PHD THESIS DECLARATION

I, the undersigned

FAMILY NAME	MARCHETTI
NAME	FILIPPO
Student ID no.	1759968

Thesis title:

Internet Data Privacy in European Union Private International Law

PhD in	International Law and Economics
Cycle	XXIX
Student's Advisor	Prof. Alberto Malatesta
Calendar year of thesis defence	2017

DECLARE

under my responsibility:

1) that, according to the Italian Republic Presidential Decree No 445 of 28 December 2000, mendacious declarations, falsifying records and the use of false records are punishable under the Italian penal code and related special laws. Should any of the above prove true, all benefits included in this declaration and those of the temporary 'embargo' are automatically forfeited from the beginning;

2) that the University has the obligation, according to art. 6 par. 11 of Ministerial Decree No 224 of 30 April 1999, to keep a copy of the thesis on deposit at the 'Biblioteche Nazionali Centrali' (Italian National Libraries) in Rome and Florence, where consultation will be permitted, unless there is a temporary 'embargo' protecting the rights of external bodies and the industrial/commercial exploitation of the thesis;

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

3) that the Bocconi Library will file the thesis in its 'Archivio Istituzionale ad Accesso Aperto' (Institutional Registry) which permits online consultation of the complete text (except in cases of temporary 'embargo');

4) that, to file the thesis at the Bocconi Library, the University requires that the thesis be submitted online by the student in unalterable format to Società Normadec (acting on behalf of the University), and that Società Normadec will indicate in each footnote the following information:
   - PhD thesis Internet Data Privacy in European Union Private International Law;
   - by Filippo Marchetti;
   - defended at Università Commerciale 'Luigi Bocconi' – Milano in the year 2017;
   - the thesis is protected by the regulations governing copyright (Italian Law No 633 of 22 April 1941 and subsequent integrations and modifications). The exception is the right of Università Commerciale 'Luigi Bocconi' to reproduce the same, quoting the source, for research and teaching purposes;
   - the thesis is subject to 'embargo' for 36 months;

5) that the copy of the thesis submitted online to Società Normadec is identical to the copies handed in/sent to the members of the Thesis Board and to any other paper or digital copy deposited at the University offices, and, consequently, the University is absolved from any responsibility regarding errors, inaccuracy or omissions in the contents of the thesis;

6) that the contents and organization of the thesis is an original work carried out by the undersigned and does not in any way compromise the rights of third parties (Italian Law No 633 of 22 April 1941 and subsequent integrations and modifications), including those regarding security of personal details; therefore, the University is in any case absolved from any responsibility whatsoever, civil, administrative or penal, and shall be exempt from any requests or claims from third parties;

7) that the PhD thesis is subject to 'embargo' as per the separate undersigned 'PhD Thesis Temporary 'Embargo' Request'.

Milan, 20 March 2017

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

ABSTRACT

In the last decade, online flows of personal data soared as technological development allowed individuals to communicate, inform themselves, share, and trade through the internet. Due to the fact that ubiquity is an innate trait of the internet, disputes in internet-related matters – including those concerning the legal relationship between data controller and data subject arising out of online sales, internet surfing, social networking, and similar – are likely to include cross-border elements. As a consequence, private international law (PIL) must be applied in such cases in order to determine which national court may adjudicate the matter, and which law applies.

To tackle the issue of the PIL implications in internet data privacy disputes, this work first investigates the origins of the right to the protection of personal data. Then, jurisdiction is addressed by analysing the functioning of the Brussels-Lugano-regime rules, which will be considerably impacted by Regulation (EU) 2016/679 (General Data Protection Regulation – GDPR). Given that the GDPR is not equipped with rules addressing each aspect that could prove relevant in cross-border data privacy disputes, the prospective interaction of the GDPR with the Brussels I regime is addressed, with special regard to the functioning of the new rules on jurisdiction and on parallel proceedings. In addition, critical frictions of the GDPR with the Lugano regime are highlighted and analysed.

Regarding the matter of the applicable law, this work first investigates the potential PIL nature of the 'National law applicable' rule of Directive 95/46/EC (Data Protection Directive). It is argued that such a rule does not function as a PIL rule, but instead falls within a subtype of overriding mandatory rules that prevent PIL rules that overlap with its scope of application from functioning. In fact, only a few aspects not covered by the Directive and by the GDPR are still subject to PIL considerations. On the one hand, Regulation (EC) No 593/2008 (Rome I) still determines the law applicable to a few contractual data-privacy-related obligations. On the other hand, Regulation (EC) No 864/2007 (Rome II) is not applicable to data privacy, and applicable PIL rules must be found in national legal orders. In order address this lack of unification in non-contractual matters, a draft article is included in this work to prompt the European Union legislator to introduce a uniform rule in this matter.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Per te.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

CONTENTS

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

INTRODUCTION

The protection of personal data in the online environment is a matter of paramount importance. Currently, interactions and transactions of any kind flow through the internet, an immaterial network that pierces geographical boundaries and establishes connections among subjects located in different countries. These subjects belong to different cultures and, consequently, are subjected to different legal regimes.

Currently, almost 90 countries in the world have introduced legislation in order to grant a certain degree of protection to personal data, and the number is constantly growing. However, despite the fact that people in such countries are aware that they are entitled to protection of their personal data collected online, very few are aware of the kind of protection that is granted by national legal systems.

This lack of awareness has a twofold origin. First, people are not aware of the extent of the protection of their data. Despite the fact that people 'sense' if their data is processed in a way that may prove potentially harmful, they can rarely tell the exact triggering action that turned a licit processing into a breach of law. This derives from the fact that privacy is a difficult concept to define legally and the boundaries related to privacy are rather uncertain. Additionally, privacy and the protection of personal data do not necessarily share a legal rationale, despite sharing legal origins and goals.

Second, private citizens are rarely aware of how to enforce such rights, and rarely rely on the systems in place in order to claim protection of their personal data.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

For these reasons, studies and political campaigns on the enforcement of personal data rights have been carried out in the past years, and national and supranational institutions attempt to make enforcement systems more accessible to people.

Curiously, the studies on the protection of personal data, with special regard to transnational cases in the European context, have been so far focused on enforcement mechanisms other than civil justice. Indeed, personal data privacy is a field in which the lines that separate public, private, and administrative law are rather blurry. Thus, attention was so far focused on the public and administrative protection enforced by national authorities in compliance with national and supranational sources of law. This orientation is understandable, and derives from the fact that data protection authorities are dedicated authorities that ensure a high degree of specialisation in the field, and are possibly more efficient in dealing with cases in such matters. Nevertheless, they are not judicial authorities, and despite the fact that they may impose fines, they are not equipped with tools such as awarding damages. Therefore, judicial authorities are the only authorities that may virtually process the whole case, and it seems appropriate to analyse how such proceedings would function in disputes when both an international element and the internet are involved.

Private international law is an upstream question in transnational disputes. It involves the matters of jurisdiction and the law applicable to the demands of the plaintiff. With regard to jurisdiction, the private international law question concerns which court is entitled to decide upon the merits of the case. The possibility of suing in the national courts of one State over another implies a different set of procedural rules that will be applicable in the proceeding. With regard to the applicable law, the question is the identification of the legal system with the substantive provisions that will apply to the case. Clearly, when the law that is applicable to the matter varies, the rights and duties connected to the matter will be different.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

This work aims at reconstructing the private international law framework that applies to disputes concerning personal data brought before courts competent in civil and commercial matters within the European Union. In order to do so, it is necessary to study the foundations of the right to the protection of personal data. Despite the fact that personal data protection (which for the purposes of this study will be labelled 'data privacy')[1] is nowadays approached very differently on the two shores of the Atlantic Ocean, it is undeniable that the American approach to privacy is the origin of the current concept of data privacy.

Therefore, the present work will initially tackle the issue of the birth of the current concept of privacy,[2] which happened in the United States. Its theoretical construction will be addressed and an argument will be put forward that the 'separation' *vis-à-vis* 'control' paradigm possibly allows for identifying the very origin of the separation between privacy and data privacy. After that, it will be necessary to address the matter of the origins of data privacy on the European continent. The terminology that will be used in the rest of the work will be clarified in light of the elements that emerged in the previous analysis.

Despite the terminological clarifications, it is undeniable that a difference in approach nowadays exists between American and European data privacy laws. It is necessary to address this issue because the rank of substantive rules within the legal order that they stem from also influences the private international law analysis that courts make when assessing jurisdiction and applicable law. In the disputes that courts settle, special regard is given to the applicability of foreign law or of hierarchically higher rules contained in the legal order of the forum. After that, it will be appropriate to give a brief overview of the current and upcoming legal frameworks, then narrow the investigation to the European one, in view of the subsequent

[1] See *infra*, chapter I, para 2.c.
[2] See *infra*, chapter I.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

analysis of the European Union private international law rules in data privacy matters. Finally, it also seems necessary to address the different enforcement paths provided in the European Union area, which may be of both public and private types. Addressing these paths will introduce the private international law questions that arise in the path utilising civil justice.

The second part of the work will address the private international law question of determining the competent court to hear a case on data privacy matters.[3] The current European Union system will be examined, as well as the system that will apply once Regulation (EU) 2016/679 will become applicable. Preliminarily, it will be necessary to address two issues of capital importance for the work, which regard the issue of data privacy in the internet environment: territory and the international element. First, territory is an important element in the current system. Given the fact that the internet escapes territorial boundaries, the issue of territoriality in internet-related disputes will be addressed. Second, the nature of the international element that triggers the private international law question will be discussed. With regard to jurisdiction, Directive 95/46/EC, as well as any other instrument specifically dealing with data privacy, lack special rules on jurisdiction. Thus, the current Brussels I system must determine the Member State's courts that are competent to hear cases on data privacy matters. It will be argued that in this system, the relevant rules are mainly: the general forum, the special fora in contractual and non-contractual matters, and the protective fora in place to protect consumers. Moreover, this work will also analyse the regime applicable in those cases that escape the scope of application of European Union private international law, and Italian private international law will be taken as an example. In view of the upcoming applicability of Regulation (EU) 2016/679 – which will replace the Data Privacy Directive starting 25 May 2018 –

[3] See *infra*, chapter II.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

an analysis of such legislation will be necessary in light of the presence of rules on jurisdiction and (to some extent) parallel proceedings. It will be necessary to establish how the grounds of jurisdiction provided for in the new Regulation will interact with the Brussels I system. Additionally, this work will assess how the General Data Privacy Regulation interacts with the Lugano system and with the systems of those States that are bound to the *Schengen acquis*, to which the Regulation allegedly belongs.

Finally, the issue of the law applicable to the merits of the dispute will be tackled.[4] Different from the approach on jurisdiction, the European Union Directive contains a rule titled 'National law applicable'. Frequently, it is argued that such a rule functions as a conflict-of-laws rule and answers the private international law question on the applicable law. In this work, it will be argued that such a rule is not crafted to function as a standard bilateral private international law rule. Instead, it falls within a subtype of overriding mandatory rules that preclude proper private international law rules from operating. However, because the scope of such a rule does not cover all aspects of a data privacy dispute, it will be argued that the Rome I and Rome II regimes still remain potential candidates for the determination of the law applicable to the matters falling within their scope of application. On the one hand, by mirroring the approach in the Brussels I system, it will be argued that the relevant rules of the Rome I Regulation are those on the law applicable to contractual obligations in the presence and in the absence of a choice-of-law clause in the contract, and those protecting consumers. On the other hand, it will be argued that the exclusion of violations of private life included in Article 1(2)(g) of the Rome II Regulation impedes the application of such a legal instrument to data privacy disputes. Lacking a legal tool of supranational origin, again the conflict-of-laws rules will have to be sought within the legal orders of the Member States; again the Italian system

[4] See *infra*, chapter III.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

will be taken as an example in order to give a complete picture of the current framework. Finally, in light of the analysis made, the present work provides the author's own proposal for the amendment of the Rome II Regulation[5] to broaden its scope of application towards the inclusion of tortious data privacy disputes.

It seems necessary to underline that this research aims at exploring a field that is in thriving development. For this reason, despite the fact that cases of civil disputes in data privacy matters are now numerically poor, it seems reasonable to expect that their number will rapidly grow in the upcoming years. This growth is especially likely in light of the substitution of the Directive of 1995 with the more advanced regime of Regulation (EU) 2016/679.

Of course, it is equally important to highlight the fact that the investigation of the present work only regards private-to-private relations, such as relationships between data controller and data subject. These relationships arise out of online sales, internet surfing, social network participation, and similar activities. In the view of the author, such relationships may well entail some relevant geopolitical consequences that depend on the underlying dynamics of the internet. But it is also necessary to issue a full *caveat* on this matter: the present investigation excludes from its scope any data privacy considerations involving States in the exercise of their powers of *imperium*, such as issues related to public security, national security, diplomacy, and secrecy.

Finally, in order to put the greatest attention on those aspects that present a greater number of specific issues in internet data privacy disputes – and also in the light of the higher number of interpretations given by the Court of Justice of the European Union in the past decades – the choice has been made not to tackle issues in which internet data privacy peculiarities re-

[5] See *infra*, chapter III, para 5.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

sult in a reduced influence. Examples include choice-of-court agreements and the recognition and enforcement of judgments in civil and commercial matters.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

CHAPTER I – DATA PRIVACY: FOUNDATIONS

1. Interim introduction

In order to tackle the issue of private international law in European internet data privacy disputes, it seems necessary to set up a conceptual frame. It will allow an understanding of the strengths and the shortcomings of applying the standard private international law approach to the legal field of data privacy. Indeed, defining and casting limits on the scope of the investigation will make it clear if, and how, individuals are able to enforce their right to retain control over their own personal data. In order to do so, the investigation will first assess the main concepts of privacy outlined in the American and continental traditions.

As anticipated *supra*, the current doctrines on privacy mainly stem from the American doctrines on the 'right to be left alone' and on the control over one's own information. It will be argued that the 'separation' *vis-à-vis* 'control' paradigm is the one that grants a fruitful insight into the differentiation between privacy and data protection.

The analysis of the American and European origins of privacy has a functional purpose in the private international law analysis of the present work. Indeed, it seems appropriate to understand the so called transatlantic divide, which is characterised by different approaches to data privacy, namely 'private-alike' *vis-à-vis* 'fundamental' rights. This is suitable for investigation because the different approaches may trigger public-policy considerations of courts when dealing with private international law issues, especially when applying a foreign law.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Nonetheless, it seems also necessary to provide the reader with the normative coordinates of the investigation, through a brief overview of the existing legislation, and an explanation of the main paths of enforcement of data privacy rights under the European Union data privacy regime.

2. Privacy, data protection, and data privacy

A. *Privacy: its origin and attempted definitions*

Every respectable research investigating the right to privacy begins with a *caveat* concerning the difficulties encountered in conceptualising, defining, and ultimately characterising the scope of such a right.[6] Nevertheless, scholars usually agree in understanding privacy as an innate human need, which made an appearance at the very dawn of ancient civilisation. The Bible, the Qur'an, and the ancient code of Hammurabi, all make reference to a certain degree of privacy accorded to individuals;[7] even ancient Chinese law is reported to have protected some degree of privacy.[8] Philosophers also investigated the matter: Aristotle wrote about the

[6] See, *ex multis*, R. Murphy, *Property rights in personal information: an economic defence of privacy*, in *The Georgetown Law Journal*, 1996, p. 2381, 2381; R.C. Post, *Three Concepts of Privacy*, in *The Georgetown Law Journal*, 2001, p. 2087; D.J. Solove, *Understanding privacy*, Harvard University Press, 2009; A. Westin, *Privacy and freedom*, Atheneum, 1967, p. 7; J.Q. Whitman, *The two Western cultures of privacy: dignity versus liberty*, in *Yale Law Journal*, 2004, p. 1151, 1151, 1153. Prosser, in its work titled '*Privacy*', does not attempt at all to define privacy, limiting himself to an historical definition. See W.L. Prosser, *Privacy*, in *California Law Review*, 1960, p. 383, 383.

[7] A. Rengel, *Privacy in the 21st century*, Martinus Nijhoff Publishers, 2013, p. 29. For a comprehensive and exhaustive study of privacy in ancient civilisations, with strong focus on the Italian peninsula, see: J. Rykwert, *Privacy in Antiquity*, in *Social Research*, 2001, p. 29.

[8] C. Jingchun, *Protecting the right to privacy in China*, in *Victoria University of Wellington Law Review*, 2005, p. 645, 645, 647. For a more recent analysis of privacy law in China, with particular regard to data privacy in the internet, please refer to R. Ong, *Recognition of the right to privacy on the internet in China*, in *International Data Privacy Law*, 2011, p. 172, 172.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

public-private divide in society,[9] and more recently Locke defined the concept of 'zone of privacy'.[10]

Privacy is indeed an ephemeral and elusive concept,[11] which is often understood differently by different cultures and anthropological heritages. Customs that may be fully accepted in one geographical area, or within a certain culture, may be intolerable in or within others.[12] Moreover, some individuals may be willing to protect their intimacy to a different extent compared to others.[13] Indeed, people usually have intuitions about the delimitation of their private sphere, but the creation of a shared definition is not easy. This aspect of privacy will not be underestimated, as it indeed influenced, and still influences, the development of the legal field of privacy and data protection and of the connected legal instruments. Indeed, such a complexity limits and slows the process of creation of a shared and complete definition of privacy.

Due to this evanescence of privacy, the first attempt to shape privacy as a legal concept is relatively recent. At the end of the nineteenth century, Samuel D. Warren and Luis D. Brandeis published an article in the *Harvard Law Review*, titled *The right to privacy*, which is commonly referred to by scholarship as the first appearance of privacy as a legally conceptualised right.[14] At that time, the two authors were trying to frame a right to safeguard 'an

---

[9] Aristotele, *La Politica*, Laterza, 2014, book III.

[10] J. Locke, *Two treatises on government*, Cambridge University Press, 1988. See esp. 'Second treatise on government', p. 288 et seq.

[11] Solove described it as a concept 'in disarray', while Bygrave deems it to be 'prone to definitional instability'. See D.J. Solove, *Understanding privacy*, Harvard University Press, 2009, p. 1.; L.A. Bygrave, *Data privacy law: an international perspective*, Oxford University Press, 2014, p. 23.

[12] One example could be a certain degree of nudity allowed by some cultures, opposed to the complete ban issued by others.

[13] D. Heisenberg, *Negotiating privacy: the European Union, the United States, and personal data protection*, Lynne Rienner Publishers, 2005, p. 13 et seq.

[14] S.D. Warren, L.D. Brandeis, *The right to privacy*, in *Harvard Law Review*, 1890, p. 193. This article is considered one of the most influential academic works of all times, and in 2012, it ranked second in the most cited articles ever published in a law journal: see F.R. Shapiro, M. Pearse, *The most-cited law review articles of all time*, in *Michigan Law Review*, 2012, p. 1483, 1503. Nevertheless, a French court addressed a

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

inviolate personality',[15] and therefore they defined privacy as the right to be let alone.[16] They framed the violation of such a right as falling within the field of tort law, alongside the already-existing libel and slander.[17]

Warren and Brandeis were concerned that the technological development of that time would have made it impossible to maintain a separation between what is private and what is public.[18] The press – an industry in fast and inexorable development – was their main concern. Today, an uncountable number of new technologies indeed increase the potential violation of the personal space of the individual.

Before Warren and Brandeis, the concept of privacy was mainly related to property. Indeed, personal property was the main instrument through which physical privacy was achieved.[19] Nonetheless, examples of non-property-related privacy actions before the 1890 journal article do exist: Hixson reports a case dated 1624, in which some conspirers claimed the invasion of their privacy when the first Governor of Plymouth intercepted their personal correspondence and foiled their coup.[20]

---

right to privacy well before Warren and Brandeis. See A. Bertrand, *Droit a la vie privée et droit a l'image*, Litec, 1999, p. 3 et seq. According to Kulesza, a right to privacy was also conceived by Kohler in 1900: see J. Kulesza, *International law challenges to location privacy protection*, in *International Data Privacy Law*, 2013, p. 158, 158 et seq.

[15] S.D. Warren, L.D. Brandeis, *The right to privacy*, in *Harvard Law Review*, 1890, p. 193, 205.

[16] *Ibidem*, p. 193.

[17] *Ibidem*, p. 219.

[18] Indeed, their main concern was the invention of instant photography. Before Kodak, photography was a complex activity, mostly carried out by professionals. With the invention of small, portable cameras, virtually anybody would have been able to practice photography. See also D.J. Solove, *Understanding privacy*, Harvard University Press, 2009, p. 14 et seq.

[19] J. Hirshleifer, *Privacy: its origin, function and future*, in *The Journal of Legal Studies*, 1980, p. 649, 650. Clearly, the reference is made with particular regard to the safeguard of the 'sanctity' of one's home. To this end, please see the English case *Entick vs Carrington* [1765] EWHC, KB, J98.

[20] See. R.F. Hixson, *Privacy in a public society: human rights in conflict*, Oxford University Press, 1987, p. 11 et seq.; the reference data on the judgment is not mentioned by the source.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

From Warren and Brandeis on, scholars have been used to conceive privacy as a right connected to personality. Privacy has been defined as: one's autonomy within society;[21] the desire of people to choose freely the circumstances and the extent to which their attitudes and behaviour are exposed;[22] the means to protect one's dignity and integrity;[23] the right to determine the manner of building up one's own private sphere;[24] and ultimately as a right encompassing freedom of thought, control over one's body, reputation, and personal information, solitude in one's home, freedom from surveillance, and protection from interrogation.[25]

Despite the fact that privacy is unanimously considered to be a human need,[26] not every scholar agrees that it should be considered an autonomous set of rights.[27] Indeed, some of them argue that the interests usually encompassed within the meaning of privacy may be addressed by using other (already well-established) rights, such as property, or the rights over the person.[28] Nevertheless, as convincing as this argument may seem *prima facie* on a con-

---

[21] J. Hirshleifer, *Privacy: its origin, function and future*, in *The Journal of Legal Studies*, 1980, p. 649, 664.

[22] A. Westin, *Privacy and freedom,* Atheneum, 1967, p. 7.

[23] E.J. Bloustein, *Privacy as an aspect of human dignity: an answer to Dean Prosser*, in *New York University Law Review*, 1964, p. 962, 971.

[24] S. Rodotà, *Data protection as a fundamental right*, in S. Gutwirth *et al*., *Reinventing data protection?*, Springer, Berlin, 2009, p. 77, 78.

[25] D.J. Solove, *Conceptualizing privacy*, in *California Law Review*, 2002, p. 1087, 1089.

[26] Indeed, not only human. According to some scholars the need of privacy arises in most of the higher forms of life. See B. Mills, *Television wildlife documentaries and animals' right to privacy*, in *Continuum*, 2010, p. 193, 193. See also the US judgment *Pavesich v New England Life Ins. Co. et al.* 50 S.E. 68 (1905), in which privacy has been reconstructed by allocating 'its foundation in the instincts of nature'.

[27] Indeed, to this end Birnhack argues that privacy is under constant attack. See M.D. Birnhack, *The EU Data Protection Directive: An Engine of a Global Regime*, in *Computer Law and Security Report*, 2008, p. 508, 508.

[28] This is the idea of J.J. Thomson, *The right to privacy*, in *Philosophy and Public Affairs*, 1975, p. 295, 306. See also H.J. Kalven, *Privacy in Tort Law - Were Warren and Brandeis Wrong?*, in *Law & Contemporary Problems*, 1966, p. 326, 327, where Kalven argues that 'privacy seems less precise way of approaching more specific values, as for example, in the case of freedom of speech, association and religion'.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

ceptual basis, those against the recognition of privacy as an autonomous right is nowadays a considerable minority compared to those in favour.[29]

The conception of privacy most useful to the present work is outlined by Glenn in his analysis and categorisation of the existing literature: he drew a distinction between separation, secrecy, and control.[30] Separation is intended to be Warren's right to be left alone, secrecy is intended to be the right to determine if and to what extent personal information is to be disseminated, and control is intended as control over the intimacies of life. One could argue that secrecy and control often overlap, allowing for a compression of these three categories into two: separation and control. Separation is indeed the outline of Warren and Brandeis which *de facto* includes the protection of the intimacies of life. Control becomes, according to Westin[31] and Fried,[32] the very core of privacy, including the people's need to control the flow of their information.[33]

---

[29] A. Rengel, *Privacy in the 21st century*, Martinus Nijhoff Publishers, 2013, p. 37. On the imbalance between those favourable and those against the recognition of the right to privacy, Murphy ironically observes that '[b]ecause people who write about privacy tend to be in favour of it, a large portion of the literature – both popular and scholarly – consists of articles extolling the virtues of privacy and bemoaning the absence of judicial and statutory privacy protection', recalling the example of A.R. Miller, *Personal privacy in the computer age: the challenge of a new technology in an information-oriented society*, in *Michigan Law Review*, 1969, p. 1089, 1089, with particular focus on the issue of control over personal data. A certain degree of support to privacy can be spotted in G. González Fuster, *The emergence of personal data protection as a fundamental right of the EU*, Springer, 2014. Indeed, most of the scholarly work on privacy and personal data issues is focused on the activities of public servants for law enforcement purposes.

[30] R.A. Glenn, *The right to privacy: Rights and liberties under the law*, ABC-CLIO, 2003, p. 3 et seq. Actually, in his work, Glenn articulates the paradigm of a binomial privacy approach, which distinguishes between *tort privacy* and *constitutional privacy.* However, this approach is developed to tackle the issue of privacy in *government-citizen* relations, which are out of the scope of the present dissertation and only addresses private-to-private relations.

[31] A. Westin, *Privacy and freedom,* Atheneum,1967, p. 7.

[32] C. Fried, *Privacy*, in *Yale Law Journal*, 1968, p. 475, 482.

[33] Some critics of this theory argue that one cannot reasonably expect to control all of their data. Nevertheless, this argument sounds at least instrumental, as it is clear that a failure to guarantee the possibility to enjoy a right does not itself undermine the value of the right itself. Among the critics see R.L.D. Hughes, *Two Concepts of Privacy*, in *Computer Law and Security Review*, 2015, p. 527, 534.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

A separation-control approach maintains its dignity also with regard to Solove's analysis of the existing conceptions of privacy.[34] Indeed, Solove organises the existing conceptions into five main categories: the right to be let alone; the limitation to access to the self; secrecy; control over personal information; and personhood. The first is, as already described, the right outlined by Warren and Brandeis.[35] The second is intended to safeguard one's right to concealment.[36] The third is deemed to be a subset of the second,[37] although it also presents some overlaps with the fourth, which is control over personal information. Indeed, Solove recognises that once certain information is divulged, it is impossible to make it private again;[38] nevertheless this is also an aspect of control, or of the lack thereof. Finally, personhood stems from Warren's conception and has been mainly developed by Bloustein.[39]

By trying to match the separation-control approach with Solove's classifications, one could possibly match the concept of separation with the concepts of right to be let alone, the limitation to access to the self, and secrecy, while the concept of control would match some aspects of secrecy and the right to have control over personal information.[40] This exercise is considered useful in order to understand the phenomenon of data protection, which rose as an autonomous dynamic in Europe in the second half of the twentieth century. This work will only deal with the private international law aspects connected to the second sub-category of privacy rights: the right to retain control over personal information.

---

[34] D.J. Solove, *Conceptualizing Privacy*, in *California Law Review*, 2002, p. 1087, 1099 et seq.
[35] *Supra*, para 2.A.
[36] Which may be intended to be a more sophisticated version of the right to be let alone, according to Solove.
[37] D.J. Solove, *Conceptualizing Privacy*, in *California Law Review*, 2002, p. 1087, 1106.
[38] *Ibidem*, p. 1107.
[39] *Supra*, fn. 23.
[40] *Contra* Wuermeling, who argues that the right to retain control over personal information falls under the right to be let alone. See U.U. Wuermeling, *Harmonisation of European Union Privacy Law*, in *Mashall Journal of Computer & Information Law*, 1996, p. 412, 414.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

B. Data protection: definition and its hybrid nature

Up to now, the regulatory response to privacy needs has been twofold. On the one hand, sources of law of any rank and origin protect what has been called the need for separation.[41] For instance, Article 12 of the Universal Declaration of Human Rights prescribed that 'no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks'.[42] In addition, Article 17 of the International Covenant on Civil and Political Rights prohibits any arbitrary or unlawful interference with privacy, family, home, or correspondence, and any unlawful attacks on honour and reputation.[43] Moreover, in its Article 8 the European Convention on Human Rights prescribes that everyone has 'the right to respect for his private and family life, his home and his correspondence'.[44] Multiple national constitutions in Europe and abroad safeguard privacy as a right to physical and moral seclusion.[45]

On the other hand, a plethora of national and supranational legislation regulates the field of personal-information privacy, which pertains to what has been called the need to control.[46] The first attempt in regulating the matter is a law of the German Land Hessen, which was approved in October 1970, following the creation of one of the first centres for the automated

---

[41] *Supra*, para 2.A.

[42] Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly in Paris on 10 December 1948, General Assembly resolution 217-A, freely available online at the website: un.org (last accessed 7 October 2016).

[43] International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by the United Nations General Assembly on of 16 December 1966, General Assembly resolution 2200-A, available online at the website: ohchr.org (last accessed 7 October 2016).

[44] The convention is available online at the website of the Council of Europe: echr.coe.int (last accessed 7 October 2016).

[45] For instance, the South African Constitution (Article 14); the Vietnamese Constitution (Article 21); and the South Sudanese Interim Constitution of 2011 (Article 22); all of them are available online at the website: constituteproject.org (last accessed 7 October 2016).

[46] *Supra*, 2.A.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

processing of data by the public sector.[47] The reason for such legislative intervention was the increasing concern regarding data security and data privacy in matters of automated processing. Indeed, the law both prescribed obligations of confidentiality, security, and segregation of the stored data.[48] It allowed individuals to have access to their own data and entitled them to ask for the rectification of such data, if necessary.[49] Legislators made use of the term *Datenschutz*, or in English, Data Protection, which would become the standard term concerning matters of personal data processing. However, the purpose of the *hessischen Datenschutz* law was to protect data from third-party intrusions, and did not make any reference to the legal foundations, such as personal rights or interests of the individual.[50]

The second example of legislative intervention in the field of data protection is the Swedish *Datalag.*[51] The innovation of this piece of legislation was the referral to the concept of personal integrity, which made *Datalag* the ancestor of modern data privacy laws.[52] After Sweden, within a decade most of the European countries put in place pieces of legislation in data privacy matters.[53] The legislative interventions of that time were mainly based on the conceptions of privacy outlined by Westin and Miller concerning control over personal in-

---

[47] *Hessische Datenschutzgesetz vom 7. Oktober 1970*, published in Wiesbaden in *Gesetz- und Verordnungsblatt für das Land Hessen* 625(1970).

[48] *Ibidem,* Article 2.

[49] *Ibidem,* Article 4.

[50] G. González Fuster, *The emergence of personal data protection as a fundamental right of the EU*, Springer, Berlin, 2014, p. 57 et seq.; on the recent reconstruction of the term 'Datenschutz' as the *Schutz personenbezogener Daten*, see M. Hansen, *Datenschutz Im Cloud Computing*, in *Daten- und Identitätsschutz in* G. Borges and J. Schwenk, *Cloud Computing, E-Government und E-Commerce*, Springer, 2012, p. 79, 82 et seq.

[51] *Datalag* 1973, available online at the website: notisum.se/rnp/sls/lag/19730289.htm (last accessed 7 October 2016).

[52] See *Datalag*, Articles 3, 6 7, 8, 9, 10, 11, 15, 18. For a complete assessment of the evolution of Swedish data privacy law, see S. Öman, *Implementing Data Protection in Law*, in *Scandinavian studies in law*, 2004, p. 389, 389.

[53] As an example, see the German federal initiative: *Bundesdatenschutzgesetz* 1977, which repealed the *hessischen Datenschutzgesetz*. The law has been amended several times, especially for compliance with European Union legislation. For a commentary of the legislation in force see P. Gola *et al*., *BDSG - Bundesdatenschutzgesetz: Kommentar*, Beck, 2015.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

formation;[54] further evolutions in the field are still based on that concept. Indeed, despite the fact that privacy is safeguarded through the concepts of separation and control, the legislative tools that will be analysed in the present dissertation mainly address the need of control over personal information.[55]

Before addressing the different approaches to data protection, it is necessary to define the notions of data and personal data. Indeed, while the concept of privacy challenged, and will continue to challenge, legal theorists, definitions of the two abovementioned concepts are generally shared by doctrine. Theses definitions are of key importance to the purposes of the present work, as they circumscribe the scope of application of data privacy legislation, and may trigger conflict-of-laws issues.

In the present time, data may be defined in different ways. One definition may be quite plain: 'organised information'.[56] In informatics, this definition is suitable for its purpose: indeed, a piece of information, such as a number, only acquires value if it is put into the correct context.[57]

---

[54] See H. Burkert, *Privacy-Data Protection: A German/European Perspective*, in *Proceedings of the second symposium of the Max Planck Prject Group on the Law of Common Goods and Computer Science and Telecommunication Board of the National Research Council*, 1999, p. 43, 43. With regard to Westin and Millers contributions, see *supra*, para 2.A.

[55] For more examples of national data privacy legislation see *ex multis*: T. Gidron, *Privacy protection as a case study in personal rights protection in Israeli law*, in *Computer Law and Security Review*, 2012, p. 283; N. O'Connel, *Data protection and privacy issues in the Middle East*, 2011; U. Volovelsky, R. Raynzilber, *The liability of website owners for defamation in Israel: a challenge yet to be solved?*, in *Computer Law and Security Review*, 2013, p. 590; J.L. Traça, B. Embry, *An overview of the legal regime for data protection in Cape Verde*, in *International Data Privacy Law*, 2011, p. 249; J.L. Traça, B. Embry, *The Angolan Data Protection Act: first impressions*, in *International Data Privacy Law*, 2012, p. 40; H. Miyashita, *The evolving concept of privacy in Japanese law*, in *International Data Privacy Law*, 2011, p. 229; A.B. Makulilo, *Privacy and data protection in Africa: A state of the art*, in *International Data Privacy Law*, 2012, p. 163; E.D. Christo, *Data protection in Trinidad and Tobago*, in *International Data Privacy Law*, 2013, p. 202; K.M. Yilma, *Data privacy law and practice in Ethiopia*, in *International Data Privacy Law*, 2015, p. 177; E.L. Yong Cieh, *Personal data protection and privacy law in Malaysia*, in N. Ismail, E.L. Yong Cieh (eds), *Beyond data protection*, Springer, 2013, p. 5.

[56] L.B. Curzon, P.H. Richards, *The Longman dictionary of law*, Longman, 2011, p. 133.

[57] For instance, big data are large data sets, in which raw data, or even metadata (data that give information about other data) acquire a particular relevance by reason of the size of the data set. For an

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

On the other hand, in a legal context data protection legislation is not always provided with a definition of data.[58] A definition is to be found in the data protection law of the United Kingdom (Data Protection Act 1998).[59] Article 1(1) of the Data Protection Act defines data as information which:

> (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
>
> (b) is recorded with the intention that it should be processed by means of such equipment,
>
> (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system;
>
> (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68; or
>
> (e) is recorded information held by a public authority and does not fall within any of paragraphs (a) to (d).

As one may notice, the definition of data included in the present piece of legislation is far more detailed compared to the definition for informational purposes. The term 'data' for data protection purposes is information, but it is only relevant if it is automatically processed, recorded for future processing, recorded to archive purposes, or is part of an accessible record or a record held by a public authority.[60]

---

overview on big-data trends see M.D. Assunção *et al*., *Big data computing and clouds: challenges, solutions, and future directions*, in *Journal of Parallel and Distributed Computing*, 2015, p. 3, 4 et seq.

[58] For instance, both the European Union Directive on the Protection of Personal Data and the Italian Data Protection Code lack of a definition of data. See Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, in *Official Journal*, 1995, L 281, and Legislative decree No 196/2003, *Codice in materia di protezione dei dati personali*, in *Official Journal of the Italian Republic*, 2003, No 174, available online in Italian and English at the website: garanteprivacy.it (last accessed 7 October 2016).

[59] The full text in English of the law is available online at legislation.gov.uk. For a commentary, see G.J.H. Smith, *Internet law and regulation*, Thomson/Sweet & Maxwell, 2007, p. 694 et seq.

[60] Please note that Article 1(1)(e), inserted into the Data Protection Act in 2000, *de facto* extends the scope of the term data to any data held by a public authority, even if processed manually. See also P. Carey, *Data protection*, III ed., Oxford University Press, 2009, p. 16 et seq. For a relevant case on the notion of data, please see the example of *Smith v Lloyds TSB Bank Plc* [2005] EWHC 246, in which the judge ruled that information stored as 'unstructured bundles kept in boxes' did not qualify as data, being neither processed by automated means, nor stored in a systemised filing facility.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

While a definition of data is not ubiquitous in data privacy legislation, the definition of personal data is often present. Article 2 of European Union Directive 95/46/EC,[61] which is currently one of the most influential pieces of legislation on the subject, defines personal data as follows:

> For the purposes of this Directive:
>
> (a) 'personal data' shall mean any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;

As one may see in the definition, the key element is the relation 'to an identified or identifiable natural person'. On this matter, few observations may be made. First, it may be affirmed that the Directive covers the privacy element defined above as *control over personal information.*[62] Second, it seems to regard natural persons: therefore, one may argue that natural persons only are entitled to data protection. However, directives only set the minimum requirements that Member States have to comply with when issuing the implementing legislation, but do not prevent them from granting additional protection, as long this does not conflict with other prescriptions.[63] Indeed, several Member States extended the protection of data privacy legislation to legal persons.[64] Finally, the data shall relate to an identified or

---

[61] Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, in *Official Journal*, 1995, L 281. In general on the Directive, see C. Amery, *The European Union data protection directive - where are we? How did we get here? What next?*, in *Information Security Technical Report*, 1997, p. 29; M.D. Birnhack, *The EU data protection directive: an engine of a global regime*, in *Computer Law and Security Report*, 2008, p. 508.

[62] *Supra,* para 2.A.

[63] On the legal effect of directives in the Member States, see G. Tesauro, *Diritto dell'Unione europea,* Cedam, 2012, p. 171 et seq.; P. Craig, G. De Búrca, *EU law: text, cases, and materials*, Oxford University Press, 2015, p. 200 et seq.

[64] International law association committee on the protection of privacy in private international and procedural law, *The concept of privacy in the national systems – interim report*, 2015, not yet published.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

identifiable person, which opens the field to considerations concerning the degree of specificity that data shall have in order to be considered personal.[65]

Lacking uniform implementation of Article 2(a) of the Directive by Member States,[66] in June 2007 the Article 29 Working Party[67] issued its Opinion 4/2007 on the concept of personal data.[68] This Opinion aimed at clarifying the definition included in the Directive in order to overcome possible misalignments that could have resulted in a differentiated protection for individuals in the European Union.[69] Despite this intervention, the definition of personal data in national implementing legislation slightly differs.[70] The issues caused by such misalign-

---

[65] For instance, let us consider a big data set, which is by definition a set of data that may well be anonymised. Depending on how this data is combined, the number of individuals that will match the data will lessen. When this data becomes too specific, some scholars argue that it is covered by the Directive even if it is officially anonymised. See C. Kuner, *European data protection law: corporate compliance and regulation*, II ed., Oxford University Press, 2007, p. 91 et seq.; see also J. Dhont, Y. Poullet, *Data protection in Belgium: an analysis of the new law*, in *Computer Law and Security Report*, 2000, p. 5, 6.

[66] See especially the English case *Durant v Financial Services Authority* [2003] EWCA Civ 1746, in which Lord Justice Auld ruled in favour of compressing the scope of application of the notion of personal data, arguing that, in order to trigger the application of the Directive, 'the information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction …'. This interpretation did not please the European Commission, which sent a letter of formal notice to the United Kingdom regarding the commencement of an infringement procedure for failure to implement European Union law. However, the infringement procedure has never been filed.

[67] The 'Article 29 Data Protection Working Party' is an advisory body of the European Union, established under Article 29 of the Directive 95/46/EC. Being an advisory body, its documents do not have binding status. Composed of known data privacy experts, it issues opinions concerning the interpretation of European Union data privacy law. The Working Party will be replaced by the European Data Protection Board, provided for by the new General Data Protection Regulation (EU) 2016/679 (Article 68).

[68] Opinion of the Article 29 Data Protection Working Party No 4/2007 on the concept of personal data of 20 June 2007, 01248/07/EN, WP 136.

[69] In particular, the opinion focuses on the terms: 'any information'; 'relating to'; 'an identified or identifiable'; 'natural person'. With regard to the first term, the working party recalls for a wide interpretation of the concept, without posing any limitation to its substantive content or to the technical medium in which it is stored. The second term is deemed to be an underestimated building block of the definition, and interprets it as containing three possible links to the individual: data can relate to a subject when its *content* relates to it (*e.g.* when the information is about that individual); or when the *purpose* of the processing of the data is evaluating or influencing the status or behaviour of that individual; or when the *result* of the processing has an impact to one's rights and interests. The third addresses the issue of identifiable data, including the issue of pseudonymised data. The latter excludes legal persons and established that personal data is about 'living individuals', leaving to Member States some degree of flexibility on the definition of 'alive' and 'dead'. For an assessment of Opinion 4/2007, please refer to D. Cooper, *Redefining 'personal data': can the opinion live up to the hype?*, in *Data Protection Ireland Journal*, 2007, p. 7, 7 et seq.

[70] See C. Kuner, *European data protection law: corporate compliance and regulation*, II ed., Oxford University Press, 2007, p. 95 et seq.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

ments is one of the main reasons behind the commencement, in 2012,[71] of a legislative process that has been finalised on 14 April 2016, with the approval of the new General Data Protection Regulation.[72] The Regulation defines personal data as follows:

> For the purposes of this Regulation:
>
> (1) 'personal data' means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;

Regardless of the changes introduced in the second part of the paragraph to address concerns raised in practice,[73] the definition has been confirmed and has a scope comparable with the one within the Directive. The innovation on this matter derives from the legal instrument used. Indeed, a Regulation is directly applicable in all Member States, without any need for implementation through national legislation.[74] Therefore, although different interpretations by courts may occasionally occur, no further misalignment should occur.

However, the challenging nature of data privacy legislation does not descend from the definition of data or personal data: it descends from its hybrid nature. Indeed, data privacy could be considered as falling within both public and private law, or neither one.[75] This field, and

---

[71] Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), of 25 January 2012, COM(2012) 11.

[72] Regulation (EU) 2016/679 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 *Official Journal*, 2016, L 119.

[73] The introduction of a reference to the name as a personal data possibly addressed the issue raised by the English case *Durant*. See *supra*, fn. 66; the reference to online identifiers location data addresses issues raised with technological development and until now not addressed by the provisions of the Directive.

[74] On the legal effect of Regulations in the Member States, see G. Tesauro, *Diritto dell'Unione europea,* Cedam, 2012, p. 170 et seq.; P. Craig, G. De Búrca, *EU law: text, cases, and materials*, Oxford University Press, 2015, p. 198 et seq.

[75] On this matter see: C. Kuner, *Data protection law and international jurisdiction on the internet (Part 1)*, in *International Journal of Law and Information Technology*, 2010, p. 176, 181; D.J.B. Svantesson, *Extraterritoriality in data privacy law*, Ex Tuto Publishing, 2013, p. 32 et seq.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

the legal instruments that regulate it, often fall between the two definitions, or address both. With regard to data processing, it may be carried out both by public authorities and private entities, as data privacy legislation aims at safeguarding privacy in general. To this purpose, national data authorities are generally granted powers to decide disputes arising both between individuals and public bodies, and between individuals and private entities. Nevertheless, some provisions concern civil liability. In addition, although at the dawn of data privacy law the main concern of legislators and stakeholders was the automated processing of personal data by public servants,[76] nowadays great relevance has to be attributed to private-to-private relationships that involve the processing of personal data. For instance, online contracts with internet providers, telecommunications companies, and social networks, fully fall within the category of private law contracts; some States allow cases before civil law courts without setting up the obligation to bring the claim before the data protection authority.[77] Therefore, although the issue has not been developed in depth by scholarship, possibly because of the highly technical nature of the legal relationships involving data,[78] it may be concluded that data protection is intrinsically hybrid. It should not be categorised as fully and exclusively pertaining to one of the two categories, either because it falls in between,[79] or because it may fall under the category of private or public law depending on the legal relationship and on the type of action.[80]

---

[76] Especially law enforcement actors.

[77] A comparative analysis is available on the *Commission's first report on the transposition of the Data Protection Directive,* technical annex, 2003, available online at ec.europa.eu/justice/data-protection.

[78] D.J.B. Svantesson, *Extraterritoriality in data privacy law*, Ex Tuto Publishing, 2013, p. 32 et seq.

[79] Of this opinion is Svantesson, *ibidem*.

[80] Of this opinion is C. Kuner, *Data Protection Law and International Jurisdiction on the Internet (Part 1)*, in *International Journal of Law and Information Technology*, 2010, p. 176, 183.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Despite the fact that the divide between public and private law has been criticised by some scholars,[81] the second solution seems to be more appropriate for addressing the concerns that pertain to the present work. Indeed, it is on the public/private divide that the functioning of private international law instruments is determined. Therefore a reconceptualisation of data privacy as falling in between the two categories, although interesting and conceptually challenging for legal theorists, does not allow for finding clear solutions in private international law matters.

C. Privacy, data protection, and data privacy: terminological clarifications

From the analysis carried out so far, it may be understood that the concepts of privacy and data protection are not overlapping, let alone complementary. Historically, data protection stems from privacy, as it directly derives from the theory of control over personal information.[82] However, it also stems from the concept of data security.[83] Nowadays, data protection laws have become a *per se* construct and encompasses rules that hardly match both with privacy and data protection.[84] Moreover, the two terms are often used with a certain degree of moral significance: privacy is intuitively linked with a psychological and physical

[81] See for instance Cf. L.A. Bygrave, *International agreements to protect personal data*, in J.B. Rule, G. Greenleaf, *Global privacy protection, the first generation*, Elgar, 2008, p. 15 et seq.

[82] See also: R. Forno, *Defining privacy interests*, in *Blog of the Center for Internet and Society at Stanford Law School*, 2014, 12 November, freely available online at the website: cyberlaw.stanford.edu (last accessed 7 October 2016).

[83] See L. Determann, *Determann's field guide to data privacy law: international corporate compliance*, Elgar, 2015, p. 6.

[84] See on the contrast between non-interference and standard protection approaches L.A. Bygrave, *Data privacy law: an international perspective*, Oxford University Press, 2014, p. 3.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

dimension of seclusion,[85] while the term data protection protects what is recognised to be a fundamental right to dignity.[86]

Even within the field of data protection, the nomenclature given by experts at the two shores of the Atlantic Ocean seem to diverge: in the United States, it is more common to refer to data protection with the name of privacy, or – in some cases – informational privacy. In Europe, the term data protection is almost unanimously accepted.

Now, for the purpose of studying the field of control over personal information, scholarship coined the term 'data privacy', which overcomes conceptual differences stemming from the evanescent definition of privacy and the unclear separation from data protection. This term also remains neutral between the different nomenclature practices. Some scholars use the terms data protection and data privacy interchangeably;[87] some others consider the term data privacy to stem from the American conception of privacy, arguing that it is nonetheless mostly appropriate as it would encompass the European definition of data protection.[88] For the purposes of this study, the wording 'data privacy' is deemed to be most suitable as it is considered more neutral than the terms privacy and data protection.[89] What is important to underline is that this wording will be an expedient to achieve an acceptable degree of neutrality, and it does not imply a different conception of the underlying rights, as the transatlantic divide that will be addressed in this study is not resolved by a simple change of nomenclature.

---

[85] The term derives from the Latin *privus*, which means 'one's own', 'private'.

[86] See *infra*, paragraph 3. See also J.Q. Whitman, *The two Western cultures of privacy: dignity versus liberty*, in *Yale Law Journal*, 2004, p. 1151, 1160 et seq.

[87] L.A. Bygrave, *Data privacy law: an international perspective*, Oxford University Press, 2014, p. 3 and p. 23 et seq.

[88] L. Determann, *Determann's field guide to data privacy law: international corporate compliance*, Elgar, 2015, p. 4.

[89] Kuner chose the term 'data privacy' in order to include both the European conception of 'data protection', and its Asian alternate 'informational privacy'. See C. Kuner *et al., Editorial*, in *International Data Privacy Law*, 2011, p. 1, 2.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Indeed, this choice has been made with the sole purpose of addressing a global issue with a terminology that recalls territorial conceptions as little as possible.

In order to address the issue of internet data privacy in private international law, it is of utmost importance to investigate four critical elements of the matter. This exercise will shape the framework in which the analyses of jurisdiction and connecting factors are carried out.

Until now, it has been considered how privacy has been introduced into legal discourse by Warren and Brandeis, and how it has been developed into legal theory. Data protection emerged as an offspring of such a discourse, first addressing the issue of data security and then encompassing the issue of control over personal information.

