasingly wide use of computer algorithms, which are pre-set operations that probe, intertwine and process huge amounts of data (the so-called big data) and, through calculations, provide predictions, recommendations, decisions[23].

The speed of the computers and the lower incidence of mistakes compared to carrying out the same activities in analog mode has also led the public authorities to a massive use of algorithms. There are many uses of algorithms, but it is evident that public services are naturally characterized by equal requests, connected to repetitive activities without discretion and therefore are easily applicable to them.

Algorithms stand out for their undoubted effectiveness, and are able, if properly trained, to make decisions, or in any case to advise the decision makers. In this second case, the recommendations, based on predictions, indicate to the decision maker where to focus his attention (surveillance, investment, maintenance tasks). The

[23] With reference to the most recent forms of data analysis see Michael Veale and Irina Brass, 'Administration by Algorithm? Public Management Meets Public Sector Machine Learning', Karen Yeung and Martin Lodge (eds.), *Algorithmic Regulation* (OUP 2019).

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predictions thus also shape the decision that belongs entirely to human beings (checks on expenses, tax returns, travelers).

Algorithms are also successful because they have a semblance of neutrality[24] and objectivity[25]: due to the desubjectivization of computers, their work is perceived by decision makers and users as more objective than it is. Yet these are tools that are functional to the interests and ideologies of their clients. Neutrality can thus constitute an expedient to elude the problem of the decision maker's democratic accountability[26].

According to human parameters, even algorithms can be wrong, due to design errors, which poses a problem of responsibility. Rand Hindi (entrepreneur and data scientist) said: "Artificial intelligence makes fewer mistakes than humans, but it makes mistakes that humans would not have made" (referring to the fatal accident of a Tesla car that did not identify a truck in the middle of the road, which any driver would notice)[27].

More deceitful, however, is the structural error. Precisely because of the way they are constructed or operate, algorithms can incorporate prejudices or be a source of discrimination (the best known cases concern certain ethnic groups, women,

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[24] Erika Giorgini, 'Algorithms and Law' (2019) *Italian Law Journal* 145.

[25] Paul Schwartz, 'Data Processing and Government Administration: The Failure of the American Legal Response to the Computer' (1992) 43 *Hastings L.J.* 1321, 1342 describing the deference of the individuals give to computer results.

[26] The role of those who have to make a decision and receive the recommendation from the algorithms is problematic, even and above all if they do not have adequate computer skills. The decision maker, in fact, even beyond the hypothesis of fully automated measures, may find himself in a position to formally take a decision substantially taken by artificial intelligence, without being able to understand, integrate or correct it.

With respect to this issue, the current legal framework does not provide a solution: art. 22 of the GDPR in fact prohibits the adoption of a fully automated act and refers to the final administrative decision: therefore, the level of attention on the direct use of algorithms in the adoption of decisions is high, not so much its use o in the investigation stage.

[27] *How Can Humans Keep the Upper Hand? The Ethical Matters Raised by Algorithms and Artificial Intelligence Report on the Public Debate Led by The French Data Protection Authority (Cnil) as Part of the Ethical Discussion Assignment Set by the Digital Republic Bill*, December 2017, 30.

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minorities) on a large scale[28]. Some "biases" underlying algorithms cannot be removed, also because they may be unintentional[29]. Visions of society resulting from stereotypes and prejudices can be perpetuated through decisions[30]. The programmer also affects how the algorithm works, and each algorithm is only one of the possible, which raises the problem of the relationship between scientist and public decision-maker[31].

Ultimately, human error, bias in data entry or programming or malfunctions produce discriminatory algorithms. Discriminatory effects occurred in particular in the processes applied to the dynamics of the labor market[32], to the credit sector[33], in criminal proceedings[34].

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[28] Jon Kleinberg, Jens Ludwig, Sendhil Mullainathan and Cass R. Sunstein, 'Discrimination in the Age of Algorithms' (2018) 10 *Journal of Legal Analysis*, 1; Stephanie Bornstein, 'Antidiscriminatory Algorithms' (2018) 70/2 *Alabama Law Review*, 519.

[29] Mirko Bagaric, Dan Hunter and Nigel Stobbs, 'Erasing the Bias against Using Artificial Intelligence to Predict Future Criminality: Algorithms Are Color Blind and Never Tire' (2020) 88/4 *University of Cincinnati Law Review*, 1037. Joshua A. Kroll, Joanna Huey et al., 'Accountable Algorithms' (2017) 165/3 *University of Pennsylvania Law Review* 633.

[30] 'Antidiscriminatory' *cit.*, 571.

[31] Karni Chagal-Feferkorn, 'The Reasonable Algorithm', (2018) *University of Illinois Journal of Law, Technology & Policy* 111; Ernest Schaal, 'What to Say to a Computer Programmer' (1982) 28/2 *Practical Lawyer* 71; Karni Chagal-Feferkorn, 'How Can I Tell If My Algorithm Was Reasonable?' (2021) 27/2 *Michigan Technology Law Review* 213.

[32] Matthew U. Scherer, Allan G. King and Marko J. Mrkonich, 'Applying Old Rules to New Tools: Employment Discrimination Law in the Age of Algorithms' (2019) 71 *South Carolina Law Review*, 449.

[33] Sahiba Chopra, 'Current Regulatory Challenges in Consumer Credit Scoring Using Alternative Data-Driven Methodologies' (2021) 23/3 *Vanderbilt Journal of Entertainment & Technology Law* 625.

[34] Aleš Završnik, 'Algorithmic justice: Algorithms and big data in criminal justice settings' (2021) 18/5 *European Journal of Criminology* 623; Mirko Bagaric, Jennifer Svilar, Melissa Bull, Dan Hunter, and Nigel Stobbs, 'The Solution to the Pervasive Bias and Discrimination in the Criminal Justice: Transparent Artificial Intelligence' (2022) 59/1 *American Criminal Law Review* 95; Danielle Kehl, Priscilla Guo and Samuel Kessler, *Algorithms in the Criminal Justice System: Assessing the Use of Risk Assessments in Sentencing Responsive Communities Initiative*, *Berkman Klein Center for Internet & Society, Harvard Law School*, 2017; Michael Brenner, Jeannie Suk Gersen, Michael Haley et al., 'Constitutional Dimensions of Predictive Algorithms in Criminal Justice' (2020) 55/1 *Harvard Civil Rights-Civil Liberties Law Review* 267; Spencer S. Hsu, '*Symposium - From the Crime Scene to the Courtroom: The Future of Forensic Science Reform'* (2018)

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It should be added that algorithms have an impact not only on citizens who are recipients of public decisions, but also on how citizens exercise the rights and freedoms that the legal systems recognize them.

In fact, algorithms designed to recommend information and products in line with the presumed individual preferences may mean that the preferences on user information and subsequent exposure to content over time constitute cages, the so-called bubbles[35]. Users are confined to their profiles. Citizens are less free to self-determine and to choose, because freedom is exercised in relation to what 'offered' by profiling. This affects the free construction of the personality of individuals, and also their social representation, because profiling can produce the creation or perpetuation of stereotypes, as well as social segregation.

Finally, the algorithmic decisions that shape the flows of information can induce certain behaviors, modify the preferences and values of users, even lead them to radicalization[36]: in other words, they can manipulate the way of thinking and choices of citizens, who are also voters[37].

On the one hand, the algorithms involved in these problems are not mainly those used by public authorities, but those used by companies, primarily big techs (Amazon, Google, Facebook, just to name a few)[38].

34/4 *Georgia State University Law Review*; Carolyn McKay, 'Predicting Risk in Criminal Procedure: Actuarial Tools, Algorithms, AI and Judicial Decision-Making' (2020) 32/1 *Current Issues in Criminal Justice* 22.

[35] Kerri A. Thompson, 'Commercial Clicks: Advertising Algorithms as Commercial Speech' (2019) 21/4 *Vanderbilt Journal of Entertainment & Technology Law* 1019.

[36] Shaun B. Spencer, 'The Problem of Online Manipulation' (2020) 2020/3 *University of Illinois Law Review* 959; Allyson Haynes Stuart, 'Social Media, Manipulation, and Violence' (2019) 15/2 *South Carolina Journal of International Law and Business* 100; Gina-Gail S. Fletcher, 'Deterring Algorithmic Manipulation' (2021) 74/2 *Vanderbilt Law Review* 259.

[37] Jaeho Cho, Saifuddin Ahmed et al., 'Do Search Algorithms Endanger Democracy? An Experimental Investigation of Algorithm Effects on Political Polarization' (2020) 64/2 *Journal of Broadcasting and Electronic Media* 150.

[38] Swati Srivastava, 'Algorithmic Governance and the International Politics of Big Tech' (2021) *Perspectives on Politics* 1 doi:10.1017/S1537592721003145

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But profiling is even more problematic if used in the public sector, to prevent tax, social security and social welfare fraud, and above all for the so-called 'predictive police'. It is also used in the judicial sector: the Compas software was adopted in the State of Wisconsin to calculate the risk of recidivism or to define the amounts of bail to be paid[39].

More generally, the expression of *Jus algoritmi*[40] was used to describe a new form of citizenship, whose primary mode of operation is control through identification and categorization and which takes place through the increasing use of software to express judgments. on the status of citizenship of an individual, and therefore to decide what rights he has and what operations on his person are permitted.

The so-called social credit score also fits into this framework[41]: public authorities evaluate the social reliability of citizens on the basis of certain elements, including personality characteristics, social behavior, network of relationships or other elements, by means of a social score. Access to financial contributions or services is correlated to the score. For the Chinese State Council this is a fundamental component of the socialist market economy and social 'governance', which helps to create a "culture of sincerity", encourages "trust" and allows for the construction of a "harmonious socialist society"[42]. These are systems that have an impact on the construction of personality on behavior, with limitations of freedom and forms of exclusion.

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[39] Hannah Bloch-Wehba, 'Access to Algorithms' (2020) 88/4 *Fordham Law Review* 1265; Correctional Offender Management Profiling for Alternative Sanctions (COMPAS), 18 State v. Loomis, 881 N.W.2d 749 (Wis. 2016).

[40] John Cheney-Lippold, 'Jus Algoritmi: How the National Security Agency Remade Citizenship' (2016) *International Journal of Communication* 10, 22.

[41] Lizzy Rettinger, 'The Human Rights Implications of China's Social Credit System' (2021) 21/1 *Journal of High Technology Law* 1; Bi Honghai, 'Old Regulatory Wine in a New Bottle of Technology - A Critical Analysis of China's Social Credit System' (2021) 16/2 *University of Pennsylvania Asian Law Review*, 282; Nizan Geslevich Packin and Yafit Lev-Aretz, 'On Social Credit and the Right to Be Unnetworked, Survey: The Evolving Landscape of Business and Media' (2016) *Columbia Business Law Review* 339; Daithì Mac Sithigh and Mathias Siems, 'The Chinese Social Credit System: A Model for Other Countries' (2019) 82/6 *Modern Law Review* 1034.

[42] https://www.eurozine.com/social-control-4-0-chinas-social-credit-systems/

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In this scenario, it is difficult to check and review the algorithms, first of all due to their complexity, as well as the complexity of the research and calculation activities they carry out[43]. Secondly, the debate on oversight has not yet reached shared solutions[44]. Thirdly, those who develop algorithms do not want to make them known[45]. And so also the principle of access to data, mentioned above, is not yet recognized, or at least not fully, and in some ways it is not even possible to guarantee it.

The term "algorithm dictatorship" was used to describe this situation[46]. The 'despotic domination' of algorithms, in fact, is an expression of the 'despotic domination' of public or private powers.

So much so that we can also ask whether it is appropriate to rely on algorithms, and if this does not involve a regression from the point of view of the ideals of justice. In this sense, the French National Bar Council (CNB) observes that "we must avoid the obsession with efficiency and predictability that motivates the use of the algorithm that leads us to design categories and rules no longer in consideration of our ideal of justice, but so that they can be more easily "codified"[47].

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[43] Michael W. Monterossi, 'Algorithmic Decisions and Transparency: Designing Remedies in View of the Principle of Accountability' (2019) 5/2 *Hard Cases Italian Law Journal* 711.

[44] See *infra* about the European proposal.

[45] Mariateresa Maggiolino, 'EU Trade Secrets Law and Algorithmic Transparency' (2019) *Bocconi Legal Studies Research* available at SSRN: http://dx.doi.org/10.2139/ssrn.3363178; Michelle Azuaje Pirela and Daniel Finol Gonzalez, 'Algorithmic Transparency and Intellectual Property: Tensions and Solutions' (2020) 30 *Revista la Propiedad Inmaterial* 111.

[46]https://www.munichrefoundation.org/en/Climate_change_and_education/Dialogue_forums/Dialogue_forums_2018/23_January_2018_Globalisation_and_digitalisation_The_world_in_the_fast_lane.html

[47] *How can*, *cit.*, 30.

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5. Legal discipline and algorithms. Transparency

From a legal point of view, the algorithm appears similar to a regulation, drawn up by man and applied by the machine.

The Italian Consiglio di Stato considered the algorithm, that is the software, as a digital administrative decision[48]. It also established some requirements and limits on the use of algorithms: as they have legal value, even if in mathematical form, they must comply with the general principles of administrative activity, including publicity, transparency, reasonableness, proportionality. Administrative discretion can be exercised by the administration at the time of the algorithm development; the algorithm, on the other hand, must not leave room for discretion, but must provide a solution for all possible, even improbable cases, and must respond to the principle of reasonableness. The administration must play an *ex ante* role of mediation and settlement of interests, also by means of testing and improving the algorithm. Recourse to the judge must be envisaged for the evaluation of the correctness of the automated process and for the carrying out of evaluations and assessments made automatically.

In the US case Loomis vs Wisconsin, known as 'Compas', concerning the use of algorithms by the US criminal justice administration to assess the social dangerousness of the accused, it was argued that the use of technologies of this type cannot be "determinative" with respect to the decision, but it can be a "relevant factor", to be weighed. For this reason, the aim is to preserve a space for human decision-making, during control[49].

Two problematic issues of algorithms are those of accountability and transparency.

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[48] https://www.giustiziaamministrativa.it/portale/pages/istituzionale/visualizza/?nodeRef=&schema=cds&nrg=201902936&nomeFile=201908472_11.html&subDir=Provvedimenti. Barbara Marchetti, 'La garanzia dello "human in the loop" alla prova della decisione amministrativa algoritmica' (2021) *BioLaw Journal - Rivista di BioDiritto* 367; Diana Urania Galetta 'Algoritmi, procedimento amministrativo e garanzie: brevi riflessioni, anche alla luce degli ultimi arresti giurisprudenziali in materia' (2020) *Rivista Italiana di Diritto Pubblico Comunitario* 501; Enrico Carloni, 'I principi della legalità algoritmica. Le decisioni automatizzate di fronte al giudice amministrativo' (2020) *Diritto amministrativo* 273.

[49] Anne L. Washington, 'How to Argue with an Algorithm: Lessons from the COMPAS-ProPublica Debate' (2018) 17/1 *Colorado Technology Law Journal* 131.

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The French Conseil constitutionel, in the Décision n. 2018-765 DC, 12 June 2018 found that the so-called algorithms "Auto-apprenant", cannot in any case be used as an exclusive basis for an individual administrative decision, if they are not subject to control or validation[50]. The use of an algorithm in an administrative decision is allowed under three conditions: 1) the decision must expressly mention that it was adopted on the basis of an algorithm, in accordance with the provisions of the Code des relations entre le public et l'administration; 2) the main characteristics of this algorithm must, if requested, be communicated; 3) the decision cannot be made using an algorithm whose operating principles cannot be communicated without violating one of the secrets or protected interests identified by the Code des relations entre le public et l'administration. The decision must always be recourse.

The Italian Consiglio di Stato allowed the use of computer algorithms to take public decisions as long as the criteria applied are fully known. However, the decision must be attributable to the authority, which must be able to verify the logic and legitimacy of the choice entrusted to the algorithm. The identification of a subject is necessary to impute the choice and responsibility for damages; therefore the verification of the logic and correctness of the results must be guaranteed. The algorithm must therefore be known by the administration and by private individuals, as it is a rule expressed in a language different from the legal one: the authors, the processing procedure, the decision mechanism (the priorities assigned in the evaluation and the data selected as relevant) must be knowable, to allow verification. The technical formula must be accompanied by explanations that make it understandable. Confidentiality is not allowed[51].

The European Regulation 2016/679 (GDPR), to reduce the risk of discriminatory treatments for the individual, establishes in artt. 13 and 14 that in the information addressed to the interested party, notice is given of the possible execution of an automated decision-making process, both that the data collection is carried out by the interested party and by third parties. In the case of a fully automated process, the owner must provide " meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data

[50] Matteo Pressi, 'The Use of Algorithms within Administrative Procedures: National Experiences Compared through the Lens of European Law' (2021) 14/2 *Review of European Administrative Law* 69.

[51]https://www.giustiziaamministrativa.it/portale/pages/istituzionale/visualizza/?nodeRef=&schema=cds&nrg=201902936&nomeFile=201908472_11.html&subDir=Provvedimenti

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subject"[52]. Art. 15 provides for the principle of knowability and comprehensibility: according to the first, it is possible to receive information relating to the existence of any automated decision-making processes that concern him (paragraph 1, letter h) and, for the second, the possibility to obtain " meaningful information about the logic involved ".

It remains uncertain whether, despite the rules and judicial rulings, the demand for transparency will be met. Decisions can be made taking into account such a large number of data and parameters that it is practically impossible to reconstruct the logical process, and therefore the motivation, *a posteriori*: the more powerful the algorithm, the more opaque it becomes (as it calculates more variables and processes more data). The phenomenon appears even more pronounced in the areas of security and public order, in which secrecy and lack of motivation in decisions occur more frequently. Best algorithms are inherently dynamic, can change quickly, which makes them even more difficult to understand. There is a crisis of transparency and comprehensibility. The paradigm is even reversed: human beings become knowable (reified by algorithms) and machines become opaque[53].

The recipient of the recommendation does not know how the program arrived at that conclusion in cases where the algorithms recognize occurrences by learning themselves to weight the different components of the data entered. In these cases, the creators of the algorithms know the data in general terms, but in more advanced applications, they may not know the weight that has been attributed to particular inputs. It is difficult to think that in the future the public authorities will not want to use these more advanced algorithms.

6. Legal discipline and algorithms. Consent

Art. 22, paragraph 1, of the GDPR, according to the *Human in the loop* principle, provides that, if an algorithmic decision produces legal effects or significantly affects the person, the interested party has the right to have this not based solely on an

[52] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679

[53] See Hannah Bloch-Wehba, 'Access to Algorithms' (2020) 88 *Fordham Law Review* 1265; a possible solution is proposed by W. Nicholson II Price and Arti K. Rai, 'Clearing Opacity through Machine Learning' (2021) *Iowa Law Review* 775.

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automated process. The article contemplates in paragraph 2 some exceptions: cases in which the decision: a) is necessary for a contract; b) is authorized by Union or Member State law; c) is thbased on the subject's explicit consent.

If however, for art. 22 of the GDPR, exclusively automated processing and profiling activities can find a legitimate basis in the explicit consent of the interested party, the problem is to verify the same freedom of consent, when it is a necessary condition for obtaining a service.

The problem concerns the subject matter, since the relationship of citizenship cannot be reduced to the relationship between public power and the individual. It is no longer easy to use the distinction between public and private with reference to many private entities, which provide virtual spaces and services through which people meet, debate, inform themselves, form opinions, share data, documents, images and that they are not, due to the number of participants and the conditions of the service, replicated or replicable by public entities. In this case we are dealing with private powers[54].

According to art. 7, paragraph 4, of the GDPR, " 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. ".

Consent is often stolen, without informing the user about the collection and use of his data for remunerative purposes[55]: there is a risk to social life, in the event that the user wants to exclude some of the data offered by the use[56]. The conditioning is greater the more the service offered by the website operator is not provided by other operators and cannot be waived for the interested party. It is different when it comes to fungible goods or services, whereby the user can easily access similar services and

[54] *Ex multis*, Josh Simons and Dipayan Ghosh, 'Utilities for Democracy: Why and How the Algorithmic Infrastructure of Facebook and Google Must Be Regulated', (2020) https://www.brookings.edu/wp-content/uploads/2020/08/Simons-Ghosh_Utilities-for-Democracy_PDF.pdf

[55] CJEU Case C-645/19, Facebook Ireland Ltd and Others v Gegevensbeschermingsautoriteit.

[56] Philip N. Yannella, 'The Differing US and EU Regulatory Responses to Rise in Algorithmic Profiling' (2018) 33/4 *Communications Lawyer* 1.

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therefore renounce without burdensome sacrifice[57]. On the other hand, social networks that allow you to stay in touch with people are not as fungible.

7. Legal discipline and algorithms. Profiling

With regard to profiling, art. 4, point 4, of the GDPR establishes that profiling is " any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements"[58]. However, this is a discipline that has proved to be ineffective with respect to the cited risks posed by the algorithms.

[57] Lorena Barrenechea Salazar, 'Privacy, the Fallacy of Consent and the Need to Regulate Social Media Platforms' (2020) *Intergovernmental Organisations In-house Counsel Journal* 39.

[58] See the Recital n. 71 of the GDPR: "In order to ensure fair and transparent processing in respect of the data subject, taking into account the specific circumstances and context in which the personal data are processed, the controller should use appropriate mathematical or statistical procedures for the profiling, implement technical and organisational measures appropriate to ensure, in particular, that factors which result in inaccuracies in personal data are corrected and the risk of errors is minimised, secure personal data in a manner that takes account of the potential risks involved for the interests and rights of the data subject and that prevents, inter alia, discriminatory effects on natural persons on the basis of racial or ethnic origin, political opinion, religion or beliefs, trade union membership, genetic or health status or sexual orientation, or that result in measures having such an effect. Automated decision-making and profiling based on special categories of personal data should be allowed only under specific conditions" and recital 24 of the GDPR "The processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union should also be subject to this Regulation when it is related to the monitoring of the behaviour of such data subjects in so far as their behaviour takes place within the Union. In order to determine whether a processing activity can be considered to monitor the behaviour of data subjects, it should be ascertained whether natural persons are tracked on the internet including potential subsequent use of personal data processing techniques which consist of profiling a natural person, particularly in order to take decisions concerning her or him or for analysing or predicting her or his personal preferences, behaviours and attitudes".

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8. The EU proposal for a regulation on AI

The European proposal for a regulation on AI intervenes in this scenario, and aims to reconcile the protection of fundamental rights and EU values with technological innovation, classifying AI systems according to the risk of use for health and security or for the fundamental rights of individuals[59]. A governance system is introduced at central and national level and measures are envisaged to support innovation (such as "regulatory sandboxes"). This defines a uniform legal framework for all Member States.

The proposal inherits many elements from the GDPR, including risk assessment and management, accountability and self-assessment mechanisms, sanctioning regimes and governance systems.

The proposal provides for a ban on placing on the market (or in service or using) AI systems that use subliminal techniques in order to significantly distort behaviour or that, for the same purposes, exploit the vulnerability of specific groups of people, for their age or for physical or mental disability (art. 5).

'Social scoring' systems, which lead to prejudicial or unfavorable treatment of certain individuals or entire groups of individuals in social contexts that have no relationship with those in which the data were originally generated or collected, are prohibited[60]. Real-time remote biometric identification systems are prohibited in spaces accessible to the public (for example facial recognition tools to control passers-by in public spaces), except in cases exceptionally authorized by law relating to crime prevention and contrast activities, in any case subject to specific guarantees[61].

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[59] Proposal for a Regulation of the European Parliament and of the Council Laying down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts COM(2021) 206 final. See also White Paper on Artificial Intelligence - A European Approach to Excellence and Trust COM/2020/65 final; Ethics Guidelines for Trustworthy AI High-Level Expert Group on Artificial Intelligence; Proposal for a Regulation of the European Parliament and of the Council on machinery products, COM(2021) 202 final.

[60] Recital 17.

[61] Art. 5. The use must: take into account the situation (severity, probability and extent of the damage), the consequences for the rights and freedoms of the persons concerned; be subject to temporal, geographical and personal limitations; be subject to prior authorization issued by a judicial authority or an independent administrative authority of the Member State, issued upon reasoned request and

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Other systems are classified as high risk but allowed as long as they comply with certain requirements before they are placed on the market or put into service (such as the use of high quality data sets, adequate documentation, adequate information to the user, adequate human surveillance and high standards in terms of robustness, security, cybersecurity and accuracy) and are subject to an *ex ante* conformity assessment (title III). These include critical infrastructures, like: education or vocational training (which can affect access to higher levels of education and professional life); labor (e.g. hiring procedures); essential public and private services (e.g. credit systems); transport (which could endanger life and health); the safety components of the products (e.g. robotic surgery); management of migration, asylum and border control (e.g. verification of the authenticity of travel documents); biometric identification and categorization of people; law enforcement activities that can interfere with people's fundamental rights; administration of justice and democratic processes (annex III). The list that can be extended by the Commission (art. 7).

There is an obligation to set up a risk management system for these technologies (art. 9). Data and data governance requirements are established (art. 10): training, validation and testing data must, inter alia, be relevant, representative, error-free and complete, have the appropriate statistical properties with respect to the recipients, they must take into account the geographical, behavioral or functional context in which the system is intended to be used. The drafting of the technical documentation of a high-risk AI system is required before the placing on the market or commissioning of this system (art. 11), the automatic recording of events ("log") during its operation (art. 12), conformity assessments for the most appropriate risk management measures (art. 19), the consistency of functioning with the intended purpose and compliance with the regulation. AI systems must be registered in an EU database, a declaration of conformity must be signed, and the AI system should bear the CE marking (art.19).

The suppliers of high-risk AI systems who believe that their system is not compliant must immediately take the necessary corrective measures, inform the distributors (art. 21), the competent national authorities of the States, the body that issued a certificate (art. 22).

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in accordance with national law, if the authority has verified, on the basis of clear and objective evidence, that the use is necessary and proportionate; in a situation of justified urgency, it is possible to request authorization during or after use.

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Each Member State designates or establishes a notifying authority (art. 30 and 59), which supervises the market, provides guidance and advice, and supervises notified bodies, which carry out conformity assessment for high-risk systems. Depending on the system, the supplier follows the conformity assessment procedure based on internal control or with the involvement of a notified body. Biometric identification and categorization systems of natural persons are subject to a third party conformity assessment, except in cases where the supplier has used harmonized standards or - if applicable - common specifications, which would be part of internal control, including whether the point is the subject of debate.