The four critical elements that the field of internet data privacy faces are the following. First, the 'joint' *vis-à-vis* 'separate' approach that some regional courts – especially the European Court of Human Rights – have with regard to privacy and data protection.[90] Second, there is a so-called transatlantic divide, which characterises the approaches to data privacy on the two shores of the Atlantic Ocean. Third, there is the issue of the transnational element: the attention of international lawyers has been so far focused on trans-border data flows, but it is not the only potentially-relevant international element. Fourth, there is the topical issue of the internet as a ubiquitous place and the need for a territorial approach to personal data.

---

[90] This issue mainly regards the approach that regional and national Courts may have with regard to the applicability of the doctrines elaborated in privacy matters (which have been elaborated before those on data privacy, which is a more recent phenomenon) to the matter of data privacy. For instance, it is alleged by Kokott and Sobotta that the Court of Justice of the European Union did not cast a relevant distinction between the two concepts in its *Schecke* judgment, while a clearer distinction is drawn in *Bavarian Lager* (however, it has to be noted that in the meanwhile the Charter of the Fundamental Rights of the European Union, with its Articles 7 and 8 dealing with the two matters separately, has entered into force). See CJEU, joined cases C-92/09 and C-93/09, *Schecke and Eifert*, ECLI:EU:C:2010:662; case C-28/08, *Bavarian Lager*, ECLI:EU:C:2010:378. See in general on this matter J. Kokott, C. Sobotta, *The distinction between privacy and data protection in the jurisprudence of the CJEU and the ECtHR*, in H. Hijmans, H. Kranenborg, *Data protection anno 2014: how to restore trust?*, Intersentia, 2014, p. 83 et seq.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

3. The 'transatlantic divide' in data privacy law

A. The European approach: data privacy as a fundamental right

As it has been envisaged in the previous paragraphs, the transatlantic approach on data privacy is characterised by strong differences. In contrast to the American approach to the matter,[91] the European approach is strongly oriented toward the characterisation of data privacy as a fundamental right of the individual.

The European Union data protection Directive 95/46/EC[92] – the legal tool currently applicable to the processing of personal data within the European Union – expressly mentions the protection of fundamental rights as one of its objectives, by making express referral to it in six recitals.[93] The Directive also prescribes in its Article 1(1) that 'Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data'.[94]

The new General Data Protection Regulation, Regulation (EU) 2016/679,[95] approved by the legislature on 14 April 2016, and applicable from 25 May 2018,[96] mentions the protection

---

[91] See *infra*, para 3.B.

[92] Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, in *Official Journal*, 1995, L 281. For a comprehensive and exhaustive study of the Directive from the fundamental rights perspective, please see *ex multis* M. Cunningham, *Diminishing Sovereignty: How European privacy law became international norm*, in *Santa Clara Journal of International Law*, 2013, p. 421, 430 et seq.; T.B. Loring, *An analysis of the informational privacy protection afforded by the European Union and the United States*, in *Texas International Law Journal*, 2002, p. 421, 431 et seq. For general studies on the Directive please see: C. Amery, *The European Union data protection directive - where are we? How did we get here? What next?*, in *Information Security Technical Report*, 1997, p. 29; M.D. Birnhack, *The EU data protection directive: an engine of a global regime*, in *Computer Law and Security Report*, 2008, p. 508.

[93] Directive 95/46/EC, Recitals No 1, 2, 3, 10, 34, 37.

[94] Directive 95/46/EC, Article 1(1). Please note that in the same Article the Directive reiterates the purpose of the European Union legislation, which is the achievement of a single market (now the internal market) within the Union; indeed, Article 1(2) prescribes that 'Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under paragraph 1'.

[95] Regulation (EU) 2016/679 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 *Official Journal*, 2016, L 119.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

of fundamental rights in 19 recitals out of 173,[97] and transposes the content of Article 1(1) of Directive 95/46/EC into the new legislation: Article 1(2) of the Regulation indeed states that the Regulation 'protects fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data'.[98] Moreover, Recital No 1 of the new Regulation expressly states that '[the] protection of natural persons in relation to the processing of personal data is a fundamental right'.[99]

As one may notice, the Directive is more careful in characterising data privacy as an autonomous fundamental right. Indeed, it makes reference to the protection of fundamental rights with respect to privacy, of which data privacy is one of the aspects.[100] The evolution of European Union law in the past 11 years between the entry into force of the Directive and that of the Regulation has been relevant. Indeed, the Regulation is far more explicit in addressing data privacy as an autonomous fundamental right.

However, the process of inclusion of data privacy within the fundamental rights of the European Union did not start within the European Union. The oldest piece of legislation on the

---

[96] Regulation (EU) 2016/679, Article 99.

[97] Regulation (EU) 2016/679, Recitals 1, 2, 3, 4, 10, 16, 47, 51, 52, 53, 69, 102, 109, 111, 113, 114, 153, 166, 173.

[98] Full text: 'Article 1 (Subject-matter and objectives): 1. This Regulation lays down rules relating to the protection of natural persons with regard to the processing of personal data and rules relating to the free movement of personal data. 2. This Regulation protects fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data. 3. The free movement of personal data within the Union shall be neither restricted nor prohibited for reasons connected with the protection of natural persons with regard to the processing of personal data'.

[99] For further studies on the Regulation, see *infra*, para 4.B., 5, and chapter II. Moreover, on the Regulation's proposal please see F. Resta, N. Fabiano, *Legal analysis of the new proposed EU Regulation on data protection*, in *The Privacy Advisor*, 2012; P. De Hert, V. Papakonstantinou, *The proposed data protection Regulation replacing directive 95/46/EC: a sound system for the protection of individuals*, in *Computer Law and Security Review*, 2012, p. 130; W. Kotschy, *The proposal for a new general data protection Regulation: problems solved?*, in *International Data Privacy Law*, 2014, p. 274.

[100] Full text: 'Article 1 (Object of the Directive): 1. In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data. 2. Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under para 1'.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

continent that was used in order to protect individuals with regard to the processing of their personal data was the European Convention on Human Rights of 1950.[101] Article 8(1) of said Convention prescribed that '[e]veryone has the right to respect for his private and family life, his home and his correspondence.' This article was interpreted by the European Court of Human Rights as encompassing the protection of individuals with regard to the processing of personal data on several occasions. Indeed, the scope of Article 8 was broadened over time to include aspects such as the secrecy of telephone calls,[102] video surveillance,[103] and voice recordings.[104] In several cases, the scope of Article 8 was expanded explicitly to include aspects of data privacy, such as the processing of telephone numbers,[105] emails,[106] and more generally data regarding the private life of an individual.[107] Therefore, it may be stated beyond any reasonable doubt that on the European continent, data privacy was protected as a human right alongside privacy starting from the entry into force of the European Convention on Human Rights. Moreover, in 1981, the Council of Europe opened for signature a convention that expressly dealt with data privacy; Convention No 108[108] established minimum standards of

---

[101] Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. The official text of the Convention is available online at the website: echr.coe.int (last accessed 7 October 2016). Please note that the Member States of the Council of Europe are 47: all of the continental European countries with the exception of Belarus and Kosovo; Armenia; Azerbaijan; Georgia; Iceland; Russian Federation; Turkey; United Kingdom.

[102] ECtHR, *Klass v Germany,* 6 September 1978, Case No 5029/71, para 41; *Amann v Switzerland*, 16 February 2000, Case No 27798/95, para 44; *Halford v United Kingdom*, 25 June 1997, Case No 20605/92, para 44.

[103] ECtHR, *Peck v United Kingdom*, 28 January 2003, Case No 44647/98, para 57 et seq.

[104] ECtHR, *P.G. and J.H. v United Kingdom,* 25 September 2001, Case No 44787/98, para 59 et seq.

[105] ECtHR, *Malone v United Kingdom,* 2 August 1984, Case No 8691/79, para 84.

[106] ECtHR, *Copland v United Kingdom*, 3 April 2007, Case No 62617/00, para 41.

[107] *Ibidem*, para 43. Here the Court expressly states that 'storing of personal data relating to the private life of an individual also falls within the application of Article 8(1) (…). Thus, it is irrelevant that the data (…) were not disclosed or used against the applicant (…)'.

[108] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981. The official text of the convention is available online at the website: coe.int (last accessed 7 October 2016).

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

processing of personal data in order to achieve an enhanced respect for human rights and fundamental freedoms.[109]

On December 2000, the European Union made a further step forward as it proclaimed the Charter of Fundamental Rights of the European Union, which includes two articles separately dealing with privacy and data protection. Article 7 of the Charter states that '[e]veryone has the right to respect for his or her private and family life, home and communications'.[110] On the other hand, Article 8 prescribes that

> 1. Everyone has the right to the protection of personal data concerning him or her.
>
> 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
>
> 3. Compliance with these rules shall be subject to control by an independent authority.

The Charter not only states that data privacy safeguards fundamental rights. It also includes the rights to fair processing, consent, access, rectification of information, and 'constitutionalises'[111] the control powers of national data authorities.[112]

The inclusion of data privacy as a fundamental right of the European Union is the last step of the European development on the matter. Nonetheless, it is not only at the supranational level that the fundamental-rights dimension of data privacy emerges. Indeed, European States conceived privacy and data protection as a fundamental right even without resorting to international sources of law. For instance, in Germany the Federal Supreme Court (*Bundesgerichtshof*) ruled in 1954 that individuals were granted a 'general right to personali-

---

[109] See Preamble and Article 1 of the Convention.

[110] On the Charter, see A. Mastroianni *et al.* (eds), *Carta dei diritti fondamentali dell'Unione europea*, Giuffrè. 2017.

[111] On the alleged constitutionalisation by the Charter, see P. de Hert and S. Gutwirth, *Data protection in the case-law of Strasbourg and Luxemburg: constitutionalisation in action*, in S. Gutwirth, *Reinventing data protection?*, Springer, 2009, p. 3.

[112] On Article 8 of the Charter, see extensively O. Pollicino, M. Bassini, *Protezione dei dati di carattere personale*, in A. Mastroianni *et al.* (eds), *Carta dei diritti fondamentali dell'Unione europea*, Giuffrè. 2017, p. 134 esp. p. 141 et seq.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

ty', which includes the right to respect his or her dignity as a human being and to develop his or her own personality;[113] the German Federal Constitutional Court (*Bundesverfassungsgericht*) further recognised in 1983 the so-called principle of informational self-determination (*Informationelle Selbst-bestimmung*), through which a right to control the collection, storage, use, and disclosure of personal data was granted to the individual through Ar-Articles 1 and 2 of the German Constitution (*Grundgesetz* or *Verfassung*).[114]

Far more radical is the approach of the Portuguese Republic. The Constitution of 1975 lists the protection of personal data within its constitutionally safeguarded fundamental rights. Article 35, titled 'Use of informatics', is indeed listed under its Part I – 'Fundamental rights and duties', Title II – 'Rights, freedoms and guarantees', Chapter I – 'Personal rights, freedoms and guarantees'. The Article provides, among others, that '[e]very citizen shall possess the right to access to all computerised data that concern him, to require that they be corrected and updated, and to be informed of the purpose for which they are intended, all as laid down by law'.[115] As it is reported by eminent scholars, the Portuguese Constitutions has been taken as

---

[113] Bundesgerichtshof, 25 June 1957, *Schacht*, in *BGHZ*, 13, 334. An English translation of the judgment is available online at the website: germanlawarchive.iuscomp.org (last accessed 7 October 2016).

[114] Bundesverfassungsgericht, 15 December 1983, Az. 1 BvR 209/83, 1 BvR 484/83, 1 BvR 440/83, 1 BvR 420/83, 1 BvR 362/83, 1 BvR 269/83, see esp. para 173 et seq. The judgment is available online at the website: openjur.de (last accessed 7 October 2016). The full text of the German Constitution is available at the website of the German Parliament: bundestag.de (last accessed 7 October 2016).

[115] Portuguese Constitution, Article 35(1). The full text of Article 35 so prescribes: '1. Every citizen shall possess the right to access to all computerised data that concern him, to require that they be corrected and updated, and to be informed of the purpose for which they are intended, all as laid down by law. 2. The law shall define the concept of personal data, together with the terms and conditions applicable to its automated treatment and its linkage, transmission and use, and shall guarantee its protection, particularly by means of an independent administrative body. 3. Computers shall not be used to treat data concerning philosophical or political convictions, party or trade union affiliations, religious beliefs, private life or ethnic origins, save with the express consent of the data subject, with authorisation provided for by law and with guarantees of non-discrimination, or for the purpose of processing statistical data that cannot be individually identified. 4. Third-party access to personal data shall be prohibited, save in exceptional cases provided for by law. 5. The allocation of a single national number to any citizen shall be prohibited. 6. Everyone shall be guaranteed free access to public-use computer networks, and the law shall define both the rules that shall apply to cross-border data flows and the appropriate means for protecting personal data and such other data as may justifiably be safeguarded in the national interest. 7. Personal data contained in manual files

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

an example by many non-European countries, especially South American countries, which therefore incorporate the principle of control over personal information within their fundamental laws or statutory legislation.[116]

B. The United States' approach: fragmented and sector-specific legislation

The American approach to data privacy – and privacy in general – is profoundly different compared to the European States and the European Union. The main characteristic of the European approach to data privacy is that it is 'general'. Indeed, not only in Europe data privacy is considered a fundamental right, but it is also regulated by comprehensive legislation that aims to cover all of its aspects, including sector-specific aspects such as the processing of medical and judicial data.[117] In addition, the general, and comprehensive regulation of data privacy may be considered to derive from the right to dignity.[118] This right is protected by the State as the entity responsible for safeguarding the rights of its citizens.[119]

In the United States of America, the theoretical and practical approach to data privacy is considerably different than the approach on the other side of the Atlantic. The American approach to rights is generally driven by the citizen-government opposition. Therefore, and also in the case of data privacy, the centralist approach creates the path to a sector-specific approach, which is more driven by the necessity to regulate a certain aspect of economic life of

---

shall enjoy the same protection as that provided for in the previous paragraphs, as laid down by law'. The Portuguese Constitution is available in English language at the Website of the Constitute Project: constituteproject.org (last accessed 7 October 2016).

[116] See G. González Fuster, *The emergence of personal data protection as a fundamental right of the EU*, Springer, 2014, p. 66 et seq.

[117] See Article 8 of Directive 95/46/EC.

[118] J.Q. Whitman, *The two Western cultures of privacy: dignity versus liberty*, in *Yale Law Journal*, 2004, p. 1151.

[119] S.J. Kobrin, *Safe harbours are hard to find: The trans-atlantic data privacy dispute, territorial jurisdiction and global governance*, in *Review of International Studies*, 2003, p. 111, 115; more in general, see J.R. Reidenberg, *Resolving Conflicting International Data Privacy Rules in Cyberspace*, in *Stanford Law Review*, 1999, p. 1315.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

individuals, rather than safeguard their rights and integrity.[120] No unitary provision provides for a comprehensive data privacy regulation, and even at statutory level a general data privacy law is yet to be found.[121] However, several sources of law, both at federal and statutory level regulate the matter on a sector-specific basis. At federal level, the Fourth Amendment of the United States Constitution has been interpreted to include the protection of privacy under the more general right to protection against unreasonable searches and seizures.[122] However, an express referral to privacy is made in the Californian Constitution in its Article 1; California – together with the Constitutions of Florida and Montana – are examples of State-level constitutional protection of privacy. Due to the fact that data privacy in the United States directly derives from the broader concept of privacy, it can be argued that those provisions generally protect the right to informational privacy too.[123]

Federal laws also address the right to data privacy on what it has been called a sector-specific approach.[124] Typically, these laws tend to tackle a specific, single issue. Examples of these specific issues are: the collection, processing, and dissemination of information by federal agencies;[125] the disclosure of consumer-credit data to companies;[126] the processing and

---

[120] Cf. S.J. Kobrin, *Safe harbours are hard to find: The trans-atlantic data privacy dispute, territorial jurisdiction and global governance*, in *Review of International Studies*, 2003, p. 111, 115.

[121] International Law Association Committee on the protection of privacy in private international and procedural law, *The concept of privacy in the national systems – interim report*, 2015, not yet published.

[122] See especially *Griswold v Connecticut,* 381 US 479 (1965), a case in which privacy was a reason for overturning a State law that prohibited contraceptives; *Roe v Wade*, 410 US 113 (1973), in a case of abortion; *Lawrence v Texas*, 539 US 558 (2003) banning an anti-homosexuality law as being against freedom of the individual regarding intimacy.

[123] For a comprehensive and exhaustive study on privacy in American constitutional law, see: D.J. Garrow, *Privacy and the American Constitution*, in *Social Research*, 2001, p. 55.

[124] See, in general, F.H. Cate, *The changing face of privacy protection in the European Union and the United States*, in *Indiana Law Review*, 1999, p. 173; cf. M. Cunningham, *Diminishing sovereignty: how European privacy law became international norm*, in *Santa Clara Journal of International Law*, 2013, p. 421, 441; cf. also G. Pearce, N. Platten, *Orchestrating transatlantic approaches to personal data protection: a European perspective*, in *Fordham International Law Journal*, 1999, p. 2024, 2036.

[125] It is the case of the Federal Privacy Act of 1974, 5 USC § 552a (1994); the full text of the FPA is available online at the website: justice.gov (last accessed 7 October 2016).

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

storage of banking data for investigative purposes;[127] the online gathering of information on minors;[128] and the processing of personal data by telephone marketers[129] and TV companies.[130] A similar approach is adopted by State law, which follows the federal path to regulate data privacy on a sectoral basis.[131] These laws highlight the fact that the United States' approach to data privacy is driven by the necessity to regulate data processing within a certain activity. For now, the United States has not enacted legislation that creates a comprehensive framework of rights to retain control over personal information.

Therefore, it must be inferred that the two sides of the Atlantic protect data privacy from two strongly different perspectives. The first is the European fundamental-rights perspective, according to which data privacy belongs to personality rights and is the object of specific, comprehensive, preventative protection.[132] The second is the fragmented, United States' ap-

---

[126] This is the case of the Fair Credit Reporting Act of 1970, 15 USC § 1681 et seq. (1994); the full text of the FCRA is available online at the website: consumer.ftc.gov (last accessed 7 October 2016).

[127] As in the case of the Bank Secrecy Act of 1970, 31 USC § 5311 et seq.; the full text of the BSA is available online at the website: law.cornell.edu (last accessed 7 October 2016).

[128] It is the case of the Children's Online Privacy Protection Act of 1998, 15 USC § 6501 et seq.; the full text of the COPPA is available online at the website: ftc.gov (last accessed 7 October 2016).

[129] An example is the case of the Telephone Consumer Protection Act of 1991, 41 USC § 227; the full text of the TCPA is available online at the website: transition.fcc.gov (last accessed 7 October 2016).

[130] As in the case of the Cable Communications Policy Act of 1984, 47 USC § 551; the full text, amended by the Telecommunications Act of 1996 is available online at the website: transition.fcc.gov (last accessed 7 October 2016). The list of federal laws that lay down provisions in data privacy matters is however quite long: The Communications Act of 1934, the Family Educational Rights And Privacy Act of 1974, the Foreign Intelligence Surveillance Act of 1978, the Right to Financial Privacy Act of 1978, the Privacy Protection Act of 1980, the Electronic Communications Privacy Act of 1986, the Computer Matching and Privacy Protection Act of 1988, the Communications Assistance for Law Enforcement Act of 1994, the Driver's Privacy Protection Act of 1994, the Health Insurance Portability and Accountability Act of 1996, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, the Identity Theft and Assumption Deterrence Act of 1998, the Gramm-Leach-Bliley Financial Modernization Act of 1999, the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, all available online at the websites of the responsible federal agencies (last accessed 7 October 2016). The list is not complete nor exhaustive. On the content of the four most important data privacy acts, see generally T.B. Loring, *An analysis of the informational privacy protection afforded by the European Union and the United States*, in *Texas International Law Journal*, 2002, p. 421, 429.

[131] For instance, the New York Personal Privacy Protection Law of 1984 concerning the processing of personal information in public records. See: dos.ny.gov (last accessed 7 October 2016).

[132] Cf. M. Cunningham, *Diminishing Sovereignty: How European Privacy Law Became International Norm*, in *Santa Clara Journal of International Law*, 2013, p. 421, 441.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

proach, which is extremely market oriented and affords protection to the extent to which it is strictly necessary and needed in the sector under regulation.[133] Further proof of the market-oriented approach is given by the fact that while in Europe data authorities are usually independent authorities, in the United States this function is mainly carried out by the Federal Trade Commission (FTC). However, the FTC only supervises trade-related aspects, while communication-related aspects are supervised by the Federal Communications Commission. Other agencies are responsible for data-processing supervision in activities that fall within their own scope of action.

Due to this aspect, it is rather difficult to characterise the American approach as being either fundamental-rights oriented, consumer-rights oriented, or property-rights oriented. As it has been stated, data privacy belongs to the rights of the person, but it is not an object of comprehensive legislation and the Federal Constitution does not mention it. When it comes to consumer law, sectoral laws protect citizens with regard to the processing of their data. However, protection is only considered a necessary aspect of the regulation of the specific cases, and no comprehensive consumer-law legislation regulates data privacy. Finally, scholars have argued that a shift towards a proprietary-rights model would represent a positive market incentive, as today's online economic activities *de facto* already see data as an alienable commodity.[134]

---

[133] Cf. T.B. Loring, *An Analysis of the Informational Privacy Protection Afforded by the European Union and the United States*, in *Texas International Law Journal*, 2002, p. 421, 425. Actually, it has to be pointed out that data privacy laws in America are usually put in place right after data privacy disasters that involve the public opinion.

[134] Cf. S.J. Kobrin, *Safe harbours are hard to find: the trans-atlantic data privacy dispute, territorial jurisdiction and global governance*, in *Review of International Studies*, 2003, p. 111, 116; cf. also J. Kang, *Information privacy in cyberspace transactions*, in *Stanford Law Review*, 1998, p. 1193, 1246, and J. Kulesza, *International law challenges to location privacy protection*, in *International Data Privacy Law*, 2013, p. 158, 163.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

C. On the desirability of a shift towards property: the way to unity?

Due both to the transatlantic clash and to the intrinsic nature of data privacy, it has been proposed by scholars to shift the data privacy paradigm towards a property-like system of rights.[135] It has indeed been argued that the focus of privacy already shifted from the ancient focus on the protection of the land, to the protection of the person, and now, to the protection of information, which could be seen as a new currency.[136]

For our purposes, property may be defined as the right that allows the owner to exclude everyone else from possessing or using the object of ownership.[137] Under European Union law, as well as under American law, property rights in personal data do not currently exist.[138] According to its supporters, the rationale of such a paradigm shift stems from the need to ensure a greater degree of individual control over personal data, in a world in which data is *de facto* already a commodity and the object of transactions. Moreover, the amount of personal data gathered through activities is one of the criteria that is taken into account when assessing the value of companies. In addition, people already have the impression of having property-like rights over their personal rights. For example, some Facebook users periodically publish

[135] In general on this, see J. Litman, *Information privacy/information property*, in *Stanford Law Review*, 2000, p. 1283, R. Murphy, *Property rights in personal information: an economic defence of privacy*, in *The Georgetown Law Journal*, 1996, p. 2381, P.M. Schwartz, *Property, privacy and personal data*, in *Harvard Law Review*, 2003, p. 2056; P. Samuelson, *Privacy as intellectual property?*, in *Stanford Law Review*, 2000, p. 1125, 1126. See also L. Lessig, *Code and other laws of cyberspace*, Basic, 1999, p. 142 et seq.; see also L. Lessig, *Code and other laws of cyberspace: version 2.0*, II ed., Basic, 2006, p. 200 et seq.

[136] Understood as 'data'. Cf. C. Rees, *Tomorrow's privacy: personal information as property*, in *International Data Privacy Law*, 2013, p. 220, 220.

[137] Cf. B.A. Garner (ed), *Black's Law Dictionary*, West Group, 1999.

[138] On the United States, see: M. Cunningham, *Diminishing Sovereignty: How European privacy law became international norm*, in *Santa Clara Journal of International Law*, 2013, p. 421; P. Samuelson, *Privacy as intellectual property?*, in *Stanford Law Review*, 2000, p. 1125; on the European Union, see O. Lynskey, *The foundations of EU data protection law*, Oxford University Press, 2011, p. 229 et seq.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

status updates that make reference to international legal instruments, such as the Berne Convention of 1886,[139] in order to assert a property-like right over their personal data.

Such a paradigm would have several beneficial effects. The most important one would be to create a right that is known in almost every legal system, and which would be characterised by similar, legal requirements and consequences. This would allow for a smoother and more clear legal approach, as both people and legal experts would be able to predict the outcome of disputes with a high degree of certainty. This approach would impact private international law rules, as it would remove some restrictions that nowadays derive from public policy aspects of data privacy, including its ranking as a fundamental right in some legal systems.[140] Another advantage, is that it would shift the approach of private actors towards personal data. Indeed, propertisation is claimed to be a catalyst to change the perspective of companies, which would shift from a 'burden' perspective to a 'opportunity' perspective. Data privacy rules would not be seen as a regulatory burden imposed by States, as it would have its own explicit economic value.[141]

A second improvement would be represented by autonomy itself. Indeed, individuals would be able to allocate their personal degree of value in data privacy. They would be able to negotiate with private parties to what extent their data are collected, processed, and disseminated. They would also be able to negotiate the threshold at which they prefer to keep details about themselves private versus when they are open to disseminate them.

However, a propertisation of personal data also entails prospective, negative consequences. The first and more blatant shortcoming is market driven. By shifting to a market-oriented ap-

[139] Convention for the Protection of Literary and Artistic Works, adopted in Berne on 9 September 1886. The text of the convention is available at the website: wipo.int (last accessed 7 October 2016).

[140] See *supra*, paragraph 3.A.

[141] Cf. C. Rees, *Tomorrow's privacy: personal information as property*, in *International Data Privacy Law*, 2013, p. 220, 221. Of the same view is J. Litman, *Information privacy/information property*, in *Stanford Law Review*, 2000, p. 1283, 1292.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

proach to data privacy, one would expect that market dynamics would drive to a competitive balance. However, it has been correctly argued that a market-driven approach could also bring dramatic market failures deriving from the intrinsic imbalance of contractual power between individuals and companies.[142] This criticism is undeniable, especially if one takes into account the present privacy policies and terms of service that must be accepted by users that sign up for a certain service. In principle, no service allows the user to choose to what extent their personal data are collected by the service, while most of them allow for a *prima facie* control over dissemination.[143] However, it has to be pointed out that this control actually concerns the data that users voluntarily upload, while nothing usually prevents the service from assigning or licencing the use of the data to third parties.

A second, and even more, relevant criticism concerns the true meaning of property. Indeed, property allows owners to exclude everyone else from the possessing or using the object of the right, but it also allows them to dispose of it, with the consequent loss of rights. In the case of personal data, this may represent a second failure, as personal data are not objects, and not even intangible goods. They are information, which is subject to constant change. Transferring such goods would prevent the owner from controlling to what extent such a transfer ends,[144] but it would also cast a shadow on the ability to keep such data updated, especially when it gets transferred a second, or a third time. These concerns sum up existing issues, such as the compatibility of a property regime with the fundamental-rights categorisation of data privacy in some jurisdictions.

---

[142] Cf. O. Lynskey, *The foundations of EU data protection law*, Oxford University Press, 2011, p. 247 et seq.

[143] This is the case of google.com; facebook.com; twitter.com; and instagram.com, as well as the most famous smartphone applications, such as WhatsApp, Snapchat, and Telegram.

[144] For example, data gathering would become timely unlimited.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

As it may be argued, a complete commodification is difficult to foresee, especially in the near future.[145] However, some contributions address the matter in a logical manner. Cuijpers argues that rights over personal data may be divided into personal rights and rights to use.[146] To put it differently, the right to data privacy may be understood as both the right to protect its immaterial value and to protect and retain control over the economic value of data. Samuelson goes even beyond, proposing a shift to a system of rights similar to that of intellectual property; this would allow the data subject to grant a certain kind of right to the processor, while still being able to object to their usage made by the processor if this impacts the personal-rights aspect.[147]

However, this approach is not entirely applicable to data privacy cases. Indeed, the analysis of the previous chapters highlights the strong predominance of personhood in data privacy matters. Indeed, although United States' law has been found to be market oriented, it is undeniable that data privacy stems from the right to privacy, which is protected as a personality right in the United States too. Even more relevant is the European approach, for which the personality-rights implications are predominant. When aspects of personality rights are at stake, it is most difficult to foresee a shift towards property rights. Indeed, such a shift would be beneficial in terms of transatlantic harmonisation (or harmonisability), but it would not be free of critical aspects. Because of the relevance and uncertainty of these elements, the position of states is likely to remain unchanged.[148]

---

[145] Cf. M. Cunningham, *Diminishing sovereignty: how European privacy law became international norm*, in *Santa Clara Journal of International Law*, 2013, p. 421, 445.

[146] C. Cuijpers, *A private law approach to privacy; mandatory law obliged?*, in *SCRIPT-ed*, 2007, p. 304, 315.

[147] P. Samuelson, *Privacy as intellectual property?*, in *Stanford Law Review*, 2000, p. 1125, 1149.

[148] Further on data privacy and property, see R. Murphy, *Property rights in personal information: an economic defence of privacy*, in *The Georgetown Law Journal*, 1996, p. 2381; J. Litman, *Information privacy/information property*, in *Stanford Law Review*, 2000, p. 1283; P.M. Schwartz, *Property, privacy and personal data*, in *Harvard Law Review*, 2003, p. 2056; N. Purtova, *Private law solutions in European*

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

4. Approaching the European Union: the current legal framework

After outlining the concept of data privacy and those aspects that characterise the continental approach to this matter, it is necessary to give a brief overview of the legislative initiatives in data privacy matters. In particular, it seems appropriate to examine those legislative tools that affect European States, regardless of their source, and with special emphasis on those affecting the European Union. Then, the enforcement mechanisms provided for by the European Union will be briefly addressed.

A. International legal sources

At the international level, no comprehensive legal framework exists with regard to the processing of personal data. No universal convention has ever been drafted, and most of the normative work has been carried out by regional organisations and national legislators.[149]

However, it is specifically within the general universal covenants that the roots of the right to privacy and data protection should be sought. Indeed, it is nowadays clear that the major international declarations and treaties on the protection of human rights build up the basis for the protection of personal data of individuals. In this field, an important role is played by the

---

data protection: relationship to privacy, and waiver of data protection rights, in *Netherlands Quarterly of Human Rights*, 2010, p. 179; N. Purtova, *Property rights in personal data: a European perspective*, Wolters Kluwer, 2012; A. Mantelero, *Competitive value of data protection: the impact of data protection regulation on online behaviour*, in *International Data Privacy Law*, 2013, p. 229; C. Rees, *Who owns our data?*, in *Computer Law and Security Review*, 2014, p. 75; P.M. Schwartz, D.J. Solove, *Reconciling personal information in the United States and European Union*, in *California Law Review*, 2014, p. 877.

[149] Cf. L.A. Bygrave, *International agreements to protect personal data*, in J.B. Rule, G. Greenleaf, *Global privacy protection, the first generation*, Elgar, 2008, p. 15, 16 et seq.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Universal Declaration of Human Rights of 1948[150] and by the International Covenant on Civil and Political Rights of 1966.[151]

In particular, Article 12 of the Universal Declaration provides that 'no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks'.[152]

Identically, the International Covenant provides at its Article 17 that 'no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation', and that 'everyone has the right to the protection of the law against such interference or attacks'.[153]

For the purposes of monitoring the implementation of the International Covenant, the Human Rights Committee has been established. With regard to data privacy, the Committee confirmed in its general comment of 23 March 1988 that the Covenant requires that personal data of individuals to be processed in accordance with basic data privacy principles, and that the matter should be regulated by legal instruments that address processing in both the public and private sectors.[154]

---

[150] United Nations General Assembly, Resolution 217A(III) of 10 December 1948, available at the website: un.org (last accessed 7 October 2016).

[151] United Nations General Assembly, Resolution 2200A(XXI) of 16 December 1966 (however in force starting 23 March 1976), available at the website: un.org (last accessed 7 October 2016).

[152] On the Universal Declaration, see L. Pineschi, *La Dichiarazione universale dei diritti umani*, in L. Pineschi (ed), *La tutela internazionale dei diritti umani*, Giuffrè, 2015, p. 67 et seq.

[153] On Article 17 of the International Covenant, see M. Nowak, *U.N. Covenant on Civil and Political Rights – CCPR commentary*, Engel, 2005, p. 377 et seq., see esp. para 23. See also L.A. Bygrave, *Data protection pursuant to the right to privacy in human rights treaties*, in *International journal of law and information technology*, 1998, p. 247.

[154] General Comment No 16 of 23 March 1988, code A/43/40, p. 180 et seq.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Most recently, a Special Rapporteur on the right to privacy has been appointed within the United Nations.[155] Indeed, following the concerns expressed by the General Assembly with regard to the increasing surveillance practices of some States, a study has been commissioned on the protection of such rights. Again, no mention has been made by the Rapporteur to the issue analysed in this work in its first Report to the General Assembly.

Finally, a brief mention of the so-called Umbrella Agreement[156] is necessary. Indeed, most recently, the European Union and the United States of America agreed on a treaty concerning the transfer of personal data for law enforcement purposes. The Umbrella Agreement, not yet in force, will provide with a framework of rules for the transfer of personal data of the citizens of the Union to the United States and *vice versa*. It covers all personal data exchanged between police and criminal justice authorities of the Member States and the United States federal authorities for the purpose of prevention, investigation, detection, and prosecution of criminal offences, including terrorism.[157] Regardless of the fact that such an agreement does not address the matters treated in this work,[158] it could be argued that such an agreement represents a step forward and reduces the existing frictions in data privacy matters.[159] The agreement may eventually overcome the divide with regard to private-to-private relationships. Nonetheless, practice does not confirm such a forecast. Indeed, it must be noted that the current approach of the Union is to separate fully the matter of law enforcement from that of the protection of data in civil and commercial relationships. In the recent *Schrems* judgment, the

---

[155] See Human Rights Council Resolution 28/16, code A/HRC/28/L.27 of 24 March 2015, available online at the website: un.org (last accessed 7 October 2016).

[156] Agreement between the United Stated of America and the European Union on the protection of personal information relating to the prevention, investigation, detection, and prosecution of criminal offenses. The text of the agreement is available at the website of the European Council: consilium.europa.eu (last accessed 7 October 2016).

[157] See Article 3 of the Agreement, concerning the scope of application thereof.

[158] Indeed, this work only addresses private-to-private relationships.

[159] See *supra*, chapter I, para 3 on the so-called transatlantic divide.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Court of Justice of the European Union declared that the *Safe Harbor* scheme for the trans-border transfer of personal data in civil and commercial matters was invalid.[160] In that case, law enforcement agencies of the United States accessed personal data of European residents, which were transferred overseas in normal internet-related activities. Given the fact that the authorities were able to access the data gained by Facebook Inc. (in the *Schrems* case), the scheme was not compliant with the standards granted in the Union. Indeed, data protection authorities are entitled to examine data privacy-related complaints, pursuant to Article 28 of the European Union Directive 95/46/EC.[161] The *Safe Harbor* system deprived them of this prerogative.[162] Therefore, it must be argued that from the point of view of the Union, a severe clash still exists between the European and the American approaches to data privacy.

B. Regional legal sources

At the regional level, the initiatives on the European continent are numerous. The Council of Europe was one of the first international, regional organisations to adopt provisions concerning privacy matters. The European Convention on Human Rights of 1950 has been already addressed as the first tool in Europe protecting the right to privacy,[163] and, due to the case-law of the European Court of Human Rights, data privacy as well.[164] Article 8(1) of the

---

[160] CJEU, case C-362/14, *Schrems,* ECLI:EU:C:2015:650. On the *Schrems* judgment, also compared to other data-privacy related judgments, see *inter alia* O. Pollicino, M. Bassini, *La carta dei diritti fondamentali dell'Unione europea nel reasoning dei giudici di Lussemburgo*, in *Diritto dell'informazione e dell'informatica,* 2015, p. 741.

[161] See *infra*, next paragraph.

[162] See *Schrems* judgment, para 102. On the Safe harbor system and the *Schrems* judgment, see also J. Chen, *When the safe harbour is not safe: what next for the EU*, in *SCRIPT-ed*, 2015, p. 167.

[163] See *supra*, chapter 1, para 2.B.

[164] Convention for the protection of human rights and fundamental freedoms of 4 November 1950. The official text of the convention is available online at the website: echr.coe.int (last accessed 7 October 2016). Please note that the Member States of the Council of Europe are 47: all the continental European countries except for Belarus and Kosovo; Armenia; Azerbaijan; Georgia; Iceland; Russian Federation; Turkey; United Kingdom.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Convention provides that '[e]veryone has the right to respect for his private and family life, his home and his correspondence'. This article was interpreted by the ECtHR as encompassing the protection of individuals with regard to the processing of personal data on several occasions. Indeed, the scope of Article 8 has been interpreted as including aspects such as the secrecy of telephone calls,[165] video surveillance,[166] and voice recordings.[167] In several cases, the scope of Article 8 was expanded to include explicitly aspects of data privacy, such as the processing of telephone numbers,[168] emails,[169] and general data regarding the private life of an individual.[170]

However, consequences of the broadening of the scope of application of the convention in order to include data privacy has been seen by a few as in virtual conflict with other interests, such as economic interests, resulting in situations of economic protectionism.[171] To this purpose, the Council of Europe adopted a further convention that protects the rights of the individuals with regard to the automatic processing of their personal data: Convention No 108 of 1981.[172] This Convention is a piece of legislation that provides for standards of protection for personal data,[173] and addresses the cross-border transfer of data, which was a novelty in the field at that time. However, again this tool does not provide for rules that are directly en-

---

[165] ECtHR, *Klass v Germany,* 6 September 1978, Case No 5029/71, para 41; *Amann v Switzerland*, 16 February 2000, Case No 27798/95, para 44; *Halford v United Kingdom*, 25 June 1997, Case No 20605/92, para 44.

[166] ECtHR, *Peck v United Kingdom*, 28 January 2003, Case No 44647/98, para 57 et seq.

[167] ECtHR, *P.G. and J.H. v United Kingdom,* 25 September 2001, Case No 44787/98, para 59 et seq.

[168] ECtHR, *Malone v United Kingdom,* 2 August 1984, Case No 8691/79, para 84.

[169] ECtHR, *Copland v United Kingdom*, 3 April 2007, Case No 62617/00, para 41.

[170] *Ibidem*, para 43. Here the Court expressly stated that 'storing of personal data relating to the private life of an individual also falls within the application of Article 8(1) (…). Thus, it is irrelevant that the data (…) were not disclosed or used against the applicant (…)'.

[171] See *inter alia* R. Ellger, *Der Datenschutz im gernzüberschreitenden Datenverkehr: eine rechtsvergleichende und kollisionsrechtliche Untersuchung*, Nomos, 1990.

[172] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, available online at the website coe.int (last accessed 7 October 2016).

[173] Which have been evaluated as 'hardly groundbreaking' by Bygrave. See L.A. Bygrave, International p. 22.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

forceable by private parties.[174] The Convention intends to work as an incentive for bound Council of Europe States to embark in legislative initiatives, rather than providing for directly applicable legislation.[175]

The privacy guidelines issued by the Organisation for Economic Co-operation and Development[176] are also not directly applicable in court. Also, they are not binding for OECD Member States.[177] Indeed, their aim is to increase awareness among OECD countries and to ensure that these countries take into account the principles stated therein when drafting legislation that may impact on privacy. Nonetheless, despite not being binding, such rules urge Member States to enact legislation protecting privacy and individual liberties.[178]

Nonetheless, the main initiative that is relevant to the present work is the legislative work of the European Union, which enacted a directive on the protection of personal data and establishes a regime that is enforceable in court.[179] Directive 95/46/EC (Data privacy directive) has been duly implemented by Member States through the enactment of national legislation that imposes duties on and grants rights to private individuals and companies. The Data Privacy Directive is currently the most advanced piece of legislation in force in Europe with regard to the right to the protection of personal data. The aims of the Directive are both to safeguard the functioning of the internal market and to safeguard the right to privacy.[180] The Directive also provides substantive rights that Member States have to introduce in their legal system, such as the unlawfulness of data processing without consent and the additional provi-

---

[174] See Explanatory report to Convention No 108, at paragraph 38 et seq.

[175] See, *ex multis*, S. Simitis, *Datenschutz und Europaeischer Gemeinschaft*, in *Recht der Datenverarbeitung*, 1990, p. 3, 9 et seq.

[176] Guidelines governing the protection of privacy and trans-border flows of personal data of 1980, available online at: oecd.org (last accessed 7 October 2016).

[177] In general, on soft-law, see I. Seidl-Hohenveldern, *International economic 'soft law'*, Collected courses of the Hague Academy of international law, vol. 163, Brill, 2016.

[178] See Paragraph 2 of the Guidelines.

[179] See *infra*, chapter III, para 2.

[180] See Article 1 of the Directive.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

sions concerning sensitive data. Based on Convention No 108, the Data Privacy Directive lays down extensive provisions concerning data transfers, but it also innovates by imposing on Member States the responsibility to create independent authorities equipped with the power to enforce data privacy law. These authorities can impose fines upon data controllers/processors that unlawfully process personal data.

In an effort to enforce the data privacy system of the Union, Regulation (EU) 2016/679 has been recently issued. This Regulation will bring uniformity to data protection in the territory of the Union, and will tackle issues with technological development that were not foreseeable by the drafters of the Data Privacy Directive.[181] Indeed, while the Regulation generally confirms the goals of the directive with regard to obligations such as consent and right to rectification,[182] it also innovates by introducing new rules on the right to be forgotten,[183] on the so-called privacy-by-design, and, most relevant to the present investigation, on the territorial scope of application[184] and on the cross-border enforcement of data privacy rights.[185]

Finally, the Union also implemented directives on electronic communications, which are sectoral instruments for regulating specific matters.[186] While they do not overlap with the

---

[181] Regulation (EU) 2016/679 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 *Official Journal*, 2016, L 119.

[182] However, the concept of consent has been further detailed in the new Regulation, as to require a 'positive' action by the data subject. Put it differently, tacit approval will not be considered lawful anymore under the upcoming system. See Article 4(11) of Regulation (EU) 2016/679.

[183] See Article 17 of the new Regulation. Such an Article directly builds upon the *Google Spain* judgment: CJEU, case C-131/12, *Google Spain SL and Google Inc.*, ECLI:EU:C:2014:317. On this judgment, see *infra*, chapter II, para 4.B.iii.

[184] Indeed, while Directive 95/46/EC required the processing to be carried out in the context of the activities of an establishment of the controller on the territory of one Member State (Article 4), Article 3 of the new Regulation extends the reach of such legislation to controllers established outside the Union, if the data subject is in the Union and if the activities of the controller where directed to the Union. On this, see extensively *infra*, chapter III, para 2.

[185] On this matter, see extensively *infra*, chapter II, para 5.A.ii.

[186] See Directive 97/66/EC concerning the processing of personal data and the protection of privacy in the telecommunications sector, and Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

95/46/EC directive scope of application, they are complementary tools to give a more complete protection to personal data. However, due to the approach of the present work, it seems appropriate to exclude the *Telco-Privacy* and the *ePrivacy* directives. These directives lack any provision relevant to private international law, due to their complementary approach to Directive 95/46/EC, which is the general tool that also defines the scope of application of the data privacy regime in the European Union.[187]

5. Enforcement mechanisms

In the system of European Directive 95/46/EC and of its implementing tools,[188] as well as in the upcoming system of Regulation (EU) 2016/679, enforcement is based on two different paths. The data subject who initiates the proceeding may choose between these paths. Indeed, data-privacy-related disputes may be brought both before administrative authorities, namely the data protection authorities established under Article 28 of the Directive,[189] and before courts competent to hear cases in civil and commercial matters.[190]

A. Administrative litigation

The first and, so far, most used path of litigation in data privacy matters is administrative litigation. In this case, several scenarios may be envisaged. Under Article 28 of the Directive,

---

[187] On the scope of application of the Directive, see extensively *infra*, chapter III, para 2.

[188] Such as Italian Legislative Decree No 196/2003 Data Protection Code, or the British Data Protection Act of 1998 mentioned *supra*, I.2.B.

[189] Article 28 of Directive 95/46/EC. In the new Regulation, the rule providing for administrative remedies in data privacy matters is at Article 77.

[190] Such prerogative is provided for under Article 22 of Directive 95/46/EC. Article 79 of the new GDPR provides for such a prerogative in the upcoming system. On this, see *infra*, chapter II, para 5.A.ii. In general, on such proceedings, see M. Brkan, *Data Protection and European Private International Law*, in *International Data Privacy Law*, 2015, p. 257.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

data authorities[191] have the powers of investigation, of intervention in data-privacy-law breaches, and are also equipped with legal standing before courts, should their provisions not be complied with by the parties.

In the administrative path of litigation, data subjects may bring claims when they allege their right has been violated, pursuant to Article 28(4) of the Directive (actually, of its implementing legislation).[192] In this case, the data authority will carry out an investigation that may either determine the lawfulness of the processing of personal data, or issue a declaration on its unlawfulness. In this second case, the authority may order the freezing, cancellation, or erasure of the data, or order the ceasing of the processing of such data by the controller (injunction).[193]

However, despite the fact that the new Regulation broadens the prerogatives of data authorities when prosecuting the infringement of data privacy rights,[194] the power of authorities does not go beyond those explicitly included in the legislation's test. Therefore, they do not enjoy the full power of national judicial authorities. Indeed, the most relevant kind of action related to the present work, which is the action for damages for data privacy law infringements, is not among the demands that data subjects may bring forward before data authorities.[195] Moreover, it has to be pointed out that data privacy authorities only apply their

---

[191] Which are independent authorities set up in compliance with Article 28, and soon with Article 51 of the General Data Protection Regulation.

[192] See *infra*, chapter II, para 2, on direct effect of directives and, in particular, on the Data Privacy Directive.

[193] See Article 28(3)(2) of the Directive and Article 58 of the new Regulation. In general, on the powers of data authorities, see F. Pizzetti, *Privacy e il diritto europeo alla protezione dei dati personali: dalla Direttiva 95/46 al nuovo Regolamento europeo*, Giappichelli, 2016, p. 112 et seq.

[194] For instance, though the new Regulation data authorities gain new investigative powers, new corrective powers, as well as few new advisory powers.

[195] See, for instance, Article 82(6) of the new Regulation, which explicitly states that 'proceedings for exercising the right to receive compensation shall be brought before the courts competent under the law of the Member State referred to in Article 79(2)': Article 79 regulates actions in civil and commercial matters, while administrative actions are regulated by Article 77.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

national implementation law when dealing with data-infringement cases. This means that the private international law question – although not entirely excluded in this path – is not dealt with in the same way it would be dealt with in civil litigation path, as the administrative courts will just assess whether the legislation compliance to with they are in charge of monitoring, is applicable to the case.[196]

However, challenging administrative decisions issued by national data authorities must be done before courts (administrative courts, typically).[197] In addition, data authorities are public authorities in exercise of their public powers, which also renders private international law not applicable. However, the private international law question is triggered in disputes of civil and commercial law.

B. Litigation before courts competent in civil and commercial matters

In the path of civil and commercial law, the private international law question will arise. This is because the European Union private international law Regulations No 1215/2012[198] and No 593/2008[199] do not exclude data privacy-related matters from their scope of application. Conversely, the system created by the Directive and the upcoming Regulation provides for the possibility to resort to civil justice.[200] The Directive accomplishes this without providing for rules on the determination of the competent courts and of the law applicable to the

[196] This shall not mean that international cases cannot be brought before administrative courts, but instead that administrative justice will not address the same number of issues. On the mandatory regime of the Directive, see *infra*, chapter III, para 2.

[197] See the exclusion of administrative matters included in Articles 1 of the Brussels Ia Regulation, Rome I Regulation, and Rome II Regulation. See also the considerations of M. Brkan, *Data Protection and European Private International Law*, in *International Data Privacy Law*, 2015, p. 257, 259.

[198] Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), in *Official Journal*, 2012, L 351. For further reference on this Regulation, see *infra*, fn. 211.

[199] Regulation (EC) No 593/2008 on the on the law applicable to contractual obligations ('Rome I'), in *Official Journal*, 2008, L 177. For further reference on this Regulation, see *infra*, fn. 458.

[200] See Article 22 of the Directive and Article 79 of the new Regulation.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

substance of the parties' claims.[201] The Regulation only provides a few rules on jurisdiction.[202] Preliminarily, and from a hierarchical point of view, the possibility to resort to judicial authorities is not subordinate to appealing to administrative authorities.[203] Consequently, it is possible to build hypotheses on the civil-litigation path without taking into consideration paths, such as the administrative one, which would be exorbitant in respect of the private international law of the European Union and is not applicable to administrative matters in light of the exclusion provided for under the Brussels I regime.[204]

In the current system, the following two cases may be envisaged. The first and most trivial case is the dispute between the data subject and data controller. In this case, the matter fully falls within the scope of application of European private international law. Therefore, the competence of the court seised and the applicable law will be pre-emptively assessed by the court.

Another potential case is when data authorities act as the plaintiff on behalf of the data subject. In this case, it is not clear if such litigation would be civil and commercial litigation.[205] But, given the fact that according to the new Regulation (EU) 2016/679, which will replace Directive 95/46/EC starting 25 May 2018, authorities may claim damages on behalf of the data subjects, pursuant to its Article 76(1), it is also clear that such claims will be soon

---

[201] The matter of the presence or absence of rules on the determination of the applicable law is less trivial than that of the lack of rules on jurisdiction. On this issue, see *infra*, chapter III, para 2.A. On the lack of rules on jurisdiction in the Directive, see *infra*, chapter II, para 4.A.

[202] On the non-exhaustive nature of the new rules on jurisdiction contained in Regulation (EU) 2016/679, see *infra*, chapter II, para 5.A.i. In general, see also P. Franzina, *Jurisdiction regarding claims for the infringement of privacy rights under the General Data Protection Regulation*, in A. De Franceschi (ed), *European contract law and the digital single market: the implications of the digital revolution*, Intersentia, 2016, p. 81

[203] See Articles 22 and 79 of the Directive and of the Regulation respectively.

[204] See Article 1(1) of the Brussels Ia Regulation. On this exclusion applied to data privacy cases, see the few considerations by M. Brkan, *Data protection and European private international law,* in *International Data Privacy Law*, 2015, p. 257, 264.

[205] See M. Brkan, *Data Protection and European Private International Law*, in *International Data Privacy Law*, 2015, p. 257, 264.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

considered fully included in the ‘civil and commercial’ definition of European Union private international law.

6. Interim conclusions

Privacy law is a field in which it seems difficult to provide a clear-cut definition of its concepts and mechanisms. Born as the right to be left alone, the American concept of privacy evolved and also includes informational privacy, the American label for data protection.

On the other shore of the Atlantic Ocean, current data protection developed starting with the initiatives of a few national legislators, such as the Swedish. It now encompasses a supranational harmonisation Directive, which will be soon replaced by uniform law regulating the existence, substance, and enforcement of such a right.

The transatlantic divide casts shadows on the harmonisability of such a field in the future, especially in light of the developments in the last decade of European Union law in matters of data privacy. These developments go well beyond the mere entry into force of a directive, and also encompasses new rules in the Charter of Fundamental Rights of the European Union and its role in the negotiations for international treaties. Moreover, on the Old Continent, even non-European Union instruments actually serve as a tool for the protection of the fundamental right to privacy, such as the European Convention on Human Rights.

As it has been highlighted, the path of civil litigation is only one of the options upon which individuals may rely on when dealing with an alleged breaches of data privacy rules by a data controller in the internet environment. Nonetheless, it has also been highlighted that the most complete response to the demands of the plaintiff may be given in civil courts, rather than in administrative tribunals.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

CHAPTER II – JURISDICTION IN DATA PRIVACY MATTERS

1. Interim introduction

As outlined above,[206] internet data privacy raises several issues concerning its definition, the nature of protection, the nature of protected subjects, and the compatibility of the approaches adopted in several Countries, which represent the main places where data subjects and data controller/processors are located. These issues are reflected in the difficulty of harmonising substantive law, which rarely goes beyond international agreements on principles[207] and usually becomes more concrete at the regional level.[208] Increased concreteness may be seen especially in the European Union with the recently increased harmonisation through the new Regulation.[209]

Normative lack of harmonisation not only leads to a different level of protection in different Countries – which would not be different from most other legal fields – but also to a fragmentation of the procedural protection which the parties can benefit from. In such a system, private international law questions arise, and they concern all private international law aspects: the allocation of the competence to decide on the substance of data privacy protection, the determination of the applicable data privacy law, and the recognition and enforcement of judgments in such matters.

---

[206] See *supra*, chapter I.
[207] See *supra*, chapter I, para 4.A.
[208] See *supra*, chapter I, para 4.B.
[209] See *supra*, chapter I, para 4.B.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Concerning jurisdiction, the main question is if rules exist that are suitable to regulate the issue of internet data privacy. If they exist, a second question is whether they are sufficiently effective in order to achieve the goals of private international law, such as increasing procedural efficiency, ensuring predictability, and granting access to justice and the respect of fun-fundamental procedural rights.[210]

In the European Union, jurisdiction in civil and commercial matters is usually determined based on the Brussels I system. This system is composed of the Brussels Ia Regulation[211] (which replaced the Brussels I Regulation[212]) and the Brussels Convention of 1968.[213] Should the dispute fall outside the scope of the Brussels I system, national private international law legislation will be applicable.[214]

---

[210] Such core principles are reiterated in the preambles of all main European private international law instruments. See for instance Recitals No 15, 21 of Regulation No 1215/2012 Brussels Ia, Recitals No 14, 16 of Regulation No 864/2007 Rome II, Recital No 6 of Regulation No 593/2008 Rome I.

[211] Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Brussels Ia), in *Official Journal*, 2012, L 351. On the Brussels Ia Regulation in general, see P.A. Nielsen, *The new Brussels I Regulation*, in *Common Market Law Review*, 2013, p. 503; A. Nuyts, *La refonte du Règlement Bruxelles I*, in *Revue critique de droit international privé*, 2013, p. 1; A. Malatesta, *Regolamento (UE) n. 1215/2012 del 12 dicembre 2012 concernente la competenza giurisdizionale, il riconoscimento e l'esecuzione delle decisioni in materia civile e commerciale*, in F. Pocar, M.C. Baruffi, *Commentario breve ai trattati dell'Unione europea*, Cedam, 2014, p. 536; A. Dickinson, E. Lein, *The Brussels I Regulation Recast*, Oxford University Press, 2015; F. Salerno, G*iurisdizione ed efficacia delle decisioni straniere nel regolamento (UE) n. 1215/2012 (rifusione)*, Cedam, 2015; S.M. Carbone, C.E. Tuo, *Il nuovo spazio giudiziario europeo in materia civile e commerciale*, Giappichelli, 2016; U. Magnus, P. Mankowski (eds), *Brussels Ibis Regulation*, Otto Schmidt, 2016; A. Malatesta (ed), *La riforma del regolamento Bruxelles I. Il regolamento (UE) n. 1215/2012 sulla giurisdizione e l'efficacia delle decisioni in materia civile e commerciale*, Giuffrè, 2016.

[212] Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I), in *Official Journal*, 2001, L 12. In general on the Brussels I Regulation, see F. Salerno, *Giurisdizione ed efficacia delle decisioni straniere nel regolamento (CE) n. 44/2001 (La revisione della convenzione di Bruxelles del 1968)*, Cedam, 2006; S.M. Carbone, *Lo spazio giudiziario europeo in materia civile e commerciale – da Bruxelles I al regolamento (CE) n. 805/2004*, Giappichelli, 2009; A. Malatesta, *Regolamento (CE) n. 44/2001 del 22 dicembre 2000 concernente la competenza giurisdizionale, il riconoscimento e l'esecuzione delle decisioni in materia civile e commerciale*, in F. Pocar, M.C. Baruffi, *Commentario breve ai trattati dell'Unione europea*, Cedam, 2014, p. 517.

[213] Brussels Convention of 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, in *Official Journal*, 1972, L 299.

[214] For instance, Italian Law No 218/1995 'Reform of the Italian system of private international law', in *Official Journal of the Italian Republic*, 1995, No 128, available in English in *International Legal Materials*, 1996, p. 765.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

In order to properly tackle the issue of jurisdiction in internet data privacy matters, the present work will first outline the problems concerning the territorial approach upon which the current private international law system is based. This work will then assess the nature of the foreign element that triggers private international law in the dispute. Such preliminary considerations are necessary because internet relationships, and the personality right to data privacy, are not *per se* territorially intensive. This means that grounds of jurisdiction that are based on territorial rules may be put under stress by factors that are tightly connected to individuals – rather than places; jurisdiction may also relate to activities that are difficult to locate in a single place, such as those carried out on the internet. Then, it will be necessary to outline the development of the system in force and then the most recent legislative initiatives, already in force but not yet applicable in court.[215] However, the intra/extra-European divide on which the current European private international law system is mostly based is about to end due to the upcoming applicability of a Regulation with extraterritorial effects.[216] Thus, it is most appropriate to structure the following analysis by dividing the current and upcoming systems, rather than focusing on the classical intra-European and extra-European systems.

2. Territoriality and internet-related disputes

The internet is not a physical entity. Instead, it is a network composed of nodes, which are self-sufficient and connected to the web. Since data may be transmitted through several nodes of the network, it is not possible to determine where information is about to travel, or where it is located at a certain moment. Moreover, there is no 'central administrator' of the internet.

[215] Regulation (EU) 2016/679 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 *Official Journal*, 2016, L 119.

[216] On the accuracy of this statement, see the *caveat* made *infra*, fn. 242.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Providers manage access to the internet, and private parties manage their own servers and the access of users to these servers.[217] Data (and personal data) flow as bits (ordered series of 1 and 0) through this network, leaving the place where they are stored and reaching the place where the user requested it via the network of nodes.[218]

Since the very beginning of the spread of the internet as a tool of automated information exchange among private parties, scholars have investigated internet-related issues, including de-territorialisation.[219] For instance, it is difficult to locate an e-mail, which is made by data that travels through the web. One could argue that it is possible to locate the place where it is sent and the place where it arrives. Nonetheless, an email travels through several nodes and this movement is facilitated by several actors, such as access providers[220] and service providers.[221] Another relevant aspect, which sums up with a difficult localisation of the data, is instantaneity. Data moves extremely fast and through unpredictable routes, which sometimes are not foreseeable by users and – to some extent – not even by network managers.[222]

These aspects render the determination of the location of data in a certain moment extremely difficult. It would require the intervention of one or more of the several actors of the

---

[217] See for instance United States Supreme Court in *Reno v American Civil Liberties Union*, 521 U.S. 844 (1997), available online at supreme.justitia.com (last accessed 7 October 2016). See also T. Ballarino, *Internet nel mondo della legge*, Padova, 1998, p. 17 et seq.

[218] See M. Dodge, *Mapping how data flows*, in *e-OTI*, 2000, available online at isoc.org (last accessed 7 October 2016), and O. Bigos, *Jurisdiction over cross-border wrongs on the internet*, in *International and Comparative Law Quarterly*, 2005, p. 585.

[219] See *ex multis* M.J. Bonell, *Le iniziative dell'UNCITRAL in tema di EDI*, in *Informatica e attività giuridica*, *Atti del V Congresso internazionale della Corte Suprema di Cassazione*, Roma, 1993, p. 517 et seq.; S. Fadda, *L'Electronic Data Interchange nella normativa italiana e straniera*, in *Diritto dell'informazione e dell'informatica*, 1994, p. 91 et seq; U. Draetta, *Internet e commercio elettronico nel diritto internazionale dei privati*, Giuffrè, 2005, p. 23 et seq; D.J.B. Svantesson, *Private international law and the internet*, II ed., Kluwer Law International, 2016.

[220] This is the case of telecommunication companies, such as Virgin Media in the United Kingdom, or Fastweb in Italy.

[221] This is the case of Google's Gmail, Yahoo's Ymail, Apple's Me-mail.

[222] See DLA Piper, *New rules for a new age?*, 2009, available online at: dlapiper.com (last accessed 7 October 2016), p. 10 et seq.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

internet, such as the access provider or the service provider, in order to reconstruct the path followed by the data from its starting point to the arrival point. This is hardly foreseeable especially given the high amount of data exchanged daily.

Most important, however, is that regardless of the just-mentioned speed of information access, information is accessible everywhere. This means that regardless of the effort put into determining the location of data in a certain moment, starting from the originating location down to the access point, data may be simultaneously accessed at infinite access points.

De-territorialisation, instantaneity, and ubiquity of access make the internet a service that is intrinsically different from other means of communication. This difference is especially apparent in offline press and physical data archives, which in the field of internet data privacy would be the first matters to which the application of the existing approach would be foreseeable. This difference also raises some interpretation concerns with regard to all those rules – in this case private international law rules – which are based on the concept of territory and 'place'. As a consequence of these concerns, one could argue that the internet is nowhere. Moreover, it could be also argued that internet is everywhere, as it is indeed accessible everywhere users can link their devices to the network.[223]

For the purposes of this work, it will be necessary to distinguish the cases in which the rights protected are strictly territorial, and the cases that involve the procedural rules, which are based on territory.

[223] See in general D.J.B. Svantesson, *Private international law and the internet*, II ed., Kluwer Law International, 2016, chapter I.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

a) Territoriality-intense rights

With territoriality-intense rights, reference is made to substantive rights that have a remarkably consistent territorial delimitation. An example is intellectual property rights, which are protected in a State on a territorial basis: patents indeed only exist in the State of registration.[224] European private international law has been put under pressure in matters related to offline, territoriality-intense rights several times. In intellectual property matters, the current approach to jurisdiction is to favour the courts of the territory in which such rights are protected.[225] The underlying logic is that it would be only the courts of the place that recognises the right that may decide on its existence.[226] However, a clash takes place in the event of rules that do not directly pertain to the ascertainment of the existence of these rights, but regulate other related aspects, such as torts. Once it is established that a right does exist, even foreign courts would be able to ascertain whether it has been violated. This is not the current approach of European private international law. In the *GAT* case,[227] the special jurisdiction in non-contractual matters – which is based on the concept of *locus commissi delicti* – was inapplicable when determining the competent court to hear disputes in non-contractual matters in a case in which the validity of a patent was also contested. This led to a contraction of the

[224] With regard to territoriality of intellectual property rights, see for instance: M. Trimble, *Advancing national intellectual property policies in a transnational context*, in *Maryland Law Review*, 2015, p. 231.

[225] See in general B. Ubertazzi, *Exclusive Jurisdiction in Intellectual Property*, Mohr Siebeck, 2012, p. 139.

[226] This is the case of Article 24 of the Brussels Ia Regulation. It has to be noted that such a system will soon be replaced by the more modern system of the Unitary Patent. However, such a system, with its regulations entered into force in 2013, is not yet applicable due to the still ongoing process of ratification of the Agreement on a Unified Patent Court. See Regulation (EU) No 1257/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, data.europa.eu/eli/reg/2012/1257/oj; Regulation (EU) No 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements, ELI data.europa.eu/eli/reg/2012/1260/oj; Agreement on a Unified Patent Court, in *Official Journal*, 2013, C 175. For preliminary private international law related comments, please refer to C. Honorati (ed), *Luci e ombre del nuovo sistema UE di tutela brevettuale*, Giappichelli, 2014.

[227] CJEU, case C-4/03, *Gesellschaft für Antriebstechnik (GAT)*, ECLI:EU:C:2006:457.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Brussels I system in this territoriality-intense matter.[228] After that, the interpretation of the special forum on non-contractual matters has been also extremely restrictive in all those cases in which the issue of territoriality came into question, even in internet-related matters.[229]

b) Territorially based rules

Conversely, in all those matters in which it is the private international law rule – and not necessarily the right – that is territorially based, an opposite outcome will occur. Indeed, as it will be developed further in non-contractual matters,[230] applying the same approaches in offline cases to online matters may affirm the existence of several territories that contemporaneously show a sufficient link with the matter to be considered suitable of triggering the application of the territorially based rule. This is because the notion of *locus commissi delicti* is put under pressure by the de-territorialisation, ubiquity, and instantaneity of internet-related issues. These factors lead to the coexistence of several places that are potentially suitable for a consistent link to the matter. This is the case of personality rights, including data

---

[228] More specifically, the judge of the court seised shall suspend the case in order to let the judge of the place of registration of the patent – which is determined through Article 24 of the Brussels Ia Regulation – decide on the validity of said right, regardless of the fact that the question on the validity of the intellectual property was raised by way of an action or as a defence. See also: P. Torremans, *The widening reach of the exclusive jurisdiction: where can you litigate IP rights after GAT?*, in A. Nuyts (ed), *International litigation in intellectual property and information technology*, Kluwer Law International, 2008, p. 72. With regard to data privacy, the distinction between existence and violation is also relevant: with regard to applicable law, Italian Law No 218/1995 provides for a connecting factor for the determination of the existence of personality rights, and a connecting factor concerning the violation of said rights. See *infra*, chapter III, para 4.B. With regard to the ground of jurisdiction of the *locus commissi delicti* in the Brussels regime, see *infra*, para 4.B.5.

[229] This is the case of the *Pinckney* and *Wintersteiger* judgments, in which the *Shevill* and *eDate* doctrines have been interpreted with a higher degree of restrictivity in order to take into account territoriality of intellectual property rights. See CJEU, case C-523/10, *Wintersteiger*, ECLI:EU:C:2012:220; CJEU, case C-170/12, *Pinckney*, ECLI:EU:C:2013:635. See also: N. Boschiero, *Il principio di territorialità in materia di proprietà intellettuale: conflitti di leggi e giurisdizione*, in *Annali italiani del diritto d'autore, della cultura e dello spettacolo*, 2007, p. 35; P. De Miguel Asensio, *Cross-border adjudication of intellectual property rights and competition between jurisdictions*, in *Annali italiani del diritto d'autore, della cultura e dello spettacolo*, 2007, p. 105.

[230] See *infra*, paragraph 4.B.v.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

privacy, in the current interpretation of the Court of Justice of the European Union. This approach increases the number of parallel fora with serious consequences on the governing ob-objectives of the Brussels regime, with special regard to predictability.

3. How the jurisdictional problem arises

Given the considerations made on the multifaceted natured of data privacy law,[231] and those made on territoriality,[232] some considerations will be made on the nature of the international element. This element triggers the private international law question and, consequently, the question of the allocation of jurisdiction.[233]

As it was said, the jurisdictional problem in internet data privacy matters is mainly caused by the ubiquity of the internet. As it will be highlighted in the present chapter, it mainly causes the potential fora to multiply. However, the ubiquity of the internet also creates frictions with territorially based approaches transnationally, because the same issue may also arise in the allocation of internal territorial competence of national courts in fully internal disputes.

The international element, which triggers the application of private international law instruments, may be of several natures. As it will be highlighted, the most common foreign elements are domicile, habitual residence, and citizenship, which indeed are standard international elements, but are not the only elements that are suitable of triggering private international law questions.[234] Indeed, European case law has pointed out consistently that it

---

[231] See *supra*, chapter I.

[232] See *supra*, para 2.

[233] In general, on the international element, see B. Barel, *Diritto internazionale privato,* Giuffrè, 2015, p. 35 et seq.

[234] For instance, in the *Owusu* case, the CJEU established that the localisation of one element in a non-contracting State (of the Brussels Convention of 1968), does qualify as a foreign element even if all other elements are located in one single Member State. In case *Group Josi*, a similar conclusion is drawn. In the *Maletic* case, the localisation of a third party intermediary in a Member State other than that of common domicile of the parties triggers private international law considerations as it also qualifies as a foreign ele-

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

is the legal relationship as a whole that must be evaluated in order to assess if it is suitable to trigger questions of allocation of the jurisdiction between different national courts.[235] Indeed, jurisdiction has to be allocated pre-emptively in disputes that arise within 'international relationships' and within 'the international legal order'.[236] Moreover, the Court of Justice determined that the internationality of the dispute was to be ascertained, regardless of the fact that the case was characterised as intra- or extra-European.[237] To put it differently, even when a foreign element is located outside of the European Union, all considerations concerning the internationality of the dispute remain. In that case, questions arise concerning which legal instrument will be applicable in order to determine the State with jurisdiction over the matter. However, this only depends on the scope of application of the procedural rules of the court seised. In the case of the Brussels I system, the Brussels Ia Regulation will be applicable to cases in which harm arising from a tort has occurred in the United States, but the defendant is domiciled in the Member State of the court seised, and that Member State is also the place of domicile of the plaintiff.[238]

As one may infer from the abovementioned example, factual elements may lead to the determination of the existence of an international element. A damage allegedly suffered in a State other than that of the court is a potential international element. The localisation of assets

---

ment. See CJEU, case C-281/02, *Owusu v Jackson*, ECLI:EU:C:2005:120; case C-412/98, *Group Josi v UGIC*, ECLI:EU:C:2000:399; case C-478/12, *Maletic and Maletic v lastminute.com and TUI Österreich*, ECLI:EU:C:2013:735. See also A. Dickinson, E. Lein, *The Brussels I Regulation Recast*, Oxford University Press, 2015, 3.03.

[235] Cf. CJEU, case C-281/02, *Owusu v Jackson*, ECLI:EU:C:2005:120, para 26; case C-327/10, *Hypoteční banka*, ECLI:EU:C:2011:745, para 30 et seq.

[236] See CJEU, case C-365/88, *Kongress Agentur Hagen*, ECLI:EU:C:1990:203, para 8. See also CJEU, case C-89/91, *Shearson Lehmann Hutton*, ECLI:EU:C:1993:15, para 10.

[237] This distinction derives from the fact that European Union private international law legislation in jurisdiction matters, such as the Brussels Ia Regulation, is only applicable to intra-European disputes, while extra-European disputes fall out of its scope triggering the application of national private international law legislation (with the exceptions outlined *infra,* para 4). See CJEU, case C-281/02, *Owusu v Jackson*, ECLI:EU:C:2005:120, para 25. See also the considerations of C. Hare, *Forum non conveniens in Europe: game over or time for reflexion?*, in *Journal of business law*, 2006, p. 157, 161 et seq.

[238] Article 4 of the Brussels Ia Regulation. See the considerations *infra*, para 4.B.ii.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

abroad is also a potential international element. This approach has been recently confirmed even in national case-law. For instance, the Italian Supreme Court of Cassation ruled in favour of the application of the Brussels I Regulation in a dispute involving two Italian citizens who were domiciled in Italy; the foreign element in the dispute was the fact that the cause of action was the entitlement of the money contained in an account jointly opened by the parties at an Austrian branch of a bank. The court affirmed the existence of Italian jurisdiction based on Article 2 of Regulation (EC) No 44/2001, *i.e.* the ground of jurisdiction of the defendant's domicile.[239]

With regard to internet data privacy cases, the international elements may be multiple. First of all, the classical mismatch between the domicile, residence, or citizenship of one or more of the parties with the court seised is one possible element. Moreover, the processing of personal data abroad is a further possible international element. Where the data subject is domiciled in a given Member State, which is the same of the data controller/processor, but the processing of data is carried out using servers and third-party services located abroad, the case may be characterised as international.

In addition, the dissemination of data abroad constitutes a potential cross-border element. The fact that certain personal data, for instance concerning health details of the alleged victim, is made public in a State other than the one in which the data subject sued, then the data controller/processor clearly represents an element and the dispute is international 'as a whole'.[240]

The presence of personal data abroad is also a foreign element. Scholars usually consider the trans-border data transfer a typical foreign element. This is indeed true, and it also enjoys

[239] Italian Supreme Court of Cassation, judgment No 17863/2013, in *Rivista di diritto internazionale privato e processuale,* 2014, p. 633.

[240] CJEU, case C-281/02, *Owusu v Jackson*, ECLI:EU:C:2005:120, para 26.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

a special protection under European Union law.[241] However, the action of transferring data abroad is a sufficient, but not necessary condition. It is indeed common for the data subject to sit at a desk and sign up for foreign-based internet services by giving up personal data, which is automatically transferred abroad. Nonetheless, people also travel, and the case may occur where they sign up for a service in a country where their data is also processed and stored. In this case, no transfer happens, but the case is still intrinsically international, as data remains abroad even when the data subjects travel back to their countries of residence.

All these cases trigger the application of supranational jurisdictional rules to determine where the plaintiff may bring the action. In the European Union, the current set of rules generally determines a divide between intra- and extra-European cases: in intra-European cases, the Brussels I system will apply; in extra-European disputes, national private international law rules will apply.[242] However, in two years, this divide will be partially removed as a new set of rules with extraterritorial reach will become applicable in European courts.

---

[241] Chapter IV of the current Data Privacy Directive is dedicated to trans-border data flows. On such flows see *ex multis*: C. Kuner, *Transborder data flows and data privacy law*, Oxford, 2013; M.D. Birnhack, *The EU data protection directive: an engine of a global regime*, in *Computer Law and Security Report*, 2008, p. 508; F. LeSieur, *Regulating cross-border data flows and privacy in the networked digital environment and global knowledge economy*, in *International Data Privacy Law*, 2012, p. 93; C. Millard, *Impact of the EU Data protection directive on transborder data flows*, in *Information Security Technical Report*, 1997, p. 47; D.J.B. Svantesson, *The regulation of cross-border data flows*, in *International Data Privacy Law*, 2011, p. 180.

[242] This may appear as an oversimplification, but it is considered necessary in order to tackle the next parts of the work with expositive order. Of course, an increasing number of exceptions to this divide is present in the regulation. Indeed, an almost clear-cut divide of this kind was present in the Brussels Convention of 1968, but has been progressively reduced by those rules of the Brussels I and (even more) of the Brussels Ia Regulations that apply regardless of the defendant's domicile, and which consequently blur the line between intra- and extra-EU cases. See *infra*, paragraph 4.B.i.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

4. The current system

A. The lack of rules on jurisdiction in Directive 95/46/EC

Directive 1995/46/EC does not intend to set forth private international law rules. Indeed, it neither contains rules on jurisdiction, nor on applicable law.[243] Indeed, the data privacy legislation drafted in the 1990s and 2000s has never addressed the issue of private international law. Some legislation even expressly excludes the interpretation of any of its rules as private international law rules.[244] This may derive from multiple aspects related to data privacy that impede a unification of relevant aspects of civil-procedural law. First of all, there is the threefold nature of data privacy.[245] The fact that data privacy law contains aspects of public, private, and administrative law is a complicating factor when dealing with such a delicate matter. As highlighted above, judges usually apply their national, public law only, which disincentives an approach that gives relevance to private international law. Second, the traditional territorial approach to private international law makes it difficult to design grounds of jurisdiction that prove efficient in a field which is minimally territorial, potentially ubiquitous, and highly connected to personality and human rights.

However, data privacy is not only a topical issue, but also a trending topic, which will grow in relevance in the next years. Fast technological achievement will aid this growth, and may lead to the creation of business and practices that require access to personal information in order to increase their efficiency.[246] As already noted, current economic relations involve

---

[243] Regardless of the label, Article 4 of the Directive is not a private international law rule. On this matter, please see *infra*, chapter II, para 2.A.

[244] See Article 4 and Recital No 23 of Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), in *Official Journal*, 2000, L 178.

[245] See *supra*, chapter I, para 2.B.

[246] See for example Artificial Intelligence software, which requires access, processing, and storage of enormous amounts of personal information in order to put in place self-learning processes and increase

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

personal data processing. Therefore disputes, both of contractual and tortious nature, are already a possibility for those whom data privacy rights are granted.[247] In order to address these increasing concerns, the new European Union Data Privacy Regulation[248] introduces a few rules on jurisdiction,[249] which will serve as grounds of jurisdiction in data privacy matters once the Regulation enters into force.[250]

Since the new Regulation is not yet in force, it seems appropriate to proceed with the analysis of the currently applicable legislation. The analysis will frame the environment in which parties, lawyers, and judges operate in civil and commercial matters. Presently, in the European Union the instrument applicable to the determination of the competent court is the Brussels Ia Regulation.[251]The Regulation coexists with the Lugano Convention of 2007 to address the issue of jurisdiction in cases involving EFTA countries and the European Union.[252]

---

their predictive functions. For artificial intelligence-related matters, see: A. Martino, *Artificial intelligence and law*, in *International Journal of Law and Information Technology*, 1994, p. 154; B. Stedron, *Law or artificial intelligence? New trends in the data protection*, in *Masaryk University Journal of Law and Technology*, 2007, p. 209.

[247] In general, natural persons only are granted data privacy rights. This analysis only focuses on civil and commercial matters, to which private international law rules are applicable. The Brussels I Regulation is indeed not applicable to administrative matters; therefore, the administrative path of litigation is excluded from the scope of application of the Regulation, in compliance with Article 1(1) of the Regulation. See A. Dickinson, E. Lein, *The Brussels I Regulation Recast*, Oxford University Press, 2015, 2.01.

[248] Regulation (EU) 2016/679 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 *Official Journal*, 2016, L 119.

[249] See for example Articles 78 and 79 GDPR.

[250] The General Data Privacy Regulation will enter into force on 25 May 2018 (see Article 99 GDPR).

[251] C. Kuner, *European data protection law: corporate compliance and regulation*, II ed., Oxford University Press, 2007, 3.09.

[252] The Convention is drafted on the basis of the Brussels I Regulation and it follows the interpretative paths of said Regulation. Indeed, the Brussels I system and the Lugano system are often treated together as a single 'Brussels Regime'. See Protocol No 2 annexed to the Lugano Convention (esp. Article 2). See also: E. Màrton, *Violation of personality rights through the internet: jurisdictional issues under European law*, Nomos, 2016. The Convention is currently in force between the European Union and the following EFTA countries: Iceland, Norway, and Switzerland; Liechtenstein never ratified the conventions of the Lugano Regime; Denmark, which is not part of the European judicial cooperation in civil and commercial matters, is also part of the Lugano regime. See Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007, ELI data.europa.eu/eli/convention/2007/712/oj. On the Convention, see F. Dasser, P. Oberhammer, *Lugano-*

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

B. 'Intra-European' cases: the Brussels Ia Regulation

i) General remarks

Before addressing the relevant grounds of jurisdiction contained in Regulation (EU) No 1215/2012, it is necessary to delimit the concept of an 'intra-European case'. Delimiting this concept will properly define the scope of the investigation, as well as the scope of application of European Union legislation on jurisdiction. This Regulation, which is the uniform legislation in civil and commercial matters, is applicable whenever the defendant is domiciled in a Member State.[253] Indeed, both the general forum and the special jurisdictional rules are applicable to proceedings in which the defendant is a person domiciled in the European Union. This principle also applies to legal persons, which are considered domiciled in the Member State where their statutory seat, central administration, or principal place of business is located, in compliance to Article 63 of the same Regulation.[254] The Regulation is silent on the moment when this domicile must exist in a Member State. However, scholars agree on the fact that it should exist at the moment in which the proceedings are commenced.[255]

Übereinkommen, II ed., Staempfli, 2011; P. Bonomi *et al*. (eds), *La convention de Lugano: passé, present et devenir*, Schulthess, 2007.

[253] This means all Member States, except Denmark, to which the Regulation is not applicable. For the applicability of the recast Regulation to Denmark, please see A. Dickinson, E. Lein, *The Brussels I Regulation Recast*, Oxford University Press, 2015, para 2.89. Please note that the personal scope of application of the Regulation is not limited when dealing with the so-called exclusive jurisdiction rules or with sections 3-5 of the Regulation; this is consistent with cases where judges of the Member State have jurisdiction in specific matters, regardless of the defendant's domicile. On this, please see F. Mosconi, C. Campiglio, *Diritto internazionale privato e processuale*, VII ed., Utet, 2015, p. 68 et seq. This aspect is, however, not often relevant in the case of data privacy, as personality rights are not regulated by the exclusive fora; it may be relevant when consumer contracts are involved.

[254] For the determination of the domicile of natural persons, Article 62 of the Brussels Ia Regulation applies, and prescribes that national law applies to the determination of the domicile of natural persons.

[255] See P. Vlas, *General provisions*, in U. Magnus, P. Mankowski, *Brussels I Regulation*, II ed., Selliers, 2012, 808. The author also emphasises the applicability of the *perpetuatio fori* principle in order to avoid unfair strategies by defendants, who could otherwise change their domicile during the proceedings in order to escape the jurisdiction of the Member States' judges. On the *perpetuatio fori/iurisdictionis*, see F. Mos-

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Moreover, selected rules in the Brussels Ia Regulation are the rules applicable by European Union national courts, regardless of the domicile of the defendant. This is the case of the rules on exclusive jurisdiction, and on the prorogation of jurisdiction operated in light of a choice-of-court agreement.[256] In addition, the rules on the additional protection granted to consumers (to some extent) trigger the jurisdiction of Member States' courts, regardless of the domicile of the defendant, because consumer protection law intends to maintain proximity with the place of domicile of the consumer.

Consequently, for the purposes of the present investigation, it seems appropriate to define a case as intra-European when the defendant is domiciled in a Member State of the European Union at the moment of the commencement of the proceedings.[257] In addition, the cases in which the Regulation is applicable because the plaintiff is a consumer will also be considered as falling within the concept of intra-European disputes, and the Brussels I system is fully applicable to the determination of the competent courts.

Moreover, and as already stated above, the scope of the analysis only regards the civil and commercial aspects of data privacy litigation, and not the administrative matters. This is due to the fact that uniform private international law legislation in jurisdictional matters excludes administrative matters from its scope of application.[258] Therefore, it is appropriate to exclude the administrative litigation options at the disposal of the allegedly damaged party in data privacy matters in order to focus on matters relevant to private international law.

---

coni, C. Campiglio, *Diritto internazionale privato e processuale*, VII ed., Utet, 2015, p. 160 (on the Italian law, which adopted the same approach of the uniform legislation).

[256] On choice-of-court agreements, see extensively F.C. Villata, *L'attuazione degli accordi di scelta del foro nel regolamento Bruxelles I*, Cedam, 2012. See also T. Hartley, *Choice-of-Court agreements under the European and international instruments*, Oxford University Press, 2013; A. Briggs, *Agreements on Jurisdiction and Choice of Law*, Oxford University Press, 2008.

[257] For extra-European cases, see *infra*, para C.

[258] See *supra*, para A.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

ii) The general rule of the defendant's domicile

As mentioned above, the personal scope of application of the Brussels Ia Regulation is mainly based on the concept of the 'domicile of the defendant'; whenever the defendant is domiciled in a Member State, the Regulation applies. Besides the scope of application, the general rule on jurisdiction of the Brussels Ia Regulation is also based on the concept of the place where the defendant is domiciled. Indeed, Article 4 of the Regulation states that the person who is domiciled in a Member State shall be sued in the courts of that State.[259] This ground of jurisdiction disregards both the citizenship of the parties, and the personal location of the plaintiff.[260] According to the wording of the Regulation, and of the constant, interpretative practice of the Court of Justice of the European Union, the entirety of the claim can be brought before the courts of the Member State of the defendant's domicile.[261]

Of interest is whether, and how, the general forum of the defendant's domicile operates in tort cases in internet data privacy matters. At first, it could be argued that such a forum operates flawlessly in the context of data privacy, or at least as well as it operates in most other matters, without relevant inefficiencies. However, in the field of internet data privacy, a few issues should be considered.

The first and most important issue is that, in the case of the internet, most data processors are domiciled outside the European Union. Indeed, as a matter of fact, the great majority of

---

[259] Full text: 'Article 4: 1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State. 2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that Member State'. Exceptions to the general rule are granted by Articles 5 and 6 of Section 1 of the Regulation.

[260] See *inter alia* CJEU, case C-281/02, *Owusu v Jackson*, ECLI:EU:C:2005:120, para 23 et seq.

[261] With the exception of the cases in which the matter is regulated by the so-called exclusive jurisdiction rules and those of sections 3-5 of the Regulation. See E. Màrton, *Violation of personality rights through the internet: jurisdictional issues under European law*, Nomos, 2016, 116. The prominence of the general forum as the forum of the entire action emerges especially in those cases in which a fragmentation of the elements or ubiquitous elements are present. See *infra*, para v with regard to the *Shevill*, *eDate*, and *Pickney* cases.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

internet corporations have their seat outside the European Union, which means that not only the proceedings tend to escape the scope of application of Article 4 of the Regulation, but also escape the entire Regulation as a whole.[262]

The second aspect regards the balance of power between the parties. Traditionally, the ground of jurisdiction of the defendant's domicile, *actor sequitur forum rei* (the plaintiff follows the forum of the alleged tortfeasor), is based on the rationale of safeguarding the party that is put in the most disadvantaged position.[263] Indeed, it is more difficult for defendants to defend against suits in a foreign country, rather than in the country they know best.[264] This assumption is always true, but in the current setting of civil and commercial relationships, the defendant is not always in an absolute disadvantaged position, especially in the field of data privacy. Indeed, one can imagine the case of the data subject – a natural person – whose data is misused by an internet corporation based in another Member State. By resorting to Article 4 of the Regulation, the natural person – who by definition does not have the deep pockets of a corporation – should sue the data controller or processor in a foreign country; defendants with far deeper pockets are able to benefit from the system they know best. This hypothesis applies to the majority of cases, because data privacy is substantially different from other privacy law litigation cases, such as defamation. In defamation cases, it may occur that a relatively unknown person sues a corporation for defamation.[265] It may also occur that a well-

---

[262] With the exception of consumer contracts. See *infra*, para vi. A few corporations established subsidiaries in the Union. In this case, it is of course possible to sue the subsidiary, if it is possible to attribute a relevant data processing role to that subsidiary. This is the case of the *Google Spain* judgment, in which the Spanish subsidiary of Google has been considered sufficiently involved to trigger the application of the European Union directive 95/46/EC. Of course, that reasoning concerned the applicable law, but a similar reasoning may be applied to jurisdiction. On *Google Spain*, see the considerations made *infra* in this chapter. CJEU, case C-131/12, *Google Spain SL and Google Inc.*, ECLI:EU:C:2014:317.

[263] CJEU, case C-26/91, *Handte*, ECLI:EU:C:1992:268, para 14.

[264] *Ibidem.*

[265] Such as in the case of Ms Shevill, who sued a newspaper for allegedly defaming statements against her person. See *infra*, para v, CJEU, case C-68/93, *Fiona Shevill*, ECLI:EU:C:1995:61.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

known and economically powerful person sues a relatively unknown person, for instance a blogger.[266] In these two cases, Article 4 would operate without systemic prejudice for the economically weakest party, because the strongest party may be either the defendant or the plaintiff.

However, data privacy cases intrinsically differ from this example, because data privacy is about fair and correct processing of data. A potential case of libel tort is just a consequence of this processing. In the case of data processing, it happens more often, and in much greater numbers, that the party who is economically weaker will be the plaintiff in the dispute. This hypothesis does not discharge the usefulness of the general forum, but it triggers the necessity of investigating further grounds of jurisdiction that could allow for a counterbalance of this systemic inefficiency.

A third observation regards the relationship between administrative litigation and civil litigation in data privacy matters within the European Union. Scholars highlighted an interesting situation created by the set-up of the general forum in the Brussels Ia Regulation. When there is a defendant, who is not domiciled within the European Union, and a plaintiff, who is domiciled in a Member State, jurisdiction cannot exist in civil matters, in compliance with Article 4 of the Brussels Ia Regulation; but it exists in administrative matters, in compliance with Articles 4 and 28 of the Data Privacy Directive.[267] This would be possible because the Data Protection Authorities act regardless of the defendant's domicile. For instance, it is argued

[266] Let us imagine of a well-known singer, who sues a blogger over defaming statements on his or her private life conduct. Today, a blogger may be a powerful economic entity, or a small website run by private parties that share their opinions with their readers. It is clear, that an unbalanced system leads to the threat to be suited in courts that are too 'far' from the weaker entity. The powerful singer will have the means to sue without considering costs and language differences, but defending abroad may represent an expensive situation for the blogger.

[267] Cf. M. Brkan, *Data Protection and European Private International Law*, in *International Data Privacy Law*, 2015, p. 257, 265.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

that in the *Google Spain* case[268] this difference would have arisen if the plaintiff had opted for civil litigation, as the parent company was domiciled in the United States and the Spanish subsidiary is domiciled was Spain. This scenario would have impeded the application of private international law due to the lack of the necessary international element.[269] This is only partially true. Indeed, it is true that Article 4 of the Regulation implies that jurisdiction in the *Google Spain* case would not have existed with regard to the parent company, but it could have existed with regard to the Spanish subsidiary, which had its seat in Spain. This occurs because the international element, which triggers the application of private international law instruments, is not limited to the domicile of the parties.[270] Instead, it has to be considered whether or not the legal relationship as a whole is suitable to trigger questions of allocation of jurisdiction between different national courts.[271] For instance, in the case of *Google Spain*, it was not clear whether the indicisation of the contested news on the internet represented a sufficient international element. It may be argued that such an international aspect would have proven irrelevant for the application of the Regulation when using Article 4, but it would have proven sufficiently tangible when dealing with the other grounds of jurisdiction of the Regulation, such as the special fora under Article 7.[272] Since the Regulation is to be considered applicable or inapplicable *a priori*, regardless of which Article is used to confirm or deny the existence of jurisdiction, it may be argued that the situation in *Google Spain* was indeed international, with the result that the Regulation could have been applied.

---

[268] CJEU, case C-131/12, *Google Spain SL and Google Inc.*, ECLI:EU:C:2014:317.

[269] M. Brkan, *Data Protection and European Private International Law*, in *International Data Privacy Law*, 2015, p. 257, 265.

[270] A. Dickinson, E. Lein, *The Brussels I Regulation Recast*, Oxford University Press, 2015, 3.03

[271] Cf. CJEU, case C-281/02, *Owusu v Jackson*, ECLI:EU:C:2005:120, para 26 and case C-327/10, *Hypoteční banka*, ECLI:EU:C:2011:745, para 30 et seq.

[272] See *infra*, para v.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

In conclusion, the domicile of the defendant of the Brussels Ia Regulation is a possible and effective ground for jurisdiction, but it is not entirely effective as a single ground for jurisdiction. Therefore, the effectiveness of the current European private international law system has to be assessed by analysing the additional grounds of jurisdiction.

iii) The alternative forum in contractual matters

Once it is ascertained that the general forum of the defendant's domicile is virtually effective, but further rules are necessary in order to avoid distortions, the first possible option is the resort to the alternative fora, or special jurisdiction. These rules on jurisdiction are contained in the Brussels Ia Regulation and exist to ensure the court closest to the matter will be entitled to decide on the merits of the case.[273]

The first possible option which seems appropriate to assess is the resort to the alternative forum in contractual matters of Article 7(1) of the Brussels Ia Regulation. Article 7(1) provides that:

> A person domiciled in a Member State may be sued in another Member State:
>
> (1) (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;
>
> (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:
>
> - in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

[273] The alternative fora are not hierarchically prevalent over the domicile of the defendant. Instead, and despite the fact that the general forum is applicable in all matters with the only exception of those reserved to the exclusive fora, the alternative fora may be chosen as an alternative by the plaintiff. On this matter, see: S.M. Carbone, C.E. Tuo, *Il nuovo spazio giudiziario europeo in materia civile e commerciale*, Giappichelli, 2016; F. Salerno, G*iurisdizione ed efficacia delle decisioni straniere nel regolamento (UE) n. 1215/2012 (rifusione)*, Cedam, 2015; A. Dickinson, E. Lein, *The Brussels I Regulation Recast*, Oxford University Press, 2015; G. Van Calster, *European private international law*, Bloomsbury, 2016.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided;

(c) if point (b) does not apply then point (a) applies;

(…)

Preliminarily, it is appropriate to assess whether contractual disputes may arise in data privacy matters. Indeed, data privacy is a set of *ex lege* obligations that the data controller/processor has to comply with, regardless of the fact that a contract exists for the processing of personal data, and regardless of the fact that such a contract, if it exists, makes any reference to data protection. Therefore, one could argue that the main forum in data privacy matters in which it is possible to sue is that in tort matters,[274] rather than that in contractual matters. Nevertheless, the fact that internet services are often based on online contracts, and the fact that personal data is currently a commodity on which many services base their profits on, it leads to the hypothesis that soon data subjects will try to rely on contractual jurisdiction in order to bring a dispute in a place favourable to them.

The question to tackle is whether breaches of data privacy obligations may trigger the jurisdiction for breach of contracts under the current private international law system. Some scholars implicitly find it possible to resort to contractual jurisdiction in data privacy matters.[275] Others are more cautious on this matter, arguing that those contracts in which a reference is made to a data privacy regime will trigger contractual jurisdiction in privacy matters, while jurisdiction over torts will be the only alternative forum in all other cases.[276]

For the purposes of the present investigation, it is appropriate to discuss two categories of contracts to which most of the data privacy issues may be attributed. The first type of contract

---

[274] See *infra*, v.

[275] See indirectly F. Wang, *Jurisdiction and cloud computing: further challenges to internet jurisdiction*, in *European Business Law Review*, 2013, p. 589, 610.

[276] See the considerations made by M. Brkan, *Data Protection and European Private International Law*, in *International Data Privacy Law*, 2015, p. 257, 266.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

is a contract in which the processing of data is at the core. An example is the provision of health data through a fitness tracker; these data subjects freely choose to enter into a contract in which they receive compensation in exchange for health data regarding their activity. A further example is a contract for the transfer of data to third countries, in which data is the commodity that is transferred from one data processor to another.[277]

The second type of contract is a contract in which data privacy obligations exist and are agreed upon, but data privacy is not the main subject of the contract. In this matter, two sub-types of contract may be envisaged. The first is a contract in which its clauses determine the substantive data privacy regime of the contract. For instance, a clause may state that personal data will not be disclosed; in this case, regardless of the obligations *ex lege* found in data privacy legislation – which may be more or less restrictive than the clause of this example – the parties agreed on a clause of non-disclosure. This triggers contractual jurisdiction in cases of alleged breaches of contract. A second, commonly found sub-type of contract is when a data privacy regime is only referenced, in compliance with the obligation provided for by data privacy law, to obtain the unambiguous consent of the data subject.[278] The parties usually agree on a clause in which it is stated that the processing will be carried out in compliance with the applicable data privacy laws.[279] In this case, the operation of the contract jurisdiction over al-

[277] In general, on the strategic options for businesses in personal data trade, see: S. Kudyba, *Big Data, Mining, and Analytics: Components of Strategic Decision Making*, Auerbach, 2014. On the cross-border transfer of data, see: C. Kuner, *Transborder data flows and data privacy law*, Oxford University Press, 2013; M.D. Birnhack, *The EU data protection directive: an engine of a global regime*, in *Computer Law and Security Report*, 2008, p. 508; F. LeSieur, *Regulating cross-border data flows and privacy in the networked digital environment and global knowledge economy*, in *International Data Privacy Law*, 2012, p. 93; C. Millard, *Impact of the EU Data protection directive on transborder data flows*, in *Information Security Technical Report*, 1997, p. 47; D.J.B. Svantesson, *The regulation of cross-border data flows*, in *International Data Privacy Law*, 2011, p. 180.

[278] This is the wording of the European Union Data Privacy Directive and of the new GDPR. On the matter of consent, see E. Kosta, *Consent in European data protection law*, Martinus Nijhoff, 2014.

[279] Standard clauses may be found online. For instance, see the standard clauses provided for by: privacy.it (last accessed 7 October 2016).

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

leged violation of data privacy rules is more questionable, because these obligations exist – including the need for consent and compliance with processing standards – regardless of the existence and of the nature of the contract.

In order to determine if an action that is brought forward by the plaintiff may be characterised as contractual, some considerations on the functioning of the contractual forum have to be made.

First of all, the characterisation of a cause of action as contractual or non-contractual must be made without making resort to national law.[280] The necessity of an autonomous notion of contractual matters was stated by the Court of Justice at the time of the Brussels Convention of 1968.[281] This implies that the notion of contract, which is appropriate for the purposes of the Brussels I system, does not necessarily match the notion of contract contained in the Member States' legal orders.[282]

According to the *Handte* doctrine on the delimitation of contractual and non-contractual matters in the Brussels I system, the *dictum* of the court was that the phrase 'matters relating to a contract', as used in Article 5(1) of the [Brussels] Convention [of 1968], is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another'.[283] This interpretation has been read by scholars in two distinct ways. The

---

[280] On characterisation, see S. Bariatti, *Qualificazione e interpretazione del diritto internazionale privato comunitario: prime riflessioni*, in *Rivista di diritto internazionale privato e processuale*, 2006, p. 361; T. Rauscher, *Internationales Privatrecht – mit internationalem Verfahrensrecht*, IV ed., Mueller, 2012, p. 442. A different issue is that of the coordination or accumulation of contractual and non-contractual claims, on which, please see C. Honorati, *Concorso di responsabilità contrattuale ed extracontrattuale e giurisdizione ai sensi della convenzione di Bruxelles del 1968*, in *Rivista di diritto internazionale privato e processuale*, 1994, p. 281; and S. Zogg, *Accumulation of contractual and tortious causes of action under the Judgments Regulation*, in *Journal of Private International Law*, 2013, p. 39.

[281] See CJEU, case C-34/82, *Martin Peters*, ECLI:EU:C:1983:87, para 9; CJEU, case C-9/87, *Arcado*, ECLI:EU:C:1988:127, para 10; CJEU, case C-26/91, *Handte*, ECLI:EU:C:1992:268, para 10.

[282] For complete and exhaustive considerations with regard to the differences in the Member States' conceptions of contract matters, P. Franzina, *La giurisdizione in materia contrattuale*, Cedam, 2006, p. 178 et seq, esp. fn. 3.