For AI systems considered low risk, minimum transparency requirements are imposed (art. 52), so that individuals are informed that they are interacting with an AI system, if this is not evident: chatbots, recognition systems emotions or "deep fakes" (AI systems that generate or manipulate audio or video content that may appear authentic).

A European Committee for Artificial Intelligence is established, with the task of supporting cooperation between national supervisory authorities and the Commission, providing advice and expertise to the Commission and enabling the sharing of best practices (artt. 56-58) .

An EU database for high-risk AI systems that may affect fundamental rights is envisaged, managed by the Commission and fed with data made available by AI system providers before placing them on the market or in service (art. 60); suppliers must report any serious incident or malfunction that may affect these rights to the supervisory authorities of the Member States where such incidents or violations have occurred, no later than 15 days after becoming aware of them. National authorities have the power to investigate and if they believe that, although compliant with the regulation, the AI system presents a risk, they ask the operator to take all appropriate measures, including withdrawal or recall from the market. For the most serious violations, fines of up to 30 million euros are envisaged or, if a company is responsible, up to 6 percent of the total annual worldwide turnover of the previous year, if higher.

There are many points under discussion. Beyond the need for more precise definitions and delimitations (on AI systems, on subliminal techniques, on the exploitation of vulnerabilities), there is no precise definition of high risk, which is an open standard and therefore must be interpreted.

The Economic and Social Committee has asked that the ban on social scoring extends to private organizations and semi-public authorities; a ban on the use of AI for

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automated biometric recognition even in spaces accessible to individuals; a mandatory third-party compliance assessments for all high-risk AI; appeal procedures for damage cases; the human prerogative for certain decisions.

9. Conclusions. Transparency, participation, collaboration

It was highlighted how being a citizen in a digital context provides unprecedented opportunities and risks. The principles that must govern the use of technology in the relationship of public authorities (and private individuals with citizens) are known, and are familiar to scholars of public law: legality, participation, transparency, proportionality, access to justice. And equally well-known tools are needed: regulation, authorization, supervision, sanctions. Much, however, needs to be interpreted in a new way.

Only a few examples will be given. There is a lot of emphasis on the principle of transparency, but the construction of the algorithms is the most important moment. It concerns above all the relationship between public interests: a reflection on the role of the same must be carried out in order to understand if, when, how and at what price they can be framed in predefined schemes. The programming of a computer requires, even when sensitive interests are involved, to carry out an abstract evaluation and therefore a weighting of the interests involved *ex ante*. This poses a crucial problem of the reliability of the algorithms: if they are not well calibrated, prejudices can be produced to the legal situations of the recipients of the decisions, and the algorithms will be able to replicate any errors for a potentially infinite number of times, until they (and provided that) are corrected. It therefore becomes necessary, first of all, to decide when to resort to them, in what ways and to assess which risks of prejudice the decision-maker is willing to accept, and such decisions must be documented[62].

The principle of participation can play an important role: a procedure similar to the one that characterizes rulemaking in the US system, characterized by transparency and participation, would be useful for the adoption of algorithms. Inclusive

[62] Ben Green, 'The Flaws of Policies Requiring Human Oversight of Government Algorithms' (2021) 45 *Computer Law & Security Review* https://ssrn.com/abstract=3921216 or http://dx.doi.org/10.2139/ssrn.3921216

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mechanisms of collective decision-making, with the involvement of stakeholders and civil society, can improve the correctness and validity of the models. The intervention of groups, organizations, research centers and universities makes it possible to reduce the information asymmetry. The examination and review by external and independent researchers, notice and comment procedures that subject the algorithms to public scrutiny may be useful.

Cases such as such as the one relating to the final marks of UK students[63], and the one relating the social benefits in the Netherlands[64] are examples of poorly designed, poorly constructed algorithms, not discussed with interested parties, not shared.

With regard to the principle of transparency: it is possible to predict the behavior of computers in the event that they operate on the basis of pre-programmed logical rules and known data sets. But on many aspects, the Regulation also appears simplistic: in the case of algorithms that adapt and develop new solutions to emerging and dynamic situations, the impossibility of monitoring every step of the machine must be accepted, and in exchange it must be requested that any action be carried out within the limits of the regulatory framework[65].

Technological innovation requires a rethinking of the role and tasks of the public decision maker, as well as adequate selection and training. The ability to communicate

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[63] Sam Shead, 'How a computer algorithm caused a grading crisis in British schools' (2021)

https://www.cnbc.com/2020/08/21/computer-algorithm-caused-a-grading-crisis-in-british-schools.html

[64] Gabriel Geiger, 'How a Discriminatory Algorithm Wrongly Accused Thousands of Families of Fraud

Dutch tax authorities used algorithms to automate an austere and punitive war on low-level fraud' (2021)

https://www.vice.com/en/article/jgq35d/how-a-discriminatory-algorithm-wrongly-accused-thousands-of-families-of-fraud

[65] However, it has been noted that the decisions of computers are more transparent than those of humans. We have not written the code of human learning and we have very little control over the data entered in humans for their learning. Also, when it comes to understanding, we must take into account that many technologies (airplanes, drugs, medical interventions), although we depend on them, we do not understand how they work. Intellegibility must be such for experts, not necessarily for everyone, not even for the addressees of a decision or for public decision-makers.

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with AI suppliers, often external to the administration, must be developed so that the tools are built and adapted according to a logic that respects rules, principles and objectives[66]. Administrations, particularly local ones, do not have the skills and means to regulate and supervise the development and implementation of these tools[67]. Up to now, no registers relating to algorithmic procedures or transparency measures have been imposed, the industrial secrecy exception has been accepted for not publishing the source code[68], predictive software has been used secretly.

[66] See William S. Isaac, 'Hope, Hype, and Fear: The Promise and Potential Pitfalls of Artificial Intelligence in Criminal Justice' (2018) *Ohio St. J. Crim. L.* 543.

[67] Robert Brauneis and Ellen P. Goodman 'Algorithmic Transparency of the Smart City' (2018) *Yale J.L. & Tech.* 103.

[68] *Ibidem*.

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ARTIFICIAL INTELLIGENCE AND THE GOVERNANCE OF MIGRATION: POTENTIALITIES AND PITFALLS BETWEEN TECHNOLOGICAL NEUTRALITY AND POLITICAL DESIGN

Simone Penasa*

Abstract

The article provides a general framework, in a comparative and multilevel perspective, of the current technological and legal state of the art of the use of systems equipped with AI in the sphere of migration policies. Taking the case of "smart borders" as a paradigmatic sphere, the potentials and risks deriving from such an intertwining are analysed, proposing, in the light of the current normative initiatives adopted at a comparative level, some possible regulatory tools, with the general objective of guaranteeing the integration between the efficiency of technological tools implemented and international standards of protection of fundamental rights.

Indice Contributo

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Keywords

Artificial intelligence – Smart borders – Immigration – Fundamental rights – European Union

1. AI-based tools vis-a-vis migration management: the need for a critical and 'neutral' assessment

The use of autonomous systems based on artificial intelligence has now become part of everyday life in contemporary societies, as well as of the concrete execution of the functions that are traditionally associated with the State. Legal scholarship has begun to critically analyse the possible positive effects, as well as the criticalities, which can be produced by this intertwining, focusing in particular on the effectiveness of safeguards for fundamental rights of the people involved. When they are linked to the public dimension, AI-based systems are usually adopted in order to make more efficient, fast and less expensive the concrete implementation of functions such as the administrative, judicial, social and policing ones.

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In recent years, the use of autonomous systems and algorithms, often associated with big data, has also affected the immigration sector, finding application in various contexts, such as the control of national borders and the management of the first contacts between migrants and national authorities, the formalisation and assessment of applications for visas and international protection, and even the organisation of reception and integration activities and the evaluation of applications for social assistance.[1] Even if it is a relatively new and recent field of application, it is possible to carry out an initial assessment, albeit provisional, of the effects caused by the use of systems based on artificial intelligence in the context of migration management.[2] Although, as will be discussed in the following paragraphs, the application of artificial intelligence to immigration management expresses the potentialities and risks that are constantly associated with the use by the public administration of such 'intelligent' systems, it is possible to immediately underline that the specificity of this context – and in particular the condition of particular fragility that typically characterises the people involved – determines the opportunity to carry out a specific study, in terms of legitimacy of the legal basis, technological reliability of the systems implemented, their adequacy with respect to the purposes associated with immigration policies and effective guarantee of the rights of the people involved.

Although often characterised by an experimental and temporary nature, the adoption of autonomous systems based on algorithms in the implementation of migration regulations and policies is taking on a dimension, as well as an impact in legal terms, which deserves careful consideration by the doctrine. From that perspective, it is significant that the World Migration Report 2022[3] of the International Organization for Migration dedicates a chapter to 'Artificial intelligence, migration and mobility:

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[1] For a general overview, among others, see P. Molnar, 'Technology on the margins: AI and global migration management from a human rights perspective'(2019) 8 *Cambridge International Law Journal* 2, pp. 310. With regard to the European Union dimension, see C. Dumbrava, 'Artificial intelligence at EU borders. Overview of applications and key issues' European Parliamentary Research Service. In-Depth Analysis (July 2021), available at https://www.europarl.europa.eu/thinktank/en/document/EPRS_IDA(2021)690706.

[2] See A. Beduschi, 'International migration management in the age of artificial intelligence' (2020) *Migration Studies*, 3.

[3] A. Beduschi, 'Artificial intelligence, migration and mobility: Implications for policy and practice' (2021) International Organisation for Migration, World Migration Report 2022, pp. 281-300, available at: https://publications.iom.int/system/files/pdf/WMR-2022-EN-CH-11_0.pdf.

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Implications for policy and practice'. In the IOM's Report, main pros and cons are highlighted, through the analysis of concrete cases and specific technologies that may be implemented in all phases traditionally characterising the migration cycle, thus for example the pre-departure identity checks, forecasting of migration trends and lodgement, applications and compliance with visa conditions.[4]

In fact, the intertwining of policies in the field of immigration and the use of devices based on autonomous systems are destined to produce potentially virtuous effects, to which, however, are associated some critical issues deriving in particular from the nature and degree of development of the technologies available. These criticalities are expressed both in terms of the technological feasibility of the systems actually adopted, on the one hand, and the effectiveness of the safeguards provided in relation to the rights of the persons involved, on the other hand.

In general terms, many studies have highlighted the positive potentials, not only in terms of effectiveness of immigration management policies but also of a more reasonable and impartial implementation of the relevant regulations, associated with the use of 'intelligent' systems in areas such as the presentation of applications for international protection[5] or the management of migrants' reception.[6] Reception management represents a particularly useful area for expressing the potential inherent in the use of intelligent systems, as well as the concomitant need to provide adequate guarantees in order to avoid, or at least minimise, the possible risks deriving from such use. Some countries, such as the United States, Sweden and Switzerland, have already implemented AI-based tools, able to match asylum seekers or refugees' arrivals with 'optimal placement', that is, locations or communities in which they are most likely to find employment, with the main aim to 'improve integration' of refugees through 'algorithmic assignments'.[7] As far as it is technically reliable, the function performed in this area by systems based on algorithms seems to be consistent with the declared objective of the relevant legislation, in particular the

[4] Ivi, p. 297.

[5] Critically, L. Jasmintaite-Zaniewicz and J. Zomignani Barboza, 'Disproportionate Surveillance: Technology-Assisted and Automated Decisions in Asylum Applications in the EU?' (2021) 33 *International Journal of Refugee Law*, 1, pp. 89-110.

[6] A. Beduschi, 'International migration management in the age of artificial intelligence', cit., p. 6.

[7] J. Bither, A. Ziebarth, 'Automating decision-making in migration policy: a navigation guide' (November 2021) Migration Strategy Group on International Cooperation and Development, p. 21.

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legislation on reception in the European context. In fact, the ordinary and non-emergency management of reception, as well as the integration of individuals seeking international protection, represents declared goals, which are difficult to reach in a context in which, also due to the size and the usually unpredictable nature of migratory flows, an emergency approach to reception tends to prevail. The availability of tools, capable of processing elements and data useful for maximising the organisation of the reception, not only in order to guarantee greater efficiency from the point of view of the competent administration, but also the acceptability of the presence of foreigners within a concrete social community and the chances of integration and regaining autonomy for asylum seekers and refugees, certainly represents a useful and suitable resource.

At the same time, decision-makers must be aware of possible risks embodied in such algorithmic tools, which derive directly from the technical characteristics of their design and functioning, such as errors and biases linked to the nature of data processed in order to achieve their outcomes. In particular, it has been stressed that, since these systems are designed to optimise the future employment rates of migrants participating in integration and reception projects, they risk not adequately taking into account other factors, such as for example the will of the applicant for international protection, on the one hand, or to reproduce, or even increase, the inequalities existing between applicants for international protection,[8] as 'this use of automated systems can also reinforce and exacerbate inequalities by placing those individuals with the least prospect of success into under-resourced areas, perpetuating cycles of poverty and potentially justifying negative attitudes towards refugee integration'.[9] Thus, even if it has been proven to be statistically very efficient and effective in achieving the expected goal,[10] the complexity of the migration context, combined with the duty for public authorities to avoid discriminatory or stigmatising effects that may be possibly provoked by political choices, calls for a more in-depth analysis and

[8] Ivi, p. 22.

[9] P. Molnar and L. Gill, 'Boats at the gate. A human rights analysis of automated decision-making in Canada's immigration and refugee system' (2018) International Human Rights Program, University of Toronto, p. 39.

[10] Ibidem («The Lab found that if the algorithm had selected the resettlement locations for refugees, the average employment rate would have been about 41% and 73% higher than their current rates in the United States and Switzerland, respectively»).

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assessment of the effects that can be produced,[11] even unintentionally, in terms of protection of fundamental rights and respect for the principle of non-discrimination.

2. 'Smart borders': the risk of the 'politicisation' of AI-based tools and possible remedies

The management of migratory flows at States' borders represents an area in which this complexity is destined to express itself in a paradigmatic way. It is in this geographical area where AI-based systems interact with the pre-existing need to balance between the efficient management of migration fluxes and the effective protection of migrants' fundamental rights. The set of various systems based on AI and big data that are increasingly used in order to manage the flow of foreign people at States' borders is identified through the concept of 'smart borders', which have been defined, with specific regard to the EU context, as those 'automated systems to speed up and facilitate the border check procedure of the majority of travellers, and to hinder and stop those immigrants that pose a threat to the security of the EU through their status as irregular immigrants, criminals or terrorists'.[12]

The implementation of technologies connected to the concept of smart borders (drones, facial recognition, big data, tracking apps, chatbot) is unquestionably able to increase the efficiency of the activities carried out, for example in terms of timeframe for carrying out procedures, predictability of the concrete characteristics of the various migratory flows, and the number of visa and international protection applications evaluated. On the other hand, however, it is necessary to carefully assess what is, or may be, the impact of this use in terms of effectiveness of legal safeguards

[11] We will focus on the idea of risk assessment applied to AI-based tools in the following paragraphs, here we refer to an innovative approach provided by N. Ioannidis, S. Casiraghi, A. Calvi and D. Kloza, 'A tailored method for the process of integrated impact assessment on border control technologies in the European Union and the Schengen Area' in J. P. Burgess and D. Kloza (eds.), *Border Control and New Technologies. Addressing Integrated Impact Assessment* (ASP, 2021), pp. 143-160.

[12] J. P. Burgess, D. Kloza (eds.), *Border Control and New Technologies. Addressing Integrated Impact Assessment*, cit., p. 25.

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that in this context – the border – must be guaranteed in the light of international and national law.[13]

As anticipated, AI-based systems are content-neutral per se, but they can be designed and implemented in such a way as to be functional to certain migration policy objectives, thus not only being able to reduce the risks in terms of protection of rights and the effectiveness of the procedures carried out at the border, but on the contrary to contribute to consolidating no-entry policies already adopted at a regulatory or practice level. With regard to the Canadian legal framework (see infra), the idea of 'invisible border walls' has been proposed, in order to emphasise the fact that 'introducing AI into the decision-making on immigration and border control has the potential to supplement (…) non-entrée policies, such as visa control and extradition practices'.[14] The risk of a 'politicisation' of AI-based tools, especially in the direction of a strengthening of 'state practices that are aimed at curbing international migration and preventing certain individuals from reaching state territories',[15] must be taken into account at the time of proposing the use of such technologies: a necessary precondition is the enactment of an ad hoc regulatory framework, capable of guaranteeing the ex ante assessment of the technical trustworthiness of these tools and their compatible use – and functional to – with the purposes and safeguards already provided for in terms of migration management and international protection. From that perspective (see next paragraph for more details), two issues may come into view: on the one hand, the ability of existing regulations, and in particular of the standards and indicators that characterise them,[16] to be adequately understood and processed by systems based on algorithms; on the other hand, the opportunity to provide regulations that are able to metabolise and manage the specificity,

[13] P. Molnar, 'Technology on the margins: AI and global migration management from a human rights perspective', cit., 314, with regard to the US-Mexico border, highlights that «While so-called 'smart-border' technologies have been called a more 'humane' alternative to the Trump Administration's calls for a physical wall», concretely «The use of these technologies by border enforcement is only likely to increase in the 'militarised technological regime' of border spaces, without appropriate public consultation, accountability frameworks and oversights mechanisms».

[14] R. Akhmetova, 'Efficient Discrimination: On How Governments Use Artificial Intelligence in the Immigration Sphere to Create and Fortify 'Invisible Border Walls'' (2020) Centre on Migration, Policy and Society, Working Paper n. 149, University of Oxford, p. 14.

[15] Ivi, p. 16.

[16] Ivi, p. 8. For example, the concept of safe country, or migrant's reliability.

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technological but also normative, social, and political in the broad sense, of these instruments, and the current widespread lack of legislative initiatives.[17]

Those technologies that employ facial recognition, geolocation or that may favour the prediction of future migratory flows become particularly relevant. There are currently many projects at both the international and national level, which aim to enable responsible authorities to better understand and predict migrants' movements, by matching and processing data of different types, such as the ones developed by IOM, UNHCR,[18] or EASO. The algorithm developed by EASO is particularly relevant, as it tries to predict pressures up to four weeks in advance and suggest possible future medium-term scenarios using historical and current data[19]; but, in so doing, it makes use also of migrants' social media data, which can raise relevant concerns in terms of fundamental rights, especially privacy and possible discrimination, and protection.[20]

As a matter of fact, the ability to locate arrivals in advance, also foreseeing their size, can allow national authorities to prepare, adapt and modify the resources – human, organisational, economic, infrastructural – necessary to manage the first phases of arrivals, the subsequent activity reception of persons requesting international protection, as well as the resources and procedures necessary for the expulsion of persons who are not entitled to remain in the State's territory. Potentially, this may help to overcome the traditional declination in terms of emergency of migration policies, justified by the unpredictability and concentration of flows, as the availability of technologies that exploit big data and autonomous systems based on machine

[17] Among others, see T. Krügel, B. Schützea and J. Stoklas, 'Legal, ethical and social impact on the use of computational intelligence based systems for land border crossings' (2018) International Joint Conference on Neural Networks (IJCNN); P. Molnar, 'Technological Testing Grounds and Surveillance Sandboxes: Migration and Border Technology at the Frontiers' (2021) 45 *The Fletcher Forum of World Affairs* 2, p. 112, according to whom «It is therefore not surprising that the regulatory and legal space around the use of these technologies remains murky and underdeveloped, full of discretionary decision making, privatized development, and uncertain legal ramifications».

[18] N. Kinchin, 'Technology, Displaced? The Risks and Potential of Artificial Intelligence for Fair, Effective, and Efficient Refugee Status Determination' (2021) 37 *Law in Context* 3, p. 6.

[19] T. Bircan and E.E. Korkmaz, 'Big data for whose sake? Governing migration through artificial intelligence' (2021) 8 *Humanities & Social Sciences Communications* 241, p. 2.

[20] Ibidem. See also L. Jasmintaite-Zaniewicz and J. Zomignani Barboza,' Disproportionate Surveillance: Technology-Assisted and Automated Decisions in Asylum Applications in the EU?', cit.,p. 91, on other possible uses of personal data derived from social media.

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learning could allow a State – or the European Union – to predict, albeit only in probabilistic terms, the short-medium-term trend of these events. This may facilitate an ordinary management of flows and a greater capacity of the single State, or of the European Union, to absorb in a physiological way the impact on national reception and asylum systems of arrivals of migrants at the borders. Eventually, if properly implemented, these tools may support national and international authorities to 'better discharge their legal and moral obligations towards refugees and asylum-seekers by providing them with a more efficient system of humanitarian protection'.[21]

From a European Union perspective, the implementation of migration fluxes' predictive tools may be seen as coherent and functional for the concrete building of the Migration Preparedness and Crisis Blueprint,[22] which aims to establish 'A structured migration management mechanism (…), with real-time monitoring, early warning and a centralised, coordinated EU response to mobilise structures, tools, human and financial resources as needed, across EU institutions and agencies and in cooperation with Member States' (§ 7). Within the regulatory package foreseen by the New European Pact on Migration and Asylum,[23] in the crisis management stage the Blueprint 'should ensure that up-to-date comprehensive information on the migratory situation is available to all actors allowing to take timely decisions and that the implementation of those decisions is monitored and coordinated properly' (§ 15). A feasible, reliable and data-driven capacity to predict migration fluxes and movements may also reduce States' margin of discretion in declaring a crisis in the field of migration and asylum, as the availability of evidence-based data and information shall put States in the condition to be able to adequately and timely strengthen their situational awareness and organisational and humanitarian response capacity.

[21] J. Napierala, et al., 'Toward an Early Warning System for Monitoring Asylum-Related Migration Flows in Europe' (2021) 4 *International Migration Review*.

[22] Commission Recommendation, 23 September 2020, on an EU mechanism for Preparedness and Management of Crises related to Migration (Migration Preparedness and Crisis Blueprint, C(2020) 6469 final.

[23] See EU Immigration and Asylum Law and Policy, D. Thym (ed.), Special Collection on the 'New' Migration and Asylum Pact, available at https://eumigrationlawblog.eu/series-on-the-migration-pact-published-under-the-supervision-of-daniel-thym/.

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3. How to avoid the risk of AI-based 'invisible border walls'? The thick trail of the 'algorithmic impact assessment'

However, the same tools can be used also to consolidate and make even more efficient administrative practices that end up hindering or preventing the arrival of migrants at national borders,[24] thus apparently allowing States to legitimately avoid the duty to respect internationally recognised principles, such as the prohibition of refoulement, the right to have access to the international protection procedure, as well as the right to an effective judicial remedy against decisions taken by national authorities. From this perspective, the context of immigration does not escape the consideration according to which the use reserved for a technology cannot be considered neutral,[25] when it is functional to the realisation of political purposes and it is in any case interacting with certain and consolidated implementation practices. As vividly pointed out by the legal doctrine, which specifically refers to the raising of an approach towards the building of 'smart borders' in the European Union context, 'these technological experiments also play up the "us" vs "them" mentality at the centre of migration management policy' and the risk to '(…) only exacerbate deterrence mechanisms already so deeply embedded in the EU's migration strategy'.[26] Probably, it is appropriate to clarify that it is not the technologies actually used that express a specific political or legal objective, but rather the methods through which and the purposes with respect to which the political decision-makers, holders of the functions implemented through these systems, must be accountable to the concrete use – and related purposes – they make of such tools. Also in light of the recent case-law of the European Court of Human Rights (ECHR) regarding the prohibition of inhuman and

[24] A. Beduschi, 'International migration management in the age of artificial intelligence', cit., p. 6.

[25] See P. Molnar, 'Technology on the margins: AI and global migration management from a human rights perspective', cit., p. 306.

[26] P. Molnar, 'Technological Testing Grounds and Surveillance Sandboxes: Migration and Border Technology at the Frontiers', cit., p. 115.

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degrading treatment[27] and the prohibition of collective expulsions,[28] it appears evident that the use of these technologies, especially when targeted towards people who are in particularly vulnerable and fragile conditions, requires an adequate legal basis, on the one hand, and a consistent ex ante assessment of the possible impact in terms of respect for fundamental rights involved, on the other hand.

In this direction, the case of Canada seems to be paradigmatic. Canada has long been experimenting with risk assessment tools, based on algorithms, for evaluating applications for protection of migrants in order to identify potential indications of fraudulent or illegal application, as well as applications that may put at risk national security.[29] While the characteristics and safeguards set forth within the triage of temporary visa applications by using 'risk assessment' algorithms have been extensively and critically analysed by the Canadian legal scholarship,[30] it must be underlined that the Canadian federal government approved a Directive on Automated Systems,[31] which provides that the use by the public administration of autonomous systems based on algorithms is previously subjected to an 'Algorithmic Impact Assessment', in which different standards are required according to the foreseeable level of impact on the rights, health and well-being, or economic interests of individuals or communities. Requirements and safeguards provided by the Directive, which entered into force in 2021, will apply also to automated systems implemented in the immigration field, thus calling federal authorities to guarantee – through the fulfilment of a comprehensive check-list enumerated by the Directive – principles such as transparency, accountability, legality and procedural fairness, while achieving by the implementation of AI-based tools 'more efficient, accurate, consistent, and

[27] Article 3 of the ECHR.

[28] Protocol 4, Article 4, ECHR. According to A. Beduschi, 'International migration management in the age of artificial intelligence', cit., p. 13, «AI technologies could be used to assist states in maritime interventions aiming to return migrants and asylum-seekers to unsafe countries and territories».

[29] M. Forti, 'AI-driven migration management procedures: fundamental rights issues and regulatory answers' (2021) 2 *BioLaw Journal-Rivista di BioDiritto*, p. 442.

[30] See L. Nalbandian, 'Using Machine-Learning to Triage Canada's Temporary Resident Visa Application' (2021) 9 Working Papers Series, Ryerson Centre for Immigration and Settlement (RCIS) and CERC in Migration and Integration.

[31] T. Scassa, 'Administrative Law and the Governance of Automated Decision-Making: A Critical Look at Canada's Directive on Automated Decision-Making' (2021) 54 *University of British Columbia Law Review* 1, pp. 251-298, available at: https://ssrn.com/abstract=3722192.