[283] CJEU, case C-26/91, *Handte*, ECLI:EU:C:1992:268, para 15.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

first reading is that greater stress has to be put on the 'freely assumed' obligation, which means that the free assumption of the obligation is the characterising aspect in order to determine whether the matter will be contractual or non-contractual.[284] The second reading puts more effort on the function and structure of the relationship and of the violation of the obligation. Thus, even aspects that are not contractual could fall within the scope of Article 7(1) of the Brussels Ia Regulation, provided that they are functional to the satisfactory fulfilment of the obligations of the contract.[285]

Now, depending on which of the two readings is deemed more convincing, the effect on the characterisation of the contractual nature of the action in the four examples provided above is significant. First of all, it has to be pointed out that the first type of contract outlined above fully falls within the notion of contract, because of the processing of data is the subject matter of the entire contract.

With regard to the second type, it seems appropriate to argue that the first sub-type, which are the contracts that contain an obligation relating to privacy that is additional to the protection granted *ex lege*, would trigger contractual jurisdiction when the causes of actions are

---

[284] See R. Martino, *La giurisdizione italiana nelle controversie civili transnazionali*, Cedam, 2000, p. 242 et seq. See also Tribunal of Padua, 11 April 1985, in *RDIPP*, 1986, p. 391. This means that all those obligations that are not freely agreed upon by the parties, such as *ex lege* obligations, are not attracted by the contractual notions. To put it differently, obligations that are independent from the free will of the parties should fall within the notion of non-contractual matters. Conversely, all obligations that are freely assumed by the parties, meaning that without this consent they would not exist at all, would fall within the notion of contractual matters.

[285] Cf. P. Franzina, *La giurisdizione in materia contrattuale*, Cedam, 2006, p. 223 et seq. According to this reading, not only the obligations contained in the contract, but also the related fulfilments by the parties not explicitly agreed upon, may trigger the contractual breach forum under the Regulation. It is the example, made by Franzina, of the correct packaging of the goods shipped in compliance with a contractual obligation freely assumed by the parties. They did agree on making the shipment, but they did not specify anything about the shipment. This matter is regulated *ex lege* by the Vienna Convention of 1980 on the International Sales of Goods (at Article 35). Franzina argues that jurisdiction over an action for the loss caused by the incorrect packaging of the goods falls within the scope of application of Article 7(1). A different issue is that of the coordination of contractual and non-contractual claims before a court. On this matter, see C. Honorati, *Concorso di responsabilità contrattuale ed extracontrattuale e giurisdizione ai sensi della convenzione di Bruxelles del 1968*, in *Rivista di diritto internazionale privato e processuale*, 1993, p. 281.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

connected to those clauses. This would happen regardless of the reading deemed to be more convincing. Indeed, that clause would be freely agreed upon by the parties, and also fully integrated in the contract.

The characterisation of the second sub-type, which is less clean-cut, depends on which reading will be deemed more convincing. According to the reasoning of the first group of scholars, *ex lege* obligations fall outside the scope of the notion of contracts, because it is not a set of obligations that may be freely negotiated.[286] To put it differently, those obligations of one party towards the other do exist regardless of the will of one or more parties to enter into them. Therefore, obligations such as the obtaining of consent, standards, and other obligations existing under the applicable data privacy law would fall outside of the scope of the contractual nature of the relationship, and would not be able to trigger the forum of Article 7(1) if a suit for breach of data privacy law is commenced. As a consequence, data privacy issues should be regulated by other rules on jurisdiction, with the potential split of the dispute into an action concerning both privacy-related causes of action and non-privacy-related contractual causes of action.

However, following the reasoning of the second group of scholars one could infer that: data privacy is a relevant aspect in online relationships, they would give the contractual nature additional strength, and they would include questions of data privacy breaches within the scope of application of the alternative forum in contractual matters.[287]

---

[286] See R. Martino, *La giurisdizione italiana nelle controversie civili transnazionali*, Cedam, 2000, p. 242 et seq.

[287] This approach is deemed to be preferred in general contract matters as the *Color Drack* doctrine clearly provided that the grounds of jurisdiction under Article 7(1)(b) determined the judge that was competent to hear the matters over the totality of the contractual relationship. This result occurred regardless of the fact that the obligation that gave rise to the cause of action was not directly connected to the sale of the good or to the provision of the service. See CJEU, case C-386/05, *Color Drack*, ECLI:EU:C:2007:262, para 26, which addressed the issue of the absorption of ancillary obligations – not related to the delivery of a good – to the notion of the sale of goods.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

A further set of observations are relevant to the relationship of Article 7(1)(a) with Article 7(1)(b) in data privacy matters. In fact, the current wording of the Brussels Ia Regulation distinguishes between obligations that may be framed as 'sale of goods',[288] 'provision of services',[289] or not attributable to the two abovementioned categories.

It has been said that personal data are nowadays treated like an asset. The commodification of personal data allows online business to collect data and to transfer them to data mining businesses. These businesses extract relevant information from large amount of data ('big data'), or just provide tailor-made advertising to the data subject. Now, for the purpose of the present investigation it is necessary to understand if data privacy-related contracts may be characterised as being contracts for the sale of goods, for the provision of services, or none of the two categories, especially because of the commodification of information and personal data.[290]

---

[288] The notion of sale of good generally refers to the contract that has the transfer of goods as its object, regardless of the fact that some activities that may be characterised as services and may be found in the contract. The 'characteristic performance' concept contained in the Rome I Regulation indeed allows to attract the ancillary aspects of a contract within the notion of sale of goods in all those relationships in which the sale of goods is at its core. See F. Salerno, G*iurisdizione ed efficacia delle decisioni straniere nel regolamento (UE) n. 1215/2012 (rifusione)*, Cedam, 2015, p. 148.

[289] The notion of 'provision of services' is also to be characterised autonomously in the European legal order, rather than in national context. The provision of services is one of the freedoms European Union law grants in the area of freedom, security, and justice. Services are regulated under Article 56 et seq. TFUE, which defines them as to 'be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons' (Article 57 TFUE). Scholars debated on the possibility of plainly implementing such a definition in private international law matters. On this debate, see P. Franzina, *La giurisdizione in materia contrattuale*, Cedam, 2006, p. 305 et seq. Nonetheless, the recent *Falco* judgment of the CJEU defined services as an obligation of the provider to carry out a certain activity for remuneration (the court developed this doctrine *a contrario*, by excluding intellectual-property rights licenses from the concept of provision of services because they lacked the 'activity' aspect by the provider of the licence. See CJEU, case C-533/07, *Falco*, ECLI:EU:C:2009:257.

[290] On commodification, see P. Samuelson, *Privacy as intellectual property?*, in *Stanford Law Review*, 2000, p. 1125, 1134, J. Litman, *Information privacy/information property*, in *Stanford Law Review*, 2000, p. 1283, 1289, C. Cuijpers, *A private law approach to privacy; mandatory law obliged?*, in *SCRIPT-ed*, 2007, p. 304, 305, P.M. Schwartz, *Property, privacy and personal data*, in *Harvard Law Review*, 2003, p. 2056, 2057.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Again, the four examples above will serve as benchmarks for the determination of the categories listed above. In the case of a contract for the provision of personal data by a natural person, it has to be first argued whether that person acts as a consumer or a professional. When a party acts as a consumer, jurisdiction will be determined pursuant to Article 17 et seq. of the Brussels Ia Regulation.[291] When the activity is carried out within the person's professional life, Article 7 would apply. Now, in the case of the provision of health data for remuneration, it could be argued that indeed such data is indeed commodified, and that the contract could be characterised as a supply contract. Under the same category would be the contract for the transfer of data from one data processor to the other. Since they regard the delivery of a commodified asset, and not the carrying out of any activity defined as a service, it seems that the first sentence of Article 7(1)(b) would apply.

However, with regard to the second type of contracts in the abovementioned examples, the main performance of the contract would be the provision of services, such as the creation and maintenance of a social website on which the data subject will be able to interact.

However, in spite of the lack of practice in this matter, it seems that the *Falco* doctrine could serve as a benchmark in the matter of data privacy. In the *Falco* judgment, a licensing contract for intellectual-property rights was not suitable to the category of contract for the provision of services under Article 7(1)(b), second phrase of the Brussels Ia Regulation. This holding was based on the fact that the contractual obligation did not imply an activity to be carried out by the holder of the intellectual-property right. The holder only allowed the licensee to use the protected right for compensation. The case of internet data privacy is similar to that of intellectual property in this regard. Indeed, the person that provides the data controller with personal data in our example actually lets the data controller have access to their person-

[291] See *infra*, para B.iv.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

al health data. The transfer of personal data abroad or to third parties may be realised in the delivery of the data to the buyer's servers, but also in the access of the buyers to the servers of the sellers.

Article 7(1)(b), first phrase is not applicable to the case of data privacy. This is because in the European context personal data – however commodified – is not alienable and is an object of a fundamental right.[292] A sale would imply the transfer of property or goods, namely the personal data, and the exclusive right of the new owner to dispose of the property or goods. On the other hand, data subjects have the inalienable right to demand the amendment, cancellation, or erasure of their data in possession of the data controller. Therefore it has to be argued that no contract of the first category envisaged above may be a sales contract.

In the case of the proper provision of services, such as the access to a social network or sale of goods under which the user/buyer provides the manager/seller with their data,[293] it has to be argued that the provision of data is to be considered merely ancillary to the provision of the main service/sale of the good. Therefore, it is difficult to see the data-privacy demand as significant in the contractual relationships.

From the examples made above, it may be concluded that it is difficult to allocate data privacy entirely within the definition of goods or of services. Indeed, it has been seen how this allocation depends on the contract itself. This matter is subject to exploitation in several relationships in which the centrality of the matter varies, from the supply of personal data in exchange for compensation (maximum centrality), to the ancillary provision of data for online sales (the least centrality). By crossing this variance with the fact that the *Falco* doctrine ex-

[292] Spiros Simitis, the first data protection commissioner, argued that 'this is not bananas what we are talking about' when addressing the difficulties in the negotiations that, in 1999, would have eventually brought the adoption of the Safe Harbour scheme for the transfer of personal data between the European Union and the United States. See the article in the New York Times signed by E.L. Andrews on 27 May 1999: *Europe and US still at odds over privacy.*

[293] Such as in the second categories of contracts.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

cludes the possibility of applying Article 7(1)(b) to cases in which there is no active role of the supplier in providing the service, it is not possible to claim that this Article will be mainly applicable in the case of data privacy. It seems more reasonable to expect a more consistent application of the more general Article 7(1)(a).

iv) The additional protection granted to consumers

Given the fact that data privacy law generally – with a few exceptions[294] – addresses natural persons, it could be argued that at some extent it protects the rights of persons that act as consumers in their interactions on the internet. If this would prove to be the case, all contractual fora included in the Brussels Ia Regulation[295] would be deactivated. The provisions under Section 4 of the Regulation will imperatively apply to determine the competent court to hear the case. In such a case, the grounds of jurisdiction would be those of Article 18 of the Regulation. Article 18 provides that consumers may bring proceedings either in the courts of the Member State in which the other party of the contract is domiciled or, regardless of the domicile of the other party, in the courts where the consumer is domiciled. On the other hand, proceedings against a consumer may be brought only in the courts of the Member State in which the consumer is domiciled. Therefore, the possible fora would be those of the consumer's domicile or of the domicile of the other party. Nonetheless, before addressing this matter, a few considerations will be made with regard to the qualification of a contract as a consumer contract.

---

[294] See for example Law No 82/652 of 29 July 1982 of the French Republic, granting privacy rights to legal persons as well. On this matter, see extensively International law association committee on the protection of privacy in private international and procedural law, *The concept of privacy in the national systems – interim report*, 2015, not yet published.

[295] With the only exception of Article 6 and Article 7(5).

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

First of all, it has to be recalled that there are some circumstances in which consumer-based jurisdiction is not triggered. In the *Gruber* case, which concerned the sale of covering materials for the roof of a building which was both used as a place of work and as a home by the plaintiff, the court established that the plaintiff was only to be considered a consumer if the professional activity carried out in such a building was negligible.[296] Mirroring such an interpretation in data privacy matters, it is clear that consumer-based jurisdiction will not be triggered in all cases in which the activity under scrutiny is not purely extra-professional. For instance, it is questionable whether consumer-based jurisdiction may be triggered when: a Facebook account is also used to post professional news on a profession-related page or group; a Skype account is used for professional purposes; or a Gmail account is also printed on the business card of the data subject.

Second, recall the concept of directing the activities to the Member State of domicile of the consumer, which is one of the requirements set forth in Article 17 of the Regulation. In the example of the case-law of the Court of Justice, the concept of directing the activities was interpreted extensively. In fact, in the *Pammer* judgment,[297] the Court established that websites that clearly showed the other contracting party targeting activities to the Member State of the consumer triggered consumer-based jurisdiction and fulfilled the requirement for directing the activities towards that Member State. In *Muehlleitner*[298] case, the Court further established that it was not necessary to sign a contract to trigger said jurisdiction. Thus, it is appropriate to argue that these considerations are applicable to data privacy matters.

---

[296] Brkan defines such an assessment an assessment on the 'contamination' of the consumer status by professional activities, rather than that of the centre of gravity of the dispute. See M. Brkan, *Data Protection and European Private International Law*, in *International Data Privacy Law*, 2015, p. 257, 267.

[297] CJEU, case C-585/08, *Pammer*, ECLI:EU:C:2010:740.

[298] CJEU, case C-190/11, *Muehlleitner,* ECLI:EU:C:2012:542.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

However, a relevant aspect is the imbalance of the protection towards a consumer. Indeed, in this work it is submitted that the *forum actoris* is against the purposes of the Regulation. Therefore, a solution that identifies the court of the place of domicile of the plaintiff is in general to be seen negatively.[299] However, it has to be specified that this orientation changes when it comes to plaintiffs that are regarded as being weaker parties, such as consumers.[300] Indeed, it is tolerable, and actually positive, to provide weaker parties with facilitated access to justice, because they may not be otherwise able to exercise their rights. This case also applies to internet data privacy, especially because internet relationships give the illusion of being local, when they are actually global.

v) The alternative forum in tort-related matters

Contract-based litigation is possible and will be a viable option for those data subjects who claim their data has been processed wrongfully in a contractual relationship. However, a tort claim is inevitably destined to be the most viable solution for all allegedly damaged persons that do not have an on-going legal relationship with the alleged trespasser. Also, data subjects whose contractual relationship is framed in a way such that the main obligation does not implicate the issue of data privacy may find a tort claim to be a viable solution. Due to the fact that civil litigation involving internet data privacy is not yet a field in which numerous cases have been brought, private international law aspects of litigation regarding personality rights has been investigated with regard to non-contractual claims in defamation matters.[301] One ex-

[299] See *infra*, para B.v, on *eDate*.

[300] On the protection of weaker parties in European private international law, see S. Marino, *Metodi di diritto internazionale privato a tutela del contraente debole nel diritto comunitario*, Giuffrè, 2010.

[301] On defamation, see *ex multis*: H. Ehmann, K. Thorn, *Erfolgsort bei grenzüberschreitenden Persönlichkeitsverletzungen*, in *AfP Medien, Zeitschrift für Medien- und Kommunikationsrecht* 1996, p. 20; A. Gardella, *Diffamazione a mezzo stampa e convenzione di Bruxelles del 27 settembre 1968*, in *Rivista di diritto internazionale privato e processuale*, 1997, p. 657. D. Coester-Waltjen, *Internationale Zustandigkeit*

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

ample is that of the wrongful transfer to third parties of personal data, which is then made public by the third parties. A breach of contract may be claimed with regard to the wrongful transfer by the first data controller/processor, but an action for tort may well be envisaged against the second data controller/processor, who not only was not supposed to obtain the personal data, but also caused potential harm by disclosing that information without the data subject's consent.

Nevertheless, actions for tort may also arise in relationships in which a contractual relationship does in fact exist. In non-privacy-related matters, torts may exist in doctor-patient relationships, where a contract for the provision of medical service does not exclude a cause of action for negligence afterwards, as negligence is usually characterised as tort action.[302]

In data privacy matters, the issue is subtle because a wrongful dissemination of personal data usually corresponds to a non-compliant processing of data according to the obligations provided for by the applicable data privacy legislation. This legislation usually prescribes practices that exclude the responsibility of the data controller in data privacy matters. However, new services, such as autonomous algorithms that automatically craft news based on the content shared by users on the internet, may create new possibility of tort-related liabilities in contract-based relationships.[303] Such a possibility also exists with regard to internet-services

---

bei Persönlichkeitsrechtsverletzungen, in R. Geimer, *Wege zur Globalisierung des Rechts: Festschrift Schütze*, Beck, 1999, p. 175 et seq.; K. Siehr, *European private international law of torts. Violations of privacy and rights relating to the personality*, in *Rivista di diritto internazionale privato e processuale*, 2004, p. 1201, S. Marino, *La violazione dei diritti della personalità nella cooperazione giudiziaria civile comunitaria*, in *Rivista di diritto internazionale privato e processuale*, 2012, p. 363.

[302] On this matter, see Bundesgerichtshof, judgment 27 May 2008, in *IPRax*, 2009, p. 150; actually, the doctor may present a defence arguing that the injury arose out of a treatment of which dangerous nature the patient was aware of. Nevertheless, scholars argue that this contractual defence shall not influence the allocation of jurisdiction based on the non-contractual special jurisdiction forum of the Brussels I Regulation. See; J. Kropholler, J. von Hein, *Europäisches Zivilprozessrecht*, IX ed., 2011, p. 212 et seq. Contra see A. Briggs, P. Rees, *Civil Jurisdiction and Judgments*, Informa, 2009, p. 253.

[303] For example, a social network may have a contract with a data subject but still harvest news on the internet in order to craft its news. In case such news is published on the website and the data subject deems the news to be defamatory, or published not in compliance with data privacy laws in case it also contains

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

companies that act in several fields, such as a search engine combined with advertising and email management tools. In these cases, the fact that having an email account that allows for the user to tailor their search engine usage, does not exclude tortious liability when there is a wrongful display of the user's personal data in the adverts displayed to third-party users in the search engine.

The attribution of jurisdiction in non-contractual matters is regulated by Article 7(2) of the Brussels Ia Regulation, which prescribes that 'a person domiciled in a Member State may be sued in another Member State (…) 2. in matters relating to tort, delict, or quasi-delict, in the courts for the place where the harmful event occurred, or may occur'.[304]

In order to properly tackle the issue of the adequacy of the non-contractual liability ground of jurisdiction of the Brussels Ia Regulation, it is necessary first to address the issue of the applicability of the tort rule to data privacy cases. First, it will be necessary to outline the Court of Justice of the European Union's interpretative development over time in order to address the issue of the characterisation of tort matters, and in order to understand whether the issue of data privacy may fall within the scope of the rule under Article 7(2). Second, it will be necessary to understand whether the current interpretative approach fits the matter of internet data privacy.

---

data which is shared internally in the social network, it may also sue for torts regardless of the contractual relationship with the data controller. On the use of algorithms to craft hybrid news, see the recent initiatives of Facebook Inc.: C. Netwon, *Facebook says it will stop writing descriptions for Trending Topics*, on The Verge: *theverge.com* (last accessed 7 October 2016); J.I. Wong *et al*., *Facebook is trying to get rid of bias in Trending news by getting rid of humans*, on Quartz: *qz.com* (last accessed 7 October 2016).

[304] This wording remained unchanged with the recast of the Brussels Regulation. It changed, however, in the transition from the Brussels Convention of 1968 to Regulation 44/2001 Brussels I. See F. Mosconi, C. Campiglio, *Diritto internazionale privato e processuale*, VII ed., Utet, 2015, p. 83. The Italian version of the Article innovated also with regard to the wording of the matter, from 'delitti o quasi-delitti' to 'illecito civile doloso o colposo'. However, scholars are unanimous in denying any change to the characterisation of the tort covered by the rule. See S.M. Carbone, C.E. Tuo, Il nuovo spazio giudiziario europeo in materia civile e commerciale: il regolamento (UE) n. 1215/2012, Giappichelli, 2016, p. 119.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

a) Material scope of application of the rule: tort, delict, or quasi-delict

As it regards the first question, the Court of Justice provided an autonomous, negative definition of the concept of '*tort, delict or quasi-delict'*, that is to say that a case is within the scope of application of Article 7(2) in all cases in which Article 7(1) is not applicable.[305]

Such an autonomous definition is different from the definition that is provided for by national legal systems, and aims to include a wide range of cases that are not characterisable as contractual obligations.[306] The distinction between the existence or not of a contractual obligation is the presence of an obligation freely assumed by one of the parties.[307] Due to the fact that national definitions may differ from the autonomous one, the use of national civil, contract, or tort law is excluded from determining whether a legal relationship is to be characterised as contractual; thus it is necessary to make reference mostly to the European Union case-law.[308]

---

[305] CJEU, case C-334/00, *Fonderie officine meccaniche Tacconi*, ECLI:EU:C:2002:499, para 21 to 23. See also CJEU, case 189/87, *Kalfelis*, ECLI:EU:C:1988:459, para 18, and CJEU, case C-51/97, *Réunion européenne*, ECLI:EU:C:1998:509, para 22.

[306] CJEU, case 189/87, *Kalfelis*, ECLI:EU:C:1988:459, para 17, and CJEU, case, C-375/13, *Kolassa v Barclays*, ECLI:EU:C:2015:37, para 44.

[307] CJEU, case C-51/97, *Réunion européenne*, ECLI:EU:C:1998:509, para 17. This approach was taken into strict account by the court while interpreting the scope of application of Article 7(1) and (2) of the Regulation. Indeed, with regard to pre-contractual agreements, a question arose on whether they fall under the scope of application of Article 7(1) or not. In this case, such agreements were formalised in contracts for the conclusion of a following main contract, and they fell within the scope of application of the Article's paragraph. If the conduct recalls mere pre-contractual duties and uses, Article 7(2) will be applicable. See R. Conti, *Convenzione di Bruxelles, competenza giurisdizionale e responsabilità precontrattuale*, in *Corriere Giuridico*, 2004, p. 482. See also CJEU, case C-334/00, *Fonderie officine meccaniche Tacconi*, ECLI:EU:C:2002:499, para 19 et seq, and P. Bertoli, *Criteri di giurisdizione e legge applicabile in tema di responsabilità precontrattuale alla luce della sentenza Fonderie Meccaniche Tacconi*, in *Rivista di diritto internazionale privato e processuale*, 2003, p. 109; and P. Franzina, *La responsabilità precontrattuale nello spazio giudiziario europeo,* in *Rivista di diritto internazionale*, 2003, p. 714.

[308] This will not mean that national case-law does not represent a relevant interpretation of European Union law, as it is useful in order to assess the interaction of European Union law with the national legal systems. Nonetheless, it is also clear that national case-law will comply with European Union interpretative principles, such as the need to identify autonomous definitions when applying uniform legislation in compliance with the interpretation of the Court of Justice of the European Union. To this purpose, it is necessary to distinguish the relevance of national case-law, which is undisputed, from the irrelevant national definitions of legal institutes for the purposes of applying uniform legislation. On such irrelevance see *ex multis* E. Màrton, *Violation of personality rights through the internet: jurisdictional issues under European*

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

The result of this *a contrario* construction of the definition of tort, and of the preclusion of nationally oriented interpretations of the concept, is broadening the material scope of application of Article 7(2) considerably, opening it to a wide range of actions.[309] Consequently, it not only covers the situation in which a damage *strictu sensu* is suffered, but also actions that are less-markedly tortious, such as actions concerning unfair contract terms.[310] In general, Article 7(2) encompasses actions that in some ways may recall the matter analysed here, such as intellectual property,[311] the violation of domain names and prospectus liability,[312] and, of course, the violation of personality rights[313] (to which data privacy is often compared). As for the latter category, data privacy is usually paired with defamation cases, as the Court of Justice has not yet issued any interpretation of the existing rules in data privacy matters.

b) The determination of the *locus commissi delicti*

Regarding the current, interpretative approach of the grounds of jurisdiction of Article 7(2) of the Brussels Ia Regulation, it mainly addresses the determination of the place where the

---

law, Nomos, 2016, p. 131. See also, *inter alia*, M. Audit, *L'interprétation autonome du droit international privé communutaire I,* in *Journal du droit international*, 2004, 789; S. Bariatti, *Qualificazione e interpretazione del diritto internazionale privato comunitario: prime riflessioni*, in *Rivista di diritto internazionale privato e processuale*, 2006, p. 361.

[309] P. Mankowski, *Section 2: Special Jurisdiction*, in U. Magnus, P. Mankowski (eds), *Brussels I Regulation*, II ed., 2012, p. 232 et seq. See also A. Dickinson, E. Lein, *The Brussels I Regulation Recast*, Oxford University Press, 2015, 4.77. Specifically, the matters covered include, but are not limited to, product liability, prospectus liability, infringement of intellectual property rights, antitrust, financial market liability, liability of financial rating agencies, environmental damage, pre-contractual liability, traffic accidents, and, of course, personality rights. Recently, the Italian Supreme Court of Cassation also included the liability of rating agencies within the scope of application of Article 7(2). See Italian Court of Cassation, No 8076/2012, in *RDIPP*, 2013, p. 431; see also N. Nisi, *La giurisdizione in materia di responsabilità delle agenzie di rating alla luce del regolamento Bruxelles I*, in *Rivista di diritto internazionale privato e processuale,* 2013, p. 385.

[310] CJEU, case C-167/00, *Henkel*, ECLI:EU:C:2002:555, para 42.

[311] CJEU, case C-523/10, *Wintersteiger*, ECLI:EU:C:2012:220; CJEU, case C-170/12, *Pinckney*, ECLI:EU:C:2013:635.

[312] CJEU, case C-375/13, *Kolassa v Barclays*, ECLI:EU:C:2015:37; see also Italian Supreme Court of Cassation, No 8034/2011, in *RDIPP*, 2011, p. 1103.

[313] CJEU, case C-68/93, *Fiona Shevill*, ECLI:EU:C:1995:61; CJEU, joint cases C-509/09 and C-161/10, *eDate* and *Martinez*, ECLI:EU:C:2011:685.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

damage occurred, or may occur. On this topic, the European Union case-law provided a considerable amount of interpretations over the years: the first example is the leading case *Bier*.[314] In that case, a Dutch agriculture company sued a French mining company, the *Mines de Potasse d'Alsace*, for a tort before the Dutch courts. Plaintiffs claimed damages deriving from the unlawful dumping of sewage in a river in France, which destroyed the agriculture fields of the *Bier* in the Netherlands. In this case, an interpretation of the notion of 'place of the harmful event' was clearly necessary. As it often happens in international relationships, the place where the harmful event happens does not necessarily coincide with the place where the action that led to said damage was performed.

The Court decided not to favour any of the two interpretations over the other, as the *locus actus* may have a connection with the dispute as tight as the *locus damni*. For this reason, the Court held it was inappropriate to limit the arsenal of choices of the plaintiff. Therefore, the plaintiff was able to sue the alleged tortfeasor in both places. A plaintiff in the same situation of *Bier* can choose whether to use the general rule or one of the two fora determined through the application of the *ubiquity principle*. As scholars have noticed, such a choice reduces the predictability of the system, because it multiplies the number of possible fora in which a defendant may be sued.[315] Plaintiffs have a range of choices that allow for multiple strategies, but in general, the they will probably favour either: the court of the place where the assets of the defendant are located,[316] which may often coincide with the place where the defendant has their domicile; or, even more likely, the court that is closest to the plaintiff, namely the *forum*

---

[314] CJEU, case C-21/76, *Bier v Mines de Potasse d'Alsace*, ECLI:EU:C:1976:166.

[315] J. Von Hein, *Das Günstigkeitsprinzip im Internationalen Deliktsrecht*, Mohr Siebeck, 1999, p. 97 et seq.

[316] The choice of a court with greater proximity to the assets of the defendant guarantees a faster seizure procedure in case of a victory in court, due to the lack of recognition and enforcement procedures. However, the removal of *exequatur* from the Recast Brussels Ia Regulation increases the circulation of judgments, and therefore removes the majority of this kind of uncertainties for the victorious litigant.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

actoris, if some damage has been suffered there.[317] However, the *Bier* approach may be regarded as sufficiently balanced in the context in which the judgment was issued.

However, defamation by the press is different from environmental damage, which is a physical damage. The *Shevill* judgment was the starting point of a jurisprudential line that is still in development because of the fast pace of technological development. The *Shevill* case involved offline defamation,[318] in which a French newspaper published a defamatory news concerning Ms Shevill, a UK-domiciled lady. The news was about the involvement of Ms Shevill in a money laundering investigation. The news was proved to be untruthful and, unsatisfied by the apology published by the editor, Ms Shevill decided to bring an action and claimed damages. Damage to personality is by definition intangible, hence its dynamics differ from those of tangible damage. Therefore, the Court re-focused the *Bier* doctrine and prevented a potentially uncontrollable environment where damage with multiple locations – namely the damage suffered in all the places of distribution of the news – may create unpredictability for the prospective defendant by multiplying the Courts having jurisdiction on the matter. The adjustment of the *Bier* doctrine was achieved by constraining the scope of application of the ground of jurisdiction for each jurisdiction virtually competent under the ubiquity doctrine. The court held the *forum loci damni* was only entitled to decide on the merits of the damage suffered in that Member State, and not on the entirety of the damage suffered by the alleged victim, as the pure *Bier* doctrine would have allowed it to do. The damage was defined by the Court as being caused by the distribution of the publication, and therefore only existed where

---

[317] See T. Hartley, *Article 5(3): The Place of Commission of a Tort*, in *European Law Review*, 1977, p. 143.

[318] Cf. E. Màrton, *Violation of personality rights through the internet: jurisdictional issues under European law*, Nomos, 2016, p.153.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

the publisher distributed the news.[319] The *forum actus*, on the other hand, was the place where the victim was permitted to sue for the totality of the damages suffered. In this case, the *locus actus* was the place of establishment of the publisher, which was the place where the publication was issued. Clearly, such an approach *de facto* limits the options of the plaintiff, as the place coincides with the place of the defendant's domicile which is already the result of the application of the general rule under Article 4, which overlaps with this ground of jurisdiction under Article 7(2). In the future, it will be for plaintiffs to choose the court of the *locus actus*, or to propose actions in the places where they allegedly have suffered damage.[320]

A further development of this jurisprudential line is the *eDate* judgment,[321] which regarded online defamation and is therefore closely linked to the scope of the present research. The *eDate* doctrine was elaborated in a joint-case proceeding. In the first case, a German citizen allegedly was defamed by a news agency based in Austria; in the second case, the English *Sunday Mirror* published an online gossip news article on the French actor Olivier Martinez. The plain application of the *Bier* doctrine to the case of online defamation would have

---

[319] Disquisitions may be made on the nature of the distribution. It may be relevant to distinguish between distribution to retailers versus distribution to readers: on this matter, only the second may be deemed to cause harm to the victim. Also, questions arose on the issue of voluntary or involuntary distribution, but the majority of scholars agree on the fact that involuntary publication – such as the cross-border transport and distribution of a certain publication, does not trigger the ground of jurisdiction because the publication did not address that Member State. Of this opinion T. Hartley, *'Libel tourism' and conflict of laws*, in *International & comparative law quarterly*, 2010, p. 25, 28 et seq.; B. Hess, *The Brussels I Regulation: Recent case law of the Court of Justice and the Commission's proposed recast*, in *Common Market Law Review*, 2012, p. 1075, 1088. See also E. Màrton, *Violation of personality rights through the internet: jurisdictional issues under European law*, Nomos, 2016, p. 163 et seq.

[320] The quantification of damage also derived from the popularity of the publication in the target Member State. In the *Shevill* case, the newspaper was mainly sold in France (200,000+ copies), while in the UK only 15,000 copies were distributed, of which only 5 in Yorkshire, where Ms Shevill was domiciled. These considerations must however be mediated by other factual considerations, such as the reputation of the allegedly damaged person in the *locus damni*. It is indeed reasonable to presume that Ms Shevill was barely known in France, where the greatest number of copies of the newspaper were distributed, and best known in the place where she was domiciled, which means that a small number of copies sold in that place caused Ms Shevill more harm than the high number of copies sold in France. These considerations brought about the belief that the place of the partial damage may in some circumstances be reasonable than previously thought.

[321] CJEU, joint cases C-509/09 and C-161/10, *eDate* and *Martinez*, ECLI:EU:C:2011:685.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

brought to the unbearable coexistence of jurisdiction in 27 courts.[322] All courts would have had competence to judge on the merits of the entire case, and is, therefore, not the proper application in disputes of this nature. Nevertheless, not even the plain application of the *Shevill* doctrine would have brought a completely manageable outcome, because online defamation is equipped with the qualities outlined above,[323] being sudden, ubiquitous, and causing a damage that is not easily quantifiable.[324]

However, the Court confirmed in full the applicability of the *Shevill* principle, with some relevant additions and a few amendments. The place of the establishment of the publisher – the *locus actus* of the ubiquity principle – was a place where the entirety of damage could be claimed,[325] and the places where the content was accessible were potential fora for actions concerning the damage suffered in a Member State.[326] Now, this second aspect may be regarded as differing from the *Shevill* approach, which considered the places of distribution. But it has to be underlined that in internet-related matters, ubiquity is an aspect of paramount importance, and accessibility is a criterion that allows for some degree of predictability.[327] In addition to this, and by reason of the worldwide accessibility of the news and of the serious

---

[322] The Regulation does not apply to Denmark, which is not a participating to the judicial cooperation in civil matters. The applicability of the Brussels I Regulation has been extended to Denmark with a Convention of 2006, which entered into force in 2007. See Council Decision 2006/325/EC of 27 April 2006 concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in *Official Journal*, 2006, L 120.

[323] *Supra*, chapter II, para 2.

[324] CJEU, joint cases C-509/09 and C-161/10, *eDate* and *Martinez*, ECLI:EU:C:2011:685, para 45 et seq.

[325] CJEU, joint cases C-509/09 and C-161/10, *eDate* and *Martinez*, ECLI:EU:C:2011:685, para 52.

[326] CJEU, joint cases C-509/09 and C-161/10, *eDate* and *Martinez*, ECLI:EU:C:2011:685, para 51.

[327] A website may be inaccessible only on the grounds of censorship or voluntary limitation by the editor. An alternative could be the verification of the news having been actually accessed in the Member State in analysis, but the assessment of such an aspect is far more complicated than considering mere accessibility.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

harm that this caused,[328] the Court crafted a new ground of jurisdiction that confered full competence to the Court of the place of the alleged victim's centre of interests.[329]

This centre is not explicitly defined but it is deemed to be 'in general' situated in the place of habitual residence of the victim, even if the Court recognises that in some cases it may differ due to the presence of a closer link with a different Member State.[330] This orientation, which differs from the view of the Advocate General and is positively viewed by some scholars,[331] is not adequate to ensure compatibility with the governing objectives of the Brussels I system that are usually a core objective of every interpretation of the Court of Justice.[332]

The *eDate* doctrine presents a few critical aspects. First, it creates a brand-new ground of jurisdiction that is never taken into consideration in the Brussels I system: the centre of interests of the person.[333] The Brussels Ia Regulation, in line with the past legislation, is based upon the concept of domicile and not on that of habitual residence or other grounds.[334] It must

---

[328] Advocate General on joint cases C-509/09 and C-161/10, *eDate* and *Martinez*, ECLI:EU:C:2011:192 para 52.

[329] CJEU, joint cases C-509/09 and C-161/10, *eDate* and *Martinez*, ECLI:EU:C:2011:685, para 45-50.

[330] CJEU, joint cases C-509/09 and C-161/10, *eDate* and *Martinez*, ECLI:EU:C:2011:685, para 49.

[331] See B. Hess, *Der Schutz der Privatsphäre im Europäischen Zivilverfahrensrecht*, in *Juristenzeitung*, 2012, p. 189 et seq. However, this positive approach is not unconditional, as Prof. Hess also recognises that some critical circumstances may put the doctrine under stress.

[332] Predictability is so important to the Brussels Ia system that the CJEU stated, in the *Marinari* case, that to those purposes required to take into consideration the initial damage only, when dealing with indirect and subsequent damages. This may be *prima facie* deemed to be a different matter than the one analysed here, but the Marinari case was about the reputational damage suffered in one Member State as a consequence of a tort that happened in another Member State. The matter is indeed very similar to the matters in this work, regardless of the fact that internet damage is suffered simultaneously everywhere– and not subsequently - does not undermine the fact that predictability is a core aim of the Brussels I system. See CJEU, case C-364/93, *Marinari v Lloyd's Bank*, ECLI:EU:C:1995:289.

[333] This recalls the concept of the centre of main interests (COMI), upon which Regulation No 1346/2000 on insolvency proceedings is based. On this matter, see M. Bogdan, *Defamation on the internet, forum delicti and the e-commerce directive: some comments on the ECJ judgment in the eDate case*, in *Yearbook of Private international law*, 2011, p. 483, 486. On the insolvency Regulation in general and on the COMI, see G. Moss QC *et al*. (eds), *The EC Regulation on insolvency proceedings*, Oxford University Press, 2009. Please notice that Regulation No 1346/2000 has been recast: the new Regulation (EU) 2015/848 on insolvency proceedings, in *Official Journal*, 2015, L 141. The new Regulation will be applicable starting 26 June 2017.

[334] And this even if the Brussels Ia Regulation is four years younger than the Rome I Regulation, which is based on the concept of habitual residence.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

be inferred that the legislator would have switched from the concept of domicile to that of habitual residence, if such an approach would have been considered acceptable.

Second, it creates a *de facto* second general forum, which is only limited by the material scope of application of the doctrine. This second forum has the effect of destabilising the relationship between the Regulation's rules and the implant of the Regulation itself, which is based on the general rule of the defendant's domicile, with a few exceptions that must always be interpreted restrictively. Also, the second forum creates a permanent *forum actoris*, which is against the logic of the Regulation[335] and will be applied in most cases because it is the most accessible forum for the plaintiff. Indeed, it is reasonable to predict that persons who allege to have suffered damages would find it most advantageous to refer the matter to the Court that is closest to their centre of interests, rather than suing in a Court of a legal system they do not know, with potentially more uncertain outcomes and higher costs. In fact, the only reason for plaintiffs to resort to the defendants' domicile under the *eDate* doctrine is because of potential difficulties at the recognition and enforcement stage in the Member State in which the defendants have their assets.[336]

Moreover, the doctrine also presents an objective difficulty in establishing where the centre of interests is located in the case of an international life, such as in the case of professional activities located in a different Member State than habitual residence.[337]

---

[335] CJEU, case C-168/02, *Kronhofer*, ECLI:EU:C:2004:364, para 20, and CJEU, case C-51/97, *Réunion européenne*, ECLI:EU:C:1998:509, para 34. Strongly critical of the *eDate* approach is also F. Marongiu Buonaiuti, *Le obbligazioni non contrattuali nel diritto internazionale privato*, Giuffrè, 2013, p. 25 et seq.

[336] However, in the current context great attention is given to the advantage granted to the alleged victim as they would be the weakest party, but this is not always the case. See for example the approach of J. Carrascosa González, *The Internet – privacy and rights relating to personality*, Collected courses of the Hague Academy of International law, Vol. 378, Brill, 2016.

[337] B. Hess, *The protection of privacy in the case-law of the CJEU*, in B. Hess, C.M. Mariottini (eds), *Protecting privacy in private international and procedural law and by data protection*, Nomos, 2015, p. 94.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

However, such a mechanism also has the advantage of discouraging the use of the *fora loci damni*, which are in this setting often less advantageous than those of the plaintiffs' or of the defendants' domicile, because they are limited to the damage suffered in that jurisdiction.[338]

c) '…where the harmful event occurred or may occur'

A further aspect that is relevant to the applicability of Article 7(2) in internet data privacy matters is the extension of the material scope of application of the rule to the harmful event that did not yet happen. This extension has been introduced in the transition from the Brussels Convention of 1968 to the Brussels I Regulation and has been maintained in the Recast Regulation. The Brussels Ia Regulation provides for the possibility to activate Article 7(2) in order to establish jurisdiction, even in the event of a mere danger[339] of a future harm.[340] This led to the introduction of actions intending to ascertain the illicit conduct of the defendant, even if the damage has not yet been suffered. Actually, even before the entry into force of the Regulation, the Court of Justice interpreted Article 5(3) of the Brussels Convention 1968 – which used the phrase 'the place where the harmful event occurred' – to extend the material scope of application of the rule to actions in which the harm did not yet happen. Indeed, in the *Henkel*

---

[338] Further cases of potential interest are the recent *Wintersteiger*, *Pinckney*, and *Hejduk* judgments of the CJEU. However, the matter is it not deemed to be sufficiently close to that of data privacy to allow for a mutatis mutandis interpretation of data privacy cases. In *Wintersteiger*, the Court dealt with an online violation of trademarks: in this case, the Court expressly repealed the possibility of applying mutatis mutandis the *eDate* approach, stating that personality rights are protected in all Member States, while trademarks are in principle only protected in the Member State of registration. See CJEU, case C-523/10, *Wintersteiger*, ECLI:EU:C:2012:220, para 24. In *Pinckney*, the ubiquity doctrine has been confirmed with regard to the online violations of copyrights (author rights on music), without however sharing the view of the *eDate* doctrine, which again remains limited to personality rights infringements. See CJEU, case C-170/12, *Pinckney*, ECLI:EU:C:2013:635. In *Hejduk*, the *Pinckney* approach has been confirmed with regard to copyrights on personal image: again, the court did not extend the *eDate* doctrine to copyrights and confirmed that the judge of the place of the harmful event is only entitled to decide on the merits of the damage suffered within his jurisdiction. See CJEU, case C-441/13, *Hejduk*, ECLI:EU:C:2015:28.

[339] German version of the Regulation: '(...) an dem das schädigende Ereignis eingetreten ist oder einzutreten droht'.

[340] F. Mosconi, C. Campiglio, *Diritto internazionale privato e processuale*, VII ed., Utet, 2015, p. 84.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

judgment,[341] the Court held that Article 5(3) of the Convention regulated the matter of jurisdiction in an action that aimed to hinder the use of abusive clauses,[342] which did not necessarily cause a damage and did not necessarily require it to be ascertained in order to constitute a tort under the national legal systems.[343] Such an interpretation was made in the light of the *Schlosser Report*, issued as the United Kingdom, Ireland, and Denmark joined the Brussels Convention of 1968.[344] In the Report, it was highlighted that some European Union legal systems used to allow the pre-emptive action in tort matters, and suggested interpreting the Convention in a non-restrictive way.[345] However, the Italian Supreme Court of Cassation has been restrictive while interpreting Article 5(3), and required the parties to prove the existence of verifiable, pre-existing damage.[346] The European Commission removed any ambiguity with the new formulation in the Brussels Regulations, and in the 1999 proposal (which would have become Regulation EC No 44/2001) it explicitly stated that such choice would clearly indicate to the parties a forum concerning pre-emptive actions.[347] It seems appropriate to highlight the fact that the Commission stayed consistent while issuing the Regulation on non-contractual obligations. Indeed, in the Rome II Regulation,[348] Article 2(2) provides that it 'shall apply also to non-contractual obligations that are likely to arise'. Article 2(3) further provides that, '[a]ny reference in this Regulation to: (a) an event giving rise to

[341] CJEU, case C-167/00, *Henkel*, ECLI:EU:C:2002:555, para 42.

[342] P. Mankowski, *Section 2: Special Jurisdiction*, in U. Magnus, P. Mankowski (eds), *Brussels I Regulation*, II ed., 2012, p. 232 et seq.

[343] S.M. Carbone, *Lo spazio giudiziario europeo in materia civile e commerciale – da Bruxelles I al regolamento (CE) n. 805/2004*, Giappichelli, 2009, p. 93 et seq.

[344] F. Salerno, *Giurisdizione ed efficacia delle decisioni straniere nel regolamento (CE) n. 44/2001 (La revisione della Convenzione di Bruxelles del 1968)*, Cedam, 2006, p. 165.

[345] See S.M. Carbone, C.E. Tuo, *Il nuovo spazio giudiziario europeo in materia civile e commerciale: il regolamento (UE) n. 1215/2012*, Giappichelli, 2016, p. 134.

[346] Italian Supreme Court of Cassation, No 19550/2003, in *RDIPP*, 2004, p. 1372; see also Italian Supreme Court of Cassation, plenary, No 1821/1993, in *RDIPP*, 1994, p. 354.

[347] Cf. Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(1999)348, of 14 July 1999, p. 15.

[348] Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations ('Rome II'), in *Official Journal*, 2007, L 199.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

damage shall include events giving rise to damage that are likely to occur; and (b) damage shall include damage that is likely to occur.'

Such a legislative path, now confirmed in the Brussels Ia Regulation, together with the case-law of the Court of Justice, overrides of the interpretation of the Italian court of last resort, who has been particularly restrictive in the past.

d) Internet data privacy considerations

As it has been explained already, personal data presents some differences compared to defamation. For instance, in data privacy matters, the protection of personality rights is accomplished through the creation of requirements for the data processor, such as the obligation to inform; protection is also accomplished by creating the right of the data subject to access, rectify, and delete personal data.[349] Complying with such requirements removes the harm of an action by the data subject. As in defamation matters, the approach is different because standard practices are not always provided in order to remove *ex ante* the risk of an action.[350] It may be observed that defamation is possibly one of the consequences of the non-compliant processing of personal data. But it may also be observed that defamation does not necessarily occur when data are illicitly processed.[351]

In any case, the autonomous interpretation of 'tort' under the Brussels I system clearly comprehends internet data privacy due to the current formulation of the rule under Article 7(2); the presence of a verified and pre-existing damage is not a compulsory requirement in

[349] All of these rights and duties are provided for in the European legislation in data privacy matters.

[350] In the Italian legal system, this shortcoming has been addressed by the judiciary: the Supreme Court of Cassation issued the leading case 'Sentenza Decalogo', which addressed the clash between freedom of the press and personality rights. This case-law allows publishers and journalists to tailor their activity to the legitimate expectation of privacy of persons, as well as to the sensibility of the Italian judges regarding the matter. See Italian Supreme Court of Cassation, No 5259/1984, in *Il Foro italiano*, 1984, p. 2712.

[351] Denying the access to personal data to the data subject is indeed a cause of action, however, it does not necessarily result in defamation because the data is not necessarily made public.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

order to trigger special jurisdiction. Indeed, a prospective and possible future damage is a sufficient ground. In the case of internet data privacy, it may be argued that a tortious publication of personal data by the data controller/processor may not cause a harm to the data subject, but it may constitute a basis for a potential future damage of multiple natures, for example, damage to one's image or economic harm.

For instance, the illicit publication of data concerning the health of the data subject may represent a relevant connection to tort matters. The disclosure of data on the mental health of a teenager may not be cause immediate harm to his image or economic situation; but the republication of this information when the teenager, after the juvenile depression has ended, is a successful civil aviation pilot, may cause him psychological, economic, and social harm in his professional and private life. In this case, the prospective future and potential harm is to be considered sufficiently well-founded to trigger the application of Article 7(2) of the Brussels Ia Regulation in the present. It will not be necessary to wait for the libel damage to occur in order to propose an ruling inhibiting the conduct of the data controller/processor.

Another relevant question is whether the *Shevill* and *eDate* doctrines outlined above apply to internet data privacy matters, and allow suits before the courts within the jurisdictions provided for by these interpretations. The answer is positive. As indeed it has been outlined above,[352] data privacy fully falls within personality rights, which are also considered fundamental rights of the European Union. Since the *eDate* judgment provided for an interpretation of Article 7(2) that concerns the violation online of personality rights,[353] and since *eDate* derived from and confirmed the *Shevill* doctrine, the amended mosaic approach will be

[352] *Supra*, chapter I, esp. para 3.A.

[353] The Court explicitly referenced personality rights, without restricting the scope of the judgment to defamation. See CJEU, joint cases C-509/09 and C-161/10, *eDate* and *Martinez*, ECLI:EU:C:2011:685, para 52.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

applicable to internet data privacy. Clearly, the alleged tortfeasor will not be the publisher,[354] but the data controller/processor instead.[355]

Now, the application of the *eDate* doctrine to internet data privacy matters leads to the existence of multiple, concurring fora for the alleged victim.[356] First is the forum of the place of establishment of the controller/processor, which will be the *forum actus* under the *Bier* ubiquity doctrine, and which usually coincides with the forum of the defendant's domicile under the general rule provided for by Article 4. Second is the forum of the place where the alleged victim has their centre of interests, which possibly coincides with habitual residence, even if the factual considerations outlined above may lead to some uncertainties. Finally, all fora where the personal data has been illicitly processed, or where the damage may occur, are possible fora, but only in the limits of the damage suffered or to be suffered in said Member State.

On such aspects, it has to be highlighted the criticisms of scholars concerning the definition and localisation of the 'establishment'.[357] Indeed, the *eDate* doctrine only identified – and although in quite a clear way – the place of the domicile of the publisher as *locus actus*. The doctrine did not take into account the hypothesis of the pluri-localised publisher, or a violation that occurs in several branches of a company.

For example, in the case of Facebook the headquarters, where the guidelines on data processing originate, are located in Palo Alto, California, while the main European branch of the

---

[354] However, sometimes providers may also be characterised as publishers. On the liability of internet intermediary service providers, see Articles 12-16 of Directive 2000/31/EC on electronic commerce. On the upcoming system see: G. Sartor, *Providers' Liabilities in the New EU Data Protection Regulation: A Threat to Internet Freedoms?*, in *International Data Privacy Law*, 2012, p. 3.

[355] Cf. Also M. Brkan, *Data Protection and European Private International Law*, in *International Data Privacy Law*, 2015, p. 257, 270, fn. 144.

[356] Or for the data controller/processor, in the case of a negative declaratory action. See more extensively *infra*, para 5.B.

[357] M. Brkan, *Data Protection and European Private International Law*, in *International Data Privacy Law*, 2015, p. 257, 271.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

multinational corporation is established in Ireland, and also has a subsidiary that is in charge of the data processing in Europe.[358] Putting aside the clear procedural advantages of suing the European establishment,[359] it is necessary to enquire whether the rule under Article 7(2) allows for such freedom, or not. The answer is most probably negative, as the privacy policy of Facebook clearly indicates the data controller.[360] Therefore this is an example in which a clearly identified entity is indicated. If the controller illicitly transfers the data to a third party, it will be their responsibility (and liability). If the data subject agrees on the data transfer to third parties, the subject will have to petition the third party for rectification and deletion.[361]

The second observation relates to the identification of the centre of interests, which is not always a smooth task, as stated with regard to defamation cases. This not only relates to those data subjects who often change their habitual residence,[362] but also to those who apparently have more than one.[363]

Moreover, while it is true that the centre of interests often coincides with habitual residence, this is not automatically true. There may be subjects that habitually reside in one Member State (*e.g.* Cividale del Friuli, Italy) and work in another Member State (*e.g.* Capodistria, Slovenia). In this example, it is difficult to argue that the habitual residence is localised

---

[358] See at facebook.com/about/privacy (last accessed 7 October 2016).

[359] Above all, the applicability of the Brussels I system.

[360] Mainly in order to be compliant with the administrative requirements. Indeed, administrative litigation is also an option and Data Privacy Authorities always apply their national law.

[361] Actually, the means of data transfer plays a role as well in this case. Some services sell personal data *una tantum*, which means that rectification may only happen by contacting the buyer directly. Other services provide data on a continuous basis, which means that the rectification of the data in the hands of the seller implies the rectification of the data of the buyer. For instance, see Apple Maps, which uses TomTom as a data provider. On data transfers, see C. Kuner, *Transborder data flows and data privacy law*, Oxford University Press, 2013.

[362] See M. Brkan, *Data Protection and European Private International Law*, in *International Data Privacy Law*, 2015, p. 257, 271.

[363] The issue of the possible existence of more than one habitual residence at the same time has been tackled by the Court of Appeals of Virginia, United States, in *Johnson v Johnson*, 493 S.E.2d 668 (1997), 26 Va. App. 135: in this case, the Court determined that multiple habitual residences may indeed exist. More restrictive, but without excluding *a priori* the possibility of the existence of multiple habitual residences is the US 9th Circuit Court of Appeals in *Mozes v Mozes*, 239 F.3d 1067 (9th Cir. 2001).

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

in Caporetto, but it is indeed arguable that the centre of professional interests of the subject may be located in Caporetto.[364]

Finally, if it is true that the resort to the *locus damni* ground of jurisdiction will rarely incentivise the alleged victim to bring a high number of claims in multiple Member States,[365] it is also true that the alleged tortfeasor will not be reasonably able to predict in which Member States the alleged victim will choose to sue.[366] Uncertainty is not decreased by arguing that the online provider that aims to avoid such a risk will decide to limit the access to the service on a geographical basis. This is because such considerations go against the aim of the internet, which is to reach everyone instantly. Therefore, it is unlikely that an operator will decide to limit their services just to avoid the potential, future action that may come from a data subject.

Therefore, the corrected, mosaic approach *de facto* re-establishes forum shopping that the Regulation aims to reduce.[367] Nonetheless, it is not possible to share the view with those scholars who claim the *eDate* approach renders the enforcement of data privacy rights too complex if such rights are violated in more than one Member State,[368] because the *forum actoris* is still there to be used by the weaker party. Predictability has been sacrificed, but to

---

[364] For analogy, see B. Hess, *The protection of privacy in the case-law of the CJEU*, in B. Hess, C.M. Mariottini (eds), *Protecting privacy in private international and procedural law and by data protection*, Nomos, 2015, p. 94.

[365] Which are only competent to hear the case with regard to the damage allegedly suffered there.

[366] Even in the case of offline defamation, the publisher was in the condition to evaluate the likelihood of an action in a Member State by acquiring data on the distributed copies. Greater distribution would have meant a greater potential damage and, therefore, a more probably action brought forward before the judges of that Member State.

[367] Some scholars argue that the centre of interests will *de facto* reduce forum shopping: B. Hess, *Der Schutz der Privatsphäre im Europäischen Zivilverfahrensrecht*, in *Juristenzeitung*, 2012, p. 189, 191 et seq. Others believe that this setting is negative as it actually incentivises forum shopping: J.J. Kuipers, *Joined Cases C-509/09 & C-16l/10, eDate Advertising v X and Oliver Martinez and Robert Martinez v MGN Limited, Judgment of the Court of Justice (Grand Chamber) of 25 October 2011*, in *Common Market Law Re-Review*, 2012, p. 1211, 1222. Others believe that forum shopping has been minimised, but not eliminated: P. Nielsen, *Libel tourism: English and EU private international law*, in *Journal of Private International Law*, 2013, p. 269, 278 et seq.

[368] M. Brkan, *Data Protection and European Private International Law*, in *International Data Privacy Law*, 2015, p. 257, 271.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

achieve greater ease for the plaintiff.[369] Another possibility is that a centralised action or policy change by the data controller/processor may multiply the number of actions in multiple Member States, because data subjects may sue in the courts of their centre of interests.[370]

In conclusion, the special ground of jurisdiction in tort matters is frequently the most suitable for internet data privacy disputes because it leaves greater choice to the alleged victim, and the same freedom to the alleged tortfeasor in the case of negative action. But, it also must be noted that the imbalance found in the *eDate* doctrine also casts its effect on internet data privacy matters, and that a corrective interpretation is appropriate.[371]

C. 'Extra-European' cases: the resort to national private international law

As mentioned, the Brussels Ia Regulation applies in those cases in which the defendant is domiciled in a Member State.[372] This means that where the defendant is not domiciled in a Member State, the Brussels I system may not be activated, and – as a result – it will be necessary to use the jurisdictional rules contained in the Court's Member State national procedural law. In the Italian case, which will be taken as an example of the lack of uniform legislation, the rules are those of Law No 218/1995 'Reform of the Italian system of private international law'.[373]

---

[369] However, it must also be noted that forum shopping is not to be completely eliminated. The fact that special jurisdiction rules exist demonstrates that a controlled degree of court-tourism is allowed in the mind of the legislator. The distinction concerns the predictability purpose highlighted in Recital No 15 of the Brussels Ia Regulation.

[370] *Ibidem.* 'This also because Regulation (EU) No 1215/2012 does not contain express jurisdictional rules on regrouping such claims brought by different claimants, but only rules allowing a court of one Member State to decline its jurisdiction and stay proceedings, either in the case of the same cause of action between the same parties or in the case of related actions.' See also, for an analogy M. Danov, *Jurisdiction and judgments in relation to EU competition law claims*, Hart Publishing, 2011, p. 118 et seq.

[371] See the new approach of the GDPR, *infra*, para 5.

[372] And to those cases that fall within its material scope of application.

[373] In *Official Journal of the Italian Republic*, 1995, No 128; available in English in *International Legal Materials*, 1996, p. 765.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Title II of this law provides for some circumstances in which the competence of Italian courts automatically exists. It also provides other circumstances in which referral is made to the rules of Titles II-VI of the Brussels Convention of 1968,[374] which is the predecessor of the Brussels Regulations. The Brussels Convention was applicable within the European Union when the Italian law entered into force.

Article 3 of Law No 218/1995 provides that:

> 1. Italian courts shall have jurisdiction if the defendant is domiciled or resides in Italy or has a representative in this country who is enabled to appear in court pursuant to Article 77 of the Code of Civil Procedure, as well as in the other cases provided for by law.
>
> 2. Italian courts shall further have jurisdiction according to the criteria set out in Sections 2, 3 and 4 of Title II of the Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters with Protocol, signed in Brussels on 27 September 1968, enforced by Law No. 804 of 21 June 1971, with amendments in force for Italy, including when the defendant is not domiciled in the territory of a contracting State, with respect to any of the matters falling within the scope of application of the Convention. With regard to other matters, jurisdiction shall be also determined according to the criteria laid down for territorial jurisdiction.[375]

On the formulation of this Article, there are considerations relevant to both general aspects, and to internet data-privacy-related matters.

In general, it is to be noted that Article 3(1) has the objective of granting Italian jurisdiction whenever the defendant has a permanent presence in Italian territory. Indeed, Article 3(1) combines the criteria of domicile and residence in order to enlarge the possible situations in which Italian courts are competent to hear cases. Now, it is clear that the relevance of this paragraph to data privacy is limited because, in general, the rule under Law No 218/1995 and the general forum of the defendant's domicile contained in the Brussels I system tend to over-

[374] Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, in *Official Journal*, 1972, L 299.

[375] This English version of the Law is available in *International Legal Materials*, 1996, p. 765.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

lap. Since European Union law prevails over national law,[376] the domicile of the defendant in Italy triggers the application of the Brussels I system, instead of Law No 218/1995. This is also due to the fact that the determination of domicile – pursuant to the conflict-of-laws rule contained in Article 62 of the Brussels Ia Regulation – is made by applying the law of the forum,[377] which is Italian law in the case of Italian proceedings.[378] This is the same law that the Italian judge would apply to determine domicile in the Reform law system.[379]

Whenever both the requirements of the Brussels Ia Regulation and of Article 3(1) are not fulfilled, jurisdiction of the Italian courts may also exist, pursuant to Article 3(2) of Law No 218/1995. This Article refers to the rules of title II of the Brussels Convention of 1968.

Now, for the purposes of this analysis it seems sufficient to concentrate the commentary on two fundamental issues. Since the Brussels Convention is no longer applicable, and it has been replaced by the Brussels I and then Ia Regulations,[380] it is of utmost importance to determine whether referral is still made to the Brussels Convention of 1968, or if it now operates

---

[376] Cf. R. Adam, A. Tizzano, *Manuale di Diritto dell'Unione europea*, Giappichelli, 2014, p. 216 et seq. The so-called principle of supremacy of European Union law over national law has been defined and confirmed over time by the CJEU in the cases C-6/64, *Costa v ENEL*, ECLI:EU:C:1964:66; C-106/77, *Simmenthal*, ECLI:EU:C:1978:49; C-314/08, *Filipiak,* ECLI:EU:C:2009:719; C-189/10, *Abdeli*, ECLI:EU:C:2010:206; C-18/11, *Philips*, ECLI:EU:C:2012:532. See also P. Craig, G. De Búrca, *EU law: text, cases, and materials*, Oxford University Press, 2008, p. 347 et seq. In general, with regard to the interaction of European Union law with private international law, both of national and supranational origin, in light of the case-law of the Court of Justice of the European Union, see P. Bertoli, *Corte di giustizia, integrazione comunitaria e diritto internazionale privato e processuale*, Giuffrè, 2006.

[377] See M. George, *The concept of domicile*, in A. Dickinson, E. Lein, *The Brussels I Regulation Recast*, Oxford University Press, 2015, 15.06 et seq.

[378] And in the case of those proceedings of European courts in which an allegedly Italian citizen is the defendant pursuant to Article 62(2).

[379] The dual domicile-residence approach is also barely relevant, as the Supreme Cassation Court established that the notion of domicile presumably incorporates the concept of the place of dwelling, which compresses the number of cases in which the concept of residence is a viable option to retain jurisdiction (Italian Supreme Court of Cassation, No 25275/2006, in *RDIPP*, 2007, p. 1083). The only case that is of relevance is when the person is domiciled outside the European Union – for instance Kosovo – but is formally resident in Italy. In this case, the Brussels Ia Regulation would be not applicable, while Law No 218/1995 would be. Italian judges will not be able to establish jurisdiction on the basis of domicile, but residence would constitute a relevant ground. However, for the purposes of the present work, this case is of limited relevance, as the data controller/processor is usually a company.

[380] With the exception of those territories in which the judicial cooperation is not in force, such as the French and Dutch overseas territories.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

in favour of the Brussels Ia Regulation. Moreover, it is necessary to ask if such a referral includes the case-law of the Court of Justice of the European Union, which issues interpretative judgments that are of paramount relevance in the context of internet data privacy.

Concerning the first question, it is controversial whether the referral is to the Brussels Convention or to the Regulations. Italian case-law has not crystallised on this matter; some judgments required referral to the rules of the Convention, others referred to the Regulation.[381] For our purposes, determining if the Regulation or the Convention applies is especially relevant because of the rephrasing of Article 5(3) of the Convention. This Article has been amended in order to provide that the harm that 'may occur' falls within its scope. This amendment opened up a range of new categories of action, including negative declaratory actions and inhibitory actions.[382] It could be argued that the switch from the treaty-based to the regulatory system represents an insurmountable obstacle. Or, it could be argued that the terms 'with amendments in force for Italy' is not a formulation that may encompass the substitution of the law. But these observations would be put in doubt by the prescriptions of Article 68 of the Brussels Ia Regulation. This Article indeed provides that, '…Regulation shall, as between the Member States, supersede the 1968 Brussels Convention…'. Indeed, the aim of the legislator was to make a substitute for the Convention, which cannot be repealed as it remains in force where the European Union Regulations are not applicable.

Although substitution does not correspond to repealing, the legislature's desire to see the most up-to-date regulatory system applied in the largest number of cases is clear. This desire

---

[381] The Italian Supreme Court of Cassation is in favour of a literal interpretation of Article 3(2). n. 19595/2008, in *RDIPP*, 2010, p. 93; n. 21053/2009, *ivi*, p. 462; n. 22239/2009, *ivi*, p. 481; 22883/2011, in *RDIPP*, 2012, p. 923; n. 5765/2012, in *RDIPP*, 2013, p. 156; Tribunal of Trapani, 9 June 2010, in *Pluris*; and Tribunal of Como, 22 February 2011, in *RDIPP*, 2011, p. 782. However, the most recent case law of Italian Supreme Court of Cassation is against this interpretation. See Cass., n. 4211/2013, in *RDIPP*, 2013, p. 482.

[382] Cf. *supra*, para 4.v.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

is also envisaged in the repealing of Regulation (EC) No 44/2001, which leaves no room for its application. To put it differently, the European Union legislator strongly wishes only the most recent legislation to apply in order to avoid inconsistencies. On the other hand, it is also true that creative interpretations by those scholars who wish to put pressure on the system in order to see the Brussels Ia Regulation referred to in the context of Law No 218/1995 do not seem justifiable. They ground their interpretation of Article 288 TFEU, which provides for the compulsory application of regulations by all Member States;[383] this is not convincing, because the compulsory nature of regulations concerns their application within – and not without – their scopes of application.[384] Since the referral does not derive from an obligation of European Union law, but from a voluntary choice of the Italian legislator in the vigour of its sovereignty, it is clear that imposing a transition from the Convention to the Regulation would be considered an inappropriate stretch.

A different case would be that of Article 3(2) referring to the Brussels I Regulation, which has been repealed and substituted by the Brussels Ia Regulation.[385] In that case, the transition to the Brussels Ia Regulation would have been justifiable due to the common nature of the two legal instruments and because the older one would not remain in force.

It has to be concluded that independent from the objective desirability of a shift towards the reference to the regulations, a legal duty to do so may not be found in the current system. Therefore, it will be necessary to wait for a consolidation of national case law, or for the proposal for a preliminary ruling of the Court of Justice on the scope of application of the rule under Article 68 of the Brussels Ia Regulation.

---

[383] F. Mosconi, C. Campiglio, *Diritto internazionale privato e processuale*, Utet, 2015, p. 44.
[384] Cf. R. Adam, A. Tizzano, *Manuale di Diritto dell'Unione europea*, Torino, 2014, p. 166 et seq.
[385] Regulation (EU) No 1215/2012, Article 80.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

A different approach is required with regard to the Court of Justice case-law. It is necessary to assess whether the referral to the text of the Brussels Convention of 1968 also refers to the case-law of the Court of Justice. This is also controversial, but the answer seems to be positive. Indeed, the Court of Justice itself provided that 'where domestic legislation adopts the same solutions as those adopted in Community law in order, […], it is clearly in the interest of the European Union that, in order to forestall future differences of interpretation, provisions or concepts taken from European Union law should be interpreted uniformly, irrespective of the circumstances in which they are to apply'.[386]

Now, the Court's interpretation in these cases was about the uniform interpretation of European Union law in competition matters. But it is indeed desirable to extend such an interpretation to procedural law matters, although it is not clear if this constitutes an obligation for the Italian courts. However, it is true that the Italian legislature did not incorporate the text of the Brussels Convention into the text of Law No 218/1995, and therefore the intent was to let the courts apply in each moment the most up-to-date wording and interpretation of the rules.

It is indeed probable that the Italian courts will opt for an interpretation of the Convention rules that complies with the relevant Court of Justice case law. This interpretation would include decisions that extend the scope of application of these rules to actions that are deeply related to the matter of this analysis, such as the extension of the applicability of Article 5(3) of the Brussels Convention to cases in which the harmful event did not yet occur, or the cases with pluri-localised damage.

---

[386] CJEU, case C-84/12, *Unamar*, ECLI:EU:C:2013:663, para 31. On the same line also: CJEU, case C-28/95, *Leur-Bloem*, ECLI:EU:C:1997:369, para 32; CJEU, case C-130/95, *Giloy*, ECLI:EU:C:1997:372, para 28; CJEU, case C-1/99, *Kofisa Italia*, ECLI:EU:C:2001:10, para 32; and CJEU, case C-3/04, *Poseidon Chartering*, ECLI:EU:C:2006:176, para 16.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

The unclear recall of the current Regulation, in combination with the possible application of the interpretative case law brings up the question whether the case law mentioned here only relates to the Brussels Convention, or if it also extends to the Regulations. This is relevant because the *eDate* doctrine was formulated on a case concerning the Brussels I Regulation, and not the Convention, and it is now a leading case for interpreting the scope of application of the special ground of jurisdiction for torts in data privacy matters. Again, it is appropriate to give relevance to the case law in its entirety for two main reasons. The first reason is a simple matter of procedural economy, since it would otherwise be difficult to ensure interpretative uniformity in courts. The second reason pertains to the fact that the Brussels Convention has been extensively and systematically interpreted in the light of the Brussels I Regulation in the period in which the latter was in force, but not yet applicable *ratione temporis.*

Indeed, it is the Brussels I Regulation which provides in its Recital No 19 that it is necessary to ensure continuity between the Convention and the Regulation.[387] The Court of Justice therefore resorted to an evolutionary interpretation of the Convention in view of the upcoming applicability of the Regulation.[388] The most significant case in this field is again the *Henkel* judgment,[389] in which the Court in Luxembourg indirectly extended the applicability of Article 5(3) of the Brussels Convention to the tort that had not yet caused a verifiable harm. This interpretation was given in view of the fact that the upcoming Regulation extended the scope of application of the special forum in tort matters to this kind of actions. A second case is the *Tacconi* judgment,[390] in which the Court was asked to interpret Article 5(3) in order to include or to exclude pre-contractual liability in the scope of application of this Article. In this

[387] Recital No 24 of the Brussels Ia Regulation maintains the wording and adds the Brussels I Regulation to the uniform interpretation.

[388] C. Bonaduce, *L'interpretazione della Convenzione di Bruxelles del 1968 alla luce del Regolamento n. 44/2001 nelle pronunce della Corte di Giustizia*, in *Rivista di diritto internazionale*, 2003, p. 747.

[389] CJEU, case C-167/00, *Henkel*, ECLI:EU:C:2002:555.

[390] CJEU, case C-334/00, *Fonderie officine meccaniche Tacconi*, ECLI:EU:C:2002:499.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

case also, the decision was made by taking into account the Recitals of the Brussels I Regulation, already in force but not yet applicable *ratione temporis*.

However, it is necessary to underline that the regulations, being sources of law which originate from treaties, are of a different nature and hierarchical rank compared to treaties.[391] Although the Court aimed in these cases to direct the interpretation of the Convention towards uniformity with the Regulation,[392] it may be argued that this is more a policy choice, motivated by the need to avoid conflicting rules to circulate within the Union, rather than an automatic link of the Convention with the Regulation.

Similarly, the political appropriateness should be highlighted, for procedural efficiency reasons, of incentivising a singular interpretation of the two instruments that are separately regulating private international law aspects of similar disputes, but which present international elements and are of different nature, such as the rules of the Regulation and the rules of the Convention, referred to by Law No 218/1995.[393]

This system, which originally based its applicability on the location of the defendant's domicile,[394] is going to be heavily influenced, and partially substituted, by the regime on jurisdiction included in the new General Data Privacy Regulation. This new Regulation will be applicable – with a few exceptions – to both intra- and extra-European disputes.

---

[391] C. Bonaduce, *L'interpretazione della Convenzione di Bruxelles del 1968 alla luce del Regolamento n. 44/2001 nelle pronunce della Corte di Giustizia*, in *Rivista di diritto internazionale*, 2003, p. 758.

[392] At that time, most of the attention was focused on the uniformity with the interpretation of the Convention in those territories where the Regulation would never have been applicable, such as the overseas territories.

[393] This interpretation does not intend to manipulate the recall in order to ensure a backdoor access to the Regulation. Indeed, some differences do remain. For example, Article 5(2) of the Brussels I Regulation regulated the matter of maintenance obligations; this matter is now out of the scope of the Brussels Ia Regulation as it falls within the scope of Regulation (EU) No 4/2009, but indeed remains in force in the Brussels Convention of 1968 in all cases in which Regulation No 4/2009 is not applicable. Conversely, the recall will not operate to include the matter of the civil claim for the recovery, based on ownership, of a cultural object of Article 7(4) of the Brussels Ia Regulation, which was not within the scope of application of the Brussels Convention of 1968.

[394] With the few exceptions, progressively added during the recast of the system, which have been mentioned *supra*, para 4.B.i.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

5. The upcoming system

A. The General Data Privacy Regulation

i) General remarks

The relevant supranational civil-procedural law on internet data privacy will change radically in the next years, when Regulation (EU) 2016/679 (GDPR)[395] becomes progressively applicable to data privacy disputes. Indeed, the Regulation not only has an innovative scope of application, but also introduces new rules on jurisdiction to a determine autonomously which national court has the competence to decide on internet data privacy disputes among private parties.[396]

Regarding the scope of application, which is relevant to determine the reach of the rules on jurisdiction, the GDPR applies 'to the processing of personal data wholly or partly by automated means', with some exceptions that safeguard the Member States' sovereignty in specific matters.[397] Most important is the innovation in the territorial scope of application of the legislation. Indeed, different from the wording of Directive 95/46/EC, the Regulation does

---

[395] Regulation (EU) 2016/679 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 *Official Journal*, 2016, L 119.

[396] See *infra* on Article 79 GDPR.

[397] Full text: 'Article 2 – Material scope: 1. This Regulation applies to the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system. 2. This Regulation does not apply to the processing of personal data: (a) in the course of an activity which falls outside the scope of Union law; (b) by the Member States when carrying out activities which fall within the scope of Chapter 2 of Title V of the TEU; (c) by a natural person in the course of a purely personal or household activity; (d) by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security. 3. For the processing of personal data by the Union institutions, bodies, offices and agencies, Regulation (EC) No 45/2001 applies. Regulation (EC) No 45/2001 and other Union legal acts applicable to such processing of personal data shall be adapted to the principles and rules of this Regulation in accordance with Article 98. 4. This Regulation shall be without prejudice to the application of Directive 2000/31/EC, in particular of the liability rules of intermediary service providers in Articles 12 to 15 of that Directive'.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

not apply exclusively to 'the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union'.[398] The Regulation also applies to the processing of personal data of data subjects who are in the territory of the Union by a controller or processor that is not established in the Union, 'where the processing activities are related to: (a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or (b) the monitoring of their behaviour as far as their behaviour takes place within the Union'. To put it differently, the extent of the *ratione loci* scope of applicability of the Regulation is universal where the processing of data is related to a business relationships or to profiling activities. This new rules *de facto* extend the long arm of European Union data privacy law to all those commercial data privacy processing activities that concern European Union residents.[399]

With regard to the rules on jurisdiction, it is important to assess whether they will render the Brussels Ia Regulation inapplicable to data privacy cases or not. If not, it is also important to understand the relationship between these rules. Fortunately, the Brussels Ia Regulation is equipped with a rule on the relationship with other legal instruments. Article 67 states that the Regulation 'shall not prejudice the application of provisions governing jurisdiction and the recognition and enforcement of judgments in specific matters which are contained in instruments of the Union or in national legislation harmonised pursuant to such instruments'. If data privacy falls into the category of 'specific matters', and the GDPR is equipped with provi-

---

[398] And the Regulation further specifies that it is irrelevant where the actual processing takes place.

[399] For studies on extraterritoriality in data privacy law, see *ex multis*: D.J.B. Svantesson, *The extraterritoriality of EU data privacy law: its theoretical justification and its practical effect on US businesses*, in *Stanford Journal of International Law*, 2014, p. 53; D.J.B. Svantesson, *Extraterritoriality and targeting in EU data privacy law: the weak spot undermining the regulation*, in *International Data Privacy Law*, 2015, p. 1; C. Kuner, *Extraterritoriality and regulation of international data transfers in EU data protection law*, in *International Data Privacy Law*, 2015, p. 235; C. Ryngaert, *Symposium Issue on Extraterritoriality and EU Data Protection*, in *International Data Privacy Law*, 2015, p. 221.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

sions concerning jurisdiction, it can be concluded that the Brussels Ia Regulation places itself on a lower hierarchical rank than that of the new data privacy Regulation.[400]

This reading is mirrored and confirmed in the data privacy Regulation. Indeed, Recital No 147 expressly provides that '[w]here specific rules on jurisdiction are contained in [the GDPR], in particular as regards proceedings seeking a judicial remedy including compensation, against a controller or processor, general jurisdiction rules such as those of Regulation (EU) No 1215/2012 of the European Parliament and of the Council should not prejudice the application of such specific rules'.

From the wording of the two Regulations, it is clear that the European legislator's intent is to make the GDPR the main tool for determining jurisdiction in disputes concerning the processing of data involving the data subject and the data controller/processor. However, questions arise on whether this prevalence is absolute, especially because the new Regulation does not contain rules that regulate every situation the Brussels Ia Regulation is equipped to handle.

It is doubtful that the GDPR will fully prevail over the Brussels Ia Regulation. For instance, it is questionable to allege that the GDPR prevails in cases in which rules on exclusive jurisdiction of the Brussels Ia Regulation would be applicable. Specifically, in the case of a dispute concerning personal data contained in public registries, it would be possible to argue that the court identified through Article 24(3) of the Brussels Ia Regulation may be exclusively competent to hear the causes of action on related matters; causes of action may include the tortious disclosures of the data saved in such a registry by the private operators that have ac-

[400] The following legislation is given the same kind of precedence: Directive 96/71/EC (Posted Workers Directive), in *Official Journal*, 1997, L 18; Directive 93/12/EEC (Unfair Contract Terms Directive), in *Official Journal*, 1998, L 350; Council Decision 2001/539/EC on the conclusion by the EC of the 1999 Montreal Convention for the Unification of Certain Rules for International Carriage by Air, in *Official Journal*, 2001, L 194; Council Regulation (EC) No 207/2009 on the Community Trade Mark, in *Official Journal*, 2009, L 78.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

cess to such data.[401] However, this hypothesis is not convincing. In fact, is has been said that the Brussels Ia Regulation will not prejudice the GDPR regarding the combination of two articles, which are in both Regulations. To put it differently, since the GDPR contains a rule on the allocation of jurisdiction that is applicable to tort matters, its regime will prevail over all rules of the Brussels Ia Regulation, the applicability thereof would lead to the identification of a national court other than that identified by the GDPR rule that covers tortious liability. Or, in other words, the rules in the GDPR will render Article 7(2) of the Brussels Ia Regulation inapplicable to internet data privacy disputes, as it directly clashes with Article 79 GDPR that (also) regulates torts,[402] but altogether it will render it impossible for exclusive jurisdiction rules to attract the disputes that would virtually fall within the scope of application of the Brussels Ia exclusive fora, but which would have as an outcome of deactivating the options of the plaintiff under the GDPR.[403] This is because a different approach on this matter would *de facto* deprive the new data privacy Regulation of part of its regulatory power, which would cause a systemic deprivation of effectiveness in safeguarding the rights it confers and cause uncertainty in the entire system.

Since the coexistence of the two instruments depends on the outcome of the application of the Brussels Ia Regulation and its compatibility with the rules of the GDPR, the main tools of

---

[401] A relevant example is the new Italian *SPID: Sistema Pubblico di Identità Digitale*, which is a single identity code for each Italian citizen. By using such an ID, the citizen may log into several private and public service websites with a single credential. Conversely, private companies can sign up for SPID in order to provide such a log in opportunity to their customer. It is clear, that in this case the registry is publicly, held, but this does not necessarily trigger the exclusive jurisdiction when the defendant is the private company. See: spid.gov.it (last accessed 7 October 2016).

[402] See *infra*, para ii.

[403] This acquires further relevance in light of the necessity of a restrictive interpretation of all grounds of jurisdiction of Sections 2-7 of the Brussels Ia Regulation. Indeed, the Court often reiterates the obligation not to extend the reach of the special and exclusive fora beyond their appropriate scopes of application, as the main ground of jurisdiction of the Regulation shall remain the general forum of the defendant's domicile. See: CJEU, case C-89/91, *Shearson Lehman Hutton*, ECLI:EU:C:1993:15, para 14 et seq.; CJEU, case C-51/97, *Réunion européenne*, ECLI:EU:C:1998:509, para 16; case C-288/82, *Duijnstee*, ECLI:EU:C:1983:326, para 23.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

the former may be briefly put to the test. While Article 7(2) of the Brussels Ia Regulation will become inapplicable as it contains rules that are incompatible with the new grounds of jurisdiction, the future of the general forum of the defendant's domicile of Article 4 of the Brussels Ia Regulation is not put into question. Indeed, it is true that the defendant's domicile almost always coincides with one of the grounds of jurisdiction of the GDPR, which will be analysed here.[404] But, it is also true that identifying outcomes does not imply prejudice for the tool that regulates specific matters. Nonetheless, it is also clear that whenever a situation arises in which the two grounds of jurisdiction will lead to different outcomes, Article 4 will be considered inoperative.

More scepticism is raised by taking into account the rules on the concentration of the action against co-defendants. It has been argued that the rule of Article 8(1) of the Brussels Ia Regulation on the concentration of actions against co-defendants would not prejudice the application of the GDPR.[405] Nonetheless, it is not entirely convincing that a rule that identifies a forum other than that identified by Article 79 would be admissible. As it will be analysed in the next paragraph, Article 79 provides for the *forum actoris* and for the forum of the establishment of the controller as possible competent courts. Therefore, it is not convincing that the GDPR regime would be considered unaffected if a data controller/processor was sued in a State other than that identified by Article 79. This would create a third potential forum, which would be indeed beneficial for procedural economy reasons, but is not entirely foreseeable by the data controller/processor, especially in the internet environment in which territoriality is ephemeral.

---

[404] See *infra*, para ii.

[405] See P. Franzina, *Jurisdiction regarding claims for the infringement of privacy rights under the General Data Protection Regulation*, in A. de Franceschi (ed), *European contract law and the digital single market: the implications of the digital revolution*, Intersentia, 2016, p. 81, 104. Franzina argues that the possibility granted to the plaintiff to concentrate the action before the courts of the domicile of one of the co-defendants would not prejudice the GDPR regime as it safeguards its protective nature for data subjects.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

The same consideration seems appropriate with regard to prorogation of jurisdiction. In this matter, the view of the commentator on Article 79(2) can be shared. Indeed, choice-of-court clauses that deprive the allegedly weaker party (namely the data subject in the setting of the GDPR) of using the courts identified by the rules of Regulation (EU) 2016/679 are arguably undesirable. Nonetheless, it is also true that not just any agreement conflicts with the protective set-up of the Regulation. In fact, agreements that grant the allegedly weaker party additional fora to utilize will not conflict with the protective approach of the GDPR. This results because they: a) do not deprive the weaker party of the choice provided for by the data privacy legislation; and b) maintain the predictability for the other party.[406]

With regard to *lis pendens*, the issue seems to be more controversial. Franzina argues that the rule under Article 81[407] could be interpreted restrictively as if it addresses the actions of data subjects against data authorities only – rather than all actions including those against data controllers/processors – in light of Recital No 144 GDPR, which only provides for clarification on the functioning of Article 81 for the first kind of actions. Although this view seems to be guided by the intent of preserving the functioning of a sophisticated *lis pendens* rule[408] by excluding the applicability of a (allegedly) less efficient one,[409] it seems difficult to consider this view as fully uncontroversial. This Recital does not explicitly state that Article 81 only addresses actions against data authorities. Furthermore, recitals have no binding force, and it

---

[406] On this matter, and on the analogical considerations of the prorogation options granted under the rules on the protective forum on consumer matters of the Brussels Ia Regulation (which does not deny the functioning of the agreement that enlarges the arsenal of options for the consumer) see P. Franzina, *Jurisdiction regarding claims for the infringement of privacy rights under the General Data Protection Regulation*, in A. de Franceschi (ed), *European contract law and the digital single market: the implications of the digital revolution*, Intersentia, 2016, p. 81, 106 et seq.

[407] On this rule, see *infra*, para ii.

[408] That of the Brussels Ia Regulation.

[409] That of the GDPR, see the considerations *infra* at para ii.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

is appropriate to allege that Article 81 regulates the same matter as Section 9 of the Brussels Ia Regulation.[410]

Finally, a less controversial topic is assessing the function of the rules on the recognition and enforcement of judgments in civil and commercial matters of the Brussels I system.[411] Indeed, since the GDPR does not contain any rule concerning the circulation of those judgments that are rendered in compliance with the GDPR rules on jurisdiction, the rules of the Brussels Ia Regulation will be applicable to internet data privacy matters.[412]

Of course, the new Regulation prevails also over national private international law legislation, where the necessary circumstances for the application of the latter are met.[413] This is by reason of the principle of prevalence of European Union law over national law in those matters that fall within the scope of European Union law.[414]

---

[410] For a more in-depth analysis on which rules of Section 9 are concerned and on the residual functioning of such a Section of the Brussels Ia Regulation, see *infra*, para ii.

[411] On the recognition and enforcement of judgments in matters related to personality rights, see the remarks of M. Frigo, *Recognition and enforcement of judgments in matters relating to personality rights and the recast of the Brussels I Regulation*, in F. Pocar, I. Viarengo, F.C. Villata (eds), *Recasting Brussels I*, Cedam, 2012, p. 183.

[412] Please note that the proposal for a Regulation that would become the GDPR initially included a simulacrum of rule on the recognition and enforcement of judgments in privacy matters. This rule has been removed in the actual, approved text of the GDPR. See: Articles 74(4) and 75(4) of the Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM(2012) 11, available at ec.europa.eu/justice/data-protection. Please note that the GDPR contains a rule on the recognition and the enforcement of judgments of courts of third countries ordering the transfer of personal data to these countries. This article, combined with the lack of a specific rule on the circulation of judgments in the area of freedom, security, and justice, seems to confirm the thesis on the ongoing applicability of the rules of the Brussels I system on the recognition and enforcement of judgments.

[413] Essentially, when the matter falls outside of what now is the scope of application of the Brussels Ia Regulation, namely extra-European disputes. For the extraterritorial effect of the rules on jurisdiction of the Regulation, see *infra*, at 5.B. and chapter III, para 2.

[414] R. Adam, A. Tizzano, *Manuale di Diritto dell'Unione europea*, Torino, 2014, p. 216 et seq. See also P. Craig, G. De Búrca, *EU law: text, cases, and materials*, Oxford University Press, 2008, p. 347 et seq. and *supra*, fn. 376.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

ii) The new rules on jurisdiction

There are three new jurisdiction-related rules included in the GDPR. The first rule relates to the actions against national data privacy authorities, and falls outside the scope of the present analysis. The second rule relates instead to private-to-private disputes. The third rule deals with the suspension of proceedings when there are parallel actions.[415]

Predictably, the first rule provides that national data privacy authorities may be sued only in the Member States in which they are established.[416] This is to be expected as it derives from the fact that national authorities are government-related agencies and it would be difficult to foresee an action against them in a Member State other than the one in which they operate.

Concerning the rule on private-to-private disputes, which becomes relevant in this analysis, Article 79 GDPR provides that:

> 1. Without prejudice to any available administrative or non-judicial remedy, including the right to lodge a complaint with a supervisory authority pursuant to Article 77, each data subject shall have the right to an effective judicial remedy where he or she considers that his or her rights under this Regulation have been infringed as a result of the processing of his or her personal data in non-compliance with this Regulation.
>
> 2. Proceedings against a controller or a processor shall be brought before the courts of the Member State where the controller or processor has an establishment. Alternatively, such proceedings may be brought before the courts of the Member State where the data subject has his or her habitual

---

[415] On this third rule, see *infra*, para 5-A.iii.

[416] Full text: Article 78 – Right to an effective judicial remedy against a supervisory authority. 1. Without prejudice to any other administrative or non-judicial remedy, each natural or legal person shall have the right to an effective judicial remedy against a legally binding decision of a supervisory authority concerning them. 2. Without prejudice to any other administrative or non-judicial remedy, each data subject shall have the right to a an effective judicial remedy where the supervisory authority which is competent pursuant to Articles 55 and 56 does not handle a complaint or does not inform the data subject within three months on the progress or outcome of the complaint lodged pursuant to Article 77. 3. Proceedings against a supervisory authority shall be brought before the courts of the Member State where the supervisory authority is established. 4. Where proceedings are brought against a decision of a supervisory authority which was preceded by an opinion or a decision of the Board in the consistency mechanism, the supervisory authority shall forward that opinion or decision to the court.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

> residence, unless the controller or processor is a public authority of a Member State acting in the exercise of its public powers.

On this new wording, which remained unaltered in the entire legislative process, it may be preliminarily stated that it confirms what has been said on the hierarchical parity of the administrative and civil-litigation paths.[417] In fact, it is not necessary to exhaust administrative remedies before proposing an action before a Court; the choice is made by the plaintiff.

Moreover, the roles of the parties are not interchangeable. These rules only apply to those disputes in which the plaintiff is the data subject, and the defendant is the data controller/processor.[418] In addition, this rule applies both to contractual and non-contractual disputes. Reference is only made to 'proceedings against a controller or a processor', without making any reference to the nature of the legal relationship between the parties. This is extremely positive as it eliminates any grey area in such relationships in which a contract exists, but data privacy is regulated by other instruments.[419]

Furthermore, the legislators made a precise policy choice on jurisdiction, by incorporating some aspects of the Court of Justice case-law on personality rights within the Brussels I system. Additionally, the legislators made corrective amendments in order to increase predictability. The first ground of jurisdiction is the place of establishment of the data controller/processor. This ground of jurisdiction recalls the general forum of the defendant's domicile of the Brussels I system, and is also compatible with the interpretative case-law of the Court of Justice on the special grounds of jurisdiction in tort matters. Indeed, as it is highlighted above, one of the problematic aspects of the *locus actus* as the place of establishment of the publisher (the *Shevill* doctrine) was the creation of an overlap with the general rule of

---

[417] See *supra*, para i.

[418] Which means that specular suits will fall outside the scope of application of the GDPR. See *infra*, para di 5.B on the 'one-way approach' adopted in this Regulation.

[419] Such as the so-called 'Privacy policies'.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

the defendant's domicile of Article 4 of the Brussels Ia Regulation.[420] In this case, the place of establishment becomes a forum independent from the nature of the dispute. Also, given the one-way nature of the disputes,[421] it actually unifies the two alternative fora into a single forum, which is both the *locus actus* and the place of the defendant's domicile.

The aspect that raises concerns is the limitation given by the need for an establishment within the European Union. Indeed, the rule expressly provides that it is the court '*of the Member State*' of the establishment who has jurisdiction on the matter. Similar to the Brussels Ia grounds of jurisdiction, this sentence of the Article only applies when the establishment is located within one Member State of the Union; it does not apply to those data controller/processors that are established outside the Union. The rationale of such a choice may be understood by taking into account the second sentence of the rule, which regards the *forum actoris*.

Indeed, the first ground of jurisdiction pairs with the ground of jurisdiction of the data subject's habitual residence. This criterion, which clearly derives from the *eDate* doctrine, allows plaintiffs to freely choose if it is most advantageous to sue in the Court that has the highest proximity to the defendant, or to their own location.

The choice to maintain the core of the *eDate* doctrine has advantages and shortcomings. The advantage is that it leaves the options in the hand of the alleged victim. The *favor* of the *forum actoris* allows plaintiffs to use the system they know best, to take part in proceedings in a language they understand, and to bear lower costs (compared to actions conducted abroad).

The shortcomings derive from the general approach of such a rule. The *forum actoris* is blatantly against the general setting of European Union private international law, which fa-

---

[420] See *supra*, para 4.B.ii.
[421] The data subject is always the plaintiff; the data controller/processor is always the defendant.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

vours the rule of the defendant's domicile because the defendant is sued in court and finds himself in a situation of initial 'disorientation'.[422] Of course, it is necessary to add that in the case of data privacy, the defendant is rarely the economically weaker compared to the plaintiff, and the defendant may have greater accesses to qualified legal consultants abroad.

In any case, it seems appropriate to underline that the elimination of the mosaic approach, in favour of a dual system, is certainly to be appreciated, as it limits forum shopping to two alternatives that are foreseeable by the future defendant. Of course, this only pertains to the single relationship between data subject and data controller/processor, and it may become problematic in case the data subjects are many and geographically disperse. Since the topic of data privacy actually relates to the internet in the great majority of cases, most of the disputes will involve multiple, alleged victims that are habitually resident in several countries. The GDPR Regulation does not include any rule on the concentration of disputes,[423] and only contains a rule on parallel proceedings.[424] Consequently, it is possible to foresee that, for instance, a single policy change of the controller may trigger actions in several Member States.[425] This issue would be solved if the rule of the place of the establishment had been granted hierarchical advantage, but this has not been done.

By taking the example of the two most known cases in internet data privacy matters, some observations may be given the new system, especially on the universal reach of the Regulation and on the issue of multiple plaintiffs. In the case of *Google Spain*, for example, only one

---

[422] See the considerations on *eDate* made *supra*, para 4.B.v. See also the critics by S. Marino, *La violazione dei diritti della personalità nella cooperazione giudiziaria civile europea*, in *Rivista di diritto internazionale privato e processuale*, 2012, p. 363.

[423] Or concerning collective redress, including the so-called class actions, which are a topical issue in data privacy matters, especially in the light of the *Schrems* action. See the example *infra* in this paragraph.

[424] See *infra*, para 5.A.iii.

[425] And non-Member States as well, if the national private international law legislations so allow.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

plaintiff resorted to the authority of his own Member State.[426] Now, if Mr Costeja Gonzalez had wanted to follow the civil-litigation path instead of the administrative one, he would have had an arsenal of choices under the regulatory frameworks of the Brussels Ia Regulation and of the new GDPR (depending on the time of the commencement of the action). Under the current system, the Brussels Ia Regulation would have allowed him to propose actions: a) before the (European Union) national court of the defendant's domicile (Spain, in the case of the Spanish branch of Google); b) before the courts of the Member State in which the centre of his interests was located (presumably Spain, where he was domiciled and habitually resident); or c) before the courts of all places within the European Union in which google.es was accessible and the news was available, but only if harm was suffered there. This is by reason of applying Articles 4 and 7(2) of the Regulation. The Brussels Ia Regulation does not regulate jurisdiction regarding Google Inc., which is not domiciled in a Member State.

With the new Regulation, Mr Costeja will be allowed to sue in the Spanish courts (the place of the establishment of the controller/processor, pursuant to Article 79(1) GDPR), or – again – Spain (place of his own habitual residence, pursuant to Article 79(2) GDPR). The difference pertains to the possibility of suing Google Inc. as well, in addition to the Spanish branch. In the current system, Google Inc. is excluded from the scope of application of the unitary jurisdictional rules, as it is established in the United States. On the other hand, the new Regulation allows for the attraction of the jurisdiction universally, and it also applies to extra-EU operators due to the second sentence of the rule on jurisdiction. The Regulation indeed does not specify whether the *forum actoris* is only actionable when a defendant is established

[426] CJEU, case C-131/12, *Google Spain SL and Google Inc.*, ECLI:EU:C:2014:317.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

in a Member State. To put it differently, the first forum is only actionable in an intra-European dispute, while the second one has an extraterritorial reach.[427]

The *Schrems* case[428] instead relates to a different aspect: multiple plaintiffs. Mr Schrems indeed proposed a class-action against Facebook Ireland before the Irish data authority. Now, the case was not related to the wrongful dissemination of data, but to data transfer. Thus, the application of the Brussels Ia Regulation and of the GDPR would indicate the existence of jurisdiction of the Irish courts (the place of the establishment of the defendant) or of the Austrian courts (the place of the habitual residence/COI of the plaintiff), pursuant to the *eDate* doctrine on Article 7(2) of the Brussels Ia Regulation or of Article 79 GDPR.

The difference rests in the fact that the *Schrems* dispute later became a class-action. Now, since the action was of administrative nature, it was a logical step to sue before the Irish authority, because the data controller/processor was established in Ireland. However, the civil litigation path would have generated issues that the GDPR does not tackle, as it does not contain any rule on collective redress.[429] In the civil-litigation system, therefore, each alleged victim of the *Schrems* class-action would have been allowed to decide if it was most advantageous to resort to the Irish judge or to the judge of their own domicile. This would cause an unforeseeable fragmentation of the dispute, which is difficult to manage by the defendant. One could argue that this issue is of limited relevance due to the fact that in most cases data processors/controllers have deep pockets and that the interests of the allegedly damaged per-

---

[427] This interpretation is, however, not yet supported by practice, because the Regulation is not yet applicable. This means that it is plausible to expect a petition for a preliminary ruling in this matter to be filed, in order to request an autonomous interpretation by the Court of Justice of the European Union.

[428] CJEU, case C-362/14, *Schrems,* ECLI:EU:C:2015:650.

[429] On the issue of collective redress, see: J. Steele, W.H. van Boom, *Mass justice: challenges of representation and distribution*, Elgar, 2011; D. Fairgrieve, E. Lein, *Extraterritoriality and collective redress*, Oxford University Press, 2012; E. Lein, *Jurisdiction and applicable law in cross-border mass litigation*, in F. Pocar, I. Viarengo, F.C. Villata (eds), *Recasting Brussels I*, Cedam, 2012, p. 159.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

son will prevail.[430] However, it is also true that data controllers and processors are sometimes small enterprises and start-ups, which do not enjoy deep pockets, and therefore a concentration of jurisdiction is at least desirable.

iii) The new rule on the suspension of proceedings

The only other rule in jurisdiction matters which is included in the Regulation is that on the suspension of proceedings. Article 81 GDPR indeed provides that:

> 1. Where a competent court of a Member State has information on proceedings, concerning the same subject matter as regards processing by the same controller or processor, that are pending in a court in another Member State, it shall contact that court in the other Member State to confirm the existence of such proceedings.
>
> 2. Where proceedings concerning the same subject matter as regards processing of the same controller or processor are pending in a court in another Member State, any competent court other than the court first seized may suspend its proceedings.
>
> 3. Where those proceedings are pending at first instance, any court other than the court first seized may also, on the application of one of the parties, decline jurisdiction if the court first seized has jurisdiction over the actions in question and its law permits the consolidation thereof.

On the wording of such a rule, it may be observed that – as it also happens for the currently in-force private international law legislation – such a matter is pleaded *ex officio* by the court. This is correct, but is not very effective. Indeed, in the absence of a centralised system for indexing cases, the court only knows of the existence of a proceeding 'concerning the same subject matter as regards processing by the same controller or processor' when one of the parties, possibly the defendant, brings forth evidence on this issue; such information may be autonomously ascertained only in very rare cases.[431]

---

[430] See the considerations on libel tourism by R. Garnet, M. Richardson, *Libel tourism or just redress? reconciling the (English) right to reputation with the (American) right to free speech in cross-border libel cases,* in *Journal of Private International Law*, 2009, p. 471.