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interpretable decisions' (§ 4.1.). Particularly relevant is the reference to the right of the public administration to have access to and to test the system used, if this is also necessary in the context of a trial, guaranteeing against unauthorised disclosures but providing for the possibility of authorising also third parties to review and verify these elements (§ 6.2.5.2 and 3). However, this right is related to a concomitant duty to test the development processes and the data used by the autonomous systems, before the start of production, in order to verify the absence of involuntary biases attributable to the data used and other factors that may affect the results in an unfair way, before the start of the production (§ 6.3.1), and to develop monitoring tools in order to identify any unintended results and to verify compliance with the law on the matter (§ 6.3.2). The Directive also provides the duty to carry out an 'Algorithmic Impact Assessment' before the start of production of any autonomous systems (§ 6.1.1), which could prove decisive in the area of immigration.[32]

To underline the need to guarantee an adequate and formal legal basis for the use of intelligent systems in the field of immigration, it is necessary to report the decision of the British administration to suspend the use of a risk assessment system for the evaluation of applications for entry into the country, following the appeal presented before the UK High Court by the Joint Council for the Welfare of Immigrants (JCWI). The appeal is grounded on the supposed discriminatory nature based on the nationality of applicants of the visa algorithms used by the UK Home Office. The Home Office clarified that the algorithm only had the aim of categorising different applications with reference to how much scrutiny each application needed, thus leaving the final decision to a human operator and that, among the indicators and data assessment, the applicant's nationality was not taken into consideration. According to the appellants, there may be the risk that some predetermined nationalities will automatically be attributed the greatest risk, thus resulting in more complex, lengthy procedures and – on the basis of the statistics available[33] – with a much lower percentage of being accepted than the others. As a consequence of the appeal, the Home Office decided to suspend the use of the so-called 'streaming tool' and to

[32] L. Nalbandian, 'Using Machine-Learning to Triage Canada's Temporary Resident Visa Applications', cit., p. 13.

[33] «Applications with a red rating were much less likely to be successful than those rated green, with around 99.5% of green being successful but only 48.59% of red», according to data referred by R. Jennings, 'Government Scraps Immigration "Streaming Tool" before Judicial Review' (2020) *UK Human Rights Blog*, available at https://ukhumanrightsblog.com/2020/08/06/government-scraps-immigration-streaming-tool-before-judicial-review/.

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perform an in-depth and thoughtful assessment of the algorithm, in order to detect and correct possible unconscious bias and discriminatory outcomes.

It must be recalled that, in other sectors of public administration activity, the use of algorithms aimed at assessing and predicting citizens' behaviour[34] was considered illegitimate, as the transparency and verifiability of the system were not adequately ensured. In particular, there is a need to make public the risk or evaluation models used and the indicators introduced in the algorithm, as well as its actual functioning. Moreover, there is a need to avoid the possibility that the use of such assessment systems could lead to the risk of discrimination or stigmatisation of certain categories of people, based for example on their ethnicity or personal characteristics. In this perspective, from the albeit small jurisprudence on algorithmic assessment tools, some standards of protection can be obtained that are also relevant in the context of migration policies, such as the need to minimise the risk of cognitive biases, placing on the competent authorities a duty to verify ex ante that the system does not suffer from 'training biases' that could lead to discriminatory results, through the conduct of independent research and assessment.

An experiment was also carried out within the European Union that envisaged, along borders particularly affected by constant migratory flows (Greece and Hungary in particular), the use of an algorithm – the project iBorderCtrl[35] – able to detect a person's emotions through facial recognition systems, in order to identify false or contradictory statements made to border authorities.[36] In this regard, it is useful to recall a recent judgment of the Court of Justice of the European Union (T-158/19, 15 December 2021). Without going deeply into the argumentative process, the Court partially accepted the request to make public the documents relating to the authorisation procedure of the project, which was financed entirely by European

[34] See I. Leijten, 'The Dutch SyRI Case: Some Thoughts on Indivisible Interferences and the Status of Social Rights' (2020) *IACL-IADC Blog*, available at: https://blog-iacl-aidc.org/social-rights/2020/5/19/the-dutch-syri-case-some-thoughts-on-indivisible-interferences-and-the-status-of-social-rights; M. van Bekkum and F. Zuiderveen Borgesius, 'Digital welfare fraud detection and the Dutch SyRI judgment' (2021) 23 *European Journal of Social Security* 4, pp. 323-340.

[35] For a comment, J. Sánchez- Monedero and L. Dencik, 'The politics of deceptive borders: 'biomarkers of deceit' and the case of iBorderCtrl' (2020) *Information, Communication & Society*, pp. 1-18.

[36] L. Hall, 'Programming the machine: gender, race, sexuality, AI, and the construction of credibility and deceit at the border' (2021) *Internet Policy Review*, p. 9.

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public funds. While limiting the right of access to such documents, in particular those relating to ethical and legal assessments, to the parts that are not covered by a commercial interest of the members of the Project's Consortium, the Court recognises the existence of a public interest to participate in an informed and democratic public discussion on the question of whether control technologies are desirable and whether they should be publicly funded, and that this interest should be duly safeguarded (§ 200), as it has happened – according to the Court – in the concrete case.

4. Algorithmic biases and migrants' rights effectiveness: the challenge of integrating AI-based tools' efficiency and human rights' international standards

The cases just mentioned, which are characterised by the use of artificial intelligence systems in an area that can be decisive – 'life changing'[37] – in determining the fate of the people involved, thoroughly express the main criticalities that are generally associated with these technologies: e.g., the margin of error that can be associated with technologies such as facial recognition, which turns out to be particularly high precisely in reference to the 'types' of individuals that traditionally make up the composite category of migrants; the risk of discrimination and stigmatisation towards specific social groups (such as minorities and women), deriving from the presence of cognitive bias that can characterise autonomous systems based on machine learning; the effectiveness of the right not to be subject to a completely autonomous decision; and the need for a human oversight to be ensured within the decision-making process.

Errors and biases directly associated with the technical features of the devices adopted by public administration may provoke a particularly harmful impact in the context of the management of migratory flows, ending up by increasing – rather than reducing – the current criticalities in terms of effective protection of migrants' rights, especially in the early stages of contact with national authorities. In this regard, also the safeguards related to the use of AI-based systems, for example the presence of a human operator who assumes the responsibility for the decision and the right not to be subject to a completely automated decision, risk being inadequate, taking into account the practices adopted by the border authorities to carry out expulsions or

[37] World Migration Report 2022, cit., p. 292.

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push-backs without giving migrants the concrete possibility to express their desire to request protection or in any case to prevent their entry into the national territory. Accordingly, the adoption of technologies associated with the concept of smart borders may favour, and not prevent, the consolidation of practices that are the expression of policies that are contrary to the safeguards provided by the European Convention of Human Rights (ECHR).[38] As a recent case decided by the European Court of Human Rights (ECtHR) has shown, the practices adopted by the national border authorities may be able to minimise, even exclude, the AI-based tools' potential function to assure the legitimacy, or at least guarantee the possibility of verifying the legitimacy, through the analysis and verification of reliable data, of the actions adopted by national authorities. Thus, 'intelligent' tools might empower the effectiveness of safeguards, even if only procedural, as set forth by the ECHR and EU law. In the M.H. and Others v. Croatia judgment,[39] the ECtHR recalls the principle according to which 'footage of video surveillance may be critical evidence for establishing the circumstances of the relevant events', especially when, as it was in the assessed case, the concerned area is under constant surveillance, including by stationary and thermographic cameras, due to the frequent attempts by migrants to illegally cross the border (§271). Furthermore, the availability of these recordings would also have made it possible to clarify whether the contact with the Croatian authorities took place on Croatian territory. As reported by the Croatian Ombudswoman, also in previous cases in which she had sought to obtain such recordings, the thermographic camera recordings had also not been available owing to technical problems (§ 104). It must be recalled, eventually, that the ECtHR has declared the violation of Article 2 ECHR on the ground, among other reasons, that 'the investigative authorities never verified the police allegation that there were no recordings of the impugned events, and that they had failed to inspect the signals from their mobile telephones and the police car GPS in order to establish the applicants' whereabouts and their contact with the Croatian police (…)' (§ 272).

Without denying the potentialities deriving from the use of these devices in terms of fundamental rights' protection, it is necessary to adequately assess, through a data-

[38] In particular, the risk of being subjected to inhuman and degrading in the event of refoulement and the prohibition of collective expulsions, as well as the right to an effective remedy against decisions taken at the administrative level.

[39] See H. Hakiki and D. Rodrik, 'M.H. v. Croatia: Shedding Light on the Pushback Blind Spot' (2021) *VerfBlog*, available at https://verfassungsblog.de/m-h-v-croatia-shedding-light-on-the-pushback-blind-spot/.

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driven and comprehensive assessment, the impact on the legal status – and the same existences – of the persons involved by their implementation, in particular when the outcomes may be decisive in order to determine migrants' future.

As is evident, in these cases the use of artificial intelligence can produce very different effects in terms of guarantees, both substantial and procedural, being able to alternatively contribute to reducing practices that are contrary to what is envisaged at the regulatory level (e.g., the principle of non-refoulement, and access to procedure) or, on the contrary, to strengthen its effectiveness. It is therefore necessary to raise the general question of the conditions – technological, legal but also organisational and institutional – that may allow a legitimate use of these tools, at least in order to assess their technical trustworthiness (in order to reduce the risk of errors or discriminatory effects), to guarantee their transparency and explicability for both public authorities and the public, as well as to select at the legislative level the concrete functions that they can legitimately perform[40] (for instance, avoiding the complete replacement of the human operator). In general terms, the public administration's duty to provide a comprehensive, independent, evidence-based, multidisciplinary, and rights-centred ex ante assessment of AI-based devices may become a shared standard for achieving a trustworthy use of AI-based systems in the migration policy context.

In addition, a series of related questions arises, such as the possibility of declaring the jurisdiction of a State that provides for the use, pursuant to Article 1 of the ECHR, of such measures as the following: the visual contact between migrants and thermographic cameras or cameras installed on drones, which may be used to locate groups of people who are approaching a state border, in order to intercept them in advance; the existence of adequate judicial remedies against decisions taken by competent authorities regarding the level of risk for national security or public order associable to a particular subject; the reliability of an application for international protection, which is also based on data obtained from the use of predictive algorithms and assessment tools; or, again, the legitimacy of implementing concepts such as 'safe country', or assessing the concrete social, political and cultural situation existing in a

[40] J. Purshouse and L. Campbell, 'Automated facial recognition and policing: A Bridge too far?' (2021) *Legal Studies*, pp. 1-19.

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migrant's country of origin,[41] by processing data carried out by autonomous systems based on algorithms.

5. Which regulatory design? Old safeguards in innovative tools

All issues that have been already raised lead to a conclusive – and pivotal – question, which refers to the most appropriate regulatory framework, able to guarantee a trustworthy use of such tools. In this perspective, it is necessary to question the ability of existing rules to intercept the functionalities of these innovative tools, or whether, on the contrary, it is necessary to consider ad hoc regulatory regimes, which are able to detect and govern the specificity – in positive and negative terms – that can be associated with such devices and at the same time are capable of adapting to the evolution of the latter from a technological point of view. In this sense, the need to subordinate the use of autonomous systems based on artificial intelligence at least to a 'human rights impact assessment' may be an essential requirement, in order to verify whether their use in the management of migration flows does not end with prejudice to the rights of migrants and applicants for international protection.[42]

Within the European Union, the Proposal for a Regulation on artificial intelligence presented by the Commission explicitly mentions the use of artificial intelligence systems in the management of migration, asylum and border control, underlining the point that they 'affect people who are often in particularly vulnerable positions and who are dependent on the outcome of the actions of the competent public authorities'.[43] In light of these considerations, the Proposal affirms the particular importance of guaranteeing in these areas 'the accuracy, non-discriminatory nature and transparency' of AI systems, in order to guarantee 'respect for the fundamental rights of the persons concerned, in particular their rights to free movement, non-discrimination, protection of privacy and personal data, international protection and

[41] N. Kinchin, 'Technology, Displaced? The Risks and Potential of Artificial Intelligence for Fair, Effective, and Efficient Refugee Status Determination', cit., p. 15.

[42] See A. Beduschi, 'International migration management in the age of artificial intelligence', cit., p. 8.

[43] Proposal for a Regulation laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) (2021), Recital 39.

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good administration'.[44] On this ground, in the Proposal the artificial intelligence systems used in these areas are classified as 'high risk' if they consist of '(...) polygraphs and similar tools to detect the emotional state of a natural person; for assessing certain risks posed by natural persons entering the territory of a Member State or applying for visa or asylum; for verifying the authenticity of the relevant documents of natural persons; for assisting competent public authorities for the examination of applications for asylum, visa and residence permits and associated complaints with regard to the objective to establish the eligibility of the natural persons applying for a status'.[45]

Therefore, the use by national and European authorities will be conditioned, once the proposal of Regulation will be enacted, to the compliance with predetermined requirements and safeguards, to be verified through a conformity verification procedure. Among such requirements and safeguards, it is useful to recall the duty to establish a 'risk management system', which is intended as 'a continuous iterative process run throughout the entire lifecycle' of the AI system and must comprise – among other elements – the analysis of 'known and foreseeable risks' associated with each high-risk AI system and, within the most appropriate risk management measures, it recalls the 'elimination or reduction of risks as far as possible through adequate design and development' (Article 9). With regard to data governance (Article 10), the Proposal refers to the need to examine, during the training, validation and testing data sets, the existence of 'possible biases' and of 'any possible data gaps or shortcomings, and how those gaps and shortcomings can be addressed'. In light of their implementation in the immigration governance context, the requirement that 'training, validation and testing data sets shall be relevant, representative, free of errors and complete' and that they must have the appropriate statistical properties, 'including, where applicable, as regards the persons or group of persons on which the high-risk AI system is intended to be used' (Article 10). Also 'the characteristics or elements that are particular to the specific geographical, behavioural or functional setting within which the high-risk AI system is intended to be used' must be taken into account during the training and validation data sets. These two latter requirements may have special relevance when applied to AI systems in the management of migration, asylum and border control.

In light of this potential legal framework, it would be useful to verify the compatibility of AI systems already experimented with at the EU borders (for example, the

[44] Ibidem.

[45] Ibidem.

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aforementioned iBorderCtrl project) with what is envisaged for 'high-risk' systems by the Regulation Proposal, as well as the compatibility with the latter of the legislative acts already adopted in this context at the European level.[46]

[46] For a systematic analysis of these tools, European Parliamentary Research Service, 'Artificial Intelligence at EU borders. Overview of applications and key issues' (2021), available at https://www.europarl.europa.eu/thinktank/en/document/EPRS_IDA(2021)690706.

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CONCLUDING REMARKS

Sabrina Ragone* and Graziella Romeo*

In the introduction, we assessed to what extent citizenship can be framed both as a tool for exclusion and as a tool for inclusion, restricting or expanding the enjoyment of rights and democratic instruments. The assessment provided within this special issue intersects these two views with one of the major challenges of current democracies, namely the impact of new technologies, trying to grasp how such frames play out in new environments characterized by digitalization.

Kochenov's contribution sets the foundations of the discussion, providing the theoretical basis to understand that citizenship can be used to undermine equality, build walls of segregation within borders, as well as construe the concept of the "other" who does not belong. Additionally, categories of citizens emerge from the comparative assessment, which enjoy an improved status vis-à-vis the rest, "super-citizens"[1] who do not suffer 'passport apartheid.'[2] The author delves as well into the cleavage between citizenship and human rights, claiming that the former is "designed to undermine human rights claims by the racialized barbarian (read 'foreign') others."

He challenges the actual performance of citizenship as a concept responding to the Enlightenment's belief that "the individual is in charge and the authority is able and willing to back its decisions with recourse to valid reasons and clear arguments." On

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[1] M. Boatcă, 'Unequal Institutions in the Longue-durée: Citizenship through a Southern Lens.' In D. Kochenov and K. Surak (eds), *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging* (Cambridge: Cambridge University Press, 2022).

[2] D. Kochenov, 'Ending the Passport Apartheid' (2020) *International Journal of Constitutional law* vol. 18, 1525.

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the contrary, citizenship has been employed for the opposite purpose of caste-assignment and segregation.

In addition to such inherent contradiction, one must admit that modern democracies are under pressure due to global crises, migrations, distrust in politics, and other phenomena, among which the advent of digital tools must be accounted for.

Against this backdrop, Blokker's text provides an assessment of the participatory dimension of citizenship/belonging to a community, focusing particularly on constitutional amendment procedures and the Conference on the Future of Europe. From the abovementioned dichotomic perspective, this facet fills in the inclusive dimension of citizenship.

The requests of participation in decision-making made in numerous fora and contexts defend the need to complement representative democracy with further direct participatory instruments. If this is a spread practice in constitutional reforms[3], comparatively it still lacks legal instruments within other decision-making processes. Overall, in fact, domestic (and supranational) institutions do not have the imagination – and the political will – to regulate the structural inclusion of citizens' participation in the democratic toolkit[4]. Of course, the further the institution is from the affected community, the smaller the public pressure is to be involved in the decision, as a comparison between domestic amendments and the Conference on the Future of Europe proves.

According to the author, the current debate on democracy, triggered as well by the rise of populist movements[5] is shifting from a spread agreement on the value of the representative paradigm to the acknowledgement of the necessary recognition and regulation of bottom-up involvement. Therefore, the way in which participatory citizenship becomes institutionalized and regulated is a fundamental challenge of

[3] S. Suteu, S. Tierney, 'Squaring the circle? Bringing deliberation and participation together in processes of constitution-making'. In *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge: Cambridge University Press, 2018), 282-294.

[4] A. Alemanno, J. Organ, Citizen Participation in Democratic Europe: What Next for the EU (Lanham: ECPR Press, 2021).

[5] See as well P. Gerbaudo, 'Social Media and Populism: An Elective Affinity?' *Media, Culture & Society* (2018) vol. 40, 745–53.

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modern democracies, that need to insert it within the existing institutional and constitutional framework[6].

Now, one may wonder whether digital tools can be beneficial to this end. Tronconi's contribution analyses particularly digital parties' role within the experimentation of new forms of political participation. These parties are relatively young vis-à-vis the other forces: the first Pirate Party was founded in Sweden in 2006; the Five Star Movement in Italy in 2009; Podemos in Spain in 2014; France Insoumise in 2016. They all use social media and apps to foster people's involvement claiming that such instruments favor more direct and transparent participation increasing democracy[7].

Online parties' platforms serve different purposes, from the selection of candidates to run in elections to the collective decision on whether to enter into a governmental coalition and/or with which program. Several functions are connected to deliberation and decision-making, such as the discussion and amendment of legislative proposals that can be brought about by the MPs of the corresponding party.

Nevertheless, the data collected prove that these forces in the end only provide a plebiscitarian "reactive democracy," in which party affiliated members are basically ratifying decisions already taken by the leadership. There are, in fact, major legal and political issues attached to these instruments. Only to name a few: a) the proper identification of the voters; b) the actual number of people voting on each proposal (for instance, on the so-called "reddito di cittadinanza" – a social security benefit which is one of the most relevant initiatives of the Five Star Movement -, only 4.000 comments were included, and this was one of the most debated proposals on the Russeau Platform); c) the exclusion of groups who are either not familiar with these platforms and/or do not have access to them; d) the counting and checking of the votes. More in general, the question is what the true aim of these platforms consists in: restate the leaders' consensus or ensure true consultation? The answer to this question would truly make the difference in terms of participatory citizenship.

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[6] G. Smith, 'The European Citizens' Assembly.' In A. Alemanno and J. Organ, *Citizen Participation in Democratic Europe: What Next for the EU*, above n. 4, at 204.

[7] P. Gerbaudo, The Digital Party, Political Organization and Online Democracy (London: Pluto Press, 2018).

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Tronconi's conclusions do not seem very optimistic in this respect. First, the "digital divide" reiterates the traditional unevenly distribution of participatory opportunities among citizens. In fact, as the author explains, "people located at the 'centre' of society (educated, wealthy, living in urban areas, belonging to ethnic majority, etc.) tend to be disproportionately active in politics." The only positive note could be the increasing involvement of younger generations who are more familiar with digital means. Nevertheless, the kind of activism which is triggered by such tools is in almost all cases a low-cost engagement, labelled as "clicktivism," which does not imply a committed engagement with politics. Again, a critical rethinking of digital technology's contribution to citizenship has become necessary.

Digital citizenship is the object of Costantino's text, meant as a set of rights and duties which add up to traditional citizenship as they have become possible thanks to novel information and communication technologies[8]. Of course, the potential is extremely appealing, but the risks are several as well. Therefore, the way in which the legislature regulates these tools will shape the actual content and performance of digital citizenship as a whole, according to the principles of legality, participation, transparency, proportionality, and access to justice. The interpretation of these principles requires a reconsideration of the current standards which do not apply to the digital world, as the relevance of the construction of the algorithm within the application of transparency exemplifies.

Digital tools can also serve citizenship's exclusionary purpose. Penasa's article explains this issue within immigration management, as autonomous systems and algorithms have been employed within the control of national borders, the management of the first interaction between migrants and national authorities, visa application procedures, and in general in the management of foreigners' applications, even for social assistance.[9] Also in this case, the use of digital tools offers undoubtful advantages while presenting criticalities due to the actual functioning of the tools themselves and the potential infringement on rights. This is why the author advocates

[8] K. Mossberger, C. J. Tolbert, R. S. McNeal, *Digital Citizenship: The Internet, Society, and Participation*, (Cambridge US: MIT Press, 2007).

[9] P. Molnar, 'Technology on the margins: AI and global migration management from a human rights perspective' (2019) *Cambridge International Law Journal*, vol. 8, 310 ff.

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for including at least a "human rights impact assessment" of the new tools, in order to check whether the implementation of digital means impacts on the rights of migrants and applicants for international protection.[10]

All papers collected here suggest at least three intertwined readings of citizenship in our times and just as many directions for further investigation. The first reading concerns the relationship between citizenship and rights in times of crises, such as the ones contemporary democracies are facing. Global crises reinforce the exclusionary frame of citizenship, on the one hand, while they emphasize the political significance of being a citizen on the other. The exclusionary frame plays out when we witness what Kochenov refers to as "super-citizenship" being the condition for the enjoyment of rights as well as security and welfare. In the wake of the current humanitarian crisis, following the Russian invasion of Ukraine in March 2022, the Ukrainian President has made a plea to the EU, later accompanied by a formal request of accession, to start procedures to grant admission to the state. The President interpreted what seems to be a general sentiment across the population. In particular, belonging to the EU and enjoying its citizenship is perceived as reducing chances of political instability, aggression, and major human rights violations. In contrast, being a citizen of a former Soviet republic is a heritage of liabilities and dangers rather than a status granting rights at the present historical moment. In that sense, citizenship does not convey the message of equality and liberation that liberal constitutionalism has attached to such a term.

At the same time, however, citizenship is a powerful unifying element welding together individual existences, especially in times of crisis. Again, the current war in Ukraine is the epitome of that, with citizens being called up to engage directly and defend state sovereignty, as the classical understanding of citizenship duties would require. In parallel, Ukrainian citizens abroad have spontaneously mobilized to contribute to the defense of their state of origin.

More generally, citizens' participation and engagement have been stimulated within the context of the ordinary functioning of democratic systems. As Blokker has demonstrated, this has also happened in an attempt to contrast populist backlashes in

[10] See A. Beduschi, 'International migration management in the age of artificial intelligence' (2021) *Migration Studies*, vol. 9, 8.

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recent years. The extent to which injecting direct participation elements into representative democracy models is the solution to populist drifts is still to be proven; what is essential to stress here is that participatory frame emphasizes the idea that citizenship is above all a device of empowerment, which can also expose the emptiness of certain forms of political rhetoric.

However, participation and engagement understood as elements of political action can also be disentangled from the formal possession of certain citizenship status. Studies on the interaction of technologies with political participation suggest that technological interactions often happen on the grounds of identity aggregation that do not consider legal categories such as the possession of citizenship, which in turn becomes irrelevant for partaking in online communities. In this context, citizenship describes mainly a form of participation or interest, albeit superficial and episodic, in the destiny of the political community. After all, online interactions on social media platforms that feed political parties' information gathering are not conditioned to the proof of formal citizenship.

The second reading of citizenship is precisely connected to the spread of technologies in all the interactions of public and political significance.[11] Technology escalates some of the challenges discussed here. First and foremost, digitalization raises the problem of protecting rights in contexts where their exercise is conditioned to being able to access digital technologies. Both Tronconi and Costantino contend that any digital transformation needs to address such a challenge before being put onto the table of political decisions. Tronconi suggests that there may not be much to gain in terms of political participation since technology-driven politics seems to be based on a shallow understanding of activism and social engagement. In contrast, the scenario is different if one looks at the relationship between citizens and public powers. Access to and knowledge of digital technologies can be crucial in allowing interactions and retrieving information concerning the use of technological devices in administrative procedures. On these assumptions, Costantino makes a case for digital citizenship. Secondly, technologies magnify inequalities and call us back to discuss to what extent citizenship conveys equality of chances in contexts of substantive disparities of resources and

[11] D.F. Kettl, 'Making Data Speak: Lessons for Using Numbers for Solving Public Policy Puzzles' (2016) *Governance*, vol. 29, 573–79.

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possibility to access them.[12] Thirdly, technologies can strengthen exclusionary mechanisms, as Penasa elucidates when discussing the legal status of those not members in a political community where they seek to be accepted. Once again, we are confronted with the limit of those accounts that describe citizenship as an empowering instrument, and we circle back to the universe of legal positions that one needs to take into consideration to grasp the substantive meaning of such a word.

The third reading of citizenship looks at what is required to make it a significant element in the life of contemporary democratic states. In that respect, this special issue suggests that administrators and decision-makers, particularly at the local level[13], need new skills to cope with the complex interaction between citizenship, rights, and technologies. In other words, political actors and the (future) public officers supporting them are required to cultivate novel educational patterns. Such educational patterns have something to do with developing a new 'cultural cognition' of citizenship in contemporary democracy.[14] By cultural cognition, we mean a shared frame of the world (or of a given portion of reality) among a specific group of people.[15] In this context, the new cultural cognition required frames citizenship as a

[12] See the Report on " Extreme Poverty and Human Rights" released by the UN Special Rapporteur on extreme poverty and human rights in 2019. In particular, The Report expresses concerns regarding the application of algorithmic decision-making to welfare services for at least three separate ranges of reasons: (1) lack of privacy and data protection (especially in the phase of identity verification), even veering towards systemic surveillance (exploited on the pretext of preventing and detecting fraud); (2) system failures (while assessing receivers' eligibility, benefit calculations and payments); and (3) unfairness (from basing decisions affecting individual rights on group-based predictions), lack of transparency and the risk of reinforcing existing inequalities and discrimination, particularly in relation to risk scoring and need classification. See United Nations General Assembly, "Extreme Poverty and Human Rights", *Report of the Special Rapporteur on extreme poverty and human rights*, 11 October 2019.