[431] In interviews carried on within the EUPILLAR project, judges highlighted how difficult it is for them to become acquainted with *lis pendens*. Indeed, they only notice it autonomously when one of the parties –

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Once the issue has been raised and deemed to be worth attention – which means that the court agrees that the same action has already been brought to the attention of the court of another Member State – the court is not compelled to suspend the proceedings. The Court indeed will contact the first court, in order to ascertain whether such action actually exists.[432]

Once it is clear that such an action exists, pursuant to Article 81 GDPR, the second court has three options. First, it may suspend the action. Second, it may dismiss the case for a lack of jurisdictional competence – provided that such actions are both pending before courts of first instance. Third, the court may ignore the existence of parallel proceedings and proceed with the examination on the merits. The rule of Article 81 is indeed not sufficiently clear for the courts on which action(s) they must undertake, and may create conflicts in the future. The Brussels Ia rules require that once the situation has been ascertained, the second court shall suspend the proceeding until the first court has decided upon its competence. When the first court declines jurisdiction, the second court will resume the proceedings and will decide on the merits. If the competence of the first court is confirmed, the second court will declare their lack of jurisdiction.

On the other hand, in the GDPR seems not sufficiently clear in order to guide the action of the national judges. Indeed, Article 81(1) provides that the court shall make contact with the

---

willingly or by mistake – makes reference to the other proceeding in the documentation submitted at the beginning of the case. The lack of an interconnected system between courts also makes it difficult for judges to interact and coordinate. See EUpillar project at: *abdn.ac.uk/law/research/eupillar.php*; interview is codified and classified, the content will be made public following anonymisation process in a forthcoming publication of P. Beaumont and K. Trimmings (eds). On *lis pendens* see also: F. Marongiu Buonaiuti, *Litispendenza internazionale*, in R. Baratta (ed), *Diritto internazionale privato*, Giuffrè, 2010, p. 208.

[432] And, presumably, that it regards the same subject matter and involves the same processing. This rule seems an extension of Article 29(2) of the Brussels Ia Regulation, which only provides that the courts shall share with the other involved courts the date of the commencement of the proceeding in order to establish which court has been seised first. In this case, it seems that the rule has been slightly broadened, as it requires the court in which the *lis pendens* issue has been raised to investigate the existence of such a proceeding (possibly in order to create a most protective system for the data subject, which in the view of the legislator is the weaker party).

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

allegedly first court. Article 81(2) provides that the second court may suspend the case. Article 81(3) provides that the second court may declare the lack of jurisdiction 'on the applica-application of one of the parties'. Now, it is clear that such a rule does not allow for the court second seised to decide whether it should keep or dismiss the case. This is because the decision on the suspension or dismissal of the case does not depend on any decision taken by the court first seised. It is likely that the second court would decline its jurisdiction without knowing whether the first-seised court also would, thus creating a void of jurisdictional competence. This is especially relevant because the rules on jurisdiction of the GDPR only identify two possible fora: the place of the defendant's establishment, and the *forum actoris*, which excludes the possibility of the existence of a third court who could declare the existence of jurisdiction.[433]

However, the most interesting aspect concerns the nature of such a rule and its relationship with the rules under Section 9 of the Brussels Ia Regulation.[434] Indeed, despite the fact that this Article seems to deal with *lis pendens*, it seems more appropriate to consider if it rather only applies to the matter of related actions, which currently falls within the scope of action of Article 30 of the Brussels Ia Regulation. This argument seems to be supported by the fact that the requirements for the activation of Article 81 are the identity of the *petitum* and the fact

[433] Of course, the fora may be more than two in the cases in which the data controller/processor has more than one establishment within the European Union, or in which the plaintiff has more than one habitual residence.

[434] On *lis pendens* in the Brussels I regime, see *inter alia* A. Di Blase, *Connessione e litispendenza nella convenzione di Bruxelles*, Cedam, 1993; M.R. McGuire, *Verfahrenskoordination und Verjährungsunterbrechung im europäischen Prozessrecht*, Mohr Siebeck, 2004; F. Marongiu Buonauti, *Litispendenza e connessione internazionale: strumenti di coordinamento tra giurisdizioni statali in materia civile*, Jovene, 2008, I. Queirolo, *Prorogation of jurisdiction in the proposal for a Recast of the Brussels I Regulation*, in F. Pocar, I. Viarengo, F.C. Villata (eds), *Recasting Brussels I*, Cedam, 2012, p. 183.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

that they relate to the processing by the same controller/processor; nothing is provided with regard to the fact that the controller/processor will be involved in the dispute.[435]

Conversely, one of the requirements for the triggering of Article 29 of the Brussels Ia Regulation is that of the identity of *petitum* and parties.

The main uncertainty concerning this new rule is whether it also applies to *lis pendens* actions. It should be recalled that the rules of the Brussels I system will not prejudice the functioning of those of the GDPR. For this reason, two possibilities may be envisaged. The first, is that the new rule only applies to related actions, with the consequence that the Brussels Ia rule on *lis pendens* remains in full force. In this reading, the court seised second would be only allowed to go on with the proceedings if there is an issue of a related action, rather than that of *lis pendens* as defined under the Brussels I system. This view would have two advantages. The first, is to avoid two identical disputes from being brought forward simultaneously, which leads to procedural inefficiency and higher costs for the parties and for the system. The second is to avoid the circulation of potentially conflicting decisions in the area of freedom, security, and justice.

The second view is orientated towards a more expansive reading of Article 81. In this hypothesis, the functioning of this Article would be triggered whenever the two conditions for its application are met, regardless of who is party to the dispute. Under this view, the identity of the *petita* and the fact that they relate to the same processing carried out by the same controller/processor would be sufficient to attract also the cases of *lis pendens*, and not only those of related actions within the scope of application of the GDPR. This view seems to have an objective disadvantage: the wording of Article 81 allows the potential coexistence of two par-

[435] For example, the dispute could relate to the declaration of wrongful storage of data where in State A the action is brought by the data subject against the data controller, and in State B the subcontractor who owns the servers on which the information was stored files an action for a negative declaratory action.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

allel proceedings because the court second seized has the option, but is not required, to suspend judgment. On the contrary the rule on *lis pendens* of Article 29 of the Brussels Ia Regulation requires the suspension.

Given the abovementioned hypotheses, it seems more appropriate to support the second view. In fact, it is true that the procedural inefficiency deriving from the deactivation of Article 29 of the Brussels Ia Regulation[436] is undeniable, nonetheless two arguments seem to require to give relevance to this hypothesis. First, by giving relevance to the regime on *lis pendens* of the Brussels I system in presence of the two requirements of Article 81 GDPR – based on the fact that not only the *petitum* is identical and the data processing is the same for the two proceedings, but also on the fact that the parties in the dispute are the same – would lead to the outcome of depriving the court second seised of its prerogative to declare the existence of its jurisdiction even in presence of a parallel proceeding, which would still be possible under Article 81 GDPR. Given the fact that in this example the two requirements for the application of the GDPR seem to be fulfilled, it seems appropriate to infer that the relevance given to Article 29 of the Brussels Ia Regulation would prejudice the functioning of the GDPR.

Second, it is true that in this second hypothesis two parallel proceedings could be held and completed upon refusal of the court second seised to suspend the case and possibly declare lack of jurisdiction whenever the court first seised declares its competence. And it is also true that in such a case two potentially incompatible decisions could aim at circulating within the European Union thank the recognition and enforcement system of the Brussels regime, which is fully in force. However, it is also true that the Brussels I system is already equipped with the tools in order to limit the damages deriving from conflicting decisions: Article 45(1)(c)

[436] Which would be triggered by incompatibility with the GDPR regime.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

and (d) here come into relevance. Indeed, Article 45(1)(d) provides that the decision issued first will prevail over the subsequent ones issued in other Member States. Hence, at the end of the day only one judgment will circulate within the Union. On the other hand, Article 45(1)(c) provides that the incompatible decision is unenforceable in the Member State that issued the other judgment.

The combination of the two *littera* just mentioned only leaves the path open to one critical circumstance, which would not exist in the case of the functioning of the more advanced *lis pendens* rule of the Brussels Ia Regulation. The circumstance is that of a claim filed before the courts of one Member State with a slow judicial system, and of a second claim (with an identical *petitum*, concerning the same data processing, and with identical parties) filed before the judge of a Member State equipped with a very efficient judicial system. In this case, the Brussels Ia system would still require the second court to suspend and eventually decline its competence in favour of the court first seised, while the GDPR does not require so. The deplorable result would be that the decision concerning the second claim is issued first and will circulate in the area of freedom security and justice. This result would conflict with the well-established interpretation of the rules of the Brussels regime.

Nonetheless, and regardless of the negative result deriving from this view, it is not possible to circumvent the applicability of Article 81 in the presence of the two requirements for its applicability. The rule on *lis pendens* of the Brussels Regime would indeed certainly bring a different and more prejudicial outcome than that of the GDPR.[437]

[437] It seems appropriate to state briefly that not all the rules of Section 9 are prejudicial to the application of the GDPR. Indeed, nothing is stated in the new Regulation concerning *lis pendens* with third States. Therefore, it seems appropriate to infer that Articles 33 and 34 of the Brussels Ia Regulation remain in full force in data privacy disputes.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

iv) Applicability to the EEA and Switzerland; relationship with the Lugano system

A brief set of observations may also be made with regard to the relationship of the new Regulation with the Lugano system. The Lugano Convention of 2007 is the currently in-force treaty regulating the matters of jurisdiction and recognition and enforcement of judgments in civil and commercial matters between the European Union and the EFTA countries.[438] It attempts to mirror the Brussels I system and extend a set of similar rules to the legal relationships that involve EFTA countries. While the Lugano Convention of 1988[439] – which the 2007 Convention replaced – applies to the relationship between the contracting States and the EFTA countries, the new Convention mirrors the Brussels I system and does not apply to certain territories outside the scope of application of European judicial cooperation.[440]

With regard to the current system, it has to be outlined that the current material scope of application of the rules of the Lugano system almost overlap with the scope of the Brussels I system.[441] The EFTA countries agreed to give relevance to the interpretative case-law of the Court of Justice; therefore, they shall take into account all doctrines outlined above in the matters relating to the scope of this analysis.[442]

---

[438] The European Union (except Denmark, which does not take part to the judicial cooperation), Iceland, Norway, and Switzerland. On the Lugano Convention of 2007 see: F. Dasser, P. Oberhammer, *Lugano-Übereinkommen*, II ed., Staempfli, 2011; P. Bonomi *et al*. (eds), *La convention de Lugano: passé, present et devenir*, Schulthess, 2007. In particular, see M. Jametti Greiner, *Le espace judiciaire européen en metière civile: la nouvelle convention de Lugano*, *ivi*, p. 11.

[439] On the Lugano Convention of 1988 see: S. Bariatti, *Prime considerazioni sulla Convenzione di Lugano del 16 settembre 1988 sulla giurisdizione e l'esecuzione delle sentenze*, in *Rivista di diritto internazionale privato e processuale*, 1989, p. 529; A. Zanobetti, *La convenzione di Lugano del 16 settembre 1988*, in *Le nuove leggi civili commentate*, 1994, p. 238.

[440] Such as the French and Dutch overseas territories.

[441] Some difference in the scope of application currently exist. Indeed, the Lugano Convention of 2007 still regulates jurisdiction in actions for maintenance obligations, which is now out of the scope of application of the Brussels Ia Regulation having it being absorbed by Regulation (CE) No 4/2009, in *Official Journal*, 2009, L 7.

[442] See Protocol 2, annexed to the new Lugano Convention. The same principles also applied to the old Lugano Convention due to the presence of the same annex. Curiously, Protocol 2 gives relevance to the case-law of the CJEU and of the EFTA Member States' courts, but not to the one of the EFTA Court. This means that the EFTA Member States do not rely on any centralised interpretative power exercised by their

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Pursuant to the provision of Protocol 2, the Italian Supreme Court of Cassation relied on the *Shevill* doctrine – which is European Union case-law – to determine the scope of application of Article 5(3) of the Lugano Convention of 1988.[443] In its judgment No 1141/2000, the Court held that – by interpreting the Lugano Convention in the light of the Brussels Convention and in compliance with the *Shevill* judgment – Italian jurisdiction was declined in favour of the Swiss courts. The case was about the publication of pictures of a well-known Italian actress by an adult-content magazine in order to promote a 'hot-line'. Regardless of the fact that the publication was not issued in Italy, Italian newspapers and gossip magazines echoed the news. The actress chose to bring her defamation claim before Italian courts, because Italy was the place where she alleged to have suffered the most harm. However, the strict interpretation by the Italian judge of the *Shevill* doctrine led to the declination of jurisdiction being necessary the distribution of the allegedly defamatory news in the Member State of the forum in order to trigger the *forum loci damni* ground of jurisdiction of the *Shevill* doctrine.[444] At the same time, it also stated that in case the news is republished by further newspapers which base their publication on the other's news, cases must be treated separately and without any interconnections.[445]

Although the Lugano system is parallel to the Brussels I system, a question arises on the future setting of disputes in data privacy matters due to the upcoming applicability of the GDPR. The proposal for a Regulation which would have brought to the approval of the

---

regional court. See C. Kohler, *The interpretation of the Lugano Convention of 2007 and the Brussels instruments on jurisdiction and judgments in civil and commercial matters*, in EFTA Court (ed), *Judicial protection in the European Economic Area*, German Law Publishers, 2012, p. 219 et seq.

[443] Which is applicable *ratione temporis* to the dispute.

[444] In this case, the Italian judge would have been only competent to hear the case on the damage suffered in Italy, because the publisher was established in Switzerland and the courts of the *forum actoris* were not competent to hear the entire case and the totality of damages.

[445] Supreme Court of Cassation, judgment No 1141/2000, in *Rivista di diritto internazionale privato e processuale,* 2001, p. 678.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

GDPR included recitals on the relationship to Switzerland and the other EFTA countries. Indeed, Draft Recitals No 136 and 137 provided that:

> 136. As regards Iceland and Norway, this Regulation constitutes a development of provisions of the Schengen acquis to the extent that it applies to the processing of personal data by authorities involved in the implementation of that acquis, as provided for by the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen acquis.[446]
>
> 137. As regards Switzerland, this Regulation constitutes a development of provisions of the Schengen acquis to the extent that it applies to the processing of personal data by authorities involved in the implementation of that acquis, as provided for by the Agreement between the European Union, the European Community and the Swiss Confederation concerning the association of the Swiss Confederation with the implementation, application and development of the Schengen acquis.[447]

Such recitals disappeared in the approved text of the Regulation. Nevertheless, some issues are relevant to this work. First of all, a brief consideration seems appropriate on the meaning of such draft recitals; then, their removal also requires further investigation. Such recitals did not address the relationship with the Lugano system, as they relate to the matter of data privacy, which is included in the *Schengen acquis* due to joint declarations contained in the joint agreements on the accession of the Member States to the Convention implementing the Schengen Agreement of 14 June 1985.[448] Consistently, the two agreements mentioned in the draft recitals explicitly incorporate Directive 95/46/EC as part of the *Schengen acquis* and to which the parties are bound.[449]

---

[446] In *Official Journal*, 1999, L 176, p. 36.
[447] In *Official Journal*, 2008, No L 53, p. 52.
[448] See the official published version online at the website of the *Consilium*, at consilium.europa.eu/uedocs/cmsupload/sch.acquis-en.pdf (last accessed 7 October 2016). See the case-law concerning the reach of the *Schengen acquis*: CJEU, case C-77/05, *United Kingdom v Council*, ECLI:EU:C:2007:803; CJEU, case C-482/08, *United Kingdom v Council*, ECLI:EU:C:2010:631.
[449] Annex B of the agreements.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

The repeal of the Directive could possibly require the replacement of the old legal instrument by the new one within the *Schengen acquis*, because the draft recitals were a unilateral declaration by the European Union stating that the new rules, regardless of the differences, were to replace the old ones in the *Schengen acquis*.

However, the removal of such draft recitals triggers questions, and the possible interpretations of such an action may be twofold. The first is that due to the relevant changes in the scope of application of the Regulation and its subject matter, the automatic inclusion into the *Schengen acquis* is not possible, or at least triggers issues that must be addressed by the parties. The second is that due to the fact that such a Regulation plainly substituted the repealed Data Privacy Directive, such recitals were not necessary. However, these hypotheses cannot be supported by any working document of the Commission, which lack any referral to such recitals.

The issue of the interaction of the Lugano system with the Regulation in EFTA countries has to be treated separately with regard to EEA countries and Switzerland. Different from the Data Privacy Directive's text, the GDPR text has EEA-relevance. This means that the EEA will need to evaluate whether to incorporate it into the EEA agreement. If a decision in this direction is met, the GDPR will be applicable to Iceland and Norway; thus, the question on the role of draft Recital No 136 would be irrelevant, as the adoption under EEA would make the Regulation directly applicable.[450] Should the EEA opt for the improbable choice of not implementing the Regulation, the following considerations will also apply to EEA countries.

Switzerland is not part of the EEA. In this case, it is difficult to plainly accept an automatic shift of Switzerland's obligations toward the Regulation, which would be only based on the

[450] Currently, the GDPR is under scrutiny by the EEA. See: efta.int/eea-lex/32016R0679 (last accessed 7 October 2016).

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

replacement of the Directive by the GDPR. Article 2 of the Agreement on the *Schengen acquis* provides that:

> 1. The provisions of the Schengen acquis as listed in Annex A to this Agreement as they apply to the Member States of the European Union, hereinafter referred to as 'Member States', shall be implemented and applied by Switzerland.
>
> 2. The provisions of the acts of the European Union and of the European Community listed in Annex B to this Agreement, to the extent that they have replaced and/or developed corresponding provisions of, or provisions adopted pursuant to, the Convention signed in Schengen on 19 June 1990 implementing the Agreement on the gradual abolition of checks at common borders, hereinafter referred to as the Convention Implementing the Schengen Agreement, shall be implemented and applied by Switzerland.
>
> 3. The acts and measures taken by the European Union and the European Community amending or building upon the provisions referred to in Annexes A and B, to which the procedures set out in this Agreement have been applied, shall also, without prejudice to Article 7, be accepted, implemented and applied by Switzerland.

From the provision under Article 2(3) of this Agreement, it would seem that Switzerland is bound to implement the Regulation because it builds upon a provision referred to in Annex B of the Convention (namely, the directive).

In the event that the Regulation is implemented by Switzerland,[451] a possible friction with the private international law Convention is foreseeable. Indeed, Article 12 of the same Agreement provides that:

> 1. This Agreement shall not affect in any respect the agreements concluded between the European Community and Switzerland, or between the European Community and its Member States, of the one part, and Switzerland, of the other part.
>
> 2. This Agreement shall not affect the agreements binding Switzerland, of the one part, and one or more Member States, of the other part, in so far as they are compatible with this Agreement. If these agreements are incompatible with this Agreement, the latter shall prevail.

---

[451] Switzerland is indeed preparing a reform of its data privacy legislation, which is currently based on the European Union Data Privacy Directive and in compliance with the *Schengen acquis* agreement. See: D. Seiler, *Why EU data protection regulation also concerns Switzerland*, in *KPMG Blog,* 2016, at blog.kpmg.ch (last accessed 7 October 2016).

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

> 3. This Agreement shall not affect in any respect any future agreements concluded with Switzerland by the European Community, or between the European Community and its Member States, of the one part, and Switzerland, of the other part, or agreements concluded on the basis of Articles 24 and 38 of the Treaty on European Union.

The Lugano Convention of 2007 is an agreement concluded between the European Community and Switzerland, as defined in Article 12(1) of the *Schengen acquis* Agreement. Therefore, it is reasonable to infer that this Agreement, which opens the possibility of implementing the GDPR in Switzerland, does not render the rules of jurisdiction contained in the GDPR applicable to cases in which the Lugano Convention would be applicable instead.

However, the Lugano Convention of 2007 also contains a rule (Article 67) which provides that agreements between the parties of the Convention that regulate specific matters do prevail over the Convention itself:

> 1. This Convention shall not affect any conventions by which the Contracting Parties and/or the States bound by this Convention are bound and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments. Without prejudice to obligations resulting from other agreements between certain Contracting Parties, this Convention shall not prevent Contracting Parties from entering into such conventions.
>
> 2. This Convention shall not prevent a court of a State bound by this Convention and by a convention on a particular matter from assuming jurisdiction in accordance with that convention, even where the defendant is domiciled in another State bound by this Convention which is not a party to that convention. The court hearing the action shall, in any event, apply Article 26 of this Convention.

The foreseeable clash is that of a *Schengen acquis* Aagreement that gives precedence to the Lugano Convention, pursuant to its Article 12, and of a Lugano Convention of 2007 that gives precedence to the *Schengen acquis* Agreement.

Now, the hypothesis may be two and derives on the hierarchical level granted to the two agreements. First, this issue could be contextualized within matter of the succession of international agreements over time. To put it differently, it could be argued that the provision of the most recent agreement will prevail over the older one. In this case, the *Schengen acquis*

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Agreement of 2008 is more recent than the Lugano Convention. Due to this fact, the waiver under Article 12 of its text would prevail over the waiver contained in the Lugano Convention, leading to the applicability of the Lugano Convention over the legislation in force due to the compliance of Switzerland with the *Schengen acquis* Agreement. In this case, the Lugano Convention would still be applicable, and the new rules contained in the GDPR – even if implemented – would not apply to EU-Switzerland cases.

Second, the issue could be analysed through the lenses of the *lex specialis* approach. Indeed, the new Regulation provides for rules that are more specific than those of the Convention; the rules are tailored to data privacy and make resort to principles, such as that of the centre of interests, that are not known by general private international law in civil and commercial matters.[452] Pursuant to this approach, the waiver contained in Article 67(2) of the Lugano Convention would prevail over the waiver of the *Schengen acquis* Agreement, leading to the conclusion that the rules on jurisdiction contained in the GDPR-implementing tool would prevail over the rules contained in the Lugano Convention.

Now, this issue is of some relevance. Indeed, should the second scenario be favoured, the outcome would be that of a coordinated evolution of the system, with the same set of rules applicable in the EFTA area.[453] The Lugano Convention would cease to be applicable to data privacy and the competent courts would be identified through the grounds of jurisdiction of Article 79 GDPR. Should the first scenario be favoured instead, an uncoordinated system would arise. The Lugano system would indeed part from the European Union internal system of private international law in jurisdictional matters, and the rules of the Lugano Convention –

[452] While, however, they may be known by sectoral private international law legislation, such as the insolvency Regulation. See *supra*, fn. 333.

[453] Provided that the EEA implements the Regulation as well. Otherwise, the same considerations may be made with regard to the *Schengen acquis* Agreement of 1999 in force between the European Union, Norway and Iceland.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

with the *Shevill and eDate* doctrines fully included – would remain applicable, while the GDPR - deprived of the mosaic approach – would regulate the matter differently in purely intra-EU cases. Finally, an even more complicated framework is to be foreseen in the case the EEA decides to implement the Regulation and the first scenario on Switzerland prevails. In this case, the Regulation would apply in intra-EU cases and in EU-Iceland and EU-Norway cases, while the Lugano Convention would still regulate EU-Switzerland, Switzerland-Norway, and Switzerland-Iceland disputes.

As of now, such a clash is only one of the possibilities that are envisaged. Indeed, there is not enough evidence to support either of the two hypotheses, and the question will remain open until one of the *Schengen acquis* contracting parties – or the EEA – expresses their preference on the path to follow. It is also possible that the upcoming Swiss data privacy reform mirrors the Regulation, creating a system which is *de facto* compliant with the *Schengen acquis* Agreement, without needing to tackle the issue of the substitution of the Regulation in Annex B of the Agreement.

B. Adequacy of the prospective grounds of jurisdiction in comparison with the existing ones

From the analyses above, several observations may be made with regard to the upcoming changes in the procedural system. First, the detachment from the separation between contractual and non-contractual matters, which the Brussels I System is based on should be positively noted. Indeed, data privacy is a matter that regards *ex lege* obligations to be complied with both in the presence and in the absence of a contract. In any case, the GDPR leaves this duality and provides for grounds of jurisdiction that work both in the case of a contract, or in the absence of a contract.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Second, the new system reduces uncertainty that is due to the inappropriate adaptation of the mosaic approach to the internet-related tort. Thus, parties may use the courts of any place where the damages occurred under the Brussels I system.[454]

Third, in the GDPR system, allegedly damaged parties may still decide whether it is most appropriate to bring the case before the courts of their own residence, which is where presumably their personalities are mostly damaged; or they may sue in the courts of the state of the defendants' establishment, which is possibly closer to the assets that the plaintiffs intends to seize.

The choice of the criterion of the habitual residence over the centre of main interests also allows the courts to avoid the problem of the virtual existence of several centres of interests. Even if it is virtually possible to think of the existence of multiple habitual residences,[455] this is certainly less probably than multiple centres of interests relating to different aspects of one's life.[456]

Regarding the critical aspects of this legislative developments, the main problems may derive from the one-way approach of the rules on jurisdiction and from the universal reach of the Regulation. For what concerns the one-way approach, it has been said that the new Regulation provides for rules that are only applicable when the plaintiff is the data subject. Indeed, the GDPR provides that '[p]roceedings against a controller or a processor shall be brought…', and it is clear that this rule only applies when the data subject is the plaintiff. It is therefore appropriate to enquire about the result when the controller/processor is the plaintiff. Such an action is foreseeable in contractual matters. For instance, there can be a contract for the gath-

---

[454] With the limitations outlined above.

[455] This is, however, at least controversial, given the factual assessment needed.

[456] See the considerations above on the *eDate* doctrine. See also the criticisms by *S. Marino, La violazione dei diritti della personalità nella cooperazione giudiziaria civile europea,* in *Rivista di diritto internazionale privato e processuale*, 2012, p. 363.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

ering of biometrical data for payment and the data is not provided by the data subject. Or, in non-contractual matters, there could be a negative declaratory action.

The question of negative declaratory actions created a relevant debate among scholars at the time of the Brussels Convention of 1968, as no clear reference was made to negative actions. Following the interpretative development of the Court of Justice, negative actions were included within the scope of application of Article 5(3) of the Convention. The wording of this Article has been amended, as the Brussels I Regulation has been issued in order to remove any uncertainty.

Now, it must be inferred that, today, the data controller/processor who wishes to commence a negative action would be equipped with the same arsenal of jurisdiction rules of Articles 4, 7(2) of the Brussels Ia Regulation as the data subject would be. However, if the interpretation of Article 79 GDPR by this work would be confirmed, a different situation would exist depending on who is the plaintiff. Data controller/processors would still have to make reference to the old system, with the full *eDate* doctrine included, as Article 79 does not apply to them. In contrast, the data subject would be compelled to make resort to Article 79 only.

The second source of possible criticism is represented by the alleged extraterritorial reach of the data privacy Regulation. As it has been discussed already, the GDPR applies to all the data processing involving European residents, even if the data controller/processor is established outside the European Union. Now, it has been said already that the forum of the establishment of the data controller/processor only applies when the defendant is domiciled within the Union. The problem is solved by the resort to the *forum actoris* contained in the second forum, which is not geographically limited in reach.

The criticism of this model may derive from the limited choice left to the plaintiff in this case, and because multiple plaintiffs may bring separate proceedings that are not predictable

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

for the defendant. However, this rule is not necessarily worth any modification, as it answers policy-oriented goals. It seems illogical to think of a legislative system that protects personality rights, even if commodified by current practices, but would allow a case regarding its citizens in a country in which the legislator does not have any control over procedure and related rights. In other words, by extending the rule of the establishment beyond the European Union borders, uncertainty would increase. Uncertainty regarding the degree to which personality rights would be safeguarded becomes an issue, as no control is given over conflict-of-laws rules (and therefore substance). Also, there is no control over procedural rules, which conflicts with the aim of protecting the European Union residents, regardless of where the processing takes place.

6. Interim conclusions

To conclude the present part, a few remarks deserve attention as summarising the current set up of data privacy matters and their relevant jurisdictional rules. First of all, some rules seem to be put under stress more than others because they are territorially based, rather than regulating territorially limited rights. Thus, the rules that are based on the *locus damni*, or on the *locus actus*, lack efficiency in a system that is not merely transnational, but ubiquitous.

Second, the transnational element may derive from the standard categories of transnational elements in private international law, such as the mismatch between the domicile of the data subject and the establishment of the controller. The transnational element may also come from peculiar aspects of internet data processing, such as the location of servers abroad, the processing by a third party established in another State, and the presence (and not the flow) of personal data abroad.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Third, the Data Privacy Directive is not equipped with jurisdictional rules, which must be found in the Brussels Ia Regulation. Since this Regulation also does not contain any special rule of jurisdiction on data privacy, the standard rules apply.

Four rules are highly relevant for this work. The general rule of the defendant's domicile is important; it proves to be equally protective of the defendant and sufficiently functional for the plaintiff due to its territorial scope of application. However, it has been argued that this rule alone disregards the factual circumstances that may arise in a case, and is only balanced if it coexists with further fora that allow for greater flexibility. Another important rule is the special rule on contracts. It has been argued that contractual obligations may exist in the data privacy context, and therefore such a rule may be activated whenever the cases allow it. However, due to the fact that individuals often enter into internet interactions as consumers, the rules on consumer contracts also come into play. Finally, the special rule on torts is highly important. Because of the contractual nature of several data privacy-related disputes, the nature of the infringement of data privacy rights is often non-contractual.

Moreover, the current system will be amended soon, when the GDPR will become applicable. It provides a double forum, which in principle prevails over the rules of the Brussels Ia Regulation. Indeed, despite the fact that the GDPR does not regulate all matters concerning jurisdiction, and that therefore selected rules of the Brussels Ia Regulation will remain in force, it is also clear that no rule which has the effect of impeding the data subject of making resort to one of the two fora provided for in the Regulation will be applicable anymore. Curiously, such an approach only affects the disputes – regardless of their contractual/non-contractual nature – in which the data subject is the plaintiff. Negative actions will still be fully regulated by the Brussels I system.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Finally, the Lugano system is also affected by the repeal of Directive 95/46/EC. On the one hand, the Nordic countries could soon be bound by the Regulation if it is incorporated into the EEA agreement. On the other hand, the Data Privacy Directive was considered as falling within the material scope of application of the *Schengen acquis* to which Switzerland is bound. Therefore, considerations have been made on the possible prevalence of the rules of the new Regulation over the ones of the Lugano Convention of 2007.

This work provides two possible solutions for the upcoming clash. The first, is a reading based on the rules on the succession of treaties over time, according to which the Lugano regime would prevail over the rules of the GDPR because the *Schengen acquis* Agreement is more recent than the Lugano Convention. Therefore the waiver contained in the *Schengen acquis* Agreement would prevail, rendering the GDPR inapplicable to jurisdictional matters.

The second solution regards the *lex specialis* approach. According to this reading, the rules in the GDPR would prevail, because they contain a regime that is more specific than the more general regime of the Lugano Convention of 2007. This issue, as many others, will only be tackled when transnational cases in data privacy matters become more numerous.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

CHAPTER III – APPLICABLE LAW IN DATA PRIVACY MATTERS

1. Interim introduction

In order to analyse the issue of determining the law applicable to the existence and substantive protection of data privacy rights (and to the granting of damages deriving from violations thereof) it is appropriate to investigate whether the existing legislation applicable to data privacy cases currently contains conflict-of-laws rules. Such rules could be potentially found in either: a) general European Union private international law; b) national private international law; or, c) legislation which is specifically dedicated to the regulation of data privacy both at national and supranational levels. Of course, the prevalence of the rules within one category over the others will depend on several factors, such as their ranking within the legal system of the forum, the relationships between instruments, and the interaction between international, European, and national legislation.[457]

General private international law legislation of the European Union in civil and commercial matters, which would in principle regulate the determination of the *lex causae* in data privacy disputes, does not contain any provision on the determination of the law applicable to

[457] For instance, a legislative instrument that specifically regulates privacy usually would prevail over more general legislation in private international law matters (*lex specialis* principle). Also, European Union private international law prevails over national private international law instruments in presence of a material scope of application overlap (supremacy of European Union law). On supremacy in general, see the case-law of the CJEU in the cases C-6/64, *Costa v ENEL*, ECLI:EU:C:1964:66; C-106/77, *Simmenthal*, ECLI:EU:C:1978:49; C-314/08, *Filipiak,* ECLI:EU:C:2009:719; C-189/10, *Abdeli*, ECLI:EU:C:2010:206; C-18/11, *Philips*, ECLI:EU:C:2012:532. See also the references cited *supra*, fn. 376. In general, with regard to the interaction of European Union law with private international law, both of national and supranational origins, in light of the case-law of the Court of Justice of the European Union, see P. Bertoli, *Corte di giustizia, integrazione comunitaria e diritto internazionale privato e processuale*, Giuffrè, 2006.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

the existence and substantive protection of data privacy. Both Regulations (EC) No 593/2008[458] and No 864/2007[459] ('Rome I' and 'Rome II'), make no mention of data privacy, and the Rome II Regulation excludes personality rights *tout court* from its scope of application.[460] Moreover, since more specific legislation would in principle derogate from the two general Regulations, the first step to be taken is to analyse the existing data privacy legislation and the upcoming Regulation, in order to determine if such conflict-of-laws rules exist.

Prima facie, it could seem trivial to raise questions on the applicable law in a field in which substance is currently harmonised through a European Union directive and will be uniform when the General Data Protection Regulation enters into force in May 2018. Nonetheless, as it will be argued here, not every aspect recurring in data privacy disputes is regulated by the specialised data privacy instruments. For instance, there are no provisions in the harmonised and uniform legislation concerning contractual and non-contractual obligations, which may arise out of a breach of data privacy law. To put it differently, the data privacy instruments only regulate the existence of data privacy rights, and the compliance

[458] Regulation (EC) No 593/2008 on the on the law applicable to contractual obligations ('Rome I'), in *Official Journal*, 2008, L 177. On the Rome I Regulation in general, see N. Boschiero, *La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I)*, Giappichelli, 2009; J. Carrascosa González, *Ley aplicable a los contratos internacionales: el reglamento de Roma I*, Colex, 2009; M. McParland, *The Rome I Regulation on the law applicable to contractual obligations*, Oxford University Press, 2015; C. Honorati, *Regolamento (CE) n. 593/2008 del 19 giugno 2008 sulla legge applicabile alle obbligazioni contrattuali*, in F. Pocar, M.C. Baruffi, *Commentario breve ai trattati dell'Unione europea*, Cedam, 2014, p. 613; U. Magnus, *Rome I Regulation*, Sellier, 2014; F. Ferrari (ed), *Rome I Regulation*, Sellier, 2015; R. Plender, M. Wilderspin, *The European private international law of obligations*, IV ed., Sweet & Maxwell, 2015.

[459] Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations ('Rome II'), in *Official Journal*, 2007, L 199. On the Rome II Regulation in general, see D. Aichberger-Beig, *Rom II-VO: neues Kollisionsrecht für außervertragliche Schuldverhältnisse*, Manz, 2008; A.L. Calvo Caravaca e J. Carrascosa González, *Las obligaciones extracontractuales en derecho internacional privado: el reglamento «Roma II»*, Comares, 2008; A. Dickinson, *The Rome II Regulation: the law applicable to non-contractual obligations*, Oxford University Press, 2008; J. Ahern, J. Binchy (eds), *The Rome ll Regulation on the law applicable to non-contractual obligations. A new lnternational litigation regime*, Nijhoff, 2009; C. Honorati, *Responsabilità per fatto illecito*, in R. Baratta (ed), *Diritto internazionale privato*, Giuffrè, 2010, p. 373; P. Huber, *Rome II Regulation: pocket commentary*, Sellier, 2011; F. Marongiu Buonaiuti, *Le obbligazioni non contrattuali nel diritto internazionale privato*, Giuffrè, 2013; Z. Crespi Reghizzi, *Regolamento (CE) n. 864/2007 dell'11 luglio 2007 sulla legge applicabile alle obbligazioni extracontrattuali*, in F. Pocar, M.C. Baruffi, *Commentario breve ai trattati dell'Unione europea*, Cedam, 2014, p. 586.

[460] See *infra*, para 4.A.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

mechanisms in order to safeguard it (such as the compulsory gathering of consent). All other aspects, including aspects related to virtual cases in which the European Union instruments are not applicable, are still regulated by the general legal tools of supranational and national origins.

2. The law applicable to the existence and substantive protection of data privacy rights

A. *Directive 95/46/EC: the nature of its article on the 'national law applicable'*

With regard to the determination of the law applicable to the existence and substantive protection of data privacy rights, the Data Privacy Directive provides the current legal framework for the substantive protection of personal data privacy in the European Union. This Directive contains a rule allegedly for determining the applicable law:

> Article 4
>
> National law applicable
>
> 1. Each Member State shall apply the national provisions it adopts pursuant to this Directive to the processing of personal data where:
>
> (a) the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State; when the same controller is established on the territory of several Member States, he must take the necessary measures to ensure that each of these establishments complies with the obligations laid down by the national law applicable;
>
> (b) the controller is not established on the Member State's territory, but in a place where its national law applies by virtue of international public law;
>
> (c) the controller is not established on Community territory and, for purposes of processing personal data makes use of equipment, automated or otherwise, situated on the territory of the said Member State, unless such equipment is used only for purposes of transit through the territory of the Community.
>
> 2. In the circumstances referred to in paragraph 1 (c), the controller must designate a representative established in the territory of that Member State, without prejudice to legal actions which could be initiated against the controller himself.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

In the past, few data privacy experts alleged that such a provision functions as a conflict-of-laws rule,[461] because – they argued – such a rule aimed at avoiding conflicts between potentially applicable laws.[462] This argument is to be agreed with generally; nonetheless, it is not entirely satisfactory. Indeed, despite the misleading naming of the Article and of the Advisory Opinion No 8/2010 of the Article 29 Working Party which is titled 'applicable law', and despite the fact that the final result of the application of such an Article would be the determination of a substantive set of provisions that regulate data privacy, doubts arise with regard to the private international law nature of such a provision. These doubts arise for several reasons.

As a preliminary argument, it has to be noted that Directive 95/46/EC is not directly applicable in the Member States.[463] This is due to the nature of European Union directives, which need to be implemented by Member States through national legislation that fulfils the requirements set forth in the Directive.[464] Direct effect of a directive is only provided for when two requirements are met: first, the Directive has not been implemented at all, or it has been wrongfully implemented by the Member State in which the possible direct effect is at issue. Second, the rules of the Directive have to be sufficiently clear to be able to regulate the

---

[461] See *ex multis* L.A. Bygrave, *Determining applicable law pursuant to European data protection legislation*, in *Computer Law and Security Report*, 2000, p. 252; C. Kuner, *European data protection law: corporate compliance and regulation*, Oxford University Press, 2007, p. 115. More cautious is P. Bertoli, *Tutela dei dati personali e diritto internazionale privato: questioni generali*, in M. Distefano (ed), *La protezione dei dati personali e informatici nell'era della sorveglianza globale: temi scelti*, Editoriale Scientifica, 2017, forthcoming.

[462] L.A. Bygrave, *Determining Applicable Law pursuant to European Data Protection Legislation*, in *Computer Law and Security Report*, 2000, p. 252.

[463] On the doctrine of direct effects, see P. Craig, G. De Búrca, *EU Law – Texts, cases, and materials*, Oxford University Press, 2008, p. 268 et seq.; with special regard to directives, see R. Adam, A. Tizzano, *Manuale di Diritto dell'Unione europea*, Torino, 2014, p.177 et seq.

[464] See G. Tesauro, *Diritto dell'Unione europea*, Cedam, 2012, p. 165 et seq.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

case.[465] This approach is of sanctioning nature, and is to incentivise a timely implementation of directives by Member States, rather than to give them a systemic direct effect.[466]

Now, in the case of the Data Privacy Directive, Article 4 may be considered sufficiently clear and precise to be concretely applicable. However, the requirement of the imprecise or inexistent implementation creates a logical circle and it renders this Article inapplicable. Article 4 in fact identifies the cases in which 'the national provisions [that a Member State] adopts pursuant to this Directive' are applicable. Therefore, it seems appropriate to argue that such an Article may not operate without Member States adopting national provisions to implement the Directive, because the mentioned national provisions in the legal order of the Member State would otherwise not exist. However, because of the doctrine on the direct effect of directives, the lack of national provisions is also the requirement for the direct applicability of Article 4 of the Directive, and therefore, it is difficult to foresee a case in which such a provision correctly operates.[467]

The fact that the Directive is not directly applicable restricts the utility of such an Article to the role of a compliance check for the court of the forum, which has to ensure that the rules it applies are not incompatible with the rules contained in the European Union legislation. Moreover, it serves as a coordination tool, to prevent clashes between Member States.

---

[465] Cf. especially CJEU, case C-41/74, *van Duyn*, ECLI:EU:C:1974:133, in which the Court established that directives will be effectively implemented if individuals can rely on their application even in absence of an implementing tool. On the time limits for the implementation, see CJEU, case C-8/81, *Becker*, ECLI:EU:C:1982:7. On the sufficiently clear and precise requirement, see *inter alia*, CJEU, case C-226/07, *Flughafen Köln/Bonn*, ECLI:EU:C:2008:429.

[466] In the judgment *Felicitas*, the Court of Justice specified that such a direct effect is only provided for in order to grant minimum standards of protection to individuals. See CJEU, case C-270/81, *Felicitas Rickmers* v *Finanzamt für Verkehrsteuern*, ECLI:EU:C:1982:281. See also CJEU, case C-102/79, *Commission v Belgium*, ECLI:EU:C:1980:120.

[467] A wrongful implementation may be the only case in which such a provision operates, such as in the case of a national data privacy implementation law which does not provide for such a rule, or which provides for a different applicability criterion, such as the habitual residence of the data subject.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

However, in order to illuminate the nature of Article 4, it is necessary to take into account the whole system created by the Directive and its implementing legislation. For instance, the Italian Data Privacy Code implementation rule on Article 4 of the Directive provides that the Code applies to the processing of personal data, including data held abroad, where the processing is performed by an entity which is established either within the territory of Italy, or in a territory which is under its sovereignty. In accordance with the Directive, the Code further provides that it applies to the processing made by data controllers or processors established outside the European Union, but makes use of equipment which is located in Italy, unless this equipment is only located there for data-transit purposes.[468]

An analogous rule is to be found in British data privacy law, the Data Protection Act of 1998. Indeed, such legislation applies to a data controller in respect of any data if the data controller is established in the United Kingdom and the data are processed in the context of that establishment; the legislation also applies if the data controller is established neither in the United Kingdom nor in any other EEA State but uses equipment in the United Kingdom for processing the data other than for the purposes of transit through the United Kingdom.[469]

Polish law also contemplates a similar rule in Act of 29August 1997 on the Protection of Personal Data. Indeed, a law applies – *inter alia* – to natural and legal persons having their seat or residence in Polish territory or in a third country, if they are involved in the processing of personal data by means of technical devices located in Polish territory.[470]

---

[468] Article 5 of Legislative Decree No 196/2003 Data Protection Code. The unofficial English version of the Italian Data Privacy code is available online at: garanteprivacy.it (last accessed 7 October 2016).

[469] Article 5(1) of the British Data Protection Act of 1998. The full text of the Act is freely available online at legislation.gov.uk. For a commentary, see G.J.H. Smith, *Internet law and regulation*, Thomson/Sweet & Maxwell, 2007, p. 694 et seq.

[470] See Polish Act of August 29, 1997 on the Protection of Personal Data, in *Journal of Laws of July 6, 2002*, No. 101, item 926.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

A primary reason underlying the argument of the non-private-international-law nature of this system is the nature of the alleged conflict-of-laws rule, and its formulation. Indeed, even if the referral to the implementing legislation were removed, the rule of the Directive would possibly be phrased as follows:

> Each Member State shall apply this Directive to the processing of personal data where:
>
> (a) the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State; (…)

It may be noted, that the formulation of the 'simplified' version of the Directive's rule and of the rule contained in the abovementioned national laws almost coincide.[471]

None of these rules contain the typical structure of a bilateral conflict-of-laws rule.[472] Indeed, bilateral conflict-of-laws rules – which are the most commonly used rules on the continent – contain a connecting factor that invokes an entire legal system, and not a specific piece of legislation, such as in the case of the Directive.[473] Moreover, the Italian Data Code formulates a rule on the territorial scope of application of the legislative tool, rather than a rule on the determination of the applicable law.

---

[471] The aim of this line of reasoning is not to prove the nature of a supranational rule on the basis of the way it has been implemented on a hierarchically lower level; this is especially true in light of the fact that implementation is subject to jurisdictional control by the Court of Justice of the European Union. On the contrary, the aim of this line of reasoning is to remove the implementation layer *tout court*, and reconstruct a situation in which the supranational legislation would be applicable without further action. In order to do so, it has been considered necessary to first rewrite the rule removing that layer, and then confront it with a rule which – regardless of its supranational origin – regulates the matter directly. This line of reasoning seems confirmed by the now-issued GDPR. See *infra*, para B.

[472] Bilateral conflict-of-laws rules have the characteristics of being able to invoke both national or a foreign law. They oppose to the so-called unilateral conflict-of-laws rules, which usually only determine when the *lex fori* applies, due to the fact that (according to the supporters of unilaterality) a certain legal order can only determine the scope of applicability of its own rules, and not that of the ones of other legal orders. On the classification of conflict-of-laws rules, see E. Vitta, *Diritto internazionale privato*, UTET, 1972, 205 et seq.

[473] In general, regarding connecting factors in the conflict-of-laws see O. Lopes Pegna, *Criteri di collegamento*, in R. Baratta (ed), *Diritto internazionale privato*, 2010, p. 91. See also G. van Calster, *European private international law*, II ed., Bloomsbury, 2016, p. 5 et seq; T. Rauscher, *Internationales Privatrecht – mit internationalem Verfahrensrecht*, IV ed., Mueller, 2012, p. 159.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

However, the fact that such rules are no bilateral conflict-of-laws rules does not automatically imply that they do not cast private international law effects. In fact, it can be argued that such rules might fall within the categories either of the overriding mandatory rules, or of the functionally restricted substantive rules (self-limited rules).

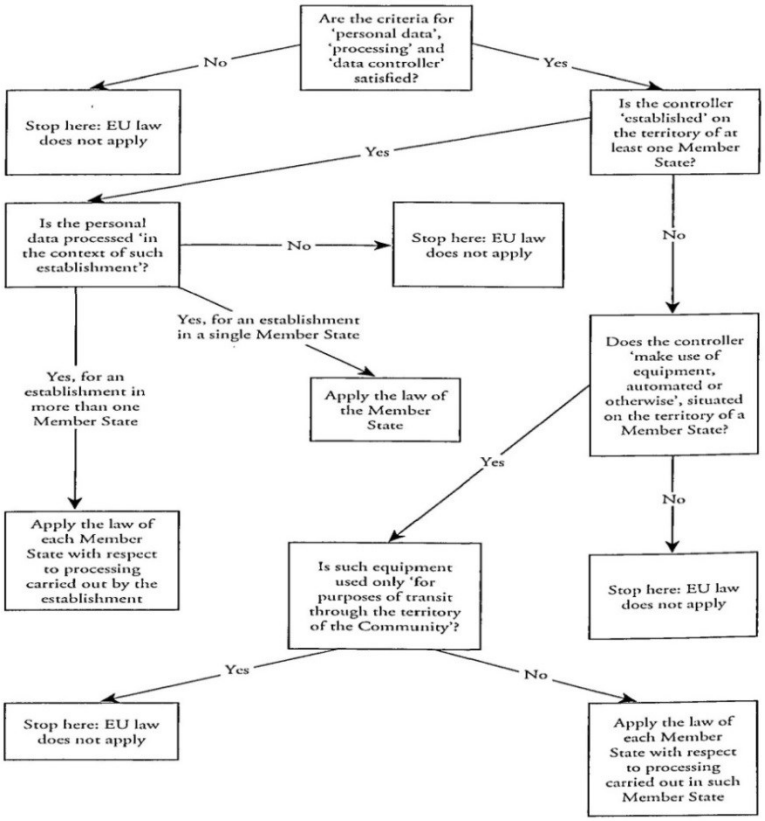
Overriding mandatory rules[474] are rules that preserve the public interests of the State of the forum, such as its political, social, or economic organisation.[475]. Therefore, they must be applied regardless of which *lex causae* is identified by the conflict-of-laws rules. To put it differently, in a private international law case in which overriding mandatory rules become relevant, the court shall first activate the appropriate conflict-of-laws rule provided for by national or supranational law, and then only take into consideration the foreign rules that do not fall within the scope of application of the overriding mandatory rule of the forum. In other words, the overriding mandatory rule will prevail over the *lex causae*, with the only exception of those aspects not directly regulated by the overriding mandatory rule itself.

---

[474] 'Normes d'application nécessaire' as defined by E. Vitta, *Cours general de droit international privé*, Collected courses of The Hague Academy of International law, Vol. 162, Brill, 1979, p. 118 et seq.

[475] This is the wording of Article 9 of the Rome I Regulation. Not anymore relevant to the purpose of the definition of the functioning of such rules seems to be the debate on the negative functioning of such rules, which would impede the functioning of the conflict-of-law rules and impose the application of the *lex fori*. Indeed, both the European Union legal instruments and national private international law rules nowadays embrace the more open approach of the ex-post compatibility control. On this debate, see F. Mosconi, C. Campiglio, *Diritto internazionale privato e processuale*, VII ed., Utet, 2015, p. 279 et seq. e T. Treves, *Art. 17 (Norme di applicazione necessaria)*, in F. Pocar, *Commentario del nuovo diritto internazionale privato*, Cedam, 1996, p. 84, 87.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.



Now, the case of Article 4 of the Directive, and of the simplified version envisaged above, clearly recalls the concept of overriding mandatory rules. Indeed, it is true that nothing prevents the application of conflict-of-laws rules with regard to those matters that are not regulated by the Directive, but Article 4 does much more. It imposes the application of its regime regardless of the international element that may come to relevance.

As it is pointed out by Kuner, Article 4 of the Directive identifies only two final situations. In one situation, European Union law applies, in another one, it does not. No reference is made to the consequence of non-application of such a law. The set of circumstances that may bring the application of European Union law is rich (see figure);[476] but the consequence of such a practice only ends with the applicability of European Union law, or not.

Therefore, it seems that such a rule more comfortably falls within a category of rules that define themselves the scope of applicability of a certain national legislation, regardless of the

[476] Figure 3.1 from C. Kuner, *European data protection law: corporate compliance and regulation*, II ed., Oxford University Press, 2007, p. 115.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

international elements.[477] These rules may be categorised as 'self-limited rules', defined by De Nova.[478] Such rules contain a connecting factor which conditions the applicability of such rules on spatial factors. In other words, such rules autonomously define the spatial (not necessarily territorial) condition under which they will apply. Such rules are normally referred to as being a sub-category of the overriding mandatory rules;[479] nonetheless, their functioning is partially different. While standard overriding mandatory rules are currently defined as rules that allow for the activation of the conflict-of-laws rule, self-limited rules prevent its application, as they both require application in national and international situations. In fact, the rule under Article 4 of the Directive does not require an international element to be applicable, neither do the simplified version or the implementing rules reported above. In other words, national data privacy laws enacted pursuant to Directive 95/46/EC disregard the international element and require application in all cases in which their triggering connecting factor – the establishment of the processor and the subordinate connecting factors – confirms the link to the legal system of the forum.

On the system just outlined, it has to be noted that such rules *prima facie* only identify the situation in which the *lex fori* applies. To put it differently, such self-limited rules only function to define the situations in which the legal tool they belong to applies. Conversely, such rules are not tailored to determine the law applicable to the case in which the court of a certain Member State is called to decide upon the merits of the processing of personal data carried out by a defendant established abroad. For instance, neither the Directive, nor the implement-

---

[477] In favour of this approach is also P. Bertoli, *Tutela dei dati personali e diritto internazionale privato: questioni generali*, in M. Distefano (ed), *La protezione dei dati personali e informatici nell'era della sorveglianza globale: temi scelti*, Editoriale Scientifica, 2017, forthcoming.

[478] On this matter, see extensively R. De Nova, *Historical and comparative introduction to conflict of laws*, Collected courses of the Hague Academy of International law, Vol. 118, Brill, 1966, p. 532 et seq.

[479] See for instance the categorisation by F. Mosconi, C. Campiglio, *Diritto internazionale privato e processuale*, VII ed., Utet, 2015, p. 279.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

ing rules (if implemented plainly), would determine the law applicable to the case of a French singer, suing a blogger established in Austria, before Italian courts, pursuant to Article 7(2) of the Brussels Ia Regulation, alleging harm suffered in Italy where she is well-known.[480] In this case, Italian courts may seek to apply Article 5 of the Italian Data Privacy Code, but the connecting factor of the self-limited rule will not be triggered, because the blogger is not estab-established in Italy. Article 4 and the its implementing legislation, which are no conflict-of-laws rules, will not identify any legal system.

In order to solve this issue, the European Union legislator drafted one Recital on the matter, which provides an interpretation aid for the rule of the Directive. Recital No 18 indeed assists in this situation, providing that '[w]hereas, in order to ensure that individuals are not deprived of the protection to which they are entitled under this Directive, any processing of personal data in the Community must be carried out in accordance with the law of one of the Member States; whereas, in this connection, processing carried out under the responsibility of a controller who is established in a Member State should be governed by the law of that State'.

This Recital, which contains a conflict-of-laws rule,[481] could serve as an ancillary conflict-of-laws rule in cases such as the one outlined above. Indeed, the combined interpretation of Article 4 and Recital No 18 of the Directive would identify the Austrian data privacy code as the law applicable to the matter.[482] The issue stemming from this approach regards the nature

---

[480] See *supra*, chapter II, para 4.A.v, on the *eDate* doctrine.

[481] Which is however spatially limited to European Union Member States. The same problem would arise in case of an extra-EU establishment.

[482] The approach of the Article 29 Working Party in its Opinion No 8/2010 on applicable law seems to infer that Article 4 should be interpreted as being a proper conflict-of-laws rules in view of the interpretative suggestion of Recital No 18. However, this view disregards the actual wording of the Directive. See Article 29 Data Protection Working Party, *Opinion 8/2010 on applicable law*, adopted on 16 December 2010, code 0836-02/10/EN – WP 179, available online at ec.europa.eu/justice/policies/privacy (last accessed 7 October 2016).

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

of recitals: being recitals not binding rules – despite being contained in a legislative tool – the decision to give relevance to them rests in the hands of the interpreter.[483] In the case of private international law in data privacy matters, which is a matter in which the public law nature of the discipline still seems to be influential, it is most probable that courts will disregard the conflict-of-laws rule of the Recital if it allows them to apply the *lex fori*.

Now, in two cases the rules of the Directive and of the implementing legislation will not be able to identify the law applicable to the underlying matters. The first case has been just outlined, and it is the case in which no relevance is given to Recital No 18 by the court.

The second case is when the blogger of the above-made example is not established in a Member State, but in a third State instead.[484] In this case, Article 4 does not designate any applicable law, and Recital No 18 would prove useless even if considered, as it only identifies the law of a Member State, where applicable, but not the law of third countries. In this case, national private international law rules would be applicable, lacking any other rule on the law applicable to the existence and substance of data privacy rights.

In Italy, where the court is seised in our example, Article 24 of Law No 218/1995 would apply. This Article provides that personality rights are governed, as to their existence and substance, by the national law of the person (Article 24(1)). At the same time, pursuant to Article 24(2), the consequences resulting from infringement of personality rights are governed by the law applicable to tortious liability (which, in the Italian case, is Article 62 of the same law).

---

[483] On the nature of recitals, see P. Craig, G. De Búrca, *EU Law – Texts, cases, and materials*, Oxford University Press, 2008, p. 268 et seq.; R. Adam, A. Tizzano, *Manuale di Diritto dell'Unione europea*, Torino, 2014, p. 177 et seq.

[484] In this case, however, the rules on jurisdiction would change, because Article 7(2) of the Brussels Ia Regulation is not applicable to the case as the defendant is not domiciled in a Member State. However, depending on the heads of jurisdiction of the national private international law legislation of the State of the court seised, such a situation is still potentially possible.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Therefore, in this second case, French law would apply to the determination of the existence and substance of the personality rights of the French singer. Of course, such a conflict-of-laws provision has universal reach, which means that, under this provision, the law of any State could possibly be indicated, depending on the nationality of the data subject.[485]

Conversely, the self-limited rule of the Directive would block the activation of Article 24 in any case in which the establishment of the blogger is located in the Member State of the forum (when no relevance is given to Recital No 18) or in any European Union Member State (when relevance is given to Recital No 18) if the data subject has no connection to any Member State. The Italian court would apply the implementing rule of the Directive, without giving relevance to the Italian conflict-of-laws provision, in the case of a data controller established in Italy and of a data subject having residence in Canada. In fact, the Directive both regulates the existence and the substance of data privacy rights. With regard to the existence of such rights, Article 1(1) of the Directive provides that all Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data. Since the wording clearly recalls the Charter of Fundamental Rights of the European Union, which provides that 'everyone has the right to the protection of personal data concerning him or her' in its Article 8(1) and renders this right universal in nature,[486] it must be inferred that in any situation in which European Union law applies, the existence of data privacy rights is granted by Article 1 of the Directive. Therefore, the functioning of private international law rules is precluded because the self-limited rule of Article 4 and its implementing legislation would prevail. With regard to substance, the Di-

[485] With the usual limitation given by public policy exceptions, which aim at limiting rules from entering into the legal system of the forum that would conflict with the core principles of the legal order itself. On public policy, see B. Barel, *Diritto internazionale privato,* Giuffrè, 2015, p. 49 et seq.

[486] On this matter, see in general T.K. Hervey, S. Peers, *The EU Charter of fundamental rights*, Hart publishing, 2014, para 4.32.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

rective regulates it as well, *de facto* deactivating all national conflict-of-laws rules that regulate this matter when the establishment of the data controller/processor is located in a Member State.

A third observation relates to the standard of protection granted by the European data privacy system. It could be indeed argued that a foreign law may establish higher standards of protection than those of the Directive system.[487] In this case, the self-limited rule of the Directive system would *de facto* lower the protection granted to the person, blocking all conflict-of-laws rules that allow for the identification of a more protective, foreign law. Indeed, a court of the Member State of the establishment would not be required at all to assess whether or not Canadian law – in the case of our example – would grant a higher standard of protection than that of the Directive. The court would limit itself to applying the Directive. However, it has been argued that this approach may be considered acceptable under European Union law as the Directive has the twofold target of protecting personal data and of ensuring the free flow of such data in the internal market; thus, accepting a higher standard of protection would undermine one of the objectives of the system.[488] This approach raises some concern, especially because the triggering connecting factor of the Directive only addresses the establishment of the controller/processor, while no relevance is given to any aspect of the data subject (nationality, residence, etc.). While such a system facilitates data controllers/processors because it gives clear-cut expectations on the law applicable to their data processing practices in case of disputes, it also disregards the standards that persons with tighter connections to other systems may be used to enjoying.

---

[487] On this matter, see C. Kohler, *Conflict of law issues in the 2016 Data Protection Regulation of the European Union*, in *Rivista di diritto internazionale privato e processuale*, 2016, p. 653, 673 et seq.

[488] *Ibidem.*

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

A final observation on such a system regards the internet. In this case, the system created by the Directive is not influenced by the nature of the internet. Indeed, since the establishment of the data controller/processor is the main connecting factor in the Directive, it has to be positively highlighted that such a system avoids the problems caused by the ubiquity of the inter-internet.[489] In fact, regardless of the activity being online or offline, the law of the Member State of the establishment will be, in principle, applicable to the matter.

B. The GDPR and the confirmed mandatory nature of European Union data privacy law

The reading of Article 4 of Directive 95/46/EC given above is definitively confirmed by the new text of Regulation (EU) 2016/679 GDPR, which will become applicable on 25 May 2018. In fact, the new formulation of Article 3 of the Regulation is structurally identical to the simplified version of Article 4 of the Directive envisaged above:

> Article 3
>
> Territorial scope
>
> 1. This Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not.
>
> 2. This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to:
>
> (a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or
>
> (b) the monitoring of their behaviour as far as their behaviour takes place within the Union.
>
> 3. This Regulation applies to the processing of personal data by a controller not established in the Union, but in a place where Member State law applies by virtue of public international law.

[489] See the considerations made *supra*, chapter II, para 2 and 3.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Article 3(1), first sentence of the new Regulation is indeed identical to that of the simplified version of Article 4(1) of the Directive crafted in this work. The fact that the new article is titled 'Territorial scope' possibly confirms the fact that the rule of the Directive is not a proper conflict-of-laws rule, but instead is only intended to define the spatial scope of application of the rule in which it is contained. The approach of the legislative instrument has not changed, and its nature does not change as well. The new rule is also a self-limited rule that establishes the spatial condition under which the Regulation necessarily applies. The combined application of such a rule with the rule on the material scope of the Regulation defines the scope of application of European Union data privacy law.

However, the territorial scope of the GDPR has been broadened, and this aspect influences the considerations made above with regard to the functioning of national conflict-of-laws rules for personality rights.

First of all, the Regulation innovates from the Directive by adding that the place where the actual processing of data takes place is irrelevant for assessing the applicability of the Regulation.[490] This innovation, which was not included in the Proposal brought forward in 2012 by the European Commission,[491] is consistent with the interpretation of the current Article 4 of the Directive given by the Court of Justice in the *Google Spain*[492] and *Weltimmo*[493] cases. In

[490] Regulation (EU) 2016/679 GDPR, Article 3(1).

[491] Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM/2012/11 of 25 January 2012. On the proposal, see the comments of P. De Hert, V. Papakonstantinou, *The Proposed Data Protection Regulation Replacing Directive 95/46/EC: A Sound System for the Protection of Individuals*, in *Computer Law and Security Review*, 2012, p. 130; G. Hornung, *A General Data Protection Regulation for Europe? Light and Shade in the Commission's Draft of 25 January 2012*, in *SCRIPTed*, 2012, p. 64; W. Kotschy, *The Proposal for a New General Data Protection Regulation — Problems Solved?*, in *International Data Privacy Law*, 2014, p. 274.

[492] CJEU, case C-131/12, *Google Spain*, ECLI:EU:C:2014:317.

[493] CJEU, case C-230/14, *Weltimmo*, ECLI:EU:C:2015:639.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

the *Google Spain* case, already mentioned with reference to the issue of jurisdiction,[494] the main processing of the personal data by Google was carried out in the United States, where Google Inc. was established. However, the fact that the company had an establishment in Spain, and that the establishment carried out relevant activities on behalf of the mother company, including some aspects of the processing, triggered the applicability of the rules contained in the Directive.[495] In *Weltimmo*, an online real estate advertisement website established in Slovakia – which collected advertisements from Hungarian residents – refused to remove the personal data of the data subjects from its servers. In this case, the Court established that the activity of the data controller/processor was relevant and directed at Hungary, because the property-dealing website was displayed in Hungarian, and a representative of the company was appointed in Hungary for credit recovery purposes. These factors constituted a sufficient link to Hungary and allowed the application of the Hungarian data privacy law.[496]

A further development is the enlargement of the scope of application of the Regulation to the processing of personal data which involves data subjects 'who are in the Union' by data controller/processors established in a non-Member State. This formulation is possibly voluntarily broad. Instead of using the expression 'residents', which would have been expected for consistency reasons with some rules contained in the Regulation, the legislator opted for a more vague term, which hints at a possible extension of the scope of application to people who have not yet fulfilled the (undefined) criteria for declaring the existence of an habitual residence in the Union, but are currently residing there.[497] This new rule extends the long arm

---

[494] Cf. *supra*, chapter II, paragraph 4.B.

[495] CJEU, case C-131/12, *Google Spain*, ECLI:EU:C:2014:317, para 45 et seq., with special focus on para 52.

[496] CJEU, case C-230/14, *Weltimmo*, ECLI:EU:C:2015:639, paras 40 et seq.

[497] For clarity reasons, the term 'residence' will be used hereafter. Actually, similar expressions are used in Article 11 of the Rome I Regulation and in Article 13 of Regulation (EC) No 2201/2003 concerning ju-

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

of European Union data privacy law[498] to all situations in which European Union 'residents' are involved.

This innovation also influences the considerations made with regard to the operation of conflict-of-laws rules as envisaged above.[499] The impossibility of activating the conflict-of-laws rules in situations in which the data controller/processor is established in the Member State of the forum remains unchanged. In such cases, the Regulation applies due to the self-limited nature of the rule on the territorial scope of application of Article 3.

The situation in which a French singer sues an Austrian data controller in Italy under the *eDate* doctrine will not be possible anymore. This is due to the new rules on jurisdiction contained in the Regulation, which only allow people to resort to the courts of the Member State(s) of the establishment(s) of the data controller, or those of the habitual residence of the data subject.[500] However, both in the theoretical exercises within this work, or in the more probable cases of negative actions brought by the data controller – which is still regulated by Regulation Brussels Ia and therefore by the *eDate* doctrine – it must be noted that the Regulation is uniformly applicable in the Union. Therefore, this removes any uncertainty that currently derives from the fact that directives need to be implemented by Member States and that substantive differences may currently arise.

With regard to the example of the Canadian national suing in the European Union, the Regulation will plainly apply. The Regulation would also plainly apply to the case of an Eu-

---

risdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels IIa), in *Official Journal*, 2003, L 338.

[498] So it has been defined by L. Moerel, *The Long Arm of EU Data Protection Law: Does the Data Protection Directive Apply to Processing of Personal Data of EU Citizens by Websites Worldwide?*, in *International Data Privacy Law*, 2011, p. 28.

[499] See *supra*, para 2.

[500] See *supra*, chapter II, para 5.A.ii.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

ropean Union resident suing a non-European-Union-based controller in a Member State's court.

Currently, the operative conflict-of-laws rules are only those addressing matters that are not regulated by the new Regulation. For example, the Regulation only provides that people who have suffered material or non-material damage as a result of an infringement of the Regulation have the right to receive compensation (Article 82 GDPR), but nothing is stated on how to grant such compensation. In such a matter, existing private international law rules are still applicable. Similarly, rules on the determination of the law applicable to contractual obligations may still function.

3. The law applicable to contractual obligations in data privacy matters

Both Directive 95/46/EC, with its implementing national laws, and the new Regulation (EU) 2016/679 regulate the existence and substance of data privacy rights, and no substantive provision is given with regard to the contractual consequences of breaches of data privacy law. Thus, it must be inferred that such matters will escape the scope of application of the self-limited rule of Article 4 of the Directive (and Article 3 GDPR), and will require a standard private international law analysis by courts to determine the applicable law. This situation seems confirmed by the fact that in the recent case-law of the Court of Justice of the European Union, issues such as the determination of the law applicable to determining unfair contractual terms in a consumer contract was addressed by applying general European Union private international law legislation, even if data privacy aspects arose in the dispute.[501] In other words, the fact that the Directive was applicable to part of the dispute did not impede the standard private international law method for ascertaining the law applicable to matters out-

[501] See CJEU, case C-191/15, *Verein für Konsumenteninformation v Amazon*, ECLI:EU:C:2016:612.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

side of the scope of application of the Directive. In the European area of freedom, security, and justice, the matter of the determination of the law applicable to contractual obligations is regulated by Regulation (EC) No 593/2008 ('Rome I'),[502] which replaced the Rome Convention of 1980 on the law applicable to contractual obligations.[503]

As generally accepted, the notion of contractual obligations under the Regulation necessarily mirrors the notion of contractual matters under the Brussels I system.[504] In fact, despite the different nature of the special fora – whose purpose is to derogate a general forum with the consequence of requiring a restrictive interpretation by courts –, and of the same notion applied to this Regulation – which not necessarily requires this time a restrictive interpretation –, it is argued that the notion shall be consistent in the two instruments in order not to create misalignments in the system.[505]

Now, with regard to data privacy obligations, it is necessary to recall that contractual obligations potentially exist in such a field. As stated above, in most cases a contract exists between the data subject and the data controller/processor, regardless of the fact that data privacy may be at the core or ancillary to the main obligations in the contract.[506]

---

[502] Regulation (EC) No 593/2008 on the on the law applicable to contractual obligations ('Rome I'), in *Official Journal*, 2008, L 177.

[503] Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, in *Official Journal*, 2005, C 334, p. 1.

[504] On this issue, Cf. the exhaustive contribution of P. Bertoli, *Art. 1 – Campo d'applicazione materia*le, in *Le Nuove Leggi Civili Commentate*, 2009, p. 547, 558.

[505] *Ibidem*, p. 559. Nevertheless, the reason for the coordination of the Rome I Regulation with the Brussels Ia Regulation has also trivial historic reasons. Indeed, it is with regard to the coordination of the Rome Convention of 1980 with the Brussels Convention of 1968 that the authors of the Giuliano-Lagarde Report claimed that a consistent interpretation of the rules of the two instruments was necessary in order to maintain coordination in the system. See M. Giuliano, P. Lagarde, *Report on the convention on the law applicable to contractual obligations*, in *Official Journal*, 1980, C 282, p. 1, esp. para 3.

[506] See *supra*, chapter II, para 4.B.iii, on the examples of data privacy contracts that are possible to envisage for the purposes of the present work, including contracts for the supply of health data and the contracts in which the processing of data is only instrumental to the performance of the obligations upon which the parties agreed.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

The rules relevant to the present work are contained in the Rome I Regulation, which addresses the law applicable in presence of a choice-of-law agreement (Article 3), in the absence of such an agreement (Article 4), and the protective measures granted to consumers (Article 6).

A. The applicable law in the presence of a choice-of-law agreement

The applicable law in the presence of a choice-of-law clause is identified through the application of the conflict-of-laws rule of Article 3 of the Rome I Regulation. Article 3 provides that contracts are generally governed by the law chosen by the parties. This approach intends to give the parties the widest freedom possible, with a view to creating predictability in their potential, future disagreements.[507] However, the advantage of giving autonomy to the parties is not only to create predictability, but also to give the parties the option of identifying a law that they consider to be the most suitable to regulate their relationship. In this sense, parties may feel the need or consider it appropriate to choose a law that provides for advanced rules in a particular business field, or that are commonly used in a certain trade practice.[508]

In the Rome I Regulation, the prerequisite for the validity of an agreement on the law applicable to contractual obligations is the express or clear choice of the applicable law, demonstrated by the terms of the contract or the circumstances of the case.[509] With the term 'express or clear', it is usually understood that the choice-of-law agreement can either be present as a clause in the contract, or it may emerge from other circumstances relating to the

[507] On this, see P. Nygh, Autonomy in International Contracts, Oxford University Press, 1999. See also R. Plender, M. Wilderspin, *The European private international law of obligations*, IV ed., Sweet & Maxwell, 2014, esp. para 6. On party autonomy, see also the considerations of M. Giuliano and P. Lagarde in their report: M. Giuliano, P. Lagarde, *Report on the convention on the law applicable to contractual obligations*, in *Official Journal*, 1980, C 282, p. 1.

[508] Cf. E. Rabel, *The Conflict of Laws: a comparative study*, II ed., University of Michigan Law School, 1960, 359 et seq.

[509] Article 3(1) of Regulation (EC) No 593/2008 Rome I.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

legal relationship. The Regulation does not require a written agreement, as oral agreements are also admissible. The relevance of such oral agreements was confirmed in the English case *Oakley*. In this case, an oral agreement on the application of German law to the disputed contract was considered enough to trigger the application of Article 3 of the Rome I Regulation.[510]

Further interpretative input on the extent of the flexibility that is considered appropriate when dealing with choice-of-law agreements comes from Italian courts. In a recent case concerning the Rome II Regulation, the Tribunal of Bologna ruled against the applicability of the provisions on party autonomy in a case in which a choice-of-court agreement was provided for in a contract, but nothing was set regarding choice-of-law.[511] In the judgment, the possibility to imply a choice on the applicable law matching the choice-of-court agreement was correctly excluded by the court. It must also be inferred that such an interpretation would be appropriate with regard to the Regulation on contractual obligations.

On the contrary, the triggering of the application of Article 3(1) of the Rome I Regulation may occur in an audio registration made by the parties in which they make constant reference to a specific national set of rules. In a German case, indeed, the fact that the BGB was referred to in a registered conversation between the parties was considered enough to confirm the clear choice of the German law to govern the contract.[512]

This restrictive approach correctly matches the evolution of the current Article 3 in the draft legislation that led to the enactment of the Rome I Regulation. Indeed, the Rome Con-

---

[510] *Oakley v Ultra vehicle design* [2005] EWHC 872.

[511] See Tribunal of Bologna, 17 March 2015, in *Pluris*. A summary of the judgment may be found in Bariatti S., Viarengo I., Villata F.C., *La giurisprudenza italiana sui regolamenti europei in materia civile e commerciale e di famiglia*, Cedam - Wolters Kluwer, 2016, p. 301. On this issue in the Rome I regime, see also R. Plender, M. Wilderspin, *The European private international law of obligations*, IV ed., Sweet & Maxwell, 2015, para 6.024.

[512] Amtsgericht Köln, 19 October 2015, 142 C 232/13. The summary of the case may be found on the EUPILLAR database at w3.abdn.ac.uk/clsm/eupillar/#/home.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

vention of 1980 required the choice to be 'express or demonstrated with reasonable certainty',[513] which gave courts greater flexibility to interpret putative choice-of-law agreements. During the negotiations for a Regulation on the law applicable to contractual obligations, such formulation, initially identically drafted to that of the Convention was highly debated, was finally amended by accepting a British proposal.[514]

The so-called *depeçage* is safeguarded in the Regulation, as the parties are allowed to choose the law applicable to both the entirety of or only a part of the contract.[515] In this sense, not only the parties may choose to let one law regulate a given part of a contract, but can also allow two or more laws to regulate (each one) a part of the agreement.[516] Such a choice may be changed by later agreement of the parties at any time, provided that such a change does not prejudice the rights of third parties.

The functioning of the imperative rules of a specific country is safeguarded whenever 'all other elements' relevant to the situation are located in that country.[517] The fact that 'all' elements, besides the choice-of-law clause, shall designate a legal system other than that chosen by the parties is a significant restriction for courts. Indeed, such a requirement leads to the conclusion that only a contract without any foreign element, other than the choice-of-law

---

[513] Article 3 of the Rome Convention of 1980 on the law applicable to contractual obligations.

[514] On the evolution of the current Article 3 in the negotiations, see extensively M. McParland, *The Rome I Regulation on the law applicable to contractual obligations*, Oxford University Press, 2015, para 9.29 et seq.

[515] Article 3(1) of Regulation (EC) No 593/2008 Rome I. On the submission of part of the contract to a law chosen by the parties, see the considerations by F. Marrella, *Funzione ed oggetto dell'autonomia della volontà nell'era della globalizzazione del contratto*, in N. Boschiero, *La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I)*, Giappichelli, 2009, p. 35.

[516] Cf. P. Lagarde, *Le nouveau droit international privé des contrats après l'entrée in vigueur de la Convention de Rome du 19 Juin 1980*, in *Revue critique de droit international privé*, 1991, p. 301 et seq.

[517] On the concept of imperative rules, also in relation to *normes d'application necessaire*, see P. De Cesari, *Disposizioni alle quali non è permesso derogare convenzionalmente e norme di applicazione necessaria*, in G. Venturini, S. Bariatti, *Nuovi strumenti del diritto internazionale privato – Liber Fausto Pocar*, Giuffrè, 2009, p. 257.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

clause, will trigger the application of such a paragraph.[518] However, once it is established that such a paragraph is triggered, questions arise regarding what constitutes an imperative rule as understood in the Rome I system. The *Unamar* case of the Court of Justice of the European Union only partially aids this interpretative effort.[519] Indeed, in this case the Court clearly reiterated the centrality of choice-of-law in the Rome I regime. Therefore, it further constrained the possibility for courts to resort to Article 3(3) by holding that the concept of mandatory rules was to be interpreted restrictively.[520]

Moreover, overriding mandatory rules deriving from European Union law must be complied with when all elements are located in a Member State and the choice of the parties is the law of a non-Member State.[521] This provision, which has been first added in the transition from the Rome Convention to the current Regulation,[522] seems to be applicable with particular regard to consumer rights.[523] Nonetheless, it cannot be excluded that such a paragraph may become relevant in data privacy cases. One example is that of a contract in which a choice-of-law clause is introduced in order to designate an applicable law that does not require the data subject's consent in order to process personal data. However, consent is an element of capital

---

[518] Cf. M. McParland, *The Rome I Regulation on the law applicable to contractual obligations*, Oxford University Press, 2015, para 9.29 et seq.

[519] CJEU, case C-184/12, *Unamar*, ECLI:EU:C:2013:663.

[520] *Ibidem*, para 49.

[521] Article 3(4) of Regulation (EC) No 593/2008 Rome I. Please note that such a paragraph does not prevent Article 3(3) from functioning. The court will first assess if the case is fully domestic, and then it will analyse if the case is not fully internal, but is still internal with regard to the Union.

[522] The debate on this provision has been lively, starting with the direct text proposed in the Rome I proposal – which excluded the possibility of circumventing mandatory EU rules *tout court*, and was enriched by the observations of Member States and private international law expert groups, such as the GEDIP. See Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) of 15 December 2005, COM(2005) 650. See also the GEDIP observations archived as Council Document of 27 September 2006, 13035/06 ADD 11.

[523] See for instance the issue of unfair terms addressed by Directive 93/13/EEC, in *Official Journal*, 1993, L 95.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

importance in European Union data privacy law,[524] and therefore it can hardly be considered an aspect from which the parties may freely escape. Consequently, the contractual effects of such a choice may be identified by taking into account the mandatory element of explicit consent.

However, regardless of the restrictions imposed to prevent the circumvention of mandatory law, the approach of the Regulation is generally favourable towards choice-of-law agreements, which aim at derogating the other conflict-of-laws rules provided for in the same legislative tool. In fact, Article 4 confirms that it is only applicable '[to] the extent that the law applicable to the contract has not been chosen in accordance with Article 3'.[525] Moreover, pursuant to Article 2 of the Regulation, the application of the Regulation is universal, which means that the law designated pursuant to the rules it contains may well be the law of a third State.

For the purposes of this investigation, it is necessary to focus on the rules concerning the applicable law in the presence of a choice-of-law agreement and their effects on two aspects related to the system created by the Data Privacy Directive.

Preliminarily, it has to be excluded that a choice-of-law agreement contained in a contract may imply the inapplicability of the Directive's rules in matter of existence and substance of privacy rights. This preliminary remark is not trivial in light of the fact that Article 3(3) and (4) of the Rome I Regulation provide that when all elements of a contract are localised in a country other than the one chosen in the choice-of-law agreement, the mandatory rules of such a system will not be prejudiced by the agreement. From this provision, it is possible to infer that in all circumstances in which the significant elements are not concentrated in one

[524] Not only it is the element on which both the European Directive and the new GDPR are based on, but it is also contained in the Charter of Fundamental Rights of the European Union (Article 8).

[525] See *infra*, para B.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

country, it is not necessary to take into account mandatory rules of any other legal order than those indicated in the agreement. Therefore, the mandatory rules of the Directive and its implementing instruments would be excluded where the chosen law is not one of the Member States.

However, this is not the case for two reasons. First, Article 9 of the Rome I Regulation gives relevance to the overriding mandatory rules of the forum (and of the system the law of that is applicable, insofar as they render the performance of the contract unlawful).[526] Since the courts that apply the Rome I Regulations are those in which the Directive is applicable,[527] it can be inferred that it is impossible to avoid the application of the rules stemming from the Directive. Second, the nature of the rule on the territorial scope of the Directive is a self-limited rule and therefore must be applied, regardless of the fact that the dispute may present an international element.

Therefore, it may be argued that a choice-of-law clause will not have the effect of rendering a substantive data privacy law other than that of the Directive applicable, if the criteria for applying the Directive are met. With the new data privacy Regulation, it is also clear that such criteria are always met, because the rules on jurisdiction[528] match the rules on the territorial scope of application.[529] Thus, it is impossible to envisage a case in which the GDPR will not

---

[526] Article 9(3) of Regulation (EC) No 593/2008 Rome I. On overriding mandatory rules, see M. McParland, *The Rome I Regulation on the law applicable to contractual obligations*, Oxford University Press, 2015, para 15. In accordance with the autonomous definition given by Article 9(1) of the Rome I Regulation, overriding mandatory provisions are provisions that are considered to be crucial by a country; they should apply to any situation, regardless of which law is designated by the parties. This is, of course, the case of several data privacy law provisions, *inter alia* that require consent for the processing of personal data provided for in Article 6 GDPR and Article 8 of the Charter of Fundamental Rights of the European Union.

[527] Indeed, despite the fact that the Rome I Regulation is not in force in all Member States (it does not apply to Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the TEU and TFEU.

[528] Article 79 GDPR. See *supra*, chapter II, para 5.A.ii.

[529] Article 3 GDPR.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

be applicable to the substance of such rights. Therefore, the scope of the choice may only embrace aspects that are not regulated by the European Union substantive law of data privacy, such as the consequence of a breach of contract.

In the four examples given above,[530] four different cases were artificially created: the case of a contract for the provision of health data under compensation; the case of the contract for the cross-border transfer of data between data processors; the case of the contract on matter other than data privacy, in which a clause is contained on the non-disclosure of all personal data collected during the performance of the contract; and a contract in which a clause is contained in which the data controller/processor states that he will process the personal data in compliance with the *ex lege* obligations provided for in the applicable, substantive data privacy law.

Now, in all these cases, the Rome I Regulation may operate, despite being limited. In an action for the termination of a contract for the provision of health data under compensation, filed due to the alleged unlawful processing of personal data by the data processor, it may be argued that Rome I Regulation determines the law that governs the contract and the consequences of the breach of contract. When there is a choice-of-law agreement, once considered that it is in no way possible to derogate from the substantive regime applicable to the processing of data, there is no reason to argue that the agreement would be inoperative and would govern the consequences of such a breach.

The same considerations may be made for the contract on the transfer of personal data, because the data subject (who is not part of the contract among processors) may not play any role in such a situation. Should the data subject file a suit in a court, the applicable law will be decided on the basis of the conflict-of-laws rules of the forum for tort matters, as the *petitum*

[530] See *supra*, chapter II, para 4.B.iii.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

would not be of contractual nature. Finally, the same considerations seem to be appropriate with regard to the latter categories of contracts.

B. The applicable law in the absence of a choice-of-law agreement

The applicable law in the absence of a choice-of-law clause is determined pursuant to Article 4 of the Rome I Regulation, which provides for several connecting factors for specific kind of contracts. The new Article 4 of the Rome I Regulation profoundly innovates from the preceding provisions of the Rome Convention of 1980. The main connecting factors of the Rome Convention were the place of the closest connection and the place of the characteristic performance, with special rules in place for immovable property and carriage of goods.[531] Now, the new Regulation provides for several special connecting factors in multiple matters, and is mainly based on the concept of habitual residence.[532] Indeed, the main connecting factor resort is made to in the Regulation's rules is that of the habitual residence of one of the parties.[533] For instance, in the case of contracts for the sale of goods[534] and for the provision of services,[535] the applicable law is that of the country where the seller or the service provider have their habitual residence. Article 4(1)(a) only covers contracts for the sale of movable goods, while immovable goods are dealt with by *littera* (c). On this matter, the *Car Trim*

[531] Article 4 of the Rome Convention of 1980.

[532] In general, on Article 4 of Regulation (EC) No 593/2008, see P. Piroddi, *Between Scylla and Charybdis. Article 4 of the Rome I Regulation navigating along the cliffs of uncertainty and inflexibility*, in G. Venturini, S. Bariatti, *Nuovi strumenti del diritto internazionale privato – Liber Fausto Pocar*, Giuffrè, 2009, p. 819. See also M. McParland, *The Rome I Regulation on the law applicable to contractual obligations*, Oxford University Press, 2015, para 16 et seq. on the legislative evolution from the Convention to the Regulation.

[533] On habitual residence in general, see M. Mellone, *La nozione di residenza abituale e la sua interpretazione nelle norme di conflitto comunitarie*, in *Rivista di diritto internazionale privato e processuale*, 2010, p. 685. For more specific reference to the Rome I Regulation, see *ivi*, p. 686.

[534] Article 4(1)(a).

[535] Article 4(1)(b).

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

judgment clarified the separation between sale of goods and provision of services.[536] In this case, the contract under analysis was characterised as a contract for the sale of goods, even though it involved raw materials which would later result in finished goods. In fact, the supplier was responsible for ensuring an appropriate quality of the goods, even if he had to provide for service-like accomplishments, because the compliance with special requirements was required by the buyer.[537]

With regard to the provision of services, the same considerations made for Article 7(1) of the Brussels I Regulation are applicable *mutatis mutandis*. In particular, pertinent to this work is the example of the *Falco* doctrine, which may be applied *mutatis mutandis* to the matter of the determination of the applicable law.[538]

The same approach has been adopted for franchising contracts, which are regulated by the law of the country of the habitual residence of the franchisee. Also, this approach applies to distribution contracts, which are regulated by the law of the country where the distributor has is habitually resident. On the other hand, contracts concerning rights *in rem* in immovable property are governed by the law of the country where the property is located, unless it is the case of temporary tenancy, for which the law of the place of habitual residence of the landlord applies.[539] The resort to the *lex rei sitae* is not surprising, as it mirrors the grounds of jurisdiction of the exclusive forum as defined in the Brussels Ia Regulation for matters relating to

---

[536] Please note that the *Car Trim* judgment regarded jurisdiction, but by virtue of the necessity to give a consistent interpretation of the rules on the applicable law with those on jurisdiction, which has been stated *inter alia* in the Giuliano-Lagarde report, such an interpretation is relevant for interpreting the Rome I Regulation as well. See CJEU, case C-381/08, *Car Trim*, ECLI:EU:C:2010:90. See also M. Giuliano, P. Lagarde, *Report on the convention on the law applicable to contractual obligations*, in *Official Journal*, 1980, C 282.

[537] See CJEU, case C-381/08, *Car Trim*, ECLI:EU:C:2010:90, esp. para 61.

[538] See *supra*, chapter II, para 4.B.iii on the (not viable) characterisation of a contract for the licensing of intellectual property rights as being a contract for the provision of services. See CJEU, case C-533/07, *Falco*, ECLI:EU:C:2009:257.

[539] Article 4(1)(c) and (d). See R. Plender, M. Wilderspin, *The European private international law of obligations*, IV ed., Sweet & Maxwell, 2015, para 7-039.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

immovable property. Nonetheless, some critical aspects may arise regarding tenancy contracts. Indeed, by repealing the interpretation of English courts in the *Jarret v Barclays* case,[540] the Court of Justice established that a timeshare contract (which is a contract in which the buyer pays in order to acquire the share for the use of a property) was not considered a tenancy contract whenever the use of the property (the 'tenancy' aspect) is not predominant in the contract.[541]

Moreover, contracts for the auctioning of goods are governed by the law of the country where the auction takes place, while contracts concluded within a multilateral system of buying and selling interests in financial instruments are governed by the single law that governs the multilateral system.[542]

In case the contract is not covered by the dedicated rules of Article 4(1), or whenever the elements of the contract would be covered by more than one of the points of this paragraph, the contract shall be governed by the law of the country of habitual residence of the party who is required to effect the characteristic performance of the contract.[543] Of course, the application of Article 4(2) to the abovementioned contractual types would lead to the application of the same law identified by Article 4(1).[544] This paragraph addresses the concept of characteristic performance, on which extensive case-law has been issued, with particular regard to categories such as donation and banking services. Nonetheless, such a concept did not change with the transition from the Rome Convention to the Rome I Regulation. An Italian Court re-

---

[540] *Jarret v Barclays* [1999] Q.B. 1.

[541] CJEU, case C-73/04, *Klein v Rhodos*, ECLI:EU:C:2005:607.

[542] On this last matter, which has no counterpart in the Rome Convention of 1980 and does not correspond to any rule on jurisdiction of the Brussels I system, see F.C. Villata, *La legge applicabile ai 'contratti dei mercati regolamentati' nel Regolamento Roma I*, in G. Venturini, S. Bariatti, *Nuovi strumenti del diritto internazionale privato – Liber Fausto Pocar*, Giuffrè, 2009, p. 967.

[543] Article 4(2).

[544] Cf. R. Plender, M. Wilderspin, *The European private international law of obligations*, IV ed., Sweet & Maxwell, 2015, para 7-031.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

cently addressed the issue of the determination of the characteristic performance in a case where the formal validity of a donation was under scrutiny.[545] In that case, the contract could not be framed within any of the *littera* of paragraph (1), and therefore the characteristic performance of the legal relationship (in that case the act of donating), was reconstructed.

Finally, as an escape clause, where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that in the more specific rules, the law of that other country shall apply. A default rule provides that where the law applicable to the contract cannot be determined pursuant to all the above mentioned rules, the contract shall be governed by the law of the country with which it is most closely connected.[546] Given the breadth of scope of application of paras (1)-(3), it is unlikely that this default rule, contained in Article 4(4), will be often applied by courts.[547] Both paragraphs (3) and (4) are based on the concept of 'closest connection', which was at the foundation of the Rome Convention.[548] However, while Article 4(3) provides for an escape clause that may be activated in exceptional circumstances, and must be documented through careful comparison of connecting factors and alternatives[549] because it provides for a derogation from the existing connecting factors of Article (1) and (2) in a situation when the contract can be placed within

---

[545] Tribunal of Bologna, 9 November 2015, in *Pluris.* A summary of the case may be found in S. Bariatti, I. Viarengo, F.C. Villata, *La giurisprudenza italiana sui regolamenti europei in materia civile e commerciale e di famiglia*, Cedam - Wolters Kluwer, 2016, p. 310.

[546] Article 4(3) and (4).

[547] See R. Plender, M. Wilderspin, *The European private international law of obligations*, IV ed., Sweet & Maxwell, 2015, para 7-087. For relevant case-law on the matter, see *inter alia Golden Ocean v Salgaocar* [2012] EWCA Civ 265 on collateral contracts.

[548] See Article 4 of the Rome Convention of 1980.

[549] On this matter, see extensively C. Honorati, *Regolamento (CE) n. 593/2008 del 19 giugno 2008 sulla legge applicabile alle obbligazioni contrattuali*, in F. Pocar, M.C. Baruffi, *Commentario breve ai trattati dell'Unione europea*, Cedam, 2014, p. 613, 617 et seq.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

the frame of the categories of these paragraphs, Article 4(4) may be activated only when these provisions fail to function, and it functions as a closure rule.[550]

In data privacy matters, three elements of these provisions raise questions regarding their applicability and effect. The first element is Article 4(1)(a), which provides that a contract for the sale of goods shall be governed by the law of the country of habitual residence of the seller. In this case, it has to be excluded that such a rule would apply to data privacy disputes, due to the fact that even with regard to the Brussels I system it has been excluded that contracts falling within the first category of data privacy contracts may be characterised as sale of goods due to the fact that personal data is inalienable.[551] A possible exception is a contract for the transfer of personal data abroad, in which the data seller provides the data buyer with personal data collected in compliance with a contract. In this case, it may be envisaged that such a transfer may be characterised as a sale of goods. Nevertheless, the data subject still has its rights to access, amend, and delete the data, even if they are now in the hands of a third party.

Second, the rules on the provisions of services may also be relevant. However, in this case, the contracts envisaged above may not fall within the matter of the provision of services. Indeed, considering the *Falco* doctrine on the requirements of the obligation to qualify as a provision of services, the same kind of exclusion must operate with regard to the Rome I Regulation.[552]

Therefore, in all cases in which none of the *littera* of Article 4(1) are suitable for application, and in those cases in which the main obligation is the processing of personal data, it has to be argued that the applicable rule is Article 4(2) of the Regulation. Article 4(2) provides

[550] On the concept of closest connection, see R. Baratta, *Il collegamento più stretto nel diritto internazionale privato dei contratti*, Giuffrè, 1991.

[551] See *supra*, chapter II, paragraph 4.B.iii.

[552] On this matter, see E. de Goetzen, *La licenza d'uso di diritto di proprietà intellettuale nel regolamento Bruxelles I: il caso Falco*, in *Rivista di diritto internazionale privato e processuale,* 2010, p. 383, 405.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

that where the contract is not covered by paragraph 1, or where the elements of the contract would be covered by more than one of the points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has their habitual residence.

Regarding characteristic performance, two aspects will be highlighted. First, often characteristic performance in data privacy matters is the processing of personal data, such as in the contracts in which the data controller declares that the data will be processed lawfully. Second, there may be cases in which characteristic performance is not processing data. For example, in contracts for the provision of health data, characteristic performance is the data subject providing their data.[553] Therefore, while in the first case the party who carries out the characteristic performance is the data controller, in the second case it is the data subject. In the second case, it is quite obvious that the habitual residence of the party required to carry out characteristic performance of the contract is the place of habitual residence of the data subject. On the contrary, in the case of a performance by the data controller, a further problem may arise.

Indeed, Article 19 of the Rome I Regulation provides that for the purposes of this regime, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration. Moreover, the habitual residence of a natural person acting in the course of business activity shall be their principal place of business. For branch and agency activities, which may in turn be relevant in the case of data privacy, the place of ha-

[553] On the characteristic performance in general, see U. Villani, *Aspetti problematici della prestazione caratteristica*, in *Rivista di diritto internazionale privato e processuale,* 1993, p. 507, 516 (with regard to this concept applied to the Rome Convention of 1980).

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

bitual residence is intended to be the location of said branch and agency. The relevant time for the determination of habitual residence is always the time of conclusion of the contract.

In the case of a company acting as a data controller, which is the most common case, the place of habitual residence is that of its central administration, pursuant to Article 19(1) of the Regulation. This brings into a consideration the possible coincidence of *forum* and *ius* in matters relating to data privacy. Indeed, it has been said that the Directive's regime and the GDPR apply in case an establishment of the data controller is located in the European Union.

If the place of central administration of the controller is in the Union, pursuant to the provision of the Brussels Ia Regulation or the GDPR, the claim is brought before the courts of that place, and a full coincidence of *forum* and *ius* will be achieved. However, when the place of central administration is located outside of the EU, and the case is brought before a Member State's court, even if jurisdiction may exist in that court by reason of the several fora that grant such a possibility, tensions may arise with regard to the applicable law. Indeed, the European substantive regime will apply in the case of an establishment located within the European Union, and the GDPR will be also applicable when the data subject is an European Union 'resident'. But, the universal application of the Rome I Regulation will allow for the application of the law of the state of central administration of the data controller, unless the processing is substantially carried out by an establishment located in a Member State.

C. The law applicable to consumer contracts

In the matter of consumer contracts, Article 6 of the Rome I Regulation provides that a contract concluded by a natural person for a purpose outside of their trade or profession (the consumer) with another person acting within their trade or profession (the professional) shall

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

be governed by the law of the country where the consumer has their habitual residence.[554] The conditions for the triggering of this Article are: (a) the professional pursues their commercial or professional activities in the country where the consumer has established habitual residence; or, (b) the professional directs such activities to that country or to several countries including that country by any means, and the contract falls within the scope of such activities.

Choice-of-law in consumer contracts is permitted. Nonetheless, such a choice may not deprive the consumer of the protection afforded by imperative provisions of the law that would have applied in the absence of any choice-of-law agreement.

For the purposes of this analysis, it is not necessary to develop further the characterisation of a person in a consumer contract, or to interpret the concept of 'directing the activities to the country' of habitual residence of the consumer. This is because the interpretation of such concepts will desirably coincide with that given within the Brussels I system, which also includes rules on the additional protection granted to consumers.[555]

Now, what here briefly comes into relevance to the purposes of this work is the relevance of such a rule in the system of contractual relationships in data privacy matters. Given the fact that the interpretation of the Court of Justice in the *Weltimmo* judgment mentioned above – which concerned the application of the self-limited rule on the territorial scope of application

---

[554] On consumer contracts in the Rome I Regulation, see in general S. Marino, *Metodi di diritto internazionale private a tutela del contraente debole nel diritto comunitario*, Giuffrè, 2010, esp. chap. III and V.

[555] Actually, a debate on the coincidence of the notion of consumer in the Brussels I and the Rome I system exists. On the one hand, some scholars argue that due to cross-pollination during the negotiations for the Brussels Convention of 1968 and for the Rome Convention of 1980, the notions are to be interpreted consistently. On the other hand, other scholars argue that while in the Brussels system the consumer has to be a part of the contract, in the Rome I system it is sufficient that the end result of the contract is to provide goods or services to consumers, regardless of the fact that the consumer is actually part of the contract. However, this approach is not justifiable anymore in light of the new formulation contained in the Rome I Regulation, which is now identical to that in the Brussels Ia Regulation. On the two interpretations of such rules, see F. Pocar, *La legge applicabile ai contratti con i consumatori*, in T. Treves (ed), *Verso una disciplina comunitaria della legge applicabile ai contratti*, Cedam, 1983, p. 303 et seq.; G. Pizzolante, *Art. 6 – Contratti conclusi da consumatori*, in *Le Nuove Leggi Civili Commentate*, 2009, p. 727 et seq.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

of Directive 95/46/EC – also gave great relevance to the concept of directing the activities towards the Member State of the court seised. Moreover, given the fact that, under its Recital No 24, the Rome I Regulation provides that '[c]onsistency with Regulation (EC) No 44/2001 requires both that there be a reference to the concept of directed activity as a condition for applying the consumer protection rule and that the concept be interpreted harmoniously in Regulation (EC) No 44/2001 and this Regulation' it must be inferred that the interpretation of such rules will be consistent.[556]

Regarding these rules, it has to be recalled that under consumer jurisdiction in the Brussels Ia Regulation, the consumer data subjects can seize the courts of the Member State of the domicile of the defendant or, regardless of where the defendant is domiciled, the courts of their own domicile.[557]

Second, under the Data Privacy Directive, the law applicable to the substance of data privacy rights is – in the most flexible interpretation of Article 4 combined with Recital No 18 of the same law – that of the place of establishment of the controller.

Third, under the GDPR, the Regulation will apply to all disputes before an European court in which an European Union 'resident' is involved. The Regulation will also apply to all cases in which the controller has an establishment within the EU.