[13] R. Brauneis, C.P. Goodman, 'Algorithmic Transparency of the Smart City' (2018) *Yale J.L. & Tech.* 103.

[14] See M. Hildebrandt, *Smart Technologies and the End(s) of Law: Novel Entanglements of Law and Technology* (Cheltenham: Edward Elgar Publishing, 2015) 100–03, discussing the use of algorithm-based technology that need to be coupled with the need to equip citizens with proper instruments by which to understand the AI ecosystem.

[15] The concept of "cultural cognition" is borrowed from J.K. Sax, 'The Problems with Decision-Making' (2020) *Tulsa Law Review,* vol. 56, 39.

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status that denotes the individual commitment and willingness to be part of a certain community by participation and political action rather than by formal attribution.

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EU CONSUMER SALE LAW AND THE CHALLENGES OF THE DIGITAL AGE. AN ITALIAN PERSPECTIVE

Laura Bugatti*

Abstract

The 2019/771/EU Directive aims to make the EU Consumer Sale Law fit for the digital age and pushes towards a modernisation of sale rules within the framework of maximum harmonisation. The article aims to provide a comprehensive overview of the new Sale law regime introduced by the EU in 2019, from the Italian perspective. In particular, it moves from some preliminary remarks on the Directive's scope of application and the subject matter covered by the new sale rules, followed by an examination of the new substantial sales rules concerning the conformity of goods, the seller's liability, including time limits, and the consumer's remedies for defective goods. Recalling the freedom recognised to Member States by the Directive, the article includes, as a paradigmatic example, the description of the main and most meaningful Italian transposition technique and choices. Some unavoidable remarks on the adequacy of the new legal regime to address the new challenges and innovative economic models that are going to prevail in the digital environment conclude the analysis.

Indice Contributo

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Keywords

Consumer sale law - 2019/771/EU Directive - Conformity of goods - Seller's liability - consumer remedies

1. Sale rules face digitalisation: an introduction

Directive 2019/770/EU (Digital Content Directive – hereinafter DCD) and 2019/771/EU (Consumer Sales Directive – hereinafter SGD) can be considered as twin directives as both address Business to Consumer (hereinafter B2C) contracts. The DCD regulates certain aspects of contracts for the supply of digital content and digital services, while the SGD covers the sale of movable goods, including goods with digital elements,[1] whether the contract is concluded on or off premises.

Both Directives represent legislative responses to the needs of the digital economy in the area of B2C commerce[2] and, more broadly, they constitute two important steps towards new European contract law legislation which is intended to be more in tune with the 'Digital Single Market'[3]. The Digital Single Market Strategy set out by the Commission has shed light on the need to introduce changes in the EU legal landscape in order to adapt the rules to the 'digital revolution'. In the SGD, the

[1] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services and Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC and repealing Directive 1999/44/EC. The Directives' transposition by the EU Member States was expected by 1 July 2021

[2] Both Directives are part of a broader package of European regulatory measures aimed at modernising the main consumer protection rules, also in light of the digital single market strategy set out in Communication COM(2015)192FIN: https://ec.europa.eu/commission/presscorner/detail/en/IP_15_4653

[3] On the evolution of European Contract Law, see C Amato, 'Dal diritto europeo dei contratti 1.0 agli smart contracts' in R Cerchia (eds), *Percorsi di diritto comparato* (Milano 2021) 33 ff.; R Schulze, 'Redrafting Principles of European Contract Law' (2020) 9 EuCML 5, 179.

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extension of the notion of goods to items with digital elements, the requirements of 'interoperability' and 'compatibility' in the conformity's assessment, the rules concerning 'updates' and the notion of 'digital environment' are just a few examples of the transformation taking place as a reaction to digitalisation.

More broadly, the Directives aim to strike the right balance between achieving a high level of consumer protection and promoting the competitiveness of enterprises, thus contributing to the correct functioning of the internal market[4]. Due to the adoption of the SGD, consumers and sellers within the (digital) single market will benefit from a uniform set of rules on the sale of goods.

In order to create a common set of rules in cross-border commerce, - increasing the confidence of consumers, on the one hand, and reducing the costs of cross-border contracting on the other hand -, the SGD moves from minimum to maximum harmonisation[5] (art. 4); therefore, within the scope covered by the Directive, the rules concerning the sale of movable good in B2C relationships would be the same in each Member State[6]. In fact, as a maximum harmonisation instrument, the SGD imposes

[4] See rec. 2 SGD.

[5] The trend towards maximum harmonisation is becoming more and more common in European legislation in general and in European consumer law in particular. This is a diversion from the previous policy underpinning consumerism legislation which was generally based on a minimum harmonisation approach that allowed Member States to go beyond the standard of protection set by European rules in favour of the consumer. Thus far, even the replaced Dir. 1999/44/EC tends to focus on minimum harmonisation, setting a minimum level of protection and leaving room for different and higher standards of consumer protection across national jurisdictions (see P Rott, 'Minimum Harmonisation for the Completion of the Internal Market? The Example of Consumer Sales Law' (2003) 40 Common Mark. Law Rev. 1107 ff). Notwithstanding the aim of enhancing consumer protection, this approach has created significant fragmentation of the EU rules applicable to the sales of goods: subject to minimum standards, national legislation has started to diverge even on essential issues, including the absence or existence of a hierarchy of remedies. Therefore, the revised choice towards full harmonisation made in the SGD represents a response to the need to overcome the current fragmentation on some essential elements of sale rules. In fact, among the European priorities is the necessity to achieve a genuine digital single market as well as to ensure legal certainty (rec. 3 SGD), especially in online and off-line cross-borders sales, in order reduce the costs of cross-border contracting as well as to enhance the confidence of consumers.

[6] The debate about the need to introduce a common set of rules in cross-border sales is not new. Because differences between MSs' contract laws are perceived by the Commission as an obstacle to trade within the EU market, the European Commission issued in 2011 a proposal for a regulation on an optional Common European Sales Law (CESL). The CESL was meant to stimulate trade by encouraging cross-border sales and to enhance consumer trust in the purchasing of goods abroad.

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on Member States an obligation not to deviate from EU law standards by maintaining or introducing in their jurisdictions more or less stringent provisions, unless otherwise provided in this Directive (art. 4 SGD).

Although the protection standards imposed by the SGD should have increased as compared to Directive 1999/44/EC (as announced in rec. 10), this will not preclude the risk that some Member States will be required to reduce their higher level of protection [7]. Despite the declared aim to achieve fully harmonised national sale

Consumers were to benefit from increased choice and enterprises – SMEs in particular – would have found it easier to extend their market shares. The aim of this optional regulation was to harmonise the MSs' contract laws and, in particular, sales law, not by requiring amendments to pre-existing national contract law but by creating within each MSs' national law a second and alternative harmonised regime for contracts covered by its scope. The CESL would contain a single set of pan-EU rules which would exist in parallel to MSs' contract laws; its application was intended to be on a voluntary basis upon express agreement of the parties. In 2014, the Commission officially placed the CESL proposal on the list of proposals to be modified or withdrawn, and the CESL proposal was finally withdrawn in favour of the adoption of the two Directives concerning the sale of goods and the supply of digital content and digital services. See Proposal for a Regulation on a Common European Sales Law, COM (2011) 635 final, 11 October 2011. The failure of CESL raises two reflections: on the one hand, it highlights the EU Commission's willingness to reach the highest level of harmonisation; on the other side, it states the inadequacy of the political context to achieve this result. From this perspective, full harmonisation in the SGD represents a compromise.
On CESL, see H Beale, 'The Future of European Contract law in the Light of the European Commission's Proposals for Directives on Digital Content and Online Sales' (2016) Revista d'Internet, Dret I Política; E Hondius, 'Towards an Optional European Sales Law' (2011) Eur. Rev. Priv. Law 709 ff.; O Lando, 'Comments and Questions Relating to the European Commission's Proposal for a Regulation on a European Sales Law' (2011) Eur. Rev. Priv. Law 717 ff.; L Niglia, *The Struggle for European Private Law* (Hart Publishing 2015).

[7] '*Regarding the sale of consumer goods, one of the main effects of Directive 2019/771 will be to reduce the level of consumer protection in many MMs. In particular, national legal systems can no longer grant the consumer the right to terminate the contract immediately (except for the first 30 days after delivery)'.* JM Carvalho, 'Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771' (2019) 5 EuCML 194, 201; RM Rafael, 'The Directive Proposals on Online Sales and Supply of Digital Content (Part I): will the new rules attain their objective of reducing legal complexity?' (2016) 23 Revista d'Internet, Dret I Politica 1, 7. Moreover, the SGD and the DCD '(..) *directives are of a maximum harmonisation standard, which not only precludes Member States from deviating from the level of consumer protection established by the directives, but also commits the EU Member States to a particular approach in establishing consumer rights with regard to the quality of goods, digital content and digital services which leaves no room for innovation to the Member States. This is particularly regrettable, because both directives are characterised by a rather traditional approach*'. C Twigg-Flesner, 'Conformity of Goods and Digital Content/Digital Services' in E Arroyo Amayuelas and S Cámara Lapuente (eds), *El Derecho privado en el nuevo paradigma digital* (Marcial Pons, 2020), 49 ff.; JM Carvalho, 'Introducción a las nuevas Directivas sobre contratos de compraventa de bienes y contenidos o servicios digitales' in E Arroyo Amayuelas and S Cámara Lapuente (eds), *El*

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legislation, the SGD recognises that Member States have the freedom to regulate several relevant aspects. Among the most significant are: the extension of the scope of application to non-consumers (e.g. small- and medium-sized enterprises -SMEs); the extension of the scope of application of the law in cases of 'mixed contracts'; the equation of platform operators with sellers in specific circumstances; and the possible exclusion of living animals and second hands goods sold at public auction from its scope of application. Moreover, the SGD is intended to provide for a fully harmonised regime only with regards to certain aspects of contracts for the sale of goods, including rules on requirements for conformity, remedies available to consumers in the event of lack of conformity and the main modalities for the exercise of remedies. Consequently, national rules on the legality of goods, damages and general contract law aspects (such as: formation, validity, nullity or effects of contracts, consequences of the termination of the contract and specific aspects regarding repair and replacement not regulated in this Directive) are not affected by the EU sale rules[8]. This wide freedom attributed to Member States may cast doubts on the fully harmonising nature of the Directive and its capability to reach its main goal of ensuring a consistent and coherent legal framework with regard to the sale of goods within Europe.

Concerning the Italian transposition of the Directive, the Italian legislature adopted on 4 November 2021 the d. lgs. n.170/2021[9]. Since the SGD is largely a modernisation of Directive 1999/44/EC which was transported into the Italian Consumer Code (from now on, it. Cons. Code) in 2005, the SGD was implemented in Italy by amending arts. 128–135 of the it. Cons. Code.

Derecho privado en el nuevo paradigma digital, cit.: '*En cuanto a la venta de bienes de consumo, uno de los principales efectos de la DCV será la reducción del nivel de protección de los consumidores en muchos Estados miembros*' (p. 46).

[8] In particular, see rec. 18 SGD which includes more specifications. See also A De Franceschi, 'Consumer's Remedies for Defective Goods With Digital Elements' (2021) 12 JIPITEC 143, 151 ff.: recalling the freedom recognised to MSs by the Directive, the A. defines the SGD harmonisation as a "'*tendential" full harmonization*' (p. 151).

[9] Decreto legislativo 4 novembre 2021, n. 170, *Attuazione della direttiva (UE) 2019/771 del Parlamento europeo e del Consiglio, del 20 maggio 2019, relativa a determinati aspetti dei contratti di vendita di beni, che modifica il regolamento (UE)2017/2394 e la direttiva 2009/22/CE, e che abroga la direttiva1999/44/CE. (21G00185)*, in *Gazz. Uff.* n. 281, 25-11-2021.

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This paper shall focus on the new substantial sales rules, in particular, the conformity of goods (§ 4), the seller's liability (§ 5), including time limits (§ 6), and the consumer's remedies for defective goods (§ 7). Some preliminary remarks on the Directive's scope of application (§ 2) and the subject matter covered by the new sale rules (§ 3) may also be of some help.

2. The scope of application: resistance to the B2C model?

The SGD's scope is limited to the relationship between consumers and sellers (art. 3 SGD). The notions of 'consumer'[10] and 'seller'[11] are consistent with traditional notions[12] .

It is nonetheless acknowledged today that the line between B2C and Business to Business (herein after B2B) contracts is more blurred than ever. First, the assumption that B2B contracts imply equality in bargaining power has been questioned. The dualistic scenario characterised by the presence of B2C and B2B relationships has been enriched by the consideration of B2B contracts. In fact, '*Small and medium size enterprises often lack specific expertise, experience, information and bargaining power, in a way very*

[10] Art. 2(2) SGD.

[11] Art. 2(3) SGD.

[12] The definition of consumer provided by art. 2(2) SGD is consistent with the definition found in other Directives, including the Consumer Rights Directive. The repealed 1999/44/EC Directive provided a narrowed notion: 'Any natural person who, in the contracts covered by [the] Directive is acting for purposes which are not related to his trade, business or profession' –Art. 1(2)(a). The inclusion of the craft is not intended to cover the '"*consumers" "do-it-self activities*' but '*it refers to the professional craftsmen*'; and D Staudenmayer, '*sub.* Art. 3' in R Schulze and D Staudenmayer (eds), *EU Digital Law: Article by Article Commentary* (Nomos/C.H. Beck/Hart Publishing, 2020) at 62. On the definition of consumer provided in Dir. 44/1999/EC and compared to the wider definition provided in the Consumer Rights Directive, see G Howells, C Twigg-Flesner and T Wilhelmsson, *Rethinking EU Consumer Law* (Routledge, 2018): '*The CRD did not amend the definitions of key terms such as "consumer" in earlier directives such as the CSD. In practical terms, however, Member States can apply the slightly wider definition from the CRD to these national rules implementing earlier directives to ensure consistency*' (p. 174). On the notion of Consumer in the It. Cons. Cod. see L Delogu, 'Leggendo il Codice del consumo alla ricerca della nozione di consumatore' (2006) Contr. e impr. Europa 87.

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similar to consumers'[13]. Therefore, SMEs need the same protection as consumers when dealing with more powerful counterparties. This unbalanced situation explains the potential extension of EU consumer protection to small businesses (B2b).

Second, a praxis is required to consider the diffusion of transactions that do not exclusively serve a private or business purpose (i.e., mixed situations). Dual-purpose contracts are contractual agreements concluded for purposes that are partly within and partly outside the private individual's trade. These situations may create uncertainty as to the applicable legal framework. As of now, the European Court of Justice (hereinafter CJEU) has ruled in favour of a restrictive interpretation of 'consumer' whenever legal regimes about jurisdiction come into question. The protective rule which permits the consumer to sue and be sued in a court where s/he is domiciled is not applicable in the case of a mixed situation '*unless the trade or professional purpose is so limited as to be negligible in the overall context of the supply, the fact that the private element is predominant being irrelevant in that respect*'[14]. By contrast, taking into account the substantial law regime, substantive EU law has generally adopted the 'predominant use' criterion: in the case of dual-purpose contracts in which the contract is concluded for purposes partly within and partly outside the person's trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person should also be considered as a consumer[15].

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[13] MW Hesselink, 'SMEs in European Contract Law', in K Boele-Woelki and W Grosheid, *The Future of European Contract Law* (Kluwer Law International, 2007) 349 ff., at 359.

[14] Case C-464/01 *Johann Gruber v Bay Wa AG* [2005] ECR I-00439, para 39. G Howells, 'The Scope of European Consumer Law' (2005) 3 Eur. Rev. Contract Law 360, 361 ff., points out that: '*The removal of contracts having a non-negligible trade or business requirement should logically be restricted to the particular context of the Convention. However, there must be a temptation for the European Court of Justice simply to transfer this logic to the definition of consumer in the substantive acquis. This would be wrong, but for non-specialists the subtleties between the different functions of the definition may be lost*'. See also Case C-630/17 *Anica Milivojević v Raiffeisenbank St. Stefan-Jagerberg-Wolfsberg eGen* [ECLI:EU:C:2019:123]; Case C-498/16 *Maximilian Schrems v Facebook Ireland Limited* [ECLI:EU:C:2018:37]).

[15] Considering EU hard law, see as an example recital 17 of Directive 2011/83/EU. With regards to EU soft law, see DCFR, art. 1:105 (1). (1) – 'A "consumer" means any natural person who is acting *primarily* for purposes which are not related to his or her trade, business or profession'; *Acquis Principles*, art. 1:201: '*Consumer means any natural person who is mainly acting for purposes which are outside this person's business activity'*. JM Carvalho, 'Introducción a las nuevas Directivas sobre contratos de compraventa de bienes y contenidos o servicios digitales' in E Arroyo Amayuelas and S Cámara Lapuente (eds), *El Derecho privado en el nuevo paradigma digital*, cit., 31, 33 and 34. See J M Carvalho, 'Sale

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Consumer law and its rationale grounded in the B2C traditional scheme, has also been recently challenged by the collaborative economy. The rise of platforms into the digital market[16] has introduced new business models onto the scene which involve three different subjects: (a) service providers acting in their professional capacity (professional service providers) or as private individuals (peer service providers); (b) users; and (c) online collaborative platforms which enable the intermediation between providers and users to facilitate the transactions. Platforms might perform different kind of activities, and they could be subject to market access requirements (e.g., business authorisation, licencing requirements, tax regulation) depending on the nature of such activities. Prior authorisation is not required as long as the platform provides an Information Society Service (ISS), that is, a service normally provided for remuneration at a distance by electronic means for the processing and storage of data at the individual request of a recipient of services[17].

In most cases, the collaborative platforms connect the service providers of the underlying service and the end users, offering additional services in order to intermediate between the two parties. A sale of goods is one of the traditional economic transactions that the platforms facilitate in the digital environment; for example, second-hand e-commerce is increasing – due as well to the consumer interest in sustainability and the COVID-19 pandemic situation – and a lot of platforms are gaining space in the digital single market within this framework (e.g., see eBay, Vinted, Etsy, Depop, etc. in Europe).

In this scenario, defining the type of contract concluded between the party offering the good and the user who purchases it is an easy task, similar to the case of a sale transaction taking place in an on/off-line environment. In contrast, the possibility to apply consumer protection law is not taken for granted[18]. In the traditional scheme

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of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771' (2019) 5 EuCML, 194, 196.

[16] C Busch, H Schulte-Nölke, A Wiewiórowska Domagalska and F Zoll, 'The Rise of the Platform Economy: A New Challenge for EU Consumer Law?' (2016) 1 EuCML 4.

[17] Dir. 200/31/EC art. 2(a) and Dir. 2015/1535 art. 1(1)(b).

[18] A Quarta, 'Narratives of the Digital Economy: How Platforms are Challenging Consumer Law and Hierarchical Organisation' (2020) 20 Global Jurist 2, 26.

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and assuming information asymmetries, the consumer is on the demand side of the market and is contracting with professional traders and, therefore, deserves special protection as the weaker party. Conversely, in the emerging platform-based economy, consumers frequently offer services and goods worldwide to other consumers without thereby turning into professionals[19]. A new market player is thus gaining space in the internal (digital) market: a consumer, defined as a natural person acting for purposes which are outside his trade, business, craft or profession, who is, however, acting as a seller or a service provider rather than a buyer. As noted elsewhere, '*in the C2C market "some consumers temporarily put on the hat of business and offer their products to other people*"[20], turning into "*hybrids acting on different sides of the market*"[21] *and becoming (producers + consumers =) prosumers*'[22]. The rise of prosumers in the digital environment may test the tightness of the current regulatory previsions in the frame of consumer protection.

Indeed, in the peer-to-peer economy which is increasingly blurring the distinction between professional and personal spheres, it is necessary to understand whether a seller is acting in a professional capacity (B) or as a private individual (C) in order to identify the regulatory framework applicable to the transaction[23].

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[19] A Quarta, 'Narratives of the Digital Economy: How Platforms are Challenging Consumer Law and Hierarchical Organisation', cit., who noted that '*These dual roles [producer and consumer] and the ease of shuttling between them derive from the fact that providing services does not necessarily require an entrepreneurial organization'*.

[20] T Theurl and E Meye, 'Cooperatives in the Age of Sharing' in K Riemer, S Schellhammer and M Meinert (eds), *Collaboration in the Digital Age – How Technology Enables Individuals, Teams and Businesses*, (Springer International Publishing, 2019) 196.

[21] T Theurl and E Meye, 'Cooperatives in the Age of Sharing', cit., 196.

[22] On the 'prosumer' in the new digital era of European contract law, see V Mak, *Legal Pluralism in European Contract Law* (Oxford University Press 2020) spec. at 118 ff.; C Amato, 'Il processo di armonizzazione del diritto contrattuale in Europa: dal più al meno' in A Saccoccio and S Cacace (eds), *Sistema Giuridico Latinoamericano, Summer School (Brescia, 9-13 luglio 2018*) (Giappichelli 2019) spec. at 212 ff.

[23] This distinction also has an impact on the legal regime applicable to the platform–seller relationship. It is worth mentioning that the relationships between the platforms and business users (P2B) is regulated by Reg. (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (in [2019]186 *OJ* L 11, 7, p. 57–79*),* which aims to ensure the fair and transparent treatment of business

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The European Commission[24] and the CJEU[25] have identified some exemplifying criteria in order to recognise on a case-by-case basis the professional nature of a trader. From a practical point of view, it is often very difficult for a buyer to understand whether or not his/her counterparty selling a good through an on-line platform is acting for purposes related to his trade, business, craft or profession. Consequently, the lack of clarity on certain platforms as to whether providers act as a business or a private person might create confusion about the applicability of

users by online platforms. Nevertheless, the EU Commission has already proposed two legislative initiatives to upgrade rules governing digital services in the EU: Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act DSA) and amending Directive 2000/31/EC, COM/2020/825 final and Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act - DMC), COM/2020/842 final. As underlined by the EU: '*Together they form a single set of new rules that will be applicable across the whole EU to create a safer and more open digital space*'. In particular, the two proposals have as main goals: '1.*to create a safer digital space in which the fundamental rights of all users of digital services are protected; 2. to establish a level playing field to foster innovation, growth, and competitiveness, both in the European Single Market and globally'* (EU Commission, *The Digital Services Act Package*). Both DSA and DMA has been finally adopted in July 2022.

[24] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European agenda for the collaborative economy {SWD(2016) 184 final}, COM(2016)356 fin.: the EU Commission has identified some factors which in combination suggest that a party acting as a provider could be considered as a professional; for example, frequency of the service, profit-seeking motive and the level of turnover.

[25] According to the principle stated in the judgment *Kamenova* (CJEU, 4 October 2018, C- 15/17, *Komisia za zashtita na potrebitelite v Evelina Kamenova*, ECLI:EU:C:2018:808), in order to understand the nature of the trader, it should be verified, case by case, '*whether the sale on the online platform was carried out in an organised manner, whether that sale was intended to generate profit, whether the seller had technical information and expertise relating to the products which she offered for sale which the consumer did not necessarily have, with the result that she was placed in a more advantageous position than the consumer, whether the seller had a legal status which enabled her to engage in commercial activities and to what extent the online sale was connected to the seller's commercial or professional activity, whether the seller was subject to VAT, whether the seller, acting on behalf of a particular trader or on her own behalf or through another person acting in her name and on her behalf, received remuneration or an incentive; whether the seller purchased new or second-hand goods in order to resell them, thus making that a regular, frequent and/or simultaneous activity in comparison with her usual commercial or business activity, whether the goods for sale were all of the same type or of the same value, and, in particular, whether the offer was concentrated on a small number of goods. (…) the criteria set out in the preceding paragraph of this judgment are neither exhaustive nor exclusive, with the result that, in principle, compliance with one or more of those criteria does not, in itself, establish the classification to be used in relation to an online seller with regard to the concept of "trader"*' (paragraphs 37 and 38).

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consumer rights protection[26]. Aware of this issue[27], the EU legislature has introduced additional specific information requirements for contracts concluded in the marketplace; in particular, the provider of an on-line marketplace shall inform the consumer '*in a clear and comprehensible manner and in a way appropriate to the means of distance communication* (…) *whether the third party offering the goods, services or digital content is a trader or not',* and in the case of a non-trader, the platform should provide a statement that the EU consumer protection law is not applicable to the contract concluded[28]. This solution is not flawless[29]. First, the provider of online marketplaces is not required to verify the legal status of the provider of the underlying service and releases the information to the consumer only on the basis of the declaration of that third party. Second, this new duty to provide information is not sufficient to ensure a coherent legal framework for the sale of goods in the digital single market as it leaves the door open for Member States (hereinafter MSs) to apply different criteria in order to qualify the seller as professionals or not, thus jeopardising the goal of the uniformity of the European digital single market.

[26] European Commission, 'Key Findings about Problems Consumers Face in the Collaborative Economy' (2018).

[27] European Commission, 'A New Deal of Consumer' (2018).

[28] Art. 6a(b) Directive (EU) 2019/2161 and rec. 24-28 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules in (2019) 328 OJL 18, p 7–28. Such an omission would be relevant as a misleading omission in the legal framework of the Unfair Commercial Practice Directive: that commercial practice shall be regarded as misleading pursuant to art. 7 because '*it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise*'. Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), in (2005) 149 OJL 11, 6, p. 22–39. On this point, see D Staudenmayer, '*sub.* Art. 3' in R Schulze and D Staudenmayer (eds), *EU Digital Law: Article by Article Commentary*, cit., at 64.

[29] C Cauffman, 'New EU Rules on Business-to-Consumer and Platform-to-Business Relationships', cit.

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Even if the SGD is based on the traditional scope of application of earlier consumer protection laws (B2C) in accordance with the evolution of European contract law, the Directive does not propose to restrict its scope to pure consumer contracts[30]. Instead, the SGD leaves wide discretion to MSs in the definition of the scope of application. However, even this choice raises some criticisms.

In particular, the SGD confers on MSs the freedom to extend the application of the SGD to B2B contracts when one of the parties is a natural or legal person that is not a consumer within the meaning of the Directive, such as non-governmental organisations, start-ups or SMEs (rec. 22 SGD)[31]. Even if the SGD expressly proposes the adoption of an extensive definition of consumer, in the case of dual-purpose contracts – in which the trade purpose is so limited as not to be predominant in the overall context of the contract – the SGD leaves MSs free to determine '*whether, and under which conditions, that person should also be considered as a consumer*'. Contrary to the previous EU orientation which was based on the 'predominant use' criterion which directly included such a person in the notion of consumer, MSs under the SGD are completely free to qualify that person as a consumer or not and to define the conditions which underline such a choice[32]. In addition, this option underestimates the fact that consumers today often decide to use a good with digital elements not only for leisure but also partially for professional reasons. The digital revolution and the effects of the COVID-19 pandemic on smart work are making it even more

[30] MW Hesselink, 'Towards a Sharp Distinction between B2B and B2C? On Consumer, Commercial and General Contract Law after the Consumer Rights Directive' (2009) 18 Eur. Rev. Priv. Law 18, 57.

[31] Rec. 21: 'Member States should also remain free to extend the application of the rules of this Directive to contracts that are excluded from the scope of this Directive, or to otherwise regulate such contracts. For instance, Member States should remain free to extend the protection afforded to consumers by this Directive also to natural or legal persons that are not consumers within the meaning of this Directive, such as non-governmental organisations, start-ups or SMEs'.

[32] See JM Carvalho, 'Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771', cit., at 196; JM Carvalho, 'Introducción a las nuevas Directivas sobre contratos de compraventa de bienes y contenidos o servicios digitales', cit., 33 and 34; C Cauffman, 'New EU Rules on Business-to-Consumer and Platform-to-Business Relationships' (2019) 26 Maastricht J. Eur. Comp. Law 4, 469, 479.
As already indicated by some scholars, this potential restriction on the notion of consumer could generally lead to discrepancies across Europe, '*while at the same time undermining the internal market and an effective protection of consumers*': JM Carvalho, 'Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771', cit., at 196.

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difficult to disconnect the private and personal sphere from the work sphere[33]. Finally, the SGD recognised the freedom of MSs to extend the scope of application to platform providers who are not direct contractual parties with the consumers.

2.1 The Italian interpretation of the scope of the SGD

Concerning the italian transposition of the SGD, the d.lgs. n. 170/2021 adopted the traditional definition of consumer, that is 'any natural person who is acting for purposes which are outside that person's trade, business, craft, or profession'[34] .

In the case of consumers' sales of goods[35], the Italian legislature did not extend the scope to other parties, such as small enterprises[36]. Moreover, the direct reference to the traditional definition of consumer (fn. 15) leads to the conclusion that the Italian contractor should not be considered as a consumer in the case of dual-purpose

[33] JM Carvalho and M Farinha, 'Goods with Digital Elements, Digital Content and Digital Services in Directive 2019/770 and 2019/771' 2020 2 Rivista de Direito e Tecnologia 2, 257, 261 and 262.

[34] In the transposition law, the Italian legislator has directly recalled the notion of consumer set up by art. 1, para 3, lett. a), it. Cons. Cod., according to which consumer means any natural person who is acting for purposes which are outside that person's trade, business, craft or profession.

[35] See C Amato, 'The Influence of the CJEU's opinions on the Italian Courts in the Application of the Unfair Commercial Practices Directive' in A Mancaleoni and E Poillot (a cura di), *National Judges and the Case Law of the Court of Justice of the European Union* (Roma-Tre Press 2021) 223; S Orlando, 'L'estensione della disciplina delle pratiche commerciali scorrette tra professionisti e "microimprese"' in G Vettori (ed), *Il contratto dei consumatori, dei turisti, dei clienti, degli investitori e delle imprese deboli. Oltre il consumatore* (vol. I, CEDAM, Padova, 2013) 181 ff.

[36] A different choice has been made by the Italian legislator in implementing the European rules concerning misleading and aggressive commercial practices. According to art. 18, d)-bis, it. Cons. Cod., SMEs – as defined by - are included in the scope of Dir. 2005/29/EU: see C Amato, 'Brevi osservazioni riguardo il contributo italiano alla crescita del diritto contrattuale europeo: della nozione di consumatore' in L Antoniolli, GA Benacchio and R Toniatti (eds), *Le nuove frontiere della comparazione, Atti del Primo convegno nazionale SIRD* (Trento, 2012), 315 ff. (with particular regards to the notion of consumer under the Dir. 2011/83)

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contracts in which the trade purpose is so limited as to not be predominant in the overall context of the contract[37].

By the same token, the notion of seller is consistent with the previous legal regime of Dir. 1999/44/EC. Considering the platform-based economy, the concept of trader expressly includes the Digital Platform Provider acting for purposes related to her/his own business and as the direct contractual partner of the consumer for the sale of goods[38]. In some instances, platforms offer more than ISS (see *supra*) and directly provide the underlying service. In this business model, the platforms – eventually subjected to the sector-specific regulation and requirements traditionally applied to services providers[39] – represent the direct counterparty of the consumer. If the platform directly sells goods to consumers, there is no doubt that the platform provider fits perfectly into the notion of 'seller'. Nevertheless, the EU law moves forward with rec. 23 SGD which recognises the freedom of MSs to also qualify the digital platform provider as a seller when it is not acting '*as the direct contractual partner of the consumer*'. According to this option, the platform should be considered liable to the consumer in the case of lack of conformity of goods, either jointly with the seller who provided the underlying service in its professional capacity[40] or as the sole party responsible in the event of peer-to-peer (C2C) transactions. Rec. 23 seems to recall the *Wathelet*[41] ruling that restricted the legal principle affirmed in the judgement to platform intermediaries. In that decision, the CJEU dealt with a triangular relationship and held that the notion of 'seller' within the meaning of the Consumer Sale Directive

[37] Cfr. G De Cristofaro, *Difetto di conformità al contratto e diritti del consumatore* (Cedam, Padova 2000) at 38.

[38] Rec. 23; art. 128, para 2, lett. c) it. Cons. Cod.

[39] *Asociacion Professional Elite Taxi v. Uber System Spain*, ECLI:EU:C:2017:981.

[40] JM Carvalho, 'Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771', cit, 7 and 8.

[41] CJEU Case C-149/15 *Sabrina Wathelet v. Garage Bietheres & Fils SPRL* [2016] ECLI:EU:C:2016:840; JC Carvalho, 'Online Platforms: Concept, Role in the conclusion of Contracts and current Legal Framework in Europe' (2020) 12 Cuadernos de Derecho Transnacional 1, 863, 869; I Domurath, 'Platforms as Contract Partners: Uber and Beyond' (2018) 25 Maastricht J. Eur. Comp. Law 5, 565. See also G Howells, C Twigg-Flesner and T Wilhelmsson, *Rethinking EU Consumer Law* (Routledge 2018) spec. at 174 and 175.

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1999/44/EC also covers traders acting as intermediaries on behalf of a private individual who fails to inform the consumer that the owner of the goods for sale is not a professional, irrespective of whether the intermediaries are remunerated or not.

Italy has not chosen this option; in the d. lgs. n. 170/2021, there is no reference to the possibility of considering the platform as the seller when it has not made clear to the consumer its mere intermediary role. As a consequence, it excluded the application of the sales' rules to platform providers who do not fulfil the requirements to be qualified as sellers. If the seller uses an intermediary platform to sell goods, no additional liability on the intermediary platforms can be foreseen and, therefore, only the professional seller can be considered responsible to consumers for the supply and conformity of goods.

3. The subject matter of the SGD

3.1. The broad definition of 'sales contract' and the case of mixed contracts

Consistent with the mediatory logic that pervades the EU's terminological choices, SGD confirms a broad definition of 'sale of good'[42] in accordance with the objectives and principles set out in the Directive itself[43]. As stated in art. 2, n. 1, 'sales contract' means any contract under which a seller transfers or undertakes to transfer the ownership of goods to the consumer and the latter pays or undertakes to pay the price[44]. Thus, the SGD does not establish a line among different kinds of contracts,

[42] In this sense, it departs from Directive 1999/44/EC, which did not propose any definition of 'sale', leaving its scope somewhat imprecise.

[43] According to EU law a 'contract of sale' constitutes an autonomous concept whose key characteristics are the obligation to deliver a product in exchange for the payment of the relative price.
In the sense of moving beyond the 'typological' perspective, see P Perlingieri, 'Apertura e coordinamento dei lavori', in aa.vv., *L'attuazione della direttiva 99/44/CE in Italia e in Europa. La tutela dell'acquirente di beni di consumo. Atti del Convegno internazionale* (CEDAM, 2002), 19, at 31: '(…) non è il tipo contrattuale che conta, è importante l'interesse regolato, il fenomeno sostanziale, fatto da tante circostanze che non possono essere tutte previste (…)'.

[44] See art. 2, n. 1, SGD. In contrast to the definition of a sales contract in the Consumer Rights, no express mention of the inclusion of a 'contract having as its object both goods and services' is made

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leaving MSs free to decide what types of agreements should be included in the notion of 'sale'.

This wide notion of 'sale contract' is not a novelty in Italian consumer legislation. As already stated in art. 128 and art. 45, lett. e) it. Cons. Cod.[45], the Italian notion of sale continues to include not only contracts that can be ascribed to the general notion of sale[46] but also barter contracts, supply contracts, contract for services, and all other contracts intended to supply consumer goods to be manufactured or produced.

The SGD promotes the opportunity to include under the scope of the Directive specific contracts with a work or service component. In particular, art. 3(2) and Recital 17 state that contracts for the supply of consumer goods to be manufactured or produced, including under the consumer's specifications, are equated to contracts of sale. As expressly stated in the Directive, the installation of consumer goods also falls within the scope of the SGD, provided that the installation forms part of the contract of sale and has to be carried out by the seller or under the seller's responsibility[47].

Unlike the Consumer Rights Directive (art.2(5)), contracts having as an *'object both goods and services*' are not expressly included in the SGD's definition of a sale contract. Under the current wording of Recital 17 SGD, the SGD leaves to MSs the freedom to

by the SGD: see art. 2(5) Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, in *OJ* L 304 22.11.2011, p. 64.

[45] On the comparison between the notion of 'bene di consumo' and 'bene' according respectively to Articles 128 and 45 cod. cons., as amended in 2014, see M Siragusa, 'sub art. 45, Definizioni' in AM Gambino e G Nava (a cura di), *I nuovi diritti dei consumatori. Commentario al d. Lgs. N. 21/2014* (Giappichelli 2014) 8 ff.

Given the frequency with which used goods are exchanged by consumers for new goods, the appropriateness of extending the objective scope of application of the provisions to the barter contract is underlined by A Ciatti, 'L'ambito di applicazione' in M Bin e A. Luminoso (eds), *Le garanzie nella vendita dei beni di consumo*, *Trattato di diritto commerciale e diritto pubblico dell'economia* diretto da F Galgano, vol. XXI, (Padova, 2003) 117 ff., 125.

[46] 'A contract of sale consists in an agreement to transfer the ownership a good or of a right in exchange for a price' (art. 1470 Italian Civil Code).

[47] See spec. rec. 17 and 34 SGD; art. 8 ('*Incorrect installation of goods*') SGD.

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determine whether contracts which include elements of both a sale of goods and the supply of services should be classified in their entirety as a sales contract[48]. This is a crucial aspect because such a discretionary power reflects the need to regulate an expanding phenomenon which is dictated by the increasing spread of mixed contracts in which the seller not only transfers or undertakes to transfer the ownership of goods to the consumer but is also bound to an obligation to provide a service upon or after delivery (e.g., assistance and maintenance services). Such an undertaking may not merely be ancillary to the transfer of goods but may acquire a significant importance in the agreement. This phenomenon is likely to increase due the inclusion of 'goods with digital elements' within the scope of the SGD (see further on, at 3.2). Under specific circumstances, the digital content or digital service will be covered by the sales contract and the provision of additional services, such as installation[49] or updating of goods with digital elements[50], may become frequently included in the sale contract.

Considering the increased significance of service components for sales contracts in a digitalised market, it is fundamental to provide guidance in the case of mixed contracts to determine whether a contract is a sale or a service contract for the purpose of creating a legal framework intelligible for the consumer.

The repealed Directive 1999/44/EC regulated similar issues as it included in the notion of sale contracts those contracts for the supply of consumer goods to be manufactured or produced as well as providing for the extension of lack of conformity to installation, whether included in the contract of sale or not[51]. Apart from these types of mixed contracts which expressly fall within the scope of the Directive, the general interpretative criterion in the case of mixed contracts required consideration of whether the transfer of ownership of the goods constituted the main

[48] '(…) Where a contract includes elements of both sales of goods and provision of services, it should be left to national law to determine whether the whole contract can be classified as a sales contract within the meaning of this Directive': rec. 17 SGD.

[49] See art. 131 it. Cons. Cod.

[50] Art. 130 it. Cons. Cod.

[51] Similar provisions were included under the repealed Directive 1999/44/EC at art. 1, para 4 and art. 2, para 5.

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purpose of the contract. Under the repealed Consumer Sale Directive, the CJEU[52] addressed in the *Schottelius v Seifert* case the question of whether installation and ancillary service elements should be included under the consumer sales legal regime. In this decision, the Court emphasised that in order to apply the sales disciplines to a mixed contract, the provision of services must be ancillary to the performance of the sale[53]. As already noted elsewhere, this principle is questionable: '*While this focus on the principal obligation constitutes a satisfying test in theory, it may lead to significant legal uncertainty in more complex contractual arrangements in which principal and ancillary contractual duties may be difficult to tease apart*'[54].

The possibility given to national legal systems to expressly set the conditions for classifying contracts that also involve the provision of services as sale contracts may

[52] On the service–sale dichotomy in the CJEU's case law, see K Erler, *Implied Warranties for Digital Products? The Interplay of Intellectual Property and Sales Law in the EU and US*, TTLF Working Papers, 2019, in part. at 64 ff.

[53] In *Schottelius* Case (C-247/16, *Heike Schottelius v Falk Seifert*, ECLI:EU:C:2017:638), the CJEU set up important principles to define contracts involving the supply of a service that falls under the discipline of Directive 1999/44/EC .
In the case at stake, in 2011, Mrs Schottelius's husband engaged the services of Mr Seifert, a contractor, to renovate the swimming pool in the couple's garden. Mrs Schottelius is the owner of the garden and of the pool. As part of the contract, Mr Seifert sold several products to the couple, such as the cleaning system and the pump, and completed the renovation of the pool. Along with the contract, the contractor issued a warranty in favour of Mrs Schottelius's husband, and after the termination of the work, the husband assigned all his rights under the warranty to his wife. After the completion of the renovation work, the pool was put into use and a number of defects (in particular, affected the cleaning system and the pump) became apparent. The couple requested that the contractor repair the defects without success.
Against this factual background, even if the CJEU denied its jurisdiction over the facts of the case, it stated that the contract for the renovation of the pool falls outside the scope of Directive 1999/44/EC. According to the CJEU judgement, the contract must be considered as a contract of work rather than a sales contract with an ancillary installation clause; even though the filter and the pump were installed by the same contractor, the principal obligation under the contract was the renovation of the pool.
The Court referred to the preparatory documents relating to Directive 1999/44/EC and to the UN Convention on Contracts for the International Sale of Goods of 1980 as the basis of its judgment.
Among scholars, see LA Reventós, 'Transmisión onerosa de un producto y su conformidad con el contrato: una relectura de la STJUE de 7 de septiembre de 2017(Asunto 247/16, Schottelius)' (2018) 16 Revista Electrónica De Direito 2, 43.

[54] P Hacker and M-S Schäfer, 'European Union Litigation' (2018) 14 Eur. Rev. Contract Law 1, 64, at 66.

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help to overcome the uncertainties related to the sale–service dichotomy as well as to eventually provide a better definition of the criterion for the 'ancillarity' of performance. Unfortunately, the Italian law implementing the SGD has not included any general provision concerning the legislative rules applicable to mixed contracts. This is a missed opportunity to codify the legal regime applicable to B2C mixed contracts which have as object both goods and services, thereby leaving a gap in our legal system.

3.1.1. New patterns of consumption in the sharing economy: the diminishing importance of the SGD

As seen before, the scope of application of the SGD is expressly limited to exchange contracts which transfer the right of ownership to a consumer; rights *in rem* or rights *in personam* (e.g., the temporary supply of goods or the sharing of tools) are not covered by the SGD[55]. Consequently, a product lease or a product as a service fall outside the subject matter of the Directive. This restriction may fully be accepted within the traditional 20th century economic model of consumer sales regulated by Dir. 1999/44/EC in which consumers were focused on owning property. However, some doubts arise about the compatibility of this traditional approach with the current economic situation characterised by the emergence of the innovative model of the sharing economy[56]. Today, new patterns of consumption are arising in which the interest of consumers with reference to certain consumer goods slips from the acquisition of property to the use of goods. Digitalisation, the inclination towards

[55] '*This limitation to certain types of supply contract is regrettable, but it is another indicator of the rather traditional approach of this Directive. In particular, the omission of contracts involving the temporary supply of goods (i.e., hire or leasing) is surprising, not least in view of the growth of the business models based on sharing, as well as the focus on the circular economy and "servitisation", but also because such alternative forms of supply will be important particularly for consumers with limited financial resources*': C Twigg-Flesner, 'Conformity of Goods and Digital Content/Digital Services', cit.

[56] E Van Gool and A Michel, 'The New Consumer Sales Directive 2019/771 and Sustainable Consumption: a Critical Analysis', Winner(s) Ius Commune Prize, 2021: '(…) *trends connected to the emergence of more sustainable consumption patterns in Europe diminish the importance of the directive's subject matter. Sales of consumer goods are increasingly replaced by alternatives (such as leasing) or bundled with ancillary services*'.

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saving[57] and the attention to sustainable consumption (especially in the case of underutilised goods such as cars and accommodations) are increasing the consumer's propensity towards sharing. This shift is likely to increase with the rise of digital platforms, which – by reducing transactional costs and facilitating the interactions between providers and users – boost the ability of consumers to access goods without owning them[58].

Within such an emerging economy which offers an alternative to the traditional consumption of products and promotes the use of goods over their ownership, the traditional approach adopted by the SGD turns out to be too narrow, thus dramatically decreasing the importance of the Directive's subject matter. The risk is that the lost opportunity to align the normative datum to the emerging praxis will have a negative impact on consumer protection as well as on the need to achieve a high level of harmonisation in this field[59], partially shaving off the objectives of the Directive.

3.1.2. Payment of the price: a missed opportunity to include virtual currency as a means of payment?

The new EU sale rules exclusively cover contracts in which '*the consumer pays or undertakes to pay the price thereof*' (art. 2(1)). Unlike the SGD which does not provide a definition of 'price', the twin DCD in art. 2(7) expressly includes in the notion of 'price' both money and a 'digital representation of value' that is due in exchange for the supply of digital content or a digital service. Digital representation of values should include electronic vouchers or e-coupons (a coupon released by the trader at the end of a transaction that can be used by the same consumer as a mean of payment for a

[57] C Veith et al., 'An Empirical Analysis of the Common Factors Influencing the Sharing and Green Economies' (2022) 14 Sustainability 771.

[58] ECORL, 'Comparative Study on Sharing Economy in EU and ECORL Consortium Countries' (2016) https://www.ecorl.it/documenti/Risultati/comparative-study-on-sharing-economy.pdf

[59] E Van Gool and A Michel 'The New Consumer Sales Directive 2019/771 and Sustainable Consumption: a Critical Analysis', cit., 4.

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next purchase) as well as virtual currency to the extent recognised by national law[60]. Such an extension is justified by the frequent and increasing use of digital representation of values in commercial practice and – as expressly stated in the Directive – to avoid the risk that '*Differentiation depending on the methods of payment could be a cause of discrimination and provide an unjustified incentive for businesses to move towards supplying digital content or a digital service against digital representations of value*' (Recital 23)[61].

Unlike the DCD, the SGD does not provide a specific definition of the meaning of a 'payment of price'; this choice seems to reflect a willingness not to extend the notion of price beyond a sum of money in government-issued currency. In fact, in the last attempt to align the two directives, the EU legislature decided to adopt this different regime given the lesser use of digital representation of values in sale of goods transactions compared to their use in the supply of digital content/services[62].

This solution is highly questionable: even if at present payments in virtual currency are undoubtedly more popular in the case of the supply of digital content and digital

[60] This is justified by the reluctance of some MSs to recognise virtual currency under the EU: D Staudenmayer, '*sub* art. 3', in R Schulze and D Staudenmayer (eds), *EU Digital Law: Article by Article Commentary*, cit., at 67.

[61] See A Janssen, 'Smart Contracting and The New Digital Directives: Some Initial Thoughts' (2021) JIPITEC 196, 201 ff.: '*with the increasing popularity of virtual currencies as a means of payment, this is the only way to prevent companies from escaping the requirements of the Digital Content Directive by demanding "virtual currencies payments" with consumers'*.
To be noted that the DCD scope of application is also open in a case in which the consumer does not pay a price but provides or undertakes to provide personal data to the trader (rec. 24 – art. 3). This specification is in line with the increasing popularity in the digital market of data transfer as a means of payment, for example, in the use of social media, even if it has raised some concern over compatibility with the GDPR rules. On the use of personal data as counter-performance, see D Staudenmayer, '*sub* art. 3', in D Staudenmayer and R Schulze, *EU Digital Law: Article-by-Article Commentary* cit., at 67. Z Efroni, *Gaps and Opportunities: The Rudimentary Protection to 'Data-Paying Consumers' under New EU Consumer Protection Law* (Weizenbaum Series, 4, Weizenbaum Institute for the Networked Society - The German Internet Institute, 2020), https://doi.org/10.34669/wi.ws/4; J Morais Carvalho and M Farinha, 'Goods with Digital Elements, Digital Content and Digital Services in Directive 2019/770 and 2019/771', cit., at 262 and 263. On the GDPR: 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) in (2016) 119 OJL 4, 5, 1–88; see D Staudenmayer, *EU Digital Law: Article-by-Article Commentary*, cit., spec. at 71 ff.

[62] R Schulz and D Staudenmayer (eds), *EU Digital Law: Article by Article Commentary*, cit., at 67

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services, in the near future there could be an increased use of this means of payment in the area of consumer sales, especially with regard to goods with digital elements. As already noted by some scholars, this constitutes a '*missed opportunity to further harmonise the aquis communautaire in a meaningful way*' and, in the near future, it will probably lead to the need for a preliminary judgement from the CJEU in order to clarify if the purchase of goods for virtual currencies falls under the SGD rules[63]. This is not only necessary to ensure the effective and uniform application of European Union legislation and to prevent divergent national interpretations but also to safeguard consumers. It is important to avoid a narrow notion of price (that is, a traditional currency) which, under the SGD, may induce sellers to move towards selling goods to consumers for virtual currency in order to evade the application of the consumers sale's rules, thus undermining the entire set of rules on consumer protection[64].

3.2. The innovative definition: goods with digital elements

The definition of 'good' brings significant novelties to the SGD.

First, in accordance with the European wording, the Italian reference to 'consumer good' before the recent reform which limited the object of the contract under art. 128

[63] A Janssen, 'Smart Contracting and The New Digital Directives: Some Initial Thoughts', cit., at 201 ff.

[64] A Janssen, 'Smart Contracting and The New Digital Directives: Some Initial Thoughts', cit.

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ss it. Cons. Cod. has disappeared in favour of the syntagm 'tangible[65] movable[66] item' (recital 12 and art. 2(5) SGD). The definition of consumption goods used in Dir. 1999/44/EC has been questioned by Italian scholars since it was transposed into the it. Cons. Code. It is well known that the term 'consumer' does not characterise a particular kind of product or the specific functionalities of goods, but is instead connected with the parties to the contractual relationship[67]. Thus, the abandonment of the linguistic expression 'consumer goods' does not produce any consequences on the scope of the sale rules.

Second, the notion of 'good' is enriched by the inclusion of 'goods with digital elements'[68]. The attention paid by the SGD to this specific type of product clearly

[65] When transposing Directive 1999/44/EC, the Italian legislator followed the opinion of the majority of scholars and deleted the reference to the 'materiality of the goods', thus including the supply of intangible goods, such as software, in the concept of consumer goods; see A Ciatti, 'L'ambito di applicazione', cit., at 121 e 122; A Ciatti, 'L'ambito di applicazione *ratione materiae* della direttiva comunitaria sulla vendita e le garanzie dei beni di consumo', cit., 445; C Iurilli, 'Le garanzie legali e commerciali nella vendita dei beni di consumo. Riflessioni in ordine a taluni aspetti relativi al recepimento della direttiva n. 99/44' (2002) 6 Giust. Civ. 2, 271, 281 ff. *Contra*, in the direction of the exclusion of intangible goods, see A Zaccaria and G De Cristofano, 'La vendita dei beni di consumo', cit., 18 ff. (with the exclusion of *software*: 19 and 20); G De Cristofaro, *Difetto di conformità al contratto e diritti del consumatore*, cit., at 41 ff. For a critical analysis, see, in particular, F Addis, '*sub* art. 128' in G Vettori (ed), *Codice del Consumo* (2007) 863, at 875; G De Cristofaro et al., *Commentario breve al diritto dei consumatori: Codice del consumo e legislazione complementare* (CEDAM 2013), at 823.

[66] The exclusion of immovable items is not new in the Italian legal system: when Directive 1999/44/EC was transposed, the European choice to restrict the applicability of the provisions to movable goods was confirmed. On the other hand, some academics were in favour of extending the objective scope of application to immovable goods: F Bocchini, 'La vendita di cose mobili' in P. Schlesinger (fondato da), FD Busnelli (diretto da), *Il Codice Civile. Commentario* (Milano, 2004) 346; R Carleo, '*sub* art. 1519 bis, comma 2, lett. b)', in S Patti (eds), *Commentario sulla vendita dei beni di consumo*, (Giuffrè 2004) 25, at 29 and 30; F Ricci, '*sub.* Art. 128', cit., 22; cfr. A Luminoso, 'Chiose in chiaroscuro in margine al d. legisl. N. 24 del 2002' in M. Bin and A Luminoso (eds), L*e garanzie nella vendita dei beni di consumo, Tratt. Dir. comm. e Dir. pubb. dell'econ*., cit., 64.

[67] See, A Luminoso, *La compravendita* (Giappichelli 2009) at 318; F Bocchini, *La vendita di cose mobili*, cit, 341; A Zaccaria and G. De Cristofano, *La vendita dei beni di consumo* (CEDAM 2003) at 17 and 18; F Addis, *sub* art. 128 in G Vettori (eds), *Codice del Consumo*, cit.; G De Cristoforo et al., *Commentario breve al diritto dei consumatori: Codice del consumo e legislazione complementare* (CEDAM 2013) 823; R Carleo, '*sub* art. 1519 bis, comma 2, lett. b)', cit., 30.

[68] Art. 2(5)(b) SGD - art. 128, para 2, lett. e), n. 2 it. Cons. Cod. See K Sein and G Spindler, 'The new Directive on Contracts for the Supply of Digital Content and Digital Services – Scope of Application and Trader's Obligation to Supply – Part 1' (2019) 15 ERCL 271; P Kalamees, 'Goods with Digital Elements And The Seller's Updating Obligation' (2021) 2 JIPITEC, 132 and 133; K Sein, '"Goods

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reflects the new digital economy and the expansion of the smart goods' market. Today, many consumer goods are smart or connected products, that is, a combination of tangible hardware and embedded digital content or services (such as software, sensors and electronic components) as well as connectivity systems. This is the case, for example, with smartphones, smartwatches and fitness trackers, SmartTVs, connected cars with devices linked to other devices within the vehicle or outside the car (e.g., navigation leave alerts, payment from dash, warn on traffic, safety and collision alerts and automobile diagnostic alerts) and smart fridges which monitor if a product is running low and make it easy to place an order at the grocery store. These are very complex products with heterogeneous components that often involve one or more third parties[69].

Recall the notion set up by the SGD that 'goods with digital elements' are '*any tangible movable items that incorporate or are inter-connected with digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions*'[70]. The SGD must, therefore, apply when (a) the digital content or digital service is embedded into the product as an integrant or inter-connected part of it and (b) The functionality of the good strictly depends on the functionality of the digital content or digital services[71]. The digital content or service incorporated in or interconnected with the goods must also be provided together with those goods as a result of the sale contract[72]. Whether or not the supply of the incorporated or

with digital elements" and the Interplay with Directive 2019/771 on the Sale of Goods', 2020, available at SSRN: https://ssrn.com/abstract=3600137 or http://dx.doi.org/10.2139/ssrn.3600137

[69] C Wendehorst, 'Sale of goods and supply of digital content – two worlds apart? Why the law on sale of goods needs to respond better to the challenges of the digital age' (2016): < https://www.europarl.europa.eu/cmsdata/98774/pe%20556%20928%20EN_final.pdf >

[70] Art. 128, para 2, let. e, n. 2, It. Cons. Cod.

[71] See J Sénechal, '*sub* art.2', in R Schulze and D Staudenmayer (eds), *EU Digital Law: Article by Article C* cit.: '*This is to be ascertained by a "negative test": if the absence of the digital content or digital service would prevent the goods from performing their functions, the goods in question fall under the definition of "goods with digital elements". How the concept of "function" is to be understood in this context is, however not described in either Art. 2 No. 3 itself or in the recitals. The decisive aspect may primarily concern the type of use and the purposes of the goods as they would normally be used or as specified in the contract*' (p. 48). See also P Rott., 'The Digitalisation Of Cars And The New Digital Consumer Contract Law' (2021) 2 JIPITEC, 156 ff. at 158 and 159.

[72] Art. 128, para 3, it. Cons. Cod.

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interconnected digital content or service is included in the sales contract should depend on the agreement's terms. In particular, the inclusion of the digital elements could be either explicitly required by the terms of the contract, or they may be expected for goods of the same type, taking into account also any public statement made by or on behalf of the seller or other persons in previous links of the chain of transactions, including the producer[73]. For example, in the case of a purchase of a smart TV, the buyer will probably expect to find connectivity with the main video-streaming applications throughout specific interfaces (e.g., Netflix app and Amazon Video); by contrast, the consumer may not expect to have access to the relevant video streaming services without directly entering into another contract for the provision of the services with the provider (e.g., Netflix or Amazon Video subscription). The only case in which the consumer would consider access to streaming services to be included within the same contract is when the seller advertised the availability of the streaming services as part of the sale of the smart TV[74].

The digital content or digital service can be pre-installed in the good, or it can be subsequently downloaded onto a different device interconnected to the good (rec. 15 SGD). The incorporated or interconnected digital content or digital service can be supplied directly by the seller or it can be provided by a third party under the sales contract (art. 3(3) SGD). In the latter case, the seller is solely responsible to the consumer; the latter does not have the burden of dealing with several suppliers (see further on, at V.2).[75]

By contrast, in the case of a sale of goods for which functionality *does not depend* on any digital content, the supply of the digital content or service will eventually be

[73] Rec. 15 SGD.

[74] K Sein and G Spindler, 'The new Directive on Contracts for the Supply of Digital Content and Digital Services – Scope of Application and Trader's obligation to Supply – Part 1' (2019) 15 ERCL 3, 257, 272; J M Carvalho, 'Introducción a las nuevas Directivas sobre contratos de compraventa de bienes y contenidos o servicios digitales' in E Arroyo Amayuelas and S Cámara Lapuente (eds), *El Derecho privado en el nuevo paradigma digital*, cit., at 36.

[75] See P Rott, 'The Digitalisation Of Cars And The New Digital Consumer Contract Law', cit., at 159, who defines the the introduction of 'one-stop mechanism' as '*the most important feature of the Directive*'.

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performed under a separate contract, likely falling within the scope of the DCD[76]. For example, if a consumer bought a smartphone with a pre-installed app to monitor weather conditions or a smart bedtime toy connected with a storytelling app to download, both applications would be considered to be a part of the smart good in question and subject to the same legal regime (sales law). If the buyer of a smartphone should later decide to install a game application that was separately bought or to buy software independently from a purchased laptop, the SGD does not apply to the game app or software[77].

In the event of doubt as to whether the supply of incorporated or interconnected digital content or digital services forms part of the sales contract, the digital content or digital service is presumed to be covered by the sales contract (Articles 3(4) sentence 2 DCD, 3(3) SGD). If the good is a physical tangible medium which exclusively serves as a carrier of the digital content, such as DVDs, CDs, USB sticks and memory cards, the DCD – instead of the SGD - should be applied (art. 3(3) and Recital 20 DCD, art. 3(4)(a) and Recital 13 SGD)[78]. Although the application of sale rules to both tangible mediums and digital content would probably have been intuitively the most understandable for the consumer[79], such a choice would not be the best option. This is because it would not reflect the minor value of the tangible medium compared to the digital content stored on it and would undermine the

[76] About the uncertainty in establishing the scope of application of the Directives and, in particular, the determination of what is covered by the DCD, see C Amato, 'Internet of Bodies: Digital Content Directive and Beyond' (2021) 12 JIPITEC 186.

[77] P Kalamees, 'Goods with Digital Elements and The Seller's Updating Obligation', cit. See also P Rott, 'The Digitalisation Of Cars And The New Digital Consumer Contract Law', cit., at 160, who underlines that '*The exceptional character of the exclusion of third party digital content and services from the sales contract suggests that the separation must be "genuine" rather than an artificial separation of contracts that circumvents the general one-stop concept of the Sale of Goods Directive*'; K Sein, 'The Applicability of the Digital Content Directive and Sales of Goods Directive to Goods with Digital Elements', (2021) 30 Juridica Int'l 23 ff.

[78] These new provisions have been implemented in the Italian legislative framework (under art. 128, para 3 and 4, lett. a, it. Cons. Cod.) without significant additions.

[79] According to EU legislation, the extent to which the DCD rules apply to the tangible medium if the medium serves exclusively as carriers of the digital content should '*meet the expectations of consumers and ensure a clear-cut and simple legal framework for traders of digital content*': rec. 20 DCD.

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principle of '*neutrality as regards the distribution channel*'[80], leading to the application of different legal regimes to the distribution of the same digital content (for instance, a music album would be treated differently depending on whether it is supplied on a CD or via online-streaming)[81].

These new provisions clearly aim to set the boundaries between the DCD's and SGD's range of application[82]; yet it is not always easy to draw a clear line between the supply of goods with digital elements (sale contract) and the supply of goods (sale contract) *and* of digital content/services (supply of digital content/service contract), nor is it simple to define when a good exclusively carries a digital component. For example, the Internet of Bodies (IoB) has increased the use for non-medical purposes of (micro)chips and sensors which are available commercially, such as an insertable payment chip which allows the buyer to provide contactless payment just by putting a hand near the contactless card reader, a chip implant as a replacement for a key, insertable devices that vibrate whenever an earthquake anywhere in the world happens and whether someone is facing north. Many other commercial self-insertable implants are already available on the market. Yet the qualification of such devices for the purpose of the application of SGD and DCD directives remains somehow problematic. Can these implantable chips be qualified as goods with digital elements? Or are they the tangible medium used to exclusively carry the digital content/service?[83]

Although uncertainty is never desirable, it is never completely avoidable in the field of new technologies given the novelty of the Internet of Things (IoT) and IoB applications and their rapid and unpredictable evolution. For the current purpose of

[80] See rec. 19 DCD: '*(…) As there are numerous ways for digital content or digital services to be supplied, such as transmission on a tangible medium, downloading by consumers on their devices, web-streaming, allowing access to storage capabilities of digital content or access to the use of social media, this Directive should apply independently of the medium used for the transmission of, or for giving access to, the digital content or digital service*'.

[81] In this sense, see R Schulze and D Staudenmayer (eds), *EU Digital Law: Article by Article Commentary*, cit., 74 and 75.

[82] In particular, see art. 3(3) SGD.

[83] C Amato, 'Internet Of Bodies: Digital Content Directive And Beyond', cit.

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the application of the SGD/DCD, agreement terms might play a pivotal role in the case-by-case definition of the applicable legal regime.

3.3. MSs' discretion: living animals and second-hand goods sold at public auction

The SGD pays particular attention to the sale of living animals and second-hand goods (art. 3(5) SGD).

With regard to living animals, the SGD leaves room for MSs to have discretionary power to choose whether to extend the application of the sale rules to these cases.

The Italian legislature has taken the chance to expressly extend the notion of goods to living animals (Article 128, para 2, letter e), n. 3 it. Cons. Cod.)[84]. This is in accordance with the interpretative approach recently developed by courts and expressed in the majority of opinions by academics[85]. Profiting from the wide definition of 'consumer good' provided by the it. Cons. Cod (at art. 3), courts are in favour of equating pets with consumer goods, arguing that the natural person who buys a pet (or companion animal) to satisfy the emotional needs of daily life and which is unrelated to the trade or professional activity that he or she may run should be qualified as a 'consumer'. By the same token, anyone who sells a pet in the exercise of trade or other professional activity should be qualified as a 'seller' pursuant to the it. Cons. Code; moreover, a pet defined as a 'movable thing' in the sense of the law constitutes a 'consumer good'[86].

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[84] R. Senigaglia, 'Riflessioni sullo stato giuridico degli animali di affezione e sue ricadute in materia di vendita e responsabilità civile' (2021) Il diritto di famiglia e delle persone, 1772 ff.

[85] A relevant number of Italian scholars have already expressed the same view: A Zaccaria and G De Cristofano, *La vendita dei beni di consumo*, cit., 24; G De Cristofaro, *Difetto di conformità al contratto e diritti del consumatore* (Padova, 2000) 44, fn 39; A Ciatti, 'L'ambito di applicazione', cit., at 124.
Among scholars who previously expressed themselves in these terms, see A Ciatti, 'L'ambito di applicazione *ratione materiae* della direttiva comunitaria sulla vendita e le garanzie dei beni di consumo' (2020) Contratto e Impresa – Europa, 433, at 446 ff. Cfr. A Maniaci, 'Vendita di animali: vizi, difetti e rimedi' (2004) XII(1) Contratti 1122 ff.

[86]'Cass. Civ., II section, 25 September 2018, n. 22728' in (2019) 6 Corriere Giur. 777, comment by S Cherti, 'Vendita di animali: gli animali da compagnia sono "beni di consumo"' in (2019) 2 Nuova Giur. Civ., 268, annoted by L Delogu and L Olivero, 'Animali d'affezione e garanzia per vizi tra codice civile e di consumo'; in (2019) 1 Contratti, 19, annoted by M Faccioli, 'L'applicabilità della

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As regards second-hand goods[87], art. 3(5)(a) allows MSs to exclude a sale contract for second-hand goods sold at public auction from the scope of the SGD.

Italian law has extended the SGD regime to all second-hand goods. The new provision under art. 128, para 5 (replacing the previous rule codified under art. 128, para. 3[88] with minor changes) confirms the applicability of the new European discipline on contracts for the sale of second-hand goods, taking into consideration the time of previous use and limited to defects which do not result from the normal use of the product[89]. The SGD regime also applies to second-hand goods sold at a public auction[90] where the seller has not informed the consumer – in a clear and comprehensive manner – about the fact that the consumer sales rules does not apply in that particular situation[91].

Finally, there are no legislative changes on sale contracts for water, gas and electricity. According to the repealed Directive 1999/44/EC on consumer sales, water, gas and electricity are considered to be goods if marketed in a limited volume or ascertained quantity (art. 2(5)(a) SGD; article 128, para 2, letter e), n. 1)[92].

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disciplina sulla vendita dei beni di consumo alla vendita di animali'; in (2019) 1 Danno e Resp. 70 (1), annoted by F Bertelli, 'Applicabilità del codice del consumo alla compravendita di animali'.

[87] Concerning the importance of increasing the confidence of consumers in the market of second-hand goods in order to contribute to the circular economy, see K Kryla-Cudna, 'Sales Contracts and the Circular Economy' (2020) 6 Eur. Rev. Priv. Law 1207.

[88] '*Le disposizioni del presente capo si applicano alla vendita di beni di consumo usati, tenuto conto del tempo del pregresso utilizzo, limitatamente ai difetti non derivanti dall'uso normale della cosa*': previous art. 128, para 3, it. Cons. Cod.

[89] These specifications have been retained despite their uselessness or obviousness, as repeatedly emphasized by scholars: v., *ex multis*, A Ciatti, 'L'ambito di applicazione', cit., at 133.

[90] By transposing the specification included in the Directive, the wording of the new Italian rule expressly includes (but does not limit) second-hand goods which are sold at public auction (see art. 128, para 5, it. Cons. Cod.).

[91] '*Le disposizioni del presente capo si applicano alla vendita di beni usati, tenuto conto del tempo del pregresso utilizzo, limitatamente ai difetti non derivanti dall'uso normale della cosa, anche nel caso in cui siano venduti in aste pubbliche qualora non siano state messe a disposizione dei consumatori informazioni chiare e complete circa l'inapplicabilità delle disposizioni del presente capo*': art. 128, para 5, it. Cons. Cod.

[92]The exclusion of water, gas and electricity depends on the particular public relevance of these goods, which are considered to be basic necessities, which postulates an autonomous regulation concerning

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As in Dir. 1999/44/EC, the SDG excludes the application of the new sale discipline to any goods sold by way of execution or otherwise by authority of law (art. 3(4)(b) SGD). The Italian implementation confirms such an exclusion and enlarges it to national peculiarities[93].

4. Seller liability under the SGD and the conformity of goods

According to SGD, the seller's duty is not limited to providing the consumer with ownership of the goods but also includes the delivery of conforming goods. The seller is liable to the consumer for any lack of conformity of the good, the digital content or the digital services incorporated or interconnected to the good and provided under the same sales contract.

The SGD establishes legal rules regarding the conformity of goods (arts. 5–9 SGD) by explicitly codifying the distinction between 'subjective' and 'objective' criteria for conformity (arts. 6 and 7 SGD)[94]. Even if the subject requirements are mentioned in the SGD before the objective requirements, the latter represent the baseline standard which must be met in all instances, irrespective of what is required by the contract. By contrast, the subjective conformity criteria upon which the parties have expressly

distribution modalities and users' rights: in this sense see. E Capobianco, L Mezzasoma, G Perlingieri (a cura di), *Codice del consumo annotato con la dottrina e la giurisprudenza,* (2018), *sub* art. 128, 669; G De Cristofaro et al., *Commentario breve al diritto dei consumatori: Codice del consumo e legislazione complementare* (CEDAM 2013), 824; R Carleo, '*sub* art. 1519 bis, comma 2, lett. b)*'* cit., 41 ff. For a critical view of such exceptions see Schlechtriem, 'Riflessioni per l'armonizzazione del diritto della vendita al consumatore attraverso la direttiva dell'Unione europea sulla vendita dei beni di consumo', in Patti (a cura di), *Annuario del diritto tedesco* (Milano, 2001) 129, at 135, fn 11.

[93] The reference is to the national specification '*anche mediante delega ai notai, o secondo alter modalità previste dalla legge*': The justification of such an exclusion has to be traced back to the circumstances of the sale rather than to the nature of the good**:** E. Capobianco, L. Mezzasoma, G. Perlingieri (a cura di), *Codice del consumo annotato con la dottrina e la giurisprudenza,* 2018, *sub* art. 128, 669; see, also, R. Carleo, '*sub* art. 1519 bis, comma 2, lett. b)*',* cit., 37 ff..; G De Cristofaro, *Difetto di conformità al contratto e diritti del consumatore* (Cedam 2000) at 45 and 46. Cfr. F Addis, *sub* art. 128 in G Vettori (a cura di), *Codice del Consumo*, cit., according to which the exceptions in Article 128, nn1, 2, and 3 (see now Art. 128, para2 lett. e (1) e para 4, let. b) are perhaps justified by the fact that the sale does not take place in *'perfect competitive market* conditions' (876)

[94] These subjective and objective conformity requirements have been transposed without significant changes into the Italian legal system, art. 129, para 2 and para 3, it. Cons. Cod.

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agreed supplements the objective conformity requirements. The fulfilment of both the objective and subjective conformity requirements ensures the overall conformity of the goods to the contract.

4.1. Objective conformity requirements

The purpose of the objective requirements is to set minimum requirements concerning the quality of the goods which apply regardless of whether the parties have specified the characteristics and qualities of the goods sold[95]. The legal standard of quality can only be increased by the parties in the case of specific negotiation[96].

Art. 7 refers to two main requirements arising from the application of legal rules and supplementing the contractual will. First, the goods must be '*fit for the purposes for which goods of the same type would normally be used, taking into account, where applicable, any existing Union and national law, technical standards or, in the absence of such technical standards, applicable sector-specific industry codes of conduct*'.

Second, if the seller provides the consumer with a sample or model before the sales contract is concluded, the good must meet that quality and correspond to the description.

Pursuant to art. 7, if applicable, the goods shall '*be delivered along with such accessories, including packaging, installation instructions or other instructions, as the consumer may reasonably expect to receive*' (c) and '*possess the qualities and other features, including in relation to durability, functionality, compatibility and security normal for goods of the same type and which the consumer may reasonably expect given the nature of the goods and taking into account any public statement made by or on behalf of the seller, or other persons in previous links of the chain of transactions, including the producer, particularly in advertising or on labelling*' (d).

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[95] C Amato, 'Responsabilità da inadempimento dell'obbligazione', cit.

[96] C Twigg-Flesner, 'Conformity of Goods and Digital Content/Digital Services', cit., 20, who underlines that '*(…) the objective baseline standard should be a mandatory minimum requirement (…) One justification for this is that consumers rarely have the expertise and skills to negotiate with a trader about what levels of quality to expect from goods/digital content/digital services. An even stronger justification is the fact that many consumer transactions involve no negotiation, nor even an opportunity for negotiation, at all (…)'* (p. 53).

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Such objective legal requirements become part of the contract, and they are presumed to be reasonably expected by the consumer[97]. Reasonableness should be ascertained in an objective manner, '*having regard to the nature and purpose of the contract, the circumstances of the case and to the usages and practices of the parties involved*' (Rec. 24 SGD). Such an analysis cannot be conducted as an abstract exercise; it should rely on the specific circumstances of the sale contract at stake[98]. Reference to public statements (as in the repelled Dir. 1999/44/EC) is also fundamental, considering the power of advertising in shaping consumer expectations (see *infra*).

4.2. Subjective conformity requirements

According to art. 6 SGD, subjective conformity criteria are the terms of the contract as agreed upon by the parties in their private relationship, that is, elements covered by specific terms of the contract or, in the case of distance and off-premises contracts, by pre-contractual information which represents an 'integral part' of the contract (pursuant to art. 6(1) and (5), Dir. 2011/83/EU).

In more detail, goods are subjectively compliant if they correspond to description, type, quantity and quality. The SGD also lists some innovative and important conformity elements which might be included in the contract terms with respect to goods with digital elements: reference is made to the functionality of the good, compatibility, interoperability and other features. Second, the conformity of goods is assessed by taking into consideration the '*fitness for a particular purpose*' requirement; the conformity of goods is ensured if the goods are explicitly required by the consumer for a particular purpose at the time of the conclusion of the contract and that purpose is explicitly accepted by the seller. The acceptance of the seller ensures that the consumer's specific request is not unilaterally imposed on the seller[99]. Nevertheless,

[97] JM Carvalho, 'Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771', cit.

[98] See C Twigg-Flesner, 'Conformity of Goods and Digital Content/Digital Services', cit., who highlights the '*context-sensitive*' nature of this assessment.

[99] D Staudenmayer, '*sub* art. 7' in R Schulze and D Staudenmayer (eds), *EU Digital Law: Article by Article Commentary,* cit., 120.

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the SGD does not specify the degree of precision required for the consumer's request to be valid, nor does it make explicit that the seller's consent must be evaluated based on the information received from the consumer. These specifications might help in a case of uncommon purposes required by a consumer.

Goods are deemed to be in conformity if the parties have agreed to deliver the goods with all accessories and instructions, including installation as agreed in the contract.

Finally, if the contract refers to updating the goods, goods with digital elements shall be supplied with all the updates as stipulated in the sale contract. The parties may agree to include upgrades which enhance the digital elements connected to or incorporated into the good, improving the functionalities of the digital content or digital service elements, adapting them to technical developments, protecting them against new security threats, and so on[100]. Both the omission to provide such updates as well as defective or incomplete updates are considered as a lack of conformity of the good.

5. Towards the 'absolute' liability of the seller

The conformity requirements set out in articles 6 and 7 SGD establish precise criteria which aim to determine the content of the seller's obligation; they define what is included in the sale contract, as well as the prodromic steps that allow assessment at the time of performance of whether and how the obligation should be performed.

As the analysis of conformity requirements has shown, the unitary notion of conformity to the contract[101] and the objective requirements for conformity under the SGD have broadened the seller's obligation as compared to the sale rules set out by the repealed Dir. 1999/44/EC.

[100] Rec. 28 SGD.

[101] On the unitary notion of lack of conformity, cf. M Bin, 'La non conformità dei beni nella convenzione di Vienna sulla vendita internazionale' (1990) 44 Riv. trim. Dir. proc. Civ. Civile 755.

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First, the content of the seller's obligations has been better specified, considering precise standards and expectations with which the goods must comply. The new directive has taken a further step towards standardisation by referring to the regulatory or technical standards or to the applicable self-regulatory codes of conduct to assess whether the good is fit for the purpose which goods of the same type would normally be used. Moreover, the SGD contains a list of performance features, namely durability, functionality, compatibility and interoperability of the goods, which better define certain purposes and expectations which must be relevant in the assessment of the conformity of goods with digital elements. As in Dir. 1999/44/EC, public statements made by the seller or on his/her behalf contribute to delineate and objectify the quantity and qualities that should be considered as necessary for goods of the same type and which, therefore, the consumer may reasonably expect to receive (see further on, at V.1)

Second, the inclusion of goods with digital elements under the notion of consumer good has expanded the seller's liability in the case of lack of conformity of the digital element provided under the same sale contract (see further on, at V.2).

Finally, under the SGD, the seller can bear the responsibility for acts beyond the transfer of ownership of the goods sold to the consumer. The sellers' obligation is increasingly extended to post-sale services. These not only include the correct installation of goods, as also stated in the repealed Dir. 1999/44/EC; the omission to provide updates may also constitute a non-conformity of the goods sold with digital elements (see further on, at V.3).

5.1. Towards a higher level of standardisation of the obligation

Art. 7(1) SGD introduces a new parameter in the assessment of the objective conformity requirement (in addition to that provided in the corresponding rule of Dir. 1999/44/EC - art. 2(2)(c)). In order to assess if the goods are fit for their purposes (as compared to goods of the same type), EU national law, technical

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standards and sector-specific industry codes of conduct must be taken into account[102]. The technical previsions (issued at both the national and European levels) typify the seller's conduct according to qualitative standards (e.g., goods specification or safety features) as well as quantitative standards. Therefore, the seller's exemption from liability is strictly limited[103].

The inclusion of goods with digital elements within the SGD's scope has led to legislation that tailors some rules on non-conformity to the peculiar characteristics of the digital content and digital services. In consideration of the digital dimension of the goods, the relevant purpose and the expectation criteria in the assessment of conformity have been revisited. In particular, the notion of conformity in the SGD has been enriched with reference to the characteristics of durability, functionality, compatibility and interoperability in addition to the safety of the goods. In accordance with the definitions provided by the SGD, 'durability' means '*the ability of the goods to maintain their required functions and performance through normal use*' (art. 2, n. 13 SGD), while 'functionality' means "*the ability of the goods to perform their functions having regard to their purpose*" (art. 2, n. 9 SGD). 'Compatibility' refers to '*the ability of the goods to function with hardware or software with which goods of the same type are normally used, without the need to convert the goods, hardware or software*' (art. 2, n. 8 SGD). As an example, a smartphone is reasonably expected to communicate with connected common devices, such as Bluetooth earrings or a car's hands-free device. Interoperability is defined as '*the ability of the goods to function with hardware or software different from those with which goods of the same*

102 This addition recalls the multilevel layout of the product liability framework and the product safety legislation, as set by the New Legislative Framework (NLF) and by the European Standardization System: see C Amato, 'Internet Of Bodies: Digital Content Directive, And Beyond', cit.; Id., 'Responsabilità da inadempimento dell'obbligazione', in E Navarretta (eds), *Codice della responsabilità civile* (Giuffré 2021) spec. at 93 ff.

[103] See *funditus* C Amato, 'Responsabilità da inadempimento dell'obbligazione', cit., spec. at 93 ff.

Identifying objective criteria for smart goods, especially with regards to those based on AI, is a complicated task; nevertheless, the criteria of conformity pursued in art. 7(1) '*do not contribute significantly to concretising the concept of objective conformity'* in case of an AI system: M Ebers, '*Liability for Artificial Intelligence and EU Consumer Law'* (2020) JIPITEC 218.

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type are normally used' (art. 2, n. 10 SGD). This is the case with smart light bulbs connected to other smart home devices[104].

The inclusion of these characteristics in the conformity assessment, together with the duty to update (see further on, at V.3), might constitute a valid ally to fight the 'technological obsolescence' phenomenon. On the one hand, a minimum durability for the goods is explicitly required as an objective requirement of conformity and must, therefore, be ensured by the seller irrespective of whether there is a contractual agreement on this issue; on the other hand, the ability of the goods to function with other hardware or software avoids their premature replacement[105].

In order to define the content of the seller's obligation, the new SGD confirms (as in the repealed Dir. 1999/44/EC) the relevance of the public statements made by the seller or on the seller's behalf or by other persons in previous links of the chain of transactions; these are expressly included as an assessment element of the conformity of the goods[106]. Indeed, the consumer's decision is often influenced by the seller's public statements, which usually aim to highlight special characteristics of the goods that make them different and more attractive compared to goods of the same type[107]. The choice of making such declarations relevant in defining the content of the seller's obligation can thus be supported. For example, if a consumer buys a laptop, he/she probably does not expect that the Microsoft 365 package is available to him/her just because he/she bought the device. In order to have access to Word, Excel or PowerPoint functionalities, the consumer must conclude a separate subscription to the service directly with Microsoft. Nevertheless, if the purchase of the laptop has been advertised with Microsoft 365 included, the buyer is entitled to have access to

[104] See also R Gonzalez-Usach et al., 'Interoperability in IoT', in G Kaur and P Tomar (eds), *Handbook of Research on Big Data and the IoT,* IGI Global, 2019, 149 ff.

[105] E Van Gool and A Michel, 'The New Consumer Sales Directive 2019/771 and Sustainable Consumption: A Critical Analysis', cit., which also extended the notion of durability to 'reparability'.

[106] Similar to the prevision in art. 2(4) Dir. 1999/44/EC.

[107] E Bellisario, '*sub* art. 1519-ter, 2º comma, lett. c)' in S Patti (eds), *Commentario sulla vendita dei beni di consumo* (Giuffrè 2004) at 113; C Caricato, 'sub art. 1519-ter, 4º comma)' in S Patti (eds), *Commentario sulla vendita dei beni di consumo,* cit., 146, at. 156.

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that ancillary digital service and, consequently, seller liability is extended to the digital element.

The SGD also restate three cases in which the seller is not bound to public statements[108]: (a) The seller does not have positive knowledge of the public statements nor could the seller have reasonably known about them; (b) The statement has been corrected '*in the same way as, or in a way comparable to how, it had been made*'. This means that the details concerning the requirements to correct are clearly aimed to ensure that the statement has reached the same target audience as the public statements[109]; (c) The decision-making process of the consumer has not been influenced by the public statements (e.g., the consumer was not aware or did not care about the public statements).

5.2. Goods with digital elements: the lack of conformity of digital content or digital service

The inclusion of goods with digital elements under the scope of the SGD clearly reflects the need to ensure effective consumer protection, thereby establishing a '*one-stop-only policy*' for the consumer[110]. In the case of a lack of conformity for a smart product (e.g., connected car), it is often very difficult, if not impossible, for a consumer to recognise whether the defect comes from the good or from its digital component. Splitting the legal framework by submitting the car to sale rules and the navigator alert system to digital content provisions or recognising that the consumer has the option to choose remedies under both legal regimes (rules on goods and rules

[108] Art. 7(2) SGD.

[109] D Staudenmayer, '*sub* art. 8' in R Schulze and D Staudenmayer (eds), *EU Digital Law: Article by Article Commentary,* cit., at 146.

[110] A Janssen, 'Smart Contracting and The New Digital Directives: Some Initial Thoughts', cit., 202.

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on digital content/service)[111] would have led to a confusing scenario[112]. Nevertheless, the inclusion of goods with digital elements under the scope of the SGD has a great impact on traditional sales law, not only because the traditional exchange of ownership of a good for payment comes along with a long-term supply of the digital element but also because of the involvement of third parties. This involvement causes an extension of the seller's liability to the ancillary digital services, even if a third party (e.g., the software producer) is the one who provided the digital service and the seller has very limited control over that performance. As already mentioned, the seller is liable for the digital element which is interconnected with the good and necessary for its functioning if it is provided with the good under the sale contract. Consequently, the extension of seller liability to the digital element mainly depends on the pre-contractual information given to the buyer and on the specific content of the contract. As stated in Recital 16 SGD, the seller might '*expressly*' agree that the consumer purchases a smartphone without a specific operating system; the consumer shall thus conclude a separate contract with a third party for the supply of the digital element. In this scenario, the supply of the operating system falls outside the scope of the SGD, and in case of lack of conformity of the digital element, the seller's liability is excluded. As noted elsewhere, '*the term "expressly" will be the pivotal point in the future: just mentioning the information in the standard terms and conditions would not meet the test of "expressly". Also, just giving a QR-code with more information would not be sufficient (..)*'[113]. In order to ensure proper consumer protection, clear information should be given to the consumer; if not, the buyer will obviously expect that the seller is liable for the '*whole smart phone*'.

Moreover, the inclusion of goods with digital elements under the SGD burdens the seller with an additional post-sale obligation – that is, updating duties (see further on, at V.3) – which cause a further extension of the seller's liability.

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[111] ELI (European Law Institute), *Statement on the European Commission's Proposed Directive on the Supply of Digital Content to Consumers* (2016), 11 and 12.

[112] K Sein and G Spindler, 'The New Directive on Contracts for the Supply of Digital Content and Digital Services – Scope of Application and Trader's Obligation to Supply – Part 1', cit., at 270.

[113] K Sein and G Spindler, 'The New Directive on Contracts for the Supply of Digital Content and Digital Services – Scope of Application and Trader's Obligation to Supply – Part 1', cit., at 274; K Sein, ''"Goods with Digital Elements" and the Interplay with Directive 2019/771 on the Sale of Goods', cit.

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5.3. Post-sale obligations: incorrect installation of goods and updating duties

As already mentioned, the seller's liability is increasingly extended to after-sales services. In particular, the correct installation of goods according to art. 8 SGD as well as the updating of the goods with digital elements pursued to art. 7(3) SGD represent a significant part of the seller's responsibility to provide goods in conformity with the contract.

First, as under the repealed directive 1999/44/EC, the content of the seller's obligation is expanded by equating the defective installation of consumer goods with a lack of conformity[114]. In particular, a non-conformity of the good resulting from its incorrect installation will be regarded as a lack of conformity of the good as such if the post-sale installation was included in the sale contract and carried out by the seller or under the seller's authority. A typical case might be the purchase of a washing machine to be connected to the water supply, provided that the contract includes the installation as a duty of the seller. The notion of installation should also include the assembly as long that is required by the nature and function of the good. In the case of goods with digital elements, the installation of the digital content or service is usually required in order to allow the buyer to use it[115].

In the case of goods that need to be installed by the consumer, the consumer is protected against incorrect installation if the incorrect installation was due to shortcomings in the installation instructions provided to him/her by the seller or by the supplier of the digital content or digital service.

[114] A. Venturelli, 'Rimedi a favore dell'acquirente per la difettosa installazione di un bene di consumo' (2006) Obb. e contr. 1006, 1008; A. Zaccaria e G. De Cristofaro, *La vendita dei beni di consumo. Commento agli artt. 1519 bis - 1519 nonies del codice civile introdotti con il d. legisl. 2 febbraio 2002, n. 24, in attuazione della Direttiva 1999/44/CE* (Padova, 2002) 41; C. Amato, *Per un diritto europeo dei contratti con i consumatori. Problemi e tecniche di attuazione della legislazione comunitaria nell'ordinamento italiano e nel Regno Unito* (Giuffrè, 2003) 361.

[115] Rec. 43 SGD.

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Second, goods with digital elements include new after-sale obligations for the seller, who is expected to update them[116]. The seller's obligation to update the goods is a ground-breaking and crucial issue. On the one hand, goods must be supplied with updates as stipulated by the sale contract; on the other hand, even in the absence of a contractual agreement to update (art. 6(d) SGD – art. 129, para 2, lett. D it. Cod. cons), the seller has the duty to ensure that the consumer is informed of and supplied with updates, including security updates (art. 7(3) SGD – art. 130, para 2 it. Cons. Cod.). In fact, such goods often need to be updated in order to conform to the contract.

In the IoT and IoB era, the duty to provide the agreed updates and – most importantly – the presence of an objective update obligation should be linked to the need to limit the ever-increasing problem of technology obsolescence. The updating regime which binds the seller to provide the updates needed to ensure that the goods with digital elements remain in conformity might contribute to tackling the problem of 'planned obsolescence' which frequently exists with smart goods (i.e., technologies are rendered outdated as soon as they are updated) and even postpone 'technological obsolescence', lasting the lifespan of a good with a digital element. This is fundamental to decreasing the environmental impact of smart goods, to reduce waste and, in general, to positively affect the sustainable consumption of goods with digital elements[117].

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[116] P Kalamees, 'Goods with Digital Elements and the Seller's Updating Obligation', cit.

[117] In contrast, see the planned obsolescence phenomenon, according to which the company designs a product with the intention to speed up its expiration, thereby forcing the consumer to buy a new one. This is, for example, the case with some important companies in the smartphone/computer industry which pushed consumers to install updates that slow down their devices as soon as a new model hits the market: such behavior has been judged to be an unfair commercial practice in Italy and France: Italian Competition Authority, 25 September 2018, PS11039, *Apple*; Italian Competition Authority, 25 September 2018, PS11039, *Samsung*; Italian Competition Authority, 25 September 2018, PS11039, *Samsung*. A De Franceschi, 'Planned Obsolescence challenging the Effectiveness of Consumer Law and the Achievement of a Sustainable Economy: The Apple and Samsung Cases' (2018) 7 EuCML 6, 217 ff.; Id., 'Consumer's Remedies for Defective Goods with Digital Elements' (2021) 12 JIPITEC 143; Id., *La vendita di beni con elementi digitali*, (Napoli, 2019), spec. at 17 ff.; HW Micklitz, 'Squaring the Circle. Reconciling Consumer Law and the Circular Economy' in E Terryn and B Keirsbilck (eds), *Circular Economy and Consumer Protection*, (Cambridge/Antwerp/Portland, 2019) 323; G Toscano, 'Nuove tecnologie e beni di consumo: il problema dell'obsolescenza programmata' (2022) 16 Actualidad Jurídica Iberoamericana 374.

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From this prospective, the content as well as the duration of the updating obligation are crucial aspects of the sales discipline.

The seller's legal obligation is restricted to updates necessary to keep the goods in conformity, and it shall not be extended (unless otherwise agreed) to the upgrades intended to enhance or improve the functionalities of the digital content or digital service elements connected or incorporated into the good or to introduce additional features[118].

The updating obligation is a continuing one, and its duration depends on the nature of the contract. In the case of a one-off contract (i.e., the digital element is provided through a one-off act), the seller should ensure that the consumer is provided with updates for the period of time that the consumer may reasonably expect. Once again, the reasonable expectation of the consumer is based on the type and purpose of the goods and digital elements as well as on the circumstances and nature of the contract. If a consumer buys a connected storyteller toy, s/he will probably not expect any update of the digital element incorporated in the toy; on the contrary, in the case of the purchase of an expensive navigator system, the consumer may reasonably expect the software to be updated for more than a couple of weeks[119]. The updating timeframe must, therefore, be separately determined in each singular case, taking into account the expectations of an average buyer as well as the nature of the good[120]. This rule ensures a flexible assessment of the duration of the updating obligation according to the wide variety of smart goods[121]. However, even if this solution is justified by the need to embrace a fast-developing technology, it introduces a high level of uncertainty, which might increase the number of disputes between consumers and sellers. Although an abandonment of the idea of setting a precise timeframe because

[118] C Twigg-Flesner, 'Conformity of Goods and Digital Content/Digital Services', cit., 20; P Kalamees, 'Goods with Digital Elements and the Seller's Updating Obligation', cit., 133.

[119] Kalamees, 'Goods with Digital Elements and the Seller's Updating Obligation', cit.; COM(2015), spec. at 14.

[120] E Dubovitskaya, 'Kauf von Waren mit digitalen Elementen Fortschritt und Rechtsunsicherheit im Verbrauchsgüterkaufrecht' (2022) MMR.

[121] P Kalamees, 'Goods with Digital Elements and the Seller's Updating Obligation', cit.; C Twigg-Flesner, 'Conformity of Goods and Digital Content/Digital Services', cit., 20.

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it is incompatible with the heterogeneous and unstable reality of smart goods, this high degree of uncertainty might be reduced through the provision of specific guidelines, once again connected to the standardisation of the smart goods available on the market. The assessment could either anchor the determination of the duration of the updating obligation to more specific parameters, including the life-cycle of the good, the price, the material used for the good's production or the seller's public statements, or be based on a pre-fixed minimum period (e.g., not less than two years)[122] or on an average timeframe established for a category of products with similar characteristics and features and based on the kind of update (e.g., is it or is it not a security update).

While the rules on liability related to the obligation to update for one-off contracts is somehow unclear, in the case of contracts for the supply of digital elements as an obligation seems easy to define. If the purchase of a smartwatch includes a weekly supply of individually adapted training plans[123], the updating obligation is extended for two years from the time the goods with the digital elements were delivered. If the parties to the contract have agreed on a period longer than two years for the supply of digital content or digital services, the seller has an obligation to deliver updates in accordance with the extended contractual period.

The seller is not obliged to directly provide the updates; nevertheless it must ensure that the consumer is informed, even if this is done by a third party (usually the developer of the digital element)[124].

Although sellers often do not have direct control over a third party's updating performance, they still remain liable for the constant supply of updates[125]. Under the

[122] See rec. 31 SGD.

[123] Rec. 14 SGD.

[124] In this context, the possibility for users of smart goods to gain access to data generated by them and to share this data with third parties to provide aftermarket services, as planned in the Data Act, would be particularly relevant: COM (2022) 68: Proposal for a Regulation Of The European Parliament And Of The Council on harmonised rules on fair access to and use of data (Data Act).

[125] This is not always an easy task for the seller. The seller may be the most informed professional party, but may not have any direct influence over the developer/producer in order to persuade them

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SGD, the duty to update is not imposed by means of additional direct liability upon the producer/supplier of the digital content; the update obligation is balanced with the seller's right of redress pursuant to art. 18 SGD. If the omission to provide updates depends on the breach of the developer in previous links in the transaction's chain, the seller has remedies and relevant legal actions against that party.

6. Time limits on the seller's liability: liability periods, limitation periods, burden of proof and obligation to notify

The SGD regulates the different time limits on consumer remedies in case of lack of conformity of goods[126].

First of all, the SGD fixes precise liability periods, that is, a period of time during which the lack of conformity of the good must exist or become apparent in order to entitle the buyer to exercise the remedies. The seller is liable for a lack of conformity that exists at the time of delivery; moreover, the seller's liability remains subject to the condition that such lack of conformity becomes apparent within a certain timeframe. In particular, the seller shall be liable to the consumer for any lack of conformity which exists at the time of delivery and which become apparent within two years of that time or within a longer time fixed by national laws (art. 10 SGD)[127]. For goods with digital elements, the liability of the seller also covers a lack of conformity of the digital content or the digital services (art. 10(2) SGD). The minimum liability period

to directly provide the update to the consumer. If the developer/producer does not cooperate, the seller has no chance to fulfil the obligation to update (although the seller has the right of redress).

[126] On time limits, including the comparison between SGD and DCD rules, see B Gsell, 'Time limits of Remedies under Directives (EU) 2019/770 and (EU) 2019/771 with Particular Regard to Hidden Defects' in E Arroyo Amayuelas and S Cámara Lapuente (eds), *El Derecho privado en el nuevo paradigma digital* (Colegio Notarial de Cataluña Marcial Pons 2020), 101 ff.; C Amato, 'Responsabilità da inadempimento dell'obbligazione', cit.

[127] This flexibility recognized to MSs, even if it 'serves the purpose of a high standard of consumer protection because Member States with longer liability periods can retain them to the benefit of the consumer' is going to frustrate the maxim of the harmonisation nature of the SGD: B Gsell, 'Time Limits of Remedies under Directives (EU) 2019/770 and (EU) 2019/771 with Particular Regard to Hidden Defects', cit.

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of two years is applicable to the purchase of smart goods for which the sales contract provides for a single act of supply of the digital content or digital services (e.g., the consumer buys a smart TV). Adapted rules apply when the contract provides for the continuous supply of the digital elements. When the sale contract provides for a continuous supply of the digital content or digital services for more than two years, the seller shall be liable according to that time period (typical examples of continuous supply include the supply of traffic data in a navigator system[128], the functioning of apps in a smartphone and the cloud connection for a gaming console)[129]. For example, if the seller promised that traffic data would be provided for four years, then the seller would be liable for the lack of conformity within the entire contractual timeframe of supply.

Art. 10(4) and (5) SGD provides guidance to MSs concerning the limitation periods[130], that is, the period within which consumers must exercise their rights. National limitation periods are not subjected to any harmonisation under the SGD, and MSs are free to maintain or introduce their own legislation on limitations. Nevertheless, the SGD aims to prevent national rules from constraining the consumer's remedies for defects that have become apparent within the liability period. In order to avoid the liability period not curtailed by national limitation periods (expressly introduced in national law or, at least, the two-year European liability period), the MSs shall ensure that consumers are allowed to exercise their rights for any lack of conformity that becomes apparent, at least during that liability period. This means that if an MS has chosen to implement the EU minimum liability period of two years or has not explicitly provided for a liability period, the limitation period should be longer than two years[131] or it should not begin to run in an early stage (e.g., from the time of

[128] Rec. 14 SGD

[129] Dubovitskaya, 'Kauf von Waren mit Digitalen Elementen', cit.

[130] On the connection between a limitation period and a period of liability with reference to the interpretation of Directive 1999/44/EC, see CJEU 13.7.2017, C-133/16, *Ferenschild*, ECLI:EU:C:2017:541.

[131] FM Corvo López, 'Estudio de Derecho Comparado sobre las garantías en la venta de bienes de consumo en España y Portugal a la luz de la Directiva (EU) 2019/771' (2020) 1 CDT 159; F Zoll, '*sub* art.11' in R Schulze and D Staudenmayer (eds), *EU Digital law: Article by Article Commentary,* cit., at. 207: who, referring to the similar provisions in the DCD, highlights that '*the limitation period must not ended before the minimum two-years period*'; B Gsell, 'Time Limits of Remedies under Directives (EU)

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delivery). This is in place to ensure that the limitation period will not expire before the defect becomes apparent; even if the lack of conformity becomes apparent at the end of the two-year liability period, the consumer will have enough time to exercise his/her remedies. Accordingly[132], the Italian legislature has introduced a limitation period of 26 months from the delivery of the good in order to allow consumers to exercise related remedies in case of defects not intentionally concealed by the seller[133].

In the case of second-hand goods, MSs may provide that the seller and the buyer are entitled to agree on a shorter liability and limitation period of at least one year; for example, this is the choice made in Italy[134].

The seller is liable for the lack of conformity unless s/he succeeds in proving the correctness of the performance and, thus, the conformity of the goods. In compliance with Dir. 1999/44/EC[135], the SGD provides for a shift in the burden of proof[136] from the buyer to the seller. In case of a reversed burden of proof, consumers shall allege lack of conformity while professionals shall prove that any lack of conformity existed at the time of delivery/supply.

The SGD extends the period for the reversed burden of proof in favour of the consumer from six months (as stated in the repealed Dir. 1999/44/EC, art. 5(3)) to

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2019/770 and (EU) 2019/771 with Particular Regard to Hidden Defects', cit., 112 ff.. Cfr. B Zöchling-Jud 'Das neue Europäische Gewährleistungsrecht' (2019) GPR 15.

[132] '*Notwithstanding paragraphs 1 and 2 of this Article, Member States may maintain or introduce only a limitation period for the remedies provided for in Article 13. Member States shall ensure that such limitation period allows the consumer to exercise the remedies laid down in Article 13 for any lack of conformity for which the seller is liable pursuant to paragraphs 1 and 2 of this Article, and which becomes apparent during the period of time referred to in those paragraphs*': art. 10 (5) SGD.

[133] Art. 133, para 3, it. Cons. Cod.

[134] art. 133, para 4, it. Cons. Cod.

[135] See CGUE C-497/13 *Froukje Faber contra Autobedrijf Hazet Ochten BV*, ECLI:EU:**C**:2015:357. F P Patti, 'Tutela effettiva del consumatore nella vendita: il caso "Faber"' (2016) Nuova Giur. Civ. Comm., 10 ff.

[136] On the burden of proof, see H Gonçalves de Lima, 'Burden of proof of (lack of) conformity in Directive 2019/770: A comparison with Directive 2019/771' in *Yearbook of the NOVA Consumer Lab – 2*, (2020) 91 ff.

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one year (art. 11 SGD). MSs have the freedom to extend the period during which defects are deemed to have already been present at the moment of delivery to a maximum of two years. This is a step towards a higher level of protection for the consumer: even if the six-month presumption under the repealed Sale Directive was only a minimum requirement, the majority of MSs have opted to not extend this period of time[137]. For goods with digital elements, if the sales contract provides for a continuous supply of the digital content or digital service, the reversed burden of proof on conformity of the digital element lasts for the time during which the digital content or digital service is to be supplied under the sales contract[138]. After one year (or the extended period as defined by national law), the non-conformity of the goods is no longer presumed; this means that within the second year from the date of delivery, the buyer has to prove that the goods are subjectively or objectively non-conforming. As noted elsewhere, the different rule governing the continuous supply of digital content/services with an extended burden of proof on the seller is justified by the fact that in the case of continuous supply the digital content or digital service does not leave the sphere of influence of the trader permanently becoming subject to the only sphere of influence of the consumer[139].

Finally, it is worth mentioning that like the repealed Dir. 1999/44/EC, the SGD allows MSs to introduce an obligation upon the consumer to promptly notify the seller of defects within two months of detecting the defect (art. 12 SGD) in order to benefit from consumer rights (art. 12 SGD). Contrary to the repealed art. 132, para 2, it. Cons. Cod., the Italian transposition law did not maintain the option to impose a notification period of two months[140].

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[137] See H Gonçalves de Lima, 'Burden of Proof of (lack of) Conformity in Directive 2019/770: A Comparison with Directive 2019/771', cit., at. 117 and 188, who reports the effect of the new rules on MSs' legislation and the related impact on the level of consumer protection.

[138] On the burden of proof see H Gonçalves de Lima, 'Burden of Proof of (lack of) Conformity in Directive 2019/770: A Comparison with Directive 2019/771', cit.

[139] B Gsell, 'Time Limits of Remedies under Directives (EU) 2019/770 and (EU) 2019/771 with Particular Regard to Hidden Defects', cit., at 118.

[140] A. De Franceschi, Italian Consumer Law after the Transposition of Directives (EU) 2019/770 and 2019/771 (2022) 2 EuCML 72, at 75.

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6.1. The seller's liability and the cooperative model

The main obligation of the seller, that is, to provide conforming goods according to the specific standards set up by law, is balanced by the relevance of the consumer's behaviour. This is evident when considering the sellers' liability and post-sale obligations.

In case of smart goods, the obligation to update is mitigated by the implementation of a cooperative model. Under the SGD, an antagonist buyer–seller model has been replaced through the enhancement of the consumer's duty of cooperation: the seller shall ensure that the consumer is informed and supplied with updates, while the consumer is entitled to install them within a reasonable time[141]. If the consumer fails to install the relevant updates, any liability for lack of conformity that could have been foreseen does not fall upon the seller if both of the following conditions are met: '(a) the seller informed the consumer about the availability of the update and the consequences of the failure of the consumer to install it; and (b) failure of the consumer to install or the incorrect installation by the consumer of the update was not due to shortcomings in the installation instructions provided to the consumer'[142].

On the other hand, pursuant to art. 8(b) SGD (incorrect installation) the seller would not be liable if the lack of conformity of the good results from an incorrect installation that was carried out directly by the consumer, if this was not due to deficiencies in the installation instructions provided by the seller or by the supplier of the digital content or digital service.

6.2. Party autonomy and exclusionary provisions

Party autonomy might play a crucial role in defining and limiting the extension of the seller's liability; as already noted (see *retro sub* 3.2 and 5.2), if goods with interconnected or incorporated digital content or digital service are purchased, the parties might

[141] On the 'reasonable time' requirement, see Helena Gonçalves de Lima, 'Burden of Proof of (lack of) Conformity in Directive 2019/770: A Comparison with Directive 2019/771', cit., at 106.

[142] Art. 7(4) SGD; art. 130, para 3, it. Cons. Cod.

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expressly agree that the consumer is only buying the 'material' good (e.g., the smartphone[143]). In this case, only the purchase of the material part of the good will be part of the sales contract, thus falling within the SGD regime. As a result, the seller will not be liable for the conformity of the digital element.

In the complex scenario of smart goods, the seller will be encouraged to exclude the digital element with a specific contractual term, especially when there has been no direct control in providing, supplying and/or updating the digital content or digital service[144]. In order to protect the consumer's reasonable expectation, his/her consent becomes of paramount importance. As noted elsewhere, '*In order to protect the reasonable expectations of the consumers the courts should set high standards for the 'express agreement' excluding the liability of the seller for the inter-connected digital service, especially in cases where such exclusion would come as a surprise for a reasonable consumer*'[145].

In addition, the SGD opens up the possibility that the parties might exclude the applicability of the objective conformity requirements under specific circumstances. A lack of conformity could not be foreseen if, at the time of the conclusion of the sales contract, (a) the consumer was specifically informed that a particular characteristic of the goods deviated from the objective requirements for conformity (e.g., the good is characterised by a particular defect or something usually included is

[143] As in the second example given in rec. 16 SGD

[144] See P Rott, 'The Digitalisation Of Cars And The New Digital Consumer Contract Law', cit.: '*There is a tension between this rule and the mandatory nature of the Sale of Goods Directive under Article 21 SGD. The exceptional character of the exclusion of third party digital content and services from the sales contract suggests that the separation must be "genuine" rather than an artificial separation of contracts that circumvents the general one-stop concept of the Sale of Goods Directive*'.

[145] K Sein, 'The Applicability of the Digital Content Directive and Sales of Goods Directive to Goods with Digital Elements', cit.

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missing[146]) and (b) the consumer expressly and separately accepted the deviation when concluding the sales contract (art. 7(5) SGD, Art. 130, para 4 it. Cons code)[147].

The standard set by art. 7(5) SGD for deviating from the objective conformity requirement, that is, the 'expressly' and 'separately accepted' deviation, seems to be a stricter parameter than the 'express agreement' required under rec. 16 CSD. Consumers should be aware of what they have agreed to and be able to make a conscious decision. For that purpose, the mention of the deviation in the standard terms and conditions would not be sufficient. As mentioned in Rec. 36 SGD, express acceptance should be made through other statements or agreements[148] and by way of active and unequivocal conduct[149]. In an online transaction, acceptance could be made by ticking a box, pressing a button or activating a similar function[150], while other common forms of online contracting, such as shrink-wrap agreements, would not fulfil the condition of art. 7(5) SGD[151].

[146] Rec. 36 SGD, which refers, as an example, to the sale of second-hand goods.

147 Cfr. rec. 49 DCD: Spindler, 'Umsetzung der Richtlinie über digitale Inhalte in das BGB' (2021) MMR Zeitschrift für IT-Recht und Recht der Digitalisierung 451 ff. This reference is not to be found in the SGD, which provides that in the event of deviation from the objective requirements (rec. 36 and art. 7(5) SGD), that the consumer is specifically informed and expressly and separately accepts that deviation.

[148] In this regard, it would be useful to recall the transparency obligation of the Unfair Terms Directives and the related CJEU jurisprudence: D Staudenmayer, '*sub* art. 8' in R Schulze and D Staudenmayer (eds), *EU Digital Law: Article by Article Commentary,* cit., at 167.

[149] De Franceschi, *La vendita di beni con elementi digitali*, cit., according to which: '*Essa (l'accettazione, ndr) dovrà pertanto avvenire in forma espressa o in forma tacita, in entrambe i casi in modo tale da non lasciare spazio a dubbi in merito alla volontà di accettare siffatta deroga*'. See also B Zöchling-Jud, 'Das neue europäische Gewährleistungsrecht für den Warenhandel', cit., 120

[150] This is explained in the DCD, rec. 49, according to which: '*Both conditions could, for instance, be fulfilled by ticking a box, pressing a button or activating a similar function*'.

[151] R Schulze and D Staudenmayer (eds), *EU Digital Law: Article by Article Commentary,* cit.

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7. Consumer remedies

As a general rule, the seller is liable for any lack of conformity which exists at the time the goods were delivered and which becomes apparent within two years of delivery. In the event of a lack of conformity, the consumer is entitled to have the goods brought into conformity, receive a proportionate reduction in the price or terminate the contract. The new legal provisions follow the traditional hierarchy of remedies: specific performance of the contractual obligations by repair or replacement is classified as a primary remedy, while reduction of the price and termination of the sale contract are relegated to the status of secondary remedies. This hierarchy of remedies reflects a general bias in favour of the preservation of the contract by giving the seller an opportunity to 'cure' the defect[152]. The primary right to proper performance, with particular regard to repair, is also justified according to the need to '*to encourage a sustainable consumption and a longer product durability for the purpose of the realization of a circular and more sustainable economy*'[153].

The choice between repair and replacement rests on the consumer, unless the remedy chosen would be impossible[154] or, in comparison to the other remedy, would impose

[152] J. Vanherpe, 'White Smoke, but Smoke Nonetheless: Some (Burning) Questions Regarding the Directives on Sale of Goods and Supply of Digital Content' (2020) 2 Eur. Rev. Priv. Law 251, 266.

[153] A De Franceschi, 'Consumer's Remedies For Defective Goods With Digital Elements' (2021) 12 JIPITEC 2, 143, 144; Id., Italian Consumer Law after the Transposition of Directives (EU) 2019/770 and 2019/771, cit., at 76; S Pagliantini, *Il diritto private europeo in trasformazione. Dalla direttiva 771/2019/UE alla direttiva 633/2019/UE e dintorni* (Giappichelli 2020) 40 ff; see also rec. 48 SGD: '*As regards bringing goods into conformity, consumers should enjoy a choice between repair or replacement. Enabling consumers to require repair should encourage sustainable consumption and could contribute to greater durability of products (…);* rec. 32 SGD '*Ensuring longer durability of goods is important for achieving more sustainable consumption patterns and a circular economy (...)*'; European Commission, *A New Circular Economy Action Plan for a Cleaner and More Competitive Europe,* 11 March 2020, COM(2020) 98 final. Critically, see P Weingerl, 'Sustainability, the Circular Economy and Consumer Law in Slovenia' (2020) 9 EuCML 3, 129; E Terryn, 'A Right to Repair? Towards Sustainable Remedies in Consumer Law' (2019) 27 Eur. Rev. Priv. Law 4, 851.
Nevertheless, a more sustainable choice would have been to put repair before resolution. In fact, the repair remedy '*should encourage sustainable consumption and could contribute to greater durability of product'* (ec. 48 SGD).

[154] This could be a case of lack of conformity of 'goods with digital elements' when the defective part is the digital one and the final seller has no means to bring the supplier of the digital service/content to directly intervene in order to bring the goods into conformity: see F De Franceschi, 'Consumer's Remedies For Defective Goods With Digital Elements', cit.

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disproportionate costs on the seller, taking into account all the circumstances, including the value the goods would have had if there were no lack of conformity, the significance of the lack of conformity and whether the alternative remedy could be provided without significant inconvenience to the consumer (art. 13(2) SGD – art. 135 bis, para 2, it. Cons. Cod.). In accordance with the repealed Directive 1999/44/EC, the SGD limits the proportionality test to 'relative proportionality', specifying that a remedy would be disproportionate if it imposes costs on the seller which are unreasonable in comparison with the alternative remedy, thus excluding the case of '*absolute lack of proportionality', i.e."where the cost of the method chosen by the buyer, even if it is the only method possible, is inherently disproportionate"*[155]. Nevertheless, the new sales rules directly recognise that the seller has the right to refuse the repair or replacement of the defective goods if this is impossible or disproportionate (art. 13(3) SGD – art. 135-bis, para 3, it. Cons. Cod.). Therefore, the statement affirmed in *Weber* (see fn 155), according to which the seller does not have the right to refuse the only primary remedy available, has been overcome. The new disposition allows the seller to avoid the risk of incurring disproportionate costs when the only remedy available involves excessive expense in comparison with the value of the good or the entity with the lack of conformity: in the event of the seller's refusal, the consumer may find protection under secondary remedies.

Any repair or replacement shall be completed within a reasonable time and without any significant inconvenience to the consumer given the nature of the goods and the purpose for which the consumer required the goods (art. 14 SGD – art. 135-ter it. Cons. Cod.). According to the SGD, the 'reasonable time' is intended to be "*the shortest*

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[155] See CJEU 16 June 2011, Joined Cases C-65/09 & C-87/09, *Gebr. Weber GmbH v. Jürgen Wittmer* and *Ingrid Putz v. Medianess Electronics GmbH*, according to which: '*It is consequently apparent that the European Union legislature intended to give the seller the right to refuse repair or replacement of the defective goods only if this is impossible or relatively disproportionate. If only one of the two remedies is possible, the seller may therefore not refuse the only remedy which allows the goods to be brought into conformity with the contract'* (par. 71). By contrast, Paragraph 439(3) of the BGB has given the seller the right to refuse the type of subsequent performance chosen by the buyer not only when that '*type of performance would result in disproportionate cost in comparison to the alternative type of performance ("relative lack of proportionality"), but also where the cost of the method chosen by the buyer, even if it is the only method possible, is inherently disproportionate ("absolute lack of proportionality")*'. See A Johnston and H Unberath, 'Joined Cases C-65/09 & C-87/09, Gebr. Weber GMBH v. Jürgen Wittmer and Ingrid Putz v. Medianess Electronics GMBH, Judgment of the Court of Justice (First Chamber) of 16 June 2011 - Case Note' (2012) 49 Common Mark. Law Rev. 2, 793; C Amato, 'Responsabilità da inadempimento dell'obbligazione', cit., spec. at 92 and 93.

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possible time necessary for completing the repair or replacement", considering the "*nature and complexity of the goods, the nature and severity of the lack of conformity, and the effort needed to complete repair or replacement*"". In order to objectively interpret the notion of reasonable time, the SGD has invited MSs to define fixed periods that could generally be considered reasonable for repair or replacement regarding specific categories of products[156]. The Italian implementation law confirms the general provision and require the seller to bring the goods into conformity within a '*congruo periodo*' (adequate period) from the moment the seller has been informed by the consumer of the lack of conformity; nevertheless, the Italian transposition law has not provided fixed time limits. This choice can be appreciated for two reasons: first, considering the multifaceted reality, it is particularly hard to establish *ex ante* and, in the abstract, a fixed timeline, even considering specific products as the object of inquiry[157]; second, a rigid and fixed time system is incompatible with the extrajudicial nature of the primary remedies[158].

According to the essential nature of the primary remedies – that is, gratuitousness – specific performance of the contractual obligations through repair or replacement shall be free of charge, which means '*free of the necessary costs incurred in order to bring the goods into conformity, particularly the cost of postage, carriage, labour or materials*' (art. 2, n. 14 SGD; art. 128, para 2, let. p) it. Cons. Cod.). If necessary, the consumer shall make goods available to the seller[159], while the seller is obliged to take back the replaced

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156 R. 55 SGD.

157 A. De Franceschi, 'Consumer's Remedies For Defective Goods With Digital Elements', cit.

158 '*... al rigore dei termini perentori è preferibile l'elasticità dei termini rimessi alla valutazione delle parti", in order to "evitare l'irrigidimento connesso ad una procedimentalizzazione del passaggio dai rimedi primari a quelli secondari, che, lungi dal facilitare il soddifacimento in natura dell'interesse del compratore, lascia trapelare piuttosto una certa insofferenza per i rimedi ripristinatori (…)*': S Mazzamuto, *Il contratto di diritto europeo* (Giappichelli 2020) at 472 and 473.

159 A De Franceschi, 'Consumer's Remedies for Defective Goods with Digital Elements', cit.: '*(…)* [Art. 14 SGD] *does not necessarily imply that the consumer has to return the goods to the seller. This will be the case where repair or replacement has to be executed on a durable good which was installed in the consumers' premises (e.g. a lift). Here, the consumer will merely have to allow the seller or his auxiliary to have access to his premises so that he can bring the good into conformity. Therefore, making the goods available to the seller is a prerequisite for the execution of the "primary" remedies. This does not apply if the good was destroyed due to reasons for which the consumer is not responsible*'.

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goods at his/her own expense. In line with CJEU jurisprudence[160], the seller under the new provisions is not only obliged to bear the costs needed to deliver substitute goods free of defects as originally agreed but also has the obligation to remove the defective goods and to instal the replacement or repaired goods, or, alternatively, the seller is obliged to bear the costs of such removal and installation[161].

Finally, following the rule established by the CJEU in the *Quelle* Case (C-404/06, 2008), a seller who has provided defective goods may not require the consumer to pay for normal use of the non-conforming goods until their replacement with new goods (art. 135-ter, para 4)[162].

The consumer can access secondary remedies only under specific circumstances which have been enriched in the new provisions[163]. Some of the criteria depend on the limits of the exercise of primary remedies (i.e., impossibility and disproportion)[164], while others are merely a way of fulfilling the obligation to restore. The consumer shall be entitled to either a proportionate reduction in price or to the termination of

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[160] CJEU Joined Cases C-65/09 & C-87/09, *Gebr. Weber GmbH v. Jürgen Wittmer and Ingrid Putz v. Medianess Electronics GmbH.*

[161] Art. 135-ter, para 3, it. Cons. Cod.

[162] CJEU Case C-404/06 *Quelle AG* v. *Bundesverband der Verbraucherzentralen und Verbraucherverbände*, ECLI:EU:C:2008:231 (2009) Europa e diritto privato, 191, with comment of L Mangiaracina, 'La gratuità della sostituzione del prodotto difettoso nella direttiva 1999/44/CE: la normativa tedesca al vaglio della Corte di Giustizia'; see also C Schneider and F Amtenbrink, '"Quelle": The possibility for the seller to ask for a compensation for the use of goods in replacement of products not in conformity with the contract' (2018) Revue européenne de droit de la consummation 301 ff..; S Mazzamuto, *Il contratto di diritto europeo*, cit., at 475.
'*This leaves an open door to claims by the seller if the replaceable good is in conditions which are not compatible with a "normal use". When this is not the case, the seller may ask for compensation for the loss of value of the replaced good. As the SGD did not expressly regulate such cases, it will be necessary to refer to Member States' national law. This shall also apply when the good was meanwhile sold or modified by the consumer*': F De Franceschi, 'Consumer's Remedies for Defective Goods with Digital Elements', cit.

[163] S Mazzamuto, *Il contratto di diritto europeo*, cit., at 469.

[164] S Mazzamuto, *Il contratto di diritto europeo*, cit., 479: *'(…) l'impossibilità e la sproporzione dei costi costituiscono, prima ancora che criteri di gerarchizzazione, limiti alla responsabilità del venditore impegnato nel ripristino*',

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the sales contract[165] in cases in which the seller has not completed repair or replacement or has not completed repair or replacement free of charge within a reasonable period of time without significant inconvenience to the consumer and providing for or bearing the cost of the removal of the defective goods and the installation of the new goods where needed, or the seller has refused to bring the goods into conformity due to the impossibility or disproportion of the primary remedies (a) or a lack of conformity appears despite the attempt of the seller to bring the goods into conformity (b). In addition, the consumer is entitled to access secondary remedies if the lack of conformity is of such a serious nature as to justify an immediate price reduction or termination of the sales contract (c). The rationale for this provision is peculiar: different from the mentioned criteria, the seriousness of the defect does not necessarily preclude the possibility of a good's replacement; in this case, the shift to the second level of the hierarchy of remedies is primarily justified by the fact that the consumer's trust in the seller might be irreversibly compromised due to the seriousness of the defect[166]. Finally, the effectiveness of the secondary remedies, both the right to termination of the contract and the right to a price reduction, is ensured if the seller has declared that the goods will not be brought into conformity within a reasonable time or without significant inconvenience for the consumer (d), or this is clear from the circumstances.

Concerning the new remedy of the price reduction, art. 15 SGD specifies the parameters of the price reduction calculation in terms of the difference between the value of the defective good received by the consumer and the value of a similar good without any lack of conformity[167]. This criterion reflects the need to preserve the synallagmatic balance between the parties' obligations as originally stated in the contract. Notwithstanding the advantages associated with the parameters of the proportional calculation, the determination of the price reduction might continue to

[165] For the Italian legal system see art. 135-bis, para 4 and 5 and 135 *quater*, it. Cod. Cons

[166] See S Mazzamuto, *Il contratto di diritto europeo*, cit., at 476, who defined the outcome of this criterion as a '*sanzione per il venditore*'.

[167] The previous wording of the italian rule was 'Nel determinare l'importo della riduzione o la somma da restituire si tiene conto dell'uso del bene' (previus art. 130, para 8, it. Cons. Cod.). It has been changed to be in accord with art. 15 SGD.

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generate in the praxis some doubts and uncertainties, especially with regards to goods with digital elements[168].

7.1. Termination of contract

Some aspects of novelty concern the discipline of the termination of the sale contract.

First, the consumer shall exercise the right to terminate the sales contract by means of a statement to the seller expressing the decision to terminate the sales contract (art. 16(1) SGD– art. 135- quarter it. Cons. Cod.). This rule overcomes the doctrinal and jurisprudential debate concerning the nature of the remedy, confirming that the right may be invoked out of court by the consumer and without the cooperation of the seller[169].

Furthermore, art. 16(3) SGD deals with the situation in which the lack of conformity is related only to some goods delivered under the same sale contracts. In this situation, the new discipline confers on the consumer the power to obtain not necessarily total but partial termination of the contract. The consumer has the choice to remain bound only in relation to the obligations properly performed by the professional rather than to reject the entire contract, if this reflects the consumer's best interest[170].

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[168] F De Franceschi, 'Consumer's Remedies For Defective Goods With Digital Elements', cit., 148 e 149.

[169] In the silence of Dir. 1999/44/EC and in the light of the Italian transposition (which ambiguously provided that the consumer could 'request' termination), the doctrine and case law debate on the nature of termination for lack of conformity is recalled, considered by some as a judicial remedy (with reference to the general discipline of the contract and, in particular, to the judicial character of the institution of termination pursuant to Article 1453 of the Civil Code), by the majority as a potestative right with an extrajudicial character (cfr. M. Paladini, *L'atto unilaterale di risoluzione per inadempimento* (Giappichelli 2013) 133 ff.; F Bocchini, 'La vendita di cose mobili' in Schlesinger-Busnelli *Commentario* (2nd ed, Giuffre` 2004) 457 ff.; Bianca, 'La vendita di beni di consumo. Artt. 128-135', cit., 183 ff.). For a reconstruction of this debate, see C Sartoris, 'La risoluzione della vendita di beni di consumo nella Dir. n. 771/2019 UE' (2020) 3 Nuova giur. civ. comm. 702, 707; also see G Caporali, 'Le Direttive nn. 770 e 771. Qualche osservazione in tema di e-commerce e tutela dei consumatori' (2021) 25 Federalismi.it, at 48 and 49.

[170] For a comment, see C Sartoris, 'La risoluzione della vendita di beni di consumo nella Dir. n. 771/2019 UE', cit., 710 ff; L Arnau Raventós, 'Remedios por falta de conformidad en contratos de

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The consequences of the return of defective goods are regulated by the new sale rules: the consumer will return the goods to the seller; the seller will bear the costs for the return or will reimburse the consumer for the price paid for the goods upon receipt of the goods or upon evidence provided by the seller of restitution for the goods (art. 16(3) SGD; art. 135 quarter, para 4, it. Cons. Cod.)[171]. The Italian legislature has not clarified the modalities for return and reimbursement[172], and uncertainties may arise with regards to the modalities and the means of payment at the seller's disposal, which might be different from those originally used by the consumer. With regards to the seller's duty to reimburse, doubts may arise related to the possibility of including not only the delivery cost but also any expenses associated with removal of the goods in compliance with an extensive interpretation of art. 135-ter, para 3, it. Cons. Cod.[173] Finally, the SGD leaves MSs free to regulate the consequences of termination other than those provided for in this Directive. It is up to the MSs to define what happens in case of a decrease in the good's value exceeding depreciation because of regular use or in case of loss or destruction of the goods[174].

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compraventa y de suministro de elementos digitales con varias prestaciones' in EA Amayuelas and S Cámara Lapuente (eds), *El derecho privado en el nuevo paradigma digital*, cit., 79, spec. at 90 ff.

[171] See J Vanherpe, 'White Smoke, but Smoke Nonetheless: Some (Burning) Questions Regarding the Directives on Sale of Goods and Supply of Digital Content', cit: '*Under the SGD, termination leads to a reversal of the performance of all obligations: the disappointed consumer must first return the good and the seller – whose (in)actions lay at the basis of the contract's termination – must only subsequently reimburse the price. This sequence of events is arguably unfair*' (p. 268).

[172] The SGD recognizes to MSs the freedom to determinate the modalities for return and reimbursement in a case of termination of the sale contract (art.16 (3) SGD).

[173] F De Franceschi, 'Consumer's Remedies for Defective Goods with Digital Elements', cit., 149.

[174] For instance, the Italian legislator has not taken a position, thereby losing the opportunity to settle the doctrinal debate on this issue, which sees the voice of those who consider applicable the principle according to which the impossibility of restitution in integrum would not allow the exercise of the resolutory remedy in deference to the general provision of art. 1492, para 3, Civil Code and in the light of the need to safeguard the balance between contractual obligations (see CM Bianca, 'La vendita dei beni di consumo', cit., 200) opposed to the voice of those who believe that it is not possible to introduce a further hypothesis of exclusion of the resolution not expressly provided for by European and domestic consumer law and which would result in an unjustified reduction in the level of consumer protection (Zaccaria and G De Cristofano, 'La vendita dei beni di consumo', cit., 97; Ruscello, 'Le garanzie post vendita nella direttiva 1999/44/CE del 25 maggio 1999', (2021) Studium Iuris, 837).

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In any event, under the previous rule, if the lack of conformity was minor, the consumer was not entitled to terminate the contract. The burden of proof concerning the 'minor' nature of the lack of conformity was on the seller. The European legislature has deliberately kept the broad reference to a 'minor' defect in conformity, leaving space to the MSs to interpret what 'minor' means according to their own legal traditions. The Italian legislature has recalled the traditional general notion of '*lieve entità*' without providing any further interpretative criteria; as a consequence, doubt remains as to whether the 'minor entity' is to be interpreted objectively considering the objective value of the good[175] and/or subjectively, also taking into consideration the consumer's interest[176].

8. Final remarks

The SGD aims to set EU consumer protection on a new track which takes into consideration the new features of the digital single market. In particular, the EU Digital Single Market is featured by the growing technical nature of the new (smart) products and the complexity of contractual sale relationships. Such complexity

[175] L. Garofalo ed A. Rodeghiero, 'Commento all'art. 1519-quater, commi 7, 8 e 10', in L. Garofalo et. Al., *Commentario alla disciplina della vendita dei beni di consumo: artt. 1519 bis-1519 nonies cod. civ. e art. 2 d.lgs. 2 febbraio 2002 n. 24* (Cedam, 2003), 386 ff., at 439: '*posto che, letteralmente, la "lieve entità" del difetto rimanda al bene, in sé e per è considerato, e non appunto all'interesse del consumatore, parrebbe logico arguire che dettorequisito – lungi dal richiedere un autonomo accertamento centrato sui riflessi riverberati dall'inadempimento del venditore sull'economia generale del contratto – esiga nulla più che una valutazione oggettiva del difetto*'.

[176] In the sense that minor entity is to be interpreted subjectively, taking into consideration (also) the consumer's interest, see A Zaccaria and G De Cristofano, 'La vendita dei beni di consumo', cit., 94 ff.; F Bocchini, *La vendita di cose mobili*, cit.
The reference could be to art. 1455 c.c., *Importanza dell'inadempimento*: on the notion of '*non scarsa importanza dell'inadempimento'*: see G Mirabelli, *Dei contratti in generale, nel Commentario al codice civile* (Utet, 1961) 476 ff.; R Scognamiglio, 'Dei contratti in generale, nel Trattato di diritto civile', diretto da Grosso e Santoro Passarelli (Giuffre` 1966), 266 ff.; A Belfiore, voce 'Risoluzione del contratto per inadempimento' in *Enc. del dir.*, XL, (Giuffre` 1989), 1307 ff.; G Collura, *Importanza dell'inadempimento e teoria del contratto* (Giuffre 1992); R. De Michel, 'Adempimento dopo la domanda di risoluzione e valutazione della non scarsa gravità dell'inadempimento' (1994) Giur. it. 1209 ff.; Costanza, 'Rifiuto legittimo della prestazione da parte del creditore e gravita` dell'inadempimento' (1997) I Giust. civ. 1379 ff.; Convento, 'Osservazioni sulla gravita` dell'inadempimento per la risoluzione del contratto (art. 1455 c.c.)' (2008) I Foro pad. 294 ff.
Concerning the notion of 'lieve entità', see C Sartoris, 'La risoluzione della vendita di beni di consumo nella Dir. n. 771/2019 UE', cit.: '*Sotto questo profilo, la nuova norma appare maggiormente in linea sia con il presupposto dell' "inadempimento essenziale" richiesto dall'art. 25 della Convenzione di Vienna sulla vendita internazionale dei beni 13, sia con il parametro della "non scarsa importanza" dell'inadempimento di cui all'art. 1455 cod. Civ*' (705 and 706).

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weakens even further the bargaining position of the consumer[177]; under the SGD, the buyer' s fragility is balanced to some extent by the choice to introduce stricter liability for the seller by increasing the standardisation of the content of his/her obligations.

Even if the SGD aims to make the sales of goods law fit for the challenges of the digital age and pushes towards modernisation of the EU Consumer Sale Law, within the framework of a maximum harmonisation – even through the introduction of an 'absolute' liability of the seller – seems not to provide a fully satisfactory answer to the new challenges and the innovative economic models which are going to prevail in the digital environment. The traditional patterns of EU consumer law are persistent.

First, based on the traditional scope of earlier consumer protection laws (B2C), the SGD emphasises a narrow notion of a consumer which a) lacks an adequate response to the new features of the market actors and b) seems not to catch the new paradigm of the platform-based economy, which has blurred the distinction between professionals and consumers, resulting in the emergence of prosumers, and which is mainly characterised by the prevalence of trilateral contractual relationships.

Furthermore, the EU legislation remains obsolete and inadequate to address the emerging model based on the sharing economy, '*as well as the focus on the circular economy and «servitisation »*'[178]. These new economic forces have reshaped the traditional patterns of ownership and consumer behaviour in favour of access to goods for limited use purposes. Notwithstanding this shift, the SGD subject matter remains expressly limited to exchange contracts that transfer the right of ownership to a consumer, thus denying the possibility to attract product lease or product as a service under the sale rules. This approach creates a gap in consumer protection, especially with regards to consumers with limited financial resources who are the main category

[177] V Mak, *The New Proposal for Harmonised Rules on Certain Aspects concerning Contracts for the Supply of Digital Content. In-Depth Analysis* (European Union 2016) at 21.

[178] Twigg-Flesner, 'Conformity of Goods and Digital Content/Digital Services', cit., 55, who recalls the COM (2015) 614 final and COM (2019) 190 final for the profile of circular economy; V Mak and E Terryn, 'Circular Economy and Consumer Protection: The Consumer as a Citizen and the Limits of Empowerment through Consumer Law' (2020) J Consum Policy 43 with reference to the '*servitisation*' phenomenon.

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that resorts to these alternative forms of access to goods (temporary supply – eg., leasing).

The main aspect of innovation in the SGD is the inclusion of 'goods with digital elements' in the framework of the sale slaw. This is clearly a response to the increasing diffusion of the IoT and the IoB in the single market, which requires particular consideration. This creates a strict relation between the SGD and the DCD regimes. Even if SGD and DCD are intended as twin directives, some interpretative uncertainties concerning their respective scopes of application still prevail. This is in part unavoidable; in the case of smart goods, the digital features are fast developing and it is sometimes hard to set boundaries defining whether a digital element is provided under the sales relationship or not. This might lead to weaknesses in the application of the legal rules, conferring particular relevance to the content of the contract alongside the consumer expectations, and increasing the need for Court interventions.

Finally, it is worth mentioning that even if the IoT objects are clearly within the scope of application of the SGD, the Directive does not make any reference to the non-personal data generated by the smart goods and the power of the buyer to get access and share that data with third parties (eg., to provide aftermarket services and updates)[179]. Concerning this issue, the SGD regime will need to be read and interpreted in the light of the Data Act, if implemented, which aims to empower users to transfer their data, creating more control for businesses and individuals over the data generated through smart goods.

[179] In contrast see art. 16 (4) DCD: in the event of termination of the contract '*trader shall, at the request of the consumer, make available to the consumer any content other than personal data, which was provided or created by the consumer when using the digital content or digital service supplied by the trader*'.

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