These rules on consumer contracts create a complicated pattern, which has been hinted to by Brkan with regard to the interaction of consumer jurisdiction and the law applicable to the

---

[556] On this matter, see F. Ragno, *The law applicable to consumer contracts*, in F. Ferrari, S. Leible (eds), *Rome I Regulation - The Law Applicable to Contractual Obligations in Europe*, Sellier, 2009, p. 129, 131.

[557] Article 18 of Regulation (EU) No 1215/2012 Brussels Ia. On this matters, see also S.M. Carbone, C.E. Tuo, *Il nuovo spazio giudiziario europeo in materia civile e commerciale*, Giappichelli, 2016, p. 185 et seq.; F. Salerno, G*iurisdizione ed efficacia delle decisioni straniere nel regolamento (UE) n. 1215/2012 (rifusione)*, Cedam, 2015, p. 223 et seq.; A. Dickinson, E. Lein, *The Brussels I Regulation Recast*, Oxford University Press, 2015, para 6.01 et seq.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

substance of data privacy rights.[558] In the current system, consumers are allowed to bring claims before the courts of their domicile,[559] while the Directive does not indicate such a criterion for the law applicable to the substance of such rights. This means, that the dispute will be within the scope of the national law implementing the Directive in the Member State of establishment of the controller. In other words, the court of the Member State in which the consumer is domiciled will have jurisdiction pursuant to Article 18 of the Brussels Ia system, but must apply the law of the country in which the controller is established regarding the substance of such rights. However, under Article 6 of the Rome I Regulation, all aspects relating to the consumer contract and the rights thereof that are not expressly dealt with in the Directive and its implementing rules, will be regulated by the law of the country of habitual residence of the consumer. This scenario may be envisioned as a 'virtual journey' to the country of the controller's establishment to determine the substantive protection granted, and back to the country of habitual residence of the consumer for the substance of the contractual obligations.

On the other hand, where the consumer chooses to bring the claim before the Member States' court of the defendant's domicile, which is also granted under the Brussels Ia system, the forced fragmentation still exists, because the Rome I Regulation only allows for the application of the law of the consumer's habitual residence, with a possibility to enter an agreement on the law applicable which could be also that of the establishment, but not for the tout-court application of the law of the place where the professional is established.

In the upcoming system of the GDPR, the protective fora granted to consumers are still those of their own habitual residence and where the controller is established. The applicable

---

[558] See M. Brkan, *Data Protection and European Private International Law*, in *International Data Privacy Law*, 2015, p. 257, 268.

[559] And of the domicile of the defendant.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

law will necessarily be that of the GDPR with all aspects concerning the substance of the protection granted. Again, the rigidity of the Rome I system may bring to a fragmentation of the law applicable to the claim when the data subject opts for making resort to the European courts of the defendant's domicile.

Moreover, it has to be pointed out that a further detachment may happen. Indeed, when the controller is established in one Member State and the consumer is not, and the consumer seizes the courts of the establishment of the controller, jurisdiction would exist both pursuant to Article 18 of the Brussels Ia Regulation and to Article 79 GDPR. Moreover, the national rules of the forum implementing the Directive and the GDPR would apply to the substance of the protection of data privacy granted to the consumer, without resorting to the conflict-of-laws rules of the forum. Finally, the Rome I Regulation will identify the non-Member State of habitual residence of the data subject in order to determine the substantive rules applicable to the contractual obligations that may arise from the data privacy breach.

On this matter, it has to be argued that such a rigid approach of the Rome I Regulation – which is intentionally set up to grant consumers protections as high as that of the country in which they live – will incentivise the resort to the courts of the Member State of the habitual residence of the consumer. Indeed, this is the only option for the consumer to gain a full coincidence of *forum* and *ius*, which is desirable for procedural efficiency purposes. Also, it is favourable because consumers will utilise a familiar system that is operated in a language that they probably understand well.[560]

By doing so, a further detachment is to be registered from the main approach of the defendant's domicile, which is the main approach of the Brussels I system in matters of jurisdiction. However, this is fully acceptable in this context, because the protection granted

[560] See also the considerations made *supra*, chapter II, para 4.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

to consumers is by definition imbalanced in favour of the consumer himself, who will suffer harm and must bring an action. In the absence of such rules, consumers may not bring these actions.

In conclusion, it has to be argued that both the current and the upcoming jurisdictional systems bring positive outcomes for the protection of consumers. Indeed, in other circumstances the use of the defendant's domicile as a forum would cause fragmentation and would be considered against the principles of the European system of private international law. However, it may be argued that in consumer matters, such fragmentation incentivises the use of the *forum actoris*. This forum is both the place in which full coincidence of *forum* and *ius* is achieved, and in which the protection most probably expected by the consumer is also granted.

4. The law applicable to non-contractual obligations in data privacy

A. The Rome II Regulation

i) The exclusion of personality rights from the scope of application of the Regulation

The most relevant exclusions on the scope of application of Regulation (EC) No 864/2007 to the law applicable to non-contractual obligations[561] for this work are the exclusions of private life and personality rights, including defamation.[562] Indeed, it is submitted that such exclusions are broad enough to include data privacy within their scope. Therefore it is also submitted that such a Regulation may not regulate the determination of the law applicable to non-contractual data-privacy-related obligations.[563]

---

[561] Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations ('Rome II'), in *Official Journal*, 2007, L 199. See *supra*, fn. 459.

[562] Article 1(2)(g) of Regulation (EC) No 864/2007 Rome II. On the protection of personality rights in European Union law, see *supra*, I.3.A.

[563] See C. Kohler, *Conflict of law issues in the 2016 Data Protection Regulation of the European Union*, in *Rivista di diritto internazionale privato e processuale*, 2016, p. 653, 684 et seq. More in general on the

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

During the drafting of the legislative proposal for a Regulation on the law applicable to non-contractual obligations,[564] a draft article on the law applicable to the violation of private life was included. This draft provided for the application of the *lex fori* when the law designated by the general rule proved to be contrary to the public policy principles of the forum.[565] To put it differently, a substantive assessment of the *lex causae* identified through the general conflict-of-laws rule of the *locus damni* was required in order to verify its compatibility with the standards of freedoms of speech and of information of the forum.

Possibly due to the lobbying of communication and editorial groups,[566] such a rule was amended by the European Parliament. In fact, after the reading by Parliament, the new amendment established that the law applicable to such matters would be 'the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur shall be applicable, but a manifestly closer connection with a particular country may be deemed to exist having regard to factors such as the country to which a publication or broadcast is principally directed or the language of the publication or broadcast or sales or au-

---

excusion of personality rights, see extensively O. Feraci, *La legge applicabile alla tutela dei diritti della personalità nella prospettiva comunitaria*, in *Rivista di diritto internazionale*, 2009, p. 1020, 1021 et seq. See also A. Dickinson, *The Rome II Regulation: the law applicable to non-contractual obligations*, Oxford University Press, 2008, para 3.228.

[564] Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ('Rome II'), COM/2003/0427 of 22 July 2003. On this proposal, see in general A. Malatesta (ed), *The unification of choice of law rules on torts and other non-contractual obligations in Europe – The 'Rome II' proposal*, Cedam, 2006. On the law of torts before the Rome II Regulation, see K. Siehr, *European private international law of torts. Violations of privacy and rights relating to the personality*, in *Rivista di diritto internazionale privato e processuale*, 2004, p. 1201.

[565] Proposal COM/2003/0427, draft Article 6: 'Violations of privacy and rights relating to the personality. 1. The law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality shall be the law of the forum where the application of the law designated by Article 3 would be contrary to the fundamental principles of the forum as regards freedom of expression and information. 2. The law applicable to the right of reply or equivalent measures shall be the law of the country in which the broadcaster or publisher has its habitual residence.'

[566] See J. von Hein, *Von Hein on Rome II and Defamation*, on *ConflictOfLaws.net* (last accessed 7 October 2016); A. Dickinson, *The Rome II Regulation: the law applicable to non-contractual obligations*, Oxford University Press, 2008, para 3.217 et seq.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

dience size in a given country as a proportion of total sales or audience size or a combination of these factors. This provision shall apply mutatis mutandis to Internet publication'.[567]

The Commission considered such an amendment unacceptable for two reasons: the first was that it was strongly imbalanced towards the law of the State where the editor is established. Second, the amendment did not correspond with the majority of the approaches currently in force within the Member States.[568]

Due to this impasse, the draft article on the violation of privacy was removed from the text of the Regulation; Article 1(2)(g) now excludes the matter from its scope of application. Nonetheless, a paragraph has been added to the review clause under Article 30 of the Regulation, which provides that: 'Not later than 31 December 2008, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, taking into account rules relating to freedom of the press and freedom of expression in the media, and conflict-of-laws issues related to Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data'.[569] At the moment, such an amendment has not yet been proposed.

---

[567] First Report on the Proposal for a Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ('Rome II') of 27 June 2005, A6-0211/2005.

[568] Cf. C. Campiglio, *La legge applicabile alle obbligazioni extracontrattuali (con particolare riguardo alla violazione della privacy)*, in *Rivista di diritto internazionale privato e processuale*, 2015, p. 857, 862.

[569] Article 30 of Regulation (EC) No 864/2007 Rome II.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

ii) The European Parliament's proposal for the amendment of the Regulation

On the other hand, a proposal for the amendment of the Regulation was submitted by the European Parliament,[570] who proposed a draft article which stated:

> 1. The law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality, including defamation, shall be the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur. However, the law applicable shall be the law of the country in which the defendant is habitually resident if he or she could not reasonably have foreseen substantial consequences of his or her act occurring in the country designated above;
>
> 2. There the violation is caused by the publication of printed matter or by a broadcast, the country in which the most significant element or elements of the damage occur or are likely to occur shall be deemed to be the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised, and that country's law shall be applicable. The country to which the publication or broadcast is directed shall be determined in particular by the language of the publication or broadcast or by sales or audience size in a given country as a proportion of total sales or audience size or by a combination of those factors;
>
> 3. The law applicable to the right of reply or equivalent measures and to any preventive measures or prohibitory injunctions against a publisher or broadcaster regarding the content of a publication or broadcast and regarding the violation of privacy or of rights relating to the personality resulting from the handling of personal data shall be the law of the country in which the publisher, broadcaster or handler has its habitual residence.

No action has yet been taken by the Commission with this regard. However, to avoid conflicts and inconsistencies deriving from the recast of the Directive on data privacy (which has been recently concluded with the entry into force of Regulation (EU) 2016/679 GDPR), some considerations seem necessary with regard to such rules. Such considerations regard the problem of the compatibility of such a system with the peculiarities of data privacy matters, which are not entirely comparable to the dynamics of press and defamation.

---

[570] Report with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations ('Rome II') (2009/2170(INI)), code A7-0152/2012 of 2 May 2012, Rapporteur Cecilia Wikström.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

First of all, it has to be pointed out that the persistent referral to the concept of damage is not necessarily optimal in data privacy matters. Indeed, it is true that the Rome II Regulation is aligned with the Brussels Ia Regulation and allows lawsuits for damage that 'may occur'.[571] But, it is also true that within the internet environment it is difficult to assess with reasonable certainty the location and the amount of harm suffered. Such criteria, such as Article 4 and its general rule based on the *locus damni*, may therefore prove inappropriate for both addressing the issue of defamation[572] – which is not the object of this work – and of data privacy. These criteria seem to be inappropriate for data privacy because of the reasons outlined above, such as the inefficiencies of the mosaic approach adopted in jurisdictional matters: mirrored on the issue of the applicable law, it would result in the application of several laws, which is potentially disadvantageous for both plaintiffs and defendants.[573]

At the same time, the proposed criteria also cast shadows on the balance between the proposed rule and the existing system. In data privacy matters, such a system would clash with the rules contained in the new GDPR as much as they clash with the rules included in the Brussels I system. Paragraph 1 of the draft article – which would theoretically apply to data privacy cases – identifies the country where the most significant element of the damage is located. While one could argue that this place often coincides with the habitual residence of the data subject, in defamation matters doubts have been raised on the split between the place of damage and the habitual residence of well-known persons.[574] Should such a criterion coincide with the habitual residence of the plaintiff, the coincidence of *forum* and *ius* would be realised

---

[571] Article 2(2)(b) of Regulation (EC) No 864/2007 Rome II.

[572] On this matter, see in general B. Vogel, *Das Medienpersoenlichkeitsrecht im Internationalen Privatrecht – Eine Untersuchung zur Harmonisierung der Kollisionsnormen in Europa*, Nomos, 2016.

[573] Cf. C. Campiglio, *La legge applicabile alle obbligazioni extracontrattuali (con particolare riguardo alla violazione della privacy)*, in *Rivista di diritto internazionale privato e processuale*, 2015, p. 857.

[574] See J. von Hein, *Von Hein on Rome II and Defamation*, on *ConflictOfLaws.net* (last accessed 7 October 2016).

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

when taking into account the *eDate* interpretation of Article 7(2) of the Brussels Ia Regulation, which creates a *de facto* second general forum in the Member State of the plaintiff's habitual residence,[575] and under one of the two parallel fora provided for in the GDPR.[576] However, when the damage is not suffered in the place of habitual residence, as it may happen in the example given by von Hein,[577] the advantages of such a criterion are lost. Different approaches may apply to jurisdiction, the law applicable to the substance of data privacy rights, and to the non-contractual obligations arising from torts in data privacy matters.

However, before addressing the issue of the conceivable connecting factors in data privacy matters, it is necessary to complete the study of the private international law rules currently in force for the law applicable to non-contractual obligations in data privacy matters.

B. Resorting to national private international law legislation

Lacking any uniform rule on the matter, conflict-of-laws situations in data privacy matters have to be addressed by resorting to the private international law rules of the forum. Therefore, once it is ascertained that jurisdiction exists, the Member States' courts have to apply their national private international law in order to determine the law that will regulate all non-contractual aspects, other than the existence of the right to compensation.[578]

In the Italian example, used in the present work, Article 62 on tortious liability of Law No 218/1995 will apply in such a practice, due to the lack of a more specific provision on privacy or data privacy the referral made by Article 24(2) on personality rights, which provides that

---

[575] Read: centre of interests. On this, see the considerations made *supra*, chapter II, para 4.B.v.
[576] See *supra*, chapter II, para 5.A.ii.
[577] See J. von Hein, *Von Hein on Rome II and Defamation*, on *ConflictOfLaws.net* (last accessed 7 October 2016).
[578] The right to compensation falls within the scope of application of the Directive.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

'[a]ny consequences resulting from infringement of the rights referred to under Paragraph 1 shall be governed by the law applicable to tortious liability'.

Article 62 of Law No 218/1995 provides that tortious liability shall be governed by the law of the State in which the damage occurred. Nonetheless, the person suffering damage may also initiate an *optio legis*, requesting the application of the law of the State in which the event causing the damage took place. These two connecting factors are overridden by the connecting factor of nationality and habitual residence combined. In fact, where all parties are nationals of one State only, and they also reside there, the law of that State will prevail, regardless of the *locus damni*.

As it may be noted in the provision above, Italian private international law does not embrace the approach of the Court of Justice with regard to jurisdiction found in the *Mines de Potasse d'Alsace* doctrine and subsequent case-law.[579] Indeed, it adopts the approach of the *lex loci delicti* by giving a different hierarchical rank to its two components. The *locus damni* is the general connecting factor, the same connecting factor provided for under the Rome II Regulation. However, the second sentence of the same paragraph provides the alleged victim with the possibility to initiate an *optio legis* in favour of the *lex loci actus*. This approach refuses the principle of parity of the two aspects of the *lex loci delicti*, and provides the alleged victims with a further choice, which possibly allows victims to apply the law most favourable to the matter.

Such a system may prove critical in internet data privacy disputes for the same reasons stated above with regard to the conflict-of-laws rules of the Rome II Regulation. Indeed, such

[579] See CJEU, case C-21/76, *Bier v Mines de Potasse d'Alsace*, ECLI:EU:C:1976:166; case C-68/93, *Fiona Shevill*, ECLI:EU:C:1995:61; joint cases C-509/09 and C-161/10, *eDate* and *Martinez*, ECLI:EU:C:2011:685.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

rules do not address the issue of pluri-localised damage.[580] The application of multiple laws is allowed by Italian private international law, as well as by European Union private international law. Therefore, it must be argued that the application of the connecting factor of the *lex loci delicti* can lead to the application of multiple laws within the same dispute.[581]

Second, it clashes with the approach that will be applicable starting 25 May 2018, under the GDPR. This system gives great relevance to territorially based grounds of jurisdiction, such as the place of habitual residence or the place of establishment of the controller; it also gives relevance to such aspects to trigger the application of the substantive provisions included in the Regulation. Thus, it is clear that such a rule based on the assessment of the factual element of damage leads to double a detachment of both *forum* and *ius* and a fragmentation of the law applicable to substance of the rightds and to the underlying tort.

On a positive note, it has to be highlighted that often such connecting factors will correspond to the habitual residence of the plaintiff (in the case of the *locus damni*) and of the place of establishment of the controller (in the case of the *locus actus*). However, this parallelism is not automatic and may be put under pressure in case of multiple establishments, and establishments located both in and outside the Union, such as in the case of *Google Spain*.[582] Moreover, the new GDPR attracts to its scope of application all those situations in which the data processing has been carried out abroad, but concern an European Union resident. Such a connecting factor would again fragment the applicable law indicating the *lex loci actus* as outside the Union.

---

[580] See also the considerations mad*e supra*, chapter II, para 4.c.

[581] Cf. also F. Mosconi, C. Campiglio, *Diritto internazionale privato e processuale*, VII ed., Utet, 2015, p. 508.

[582] CJEU, case C-131/12, *Google Spain SL and Google Inc.*, ECLI:EU:C:2014:317.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Article 62(2) also provides that '[s]hould tortious liability concern only nationals of one State, and all are residents of that State, the law of that State shall apply'. Therefore, the law of the State of common 'residence' prevails over the connecting factors of paragraph (1), provided that it is combined with the common nationality of all parties; this approach is in line with several national legislations in force at the time of the drafting of the Italian law.[583] Although no reference is made to the term 'habitual' under Italian law, 'habituality' of the residence is taken into account when interpreting the concept of residence, pursuant to Article 62, by reference to the notion of 'residence' provided under Article 43(2) of the Italian Civil Code.

Now, such a connecting factor aids several situations concerning data privacy disputes. Indeed, if this condition is met, it is automatically submitted that a full coincidence of *forum* and *ius* will be realised. Indeed, when the habitual residence of both the data subject and the establishment of the controller are in Italy, the jurisdictional criteria of the GDPR leads to the competence of Italian courts. In that case, the law applicable to the substance of data privacy rights will be the Regulation, while the law applicable to torts will be that of Italy.

C. Conceivable connecting factors

Lacking appropriate rules on the law applicable to non-contractual obligations in data privacy matters, hypotheses may be made regarding the most appropriate conflict-of-laws rule to regulate the issue. On this matter, attention will be paid to the balance of interests between the parties, and to the balance within the system. Because an amendment of the Rome II Regula-

---

[583] For a more detailed analysis of Article 62(2) of Law No 218/1995 see A. Saravalle, *Riforma del sistema di diritto internazionale privato – Art. 62 (responsabilità per fatto illecito)*, in *Nuove leggi civili commentate*, 1996, p. 1441, 1449; F. Pocar, *Articolo 62 (responsabilità per fatto illecito)*, in *Rivista di diritto internazionale privato e processuale*, 1995, p. 1210 et seq.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

tion in privacy matters would both address the matter of personality rights in general, including defamation by the press, and of data privacy, it is necessary to account for this matter as well when assessing the possible connecting factors.

Also, in the field of data privacy, the coincidence of *forum* and *ius* is to be viewed favourably, not in view of reducing the relevance of private international law considerations, but because the presence of overriding mandatory rules of the forum otherwise not only bring to a detachment of *forum* and *ius*, but also to a fragmentation of the applicable law.

i) National law of the data subject

The first possible connecting factor is that of nationality. This connecting factor is one of the most ancient connecting factors in private international law,[584] and is still a potentially appropriate tool in personality rights.

In theory, it is possible to support the thesis that persons are granted the full set of rights they enjoy under their national laws, even when they enter into relationships that contain cross-border elements. However, it is also clear that in certain circumstances such a rule would be put under stress, such as in cases in which nationality is gained through *ius sanguinis* rules and no proper connection exists with the State of nationality. In the Italian case, an example is the Italian-Brazilian community, which is primarily composed of second-generation citizens who enjoy dual Italian-Brazilian nationality and lack any real connection with Italy, besides their ancestry. In this case, a conflict-of-laws rule establishing that the national law of the data subject applies to the demand of compensation for data privacy-related

[584] See F. Mosconi, C. Campiglio, *Diritto internazionale privato e processuale*, VII ed., Utet, 2015, p. 190.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

damages would have unpredictable outcomes, giving strength to connections that were close in the past, but which become increasingly evanescent in the current international setting.

In practice, such a conflict-of-laws rule would have several shortcomings as well. First of all, it would interact in an inefficient way with the rules on jurisdiction within the current Brussels Ia Regulation and the upcoming Regulation (EU) 2016/679 GDPR. Indeed, European courts are granted jurisdiction based on either the domicile of the defendant, or of the place of damage (with *eDate* doctrine correctives).[585] Jurisdiction based on the nationality of the plaintiff or of the defendant is explicitly excluded by the Brussels Ia Regulation.[586] The existence of such a rule would impede the correspondence of *forum* and *ius* in the majority of cases.

Second, it would interact inefficiently with the self-limited rule on the territorial scope of application of Directive 95/46/EC as well.[587] Indeed, European courts shall apply the Directive to all matters concerning the existence and substance of data privacy rights, including determining the existence of a breach of the rules of the Directive and the entitlement to compensation. The triggering connecting factor of the Directive is the place of establishment of the data controller/processor. Subjecting the rest of the *petita* of the plaintiff to the law of nationality of the data subject would have the inefficient outcome of not only detaching *forum* from *ius*, but also fragmenting the law applicable to compensation, forcing the court to apply two different, applicable, substantive laws to different aspects of the same tort.

Moreover, due to the nature of the internet, and of the services granted on the internet in the current economic setting, it must be argued that such a rule would create unmanageable unpredictability for data controllers and processors, which would potentially have to take into

---

[585] See the considerations made *supra*, chapter II, para 4.B.v.
[586] Article 4(1) of Regulation (EU) No 1215/2012 Brussels Ia.
[587] See the considerations made *supra*, 2.A.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

account all national substantive data privacy laws when providing goods and services to people other than their own nationals. This not only generates additional costs for existing businesses, but also raises a barrier to entry for new-coming businesses that base their business model on the ubiquity of internet.

Therefore, it seems that such a solution would present more critical aspects than it would actually advantage the data subject. This is true especially considering that national law, despite being the most predicable for the data subject, is the most unpredictable for businesses, and that in the European Union it would clash with several existing private international law rules.

ii) Habitual residence of the data subject

A possible ground of jurisdiction in data privacy matters is the habitual residence of the data subject. The concept of habitual residence has become increasingly popular in the European Union, due to its flexibility and its proximity to the person to which it is attached. Currently, the Rome I Regulation founds its general rules on the connecting factor of the habitual residence. The Rome II Regulation also contains rules that utilize such a connecting factor, if predetermined criteria are met. Great relevance is given to this connecting factor by the new Successions Regulation as well.[588]

The advantages of this connecting factor are several. First of all, it removes the first criticism made to the connecting factor of nationality. Indeed, since the assessment of the existence of an habitual residence in a certain Member State is carried out by the court basing

[588] Regulation (EU) No 650/2012 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, in *Official Journal*, 2012, L 201.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

the investigation on factual elements, it is improbable that the court would argue the existence of such a residence in a country that does not have tight connections to the data subject.

Moreover, such a connecting factor would partially correspond to the applicable and upcoming titles of jurisdiction. Indeed, in torts matters, the *eDate* doctrine[589] provides that one of the grounds of jurisdiction is the centre of interests of the alleged victim, which in our case is generally the data subject. The Court of Justice expressly stated in *eDate* that such a centre would, in most cases, coincide with the habitual residence of the alleged victim.[590] Now, following the criticisms made above,[591] it must be argued that plaintiffs would likely resort to such a ground of jurisdiction, because it is the most convenient for them for all the reasons above stated, including familiar language and lower costs. Moreover, the new GDPR also contains the title of jurisdiction of the habitual residence of the data subject, alongside that of the establishment of the controller. In such cases, *forum* and *ius* would coincide in torts matters; since European courts will also apply the Directive to ascertain a breach of data privacy rights, a full coincidence would exist. However, such a coincidence is only potential, because both the Brussels Ia Regulation and the new GDPR contain further titles of jurisdiction at the choice of the plaintiffs. Therefore, it may also happen that such a rule indeed leads to the application of different laws.

iii) The law of common nationality and habitual residence of the data subject

The law of the State of common nationality and habitual residence of the data subject is another possible connecting factor in torts matters, which will be briefly addressed. Such a

[589] CJEU, joint cases C-509/09 and C-161/10, *eDate* and *Martinez*, ECLI:EU:C:2011:685.
[590] *Ibidem*, para 49.
[591] See *supra*, chapter II, para 4.B.v.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

rule would have the positive outcome of identifying the place with which the data subject has an undeniably close connection.

However, the shortcoming, which restricts the actual feasibility of such a connecting factor, is that such a rule contains the shortcomings of the two separate rules, without enjoying their benefits. Indeed, the critics state that such a rule is unpredictable and disadvantageous for data controller/processors who would have to take into account several legal regimes when tailoring their services. Moreover, such a rule does not coincide with any of the currently existing or upcoming titles of jurisdiction.

On the contrary, it may also be argued that such a rule would be virtually acceptable as a rule complementary to a more general one. It could serve as an additional ground of jurisdiction, which could prevail over a more general connecting factor, such as *eResidency*. A more balanced connecting factor would be derogable by such a rule. However, even this hypothesis seems weak, because even though the Italian-Brazilian data subject is a reality, such cases are by definition fewer than those of data subjects who actually reside in the State in which they hold nationality.

iv) The so-called eResidency: the Estonian example

The recent regulatory achievements of Estonia are also worth investigation because it is allegedly the first State of the world shaping the concept of *eResidency*,[592] a digital residence detached both from the concepts of actual residence and of nationality. Indeed, under the current Estonian system, any person in or outside the European Union may apply for such a digital residence. Digital residence grants persons access to the digital services offered by the State, and to the possibility of opening and conducting Estonian businesses from abroad. This

[592] See e-estonia.com/e-residents/about (last access 7 October 2016).

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

political move intends to attract businesses (both physical and virtual) to the Baltic State, as it addresses the concerns of the nationals and residents of those States in which opening and conducting businesses may result in an economic or administrative burden. Nonetheless, it also casts shadows on the functioning of those jurisdictional and applicable law rules that are based on factual elements.[593] Digital residence may introduce an element that courts are required to take into account when evaluating the existing rules, especially those based on habitual residence.

In fact, in situations regarding the protection of personal data in the internet environment, plaintiffs could selectively argue their habitual residences for internet-related matters are located in Estonia. Plaintiffs may make this argument when the Estonian procedural or substantive law forecasts a better outcome from litigation than the laws of their actual physical habitual residence do. This approach would be virtually acceptable only if relevance is given to concepts such as internet ubiquity in private international law,[594] as the Estonian government seems to do when it argues that the internet is a global phenomenon.[595]

It is arguable that the European Union is not yet ready to incorporate such a concept, which is now in development and it is only supported by the practice of one Member State, in a legal tool applicable by all courts in the territory of the Union. Nonetheless, it raises a point on the actual localisability of one's centre of 'virtual interests' that may be detached from the actual centre of interests of physical life.

---

[593] On the categorisation of factual connecting factors, see J. Re, *Le successioni mortis causa nel diritto internazionale privato dell'Unione europea. Ambito di applicazione e diritto applicabile*, Aracne, 2016, p. 52, esp. fn. 95.

[594] See the considerations made *supra*, chapter II, para 2.

[595] For a further analysis on this matter, see M. del Pilar Diago, *La residencia digital como nuevo factor de vinculación en el derecho internacional privado del ciberespacio: ¿posible conexión de futuro?*, in *Diario La Ley*, 2014, p. 406.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

v) Establishment of the data controller/processor

Finally, an assessment of the connecting factor that is the most advantageous for businesses is appropriate. Indeed, the place of the establishment of the data controller is the connecting factor that allows for the greatest predictability for data controllers, and it also complies with principles utilised by the Court of Justice, such as procedural efficiency.

Indeed, such a criterion has several advantages when it comes to efficiency. First of all, it often coincides with the ground of jurisdiction of the domicile of the defendant, which is the general forum established under the Brussels I system. It is also relevant under the special fora of this system, which identify the place of establishment of the publisher as the *locus actus* under the *Mines de Potasse* doctrine applied to defamation cases.[596]

Moreover, it also coincides with one of the grounds of jurisdiction of the new GDPR, which provides for two fora: the establishment of the controller/processor and the habitual residence of the data subject. In addition, it creates a certain and unavoidable match between the law applicable to the existence and substance of data privacy rights and the non-contractual obligations arising from tort deriving from data privacy breaches. In fact, the connecting factor of the establishment of the controller would coincide with the territorial scope of application of the Directive and its implementing legislation and of the new General Data Protection Regulation.

5. Interim conclusions and the author's proposed rule

The question on the law applicable to data privacy raises a relevant number of concerns deriving mainly from the interests of States – and, in our case, of the European Union – to preserve the set of rights it grants and that are deemed to be the most appropriate approach to

[596] See the considerations on *Shevill* made *supra*, chapter II, para 4.B.v.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

preserve the balance between the safeguard of the freedoms granted under European Union law and of the fundamental rights contained in the Charter.

The current substantive law system of the European Union in data privacy matters is harmonised by Directive 95/46/EC, which does not contain private international law rules. However, it is equipped with a self-limited rule which gives mandatory nature to the Directive itself in all cases provided for by its rule on the territorial scope of application. This creates a pattern in which national private international law rules regarding the existence and substance of personality rights, which would in theory be applicable because of the lack of uniform European Union rules on the matter, do not operate due to the supremacy of European Union law over national law. At the same time, the uniform rules in matters that are connected to data privacy, but are not regulated by the Directive, namely contractual and non-contractual obligations arising from the European regime, continue to apply.

On the one hand, this is the case of the Rome I Regulation, which provides for conflict-of-laws rules in contractual obligations. Obligations arising from contractual relationships in which data privacy is a central element will be regulated by the rules on the applicable law as chosen by the parties, or by the rules on the applicable law in the absence of a choice. Special rules protecting consumers are also highly relevant.

On the other hand, the Rome II Regulation on the law applicable to non-contractual obligations does not apply to data privacy matters, due to the exclusion contained in Article 1(2)(g) of the Regulation itself. Despite the fact that proposals for an amendment of the Regulation have been brought forward by the legislature, the current private international law of the European Union lacks rules on the determination of the law applicable to non-contractual obligations. Therefore, these rules must be found in the national private international law legislation of the Member States. The example of the Italian system, taken in the present work,

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

shows a connecting factor that partially coincides with the titles of jurisdiction on tort matters, but not necessarily coincide with the triggering connecting factor of the self-limited rule of the Directive. This brings a potential split between the law applicable to the existence and substance of data privacy rights, and the non-contractual obligations that arise from such a substantive system.

In this work, two proposals for amendment of the Rome II Regulation have been analysed. They seem appropriate in defamation matters, but do not successfully address data privacy issues. This is because in data privacy matters, the damage is often perspective and the breach of data privacy rules does not necessarily result in the tort of defamation. Thus, it is necessary to take into account rules that are less related to the damage and are more connected to the personal or territorial connection of the parties of the relationship. This is proved by the strictly territorial approach adopted in the GDPR, which adopts the criteria of the habitual residence of the data subject and of the establishment of the controller as both criteria for jurisdiction and for the functioning of the self-limited rule on the territorial scope of application.

All the possible connecting factors present advantages and shortcomings. National law is most predictable, while habitual residence is more closely related to the data subject's actual main interests, which may be damaged by the data privacy breach. The law of habitual residence combined with nationality may prove useful to diminish the shortcomings of the connecting factor of the national law, but it also creates a connecting factor that would prove similar to that of nationality and of habitual residence in most cases.

The law of the place of the establishment of the controller is the most efficient criterion, but it lacks of taking into consideration a few aspects. For instance, that while the self-limited rule in the GDPR tends to include situations in its scope of application, the Rome II Regulation adopts the reverse approach and allows the application of the law identified by its rules,

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

regardless of the State to which they belong.[597] In this sense, the GDPR would attract the case of the alleged data privacy law breach operated by a data controller established in a non-Member State at the damages of a European Union resident with regard to the substance of the rights violated, and the amended Rome II Regulation would identify the law of the place of the establishment as the law regulating the non-contractual obligations arising from such breach.

On this premises, caution is needed when proposing a conflict-of-laws rule in non-contractual matters, but if it is necessary to do so, the rule should rather include personal or territorial aspects, rather than factual aspects such as the location of damage. In addition, it is of capital importance that this conflict-of-laws rule does not share its material scope of application with other personality rights, including defamation, due to the fact that a special substantive regime with mandatory force regulates the matter.

The proposal for a conflict-of law rule is the following:

Article XYZ

Data protection

1. Without prejudice to the regime of Regulation (EU) 2016/679, the law applicable to non-contractual obligations arising out of a violation of data protection rights shall be regulated by the present article.

2. The law applicable to non-contractual obligations arising out of a violation of data protection rights shall be that of the country in which the data subject and the data controller have their common habitual residence and establishment.

3. In all cases in which paragraph 2 is not applicable, the applicable law shall be that of the place of establishment of the data controller, regardless of where the actual processing takes place, unless provided that the set of rights granted by said law is significantly lower than that granted by the law of the country of habitual residence of the data subject; in this latter case, the law of the country of habitual residence of the data subject shall apply.

---

[597] Of course, due relevance is given to the protection of the public policy of the forum. On the universal application of the Rome II Regulation, see A. Dickinson, *The Rome II Regulation: the law applicable to non-contractual obligations*, Oxford University Press, 2008, para 3.294 et seq.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Regarding the wording, it has to be pointed out that such a rule would necessarily be conceived as a special rule that has primacy over all other existing rules under the Rome II Regulation. This is arguable in light of the need to establish a predictable and uniform system that matches the approach of the GDPR. Additionally, the Proposed Article solves the potential problems caused by simply absorbing the matter of data privacy into the current Rome II Regime without introducing a special rule.

Moreover, a general rule such as that of paragraph 2 would ensure that whenever the data controller and the data subject have their establishment and habitual residence in the same State, the law of that state applies. This would be desirable for two reasons. First, it would be a logical outcome in which the courts of the place of the establishment have the possibility to decide on the merits by applying their own national law to the entirety of the case. Indeed, the jurisdictional criteria of Article 79 GDPR would lead to the same national court and the law of that State – namely the Regulation – would apply to the substance of the data privacy rights. Second, it removes the uncertainty of determining if potential damages are to arise, where they may arise, and in what amount, as compared to the damages in other countries.

However, since in the majority of internet-related cases the establishment of the controller does not coincide with the country of habitual residence of the data subject, a second, hierarchically ranked rule must be crafted. To this end, it is necessary to take into account the two territorially based criteria that are also contained in the Regulation, and to disregard again the damage-oriented approach of the Rome II regime. In this case, for efficiency and predictability purposes, prevalence has to be given to the place of the establishment of the controller. In this sense, the purpose of the European data privacy system to ensure the functioning of the internal market would be preserved, as such a rule clearly assists businesses that wish to enter relationships with European citizens. Moreover, the universal approach of Rome II would be

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

preserved, meaning that the law that is identified by such a connecting factor could be that of a non-Member State. In this case, the substance of the rights would derive from the GDPR, preserving the fundamental rights-oriented approach of the Regulation, and the arsenal of compensation instruments from the Member State in which the controller has an establishment. This approach ensures predictability concerning the risks of entering into business with European Union residents. Of course, when the establishment of the controller/processor is located within one Member State, a full coincidence of *forum* and *ius* is achieved when the plaintiff resorts to the court of the place of the establishment, due to the existence of a uniform, substantive regime. Conversely, a slight detachment regarding the matters of compensation will happen when the plaintiff resorts to the courts of the place of habitual residence under Article 79 GDPR. It is also to be highlighted that the perspective of the coincidence of *forum* and *ius* may also incentivise the use of the courts of the place of the establishment of the processor, which is also the forum of the defendant's domicile, which is preferable under the current European Union private international law system for the reasons highlighted in this work.[598]

Finally, the fundamental-rights-oriented approach of the European Union data privacy system is also preserved by creating a clause that prevents the application of a law that would result in lower protections for the data subject. This would be the case of a country in which compensation is granted based on quantitative criteria that are unacceptably lower than those of the Member State of habitual residence of the data subject. Such a clause would also have the advantage of discouraging businesses from establishing their headquarters or their data processing centre in certain countries that grant a lower protection only to limit the risk of economic loss in breaches of data privacy. However, this rule, which is clearly unbalanced

[598] See *supra*, chapter II, para 4.B.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

towards the protection of the individual, would only be applicable in cases of substantial imbalance regarding the protection granted. The most-used connecting factor would be the establishment of the controller, with a pre-emptive check on the standards afforded by the law identified by the court of the forum.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

CONCLUDING REMARKS

The analysis of data privacy in European private international law is a topic rich with grey areas and elements of uncertainty that represent food for thought for scientific and legal research in the upcoming years.

The separation between the conceptions of privacy and data protection is not yet complete. However, the most recent legislative instruments crafted on the European continent – *inter alia* the Charter of Fundamental Rights of the European Union and Regulation (EU) 2016/679 General Data Privacy Regulation – fully depart from the concept of privacy. The first regulates privacy and data protection separately. The second aims at the protection of personal data as such, and not at the 'protection of private life with regard to the protection of personal data' as Directive 95/46/EC does.

This approach creates a further divide with other privacy traditions. For instance, the American tradition is still bound to the original concept of the 'right to be left alone', even if reconceptualised with multiple, more articulated paradigms. In fact, while the European approach is that of protecting personal data across sectors, the American approach is still characterised by a sector-specific regulation, which is contained in legal tools regulating specific matters. As it has been noted, a shift towards a more property-rights-oriented approach is not desirable, as it would still clash with the European fundamental-rights-approach, according to which such a right is inalienable.

While civil and commercial litigation is not a path that is often chosen by parties as a means of dispute resolution in the European Union, administrative litigation is often used. Parties resort to the powers given to data privacy authorities by Directive 95/46/EC, which

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

provides that such authorities may decide in favour of fines against the data controller, if it is warranted.

However, in case one of the parties wishes to claim damages or wishes to seek compliance of the data controller with contractual and non-contractual obligations that may exist or have arisen out of the relationship with the other party, administrative authorities do not have powers. In other words, plaintiffs will also make resort to civil courts in order to address their claims.

It is argued that full civil and commercial litigation in data privacy matters, despite being lengthy and despite the fact that the degree of specialisation of judges is possibly lower than that of data privacy officers, may prove more efficient because it appeals to one single authority instead of two. In this event, in disputes with an international element (broadly understood to be in compliance with the interpretative orientation of the Court of Justice of the European Union) European private international law applies. In the data privacy field, which is impregnated with public policy principles in light of the fundamental-rights-oriented approach in the European Union, the functions of the current legislative tools are to be tested.

On the one hand, Regulation (EU) No 1215/2012 has proven to function in a satisfactory – even if not optimal – way, granting *prima facie* a good degree of balance in prospective disputes. The general forum, favourable to defendants, operates smoothly and grants jurisdiction over the entirety of the dispute to the courts of the Member State of the domicile of the defendant. This favour to defendants – who are not weaker parties at all – is counterbalanced by the special fora in consumers and tort matters, which are clearly more favourable towards plaintiffs. The consumer-friendly forum allows for consumers to make resort to the *forum actoris* and to the *forum rei* at their choice, and limits the functioning of choice-of-court agreements. The special forum in tort matters grants the possibility of seizing the courts of the

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

forum commissi delicti, which is split into *forum loci damni* and *forum loci actus*. In this case, the interpretative orientations of the Court of Justice are put under severe stress when applied to internet disputes concerning data privacy matters. The inefficiency is clear, as virtually each Member State would be competent to hear at least a part of the case, with the result that the data controller established in the European Union would potentially be sued anywhere in the Union. Additionally, no uniform provision is in place to concentrate the dispute in a single forum when it comes to multiple plaintiffs (even though provisions exist to concentrate multiple defendants in a single forum). Thus, in an internet-related, breach of data privacy law, the data controller could potentially be sued in multiple places by multiple data subjects who could virtually fragment their dispute and sue even in multiple Member States. Should they conversely want to concentrate the dispute, the forum of the centre of interests is in place, and grants a *forum actoris*, which is blatantly against the Court of Justice's interpretative practice of decades and against the aims of uniform private international law of the European Union. The new Regulation does not remove this critical aspect, despite removing the ubiquity aspect of the internet-oriented amendment in the mosaic approach of the *Shevill* doctrine. The main criticism of the GDPR is that it aims at regulating a matter without approaching it comprehensively, opening the path to inconsistencies and grey areas. However, on a positive note, it has to be highlighted that the Regulation approaches the problem of jurisdiction by removing the differentiated approach to contractual and non-contractual matters. This means that there will always be a clear forum in data privacy matters, regardless of the nature of the dispute. The only open question – which will be possibly clarified by practice in the upcoming years – remains the determination of the extent at which the data privacy questions is central enough in a contract to trigger the rules of the Regulation by deactivating the forum of the Brussels Ia Regulation and its *Color Drack* doctrine.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

An open and severe question remains regarding the relationships to Switzerland. Switzerland is not an EEA Member State, but has freely chosen to be bound to the so-called *Schengen acquis* through a convention with the European Union. Furthermore, the current Directive 95/46/EC is explicitly included in the *Schengen acquis*. Thus, questions arise for the functioning of the Lugano Convention of 2007, which regulates matters that almost completely overlap with those of the Brussels Ia Regulation with regard to Switzerland-European-Union relations. Indeed, the *Schengen acquis* Convention and the Lugano Convention both seem to give precedence to the other tool, raising questions on which waiver will prevail. The *lex specialis* approach would see the Regulation prevail over the Lugano Convention; the approach considering the succession of treaties over time would imply the applicability of the Lugano Convention. Again, it is arguable that an interpretation on the supremacy of these Conventions must be given soon.

The matter of the law applicable to data privacy disputes is a highly controversial topic. Directive 95/46/EC seems to include a conflict-of-laws rule. However, it has been argued that such a rule does not function as a conflict-of-laws rule, and is instead to be classified as a self-limited rule (which is a subcategory of overriding mandatory rules preventing the functioning of the otherwise applicable connecting factors). If the Directive contains a self-limited rule, the scope of application of the Directive extends to all matters concerning the existence and substance of data privacy rights that fall within its territorial connecting factor.

Regulation (EC) No 593/2008 Rome I is still applicable to contractual obligations arising from breaches of data privacy law, but its functioning is limited due to the broad scope of application of the Directive (and soon of the GDPR, which even enlarges its territorial scope of application to all processing of data concerning European ‘residents’).

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Regulation (EC) No 864/2007 Rome II is instead not applicable to data privacy matters. Regardless of the reconstruction of data protection as alongside the right to privacy or, conversely, as a standalone right, it has been argued that the exclusion of Article 1(2)(g) is broad enough to include data privacy-related non-contractual obligations. It has been argued that the rule proposed by the Parliament as a conflict-of-laws rule in personality rights matters – which is clearly tailored to fit defamation disputes – is not efficient at all in data privacy matters, as it connects to the place of damage, which is extremely critical in internet-related disputes. Since the *eDate* doctrine will cease to apply to data privacy disputes when the GDPR becomes applicable, sticking with such an approach will soon be inefficient, and also objectively useless.

Therefore, it has been proposed to fully separate privacy and data protection when dealing with a potential amendment of the Rome II Regulation. The author's Proposed Article aims at removing the uncertainties that arise from the damage-oriented approach of the general conflict-of-laws rule of the Rome II Regulation. The Proposed Article also promotes the coincidence of *forum* and *ius*, which is not an absolute goal of private international law, but proves efficient in a field such as data privacy, in which a self-limited rule subtracts the substance of the protected rights from the private international law question. In this sense, it has been considered most appropriate to craft a conflict-of laws rule which – without giving a choice to the plaintiff on which law would apply – is deemed to create a situation in which the data controller has a reasonable expectation on the law applicable to potential future data privacy torts. Also, data subjects are granted a satisfactory degree of protection of their rights to compensation, depending on the evaluations made by the judge on the degree of protection granted by the applicable law, pursuant to the general connecting factor.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

In conclusion, this work, despite not addressing all private international law aspects as declared in the initial *caveat*, tackles the issues that are considered most pertinent to internet data privacy cases. This contribution may well serve as a foundation for future studies concerning critical aspects, with special regard to the interaction of the General Data Privacy Regulation with the existing private international law legislation in jurisdictional matters. And finally, this work will possibly improve the amendment of the Regulation on the law applicable to non-contractual obligations for violations of personality rights.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

REFERENCES

Adam R., Tizzano A., *Manuale di diritto dell'Unione europea*, Giappichelli, 2014

Ahern J., Binchy J. (eds), *The Rome II Regulation on the law applicable to non-contractual obligations. A new lnternational litigation regime*, Martinus Nijhoff, 2009

Beig D. *et al.*, *Rom II-VO: neues Kollisionsrecht für außervertragliche Schuldverhältnisse*, Manz, 2008

Amery C., *The European Union data protection directive: where are we? How did we get here? What next?*, in *Information Security Technical Report*, 1997, p. 29

Andrews E.L., *Europe and US still at odds over privacy,* in *The New York Times*, 27 May 1999

Aristotele, *La Politica*, Laterza, 2014

Assunção M.D. *et al*., *Big data computing and clouds: challenges, solutions, and future directions*, in *Journal of Parallel and Distributed Computing*, 2015, p. 3

Audit M., *L'interprétation autonome du droit international privé communutaire I,* in *Journal du droit international*, 2004, p. 789

Ballarino T., *Internet nel mondo della legge*, Cedam, 1998

Baratta R., *Il collegamento più stretto nel diritto internazionale privato dei contratti*, Giuffrè, 1991

Baratta R. (ed), *Diritto internazionale privato*, Giuffrè, 2010

Barel B., *Diritto internazionale privato,* Giuffrè, 2015

Bariatti S., *Prime considerazioni sulla convenzione di Lugano del 16 settembre 1988 sulla giurisdizione e l'esecuzione delle sentenze*, in *Rivista di diritto internazionale privato e processuale*, 1989, p. 529

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Bariatti S., *Qualificazione e interpretazione del diritto internazionale privato comunitario: prime riflessioni*, in *Rivista di diritto internazionale privato e processuale*, 2006, p. 361

Bariatti S., Viarengo I., Villata F.C., *La giurisprudenza italiana sui regolamenti europei in materia civile e commerciale e di famiglia*, Wolters Kluwer, 2016

Bertoli P., *Criteri di giurisdizione e legge applicabile in tema di responsabilità precontrattuale alla luce della sentenza Fonderie Meccaniche Tacconi*, in *Rivista di diritto internazionale privato e processuale*, 2003, p. 109

Bertoli P., *Corte di giustizia, integrazione comunitaria e diritto internazionale privato e processuale*, Giuffrè, 2006

Bertoli P., *Art. 1 – Campo d'applicazione materia*le, in *Le Nuove Leggi Civili Commentate*, 2009, p. 547

Bertoli P., *Tutela dei dati personali e diritto internazionale privato: questioni generali*, in Distefano M. (ed), *La protezione dei dati personali e informatici nell'era della sorveglianza globale: temi scelti*, Editoriale Scientifica, 2017, forthcoming

Bertrand A., *Droit a la vie privée et droit a l'image*, Litec, 1999, p. 3

Bigos O., *Jurisdiction over cross-border wrongs on the internet*, in *International and Comparative Law Quarterly*, 2005, p. 585

Birnhack M.D., *The EU data protection directive: an engine of a global regime*, in *Computer Law and Security Report*, 2008, p. 508

Bloustein E.J., *Privacy as an aspect of human dignity: an answer to Dean Prosser*, in *New York University Law Review*, 1964, p. 962

Bogdan M., *Defamation on the internet, forum delicti and the e-commerce directive: some comments on the ECJ judgment in the eDate case*, in *Yearbook of Private international law*, 2011, p. 483

Bonaduce C., *L'interpretazione della convenzione di Bruxelles del 1968 alla luce del regolamento n. 44/2001 nelle pronunce della Corte di giustizia*, in *Rivista di diritto internazionale*, 2003, p. 747

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Bonell M.J., *Le iniziative dell'UNCITRAL in tema di EDI*, in *Informatica e attività giuridica*, *Atti del V Congresso internazionale della Corte Suprema di Cassazione*, Roma, 1993, p. 517

Bonomi P. *et al*. (eds), *La convention de Lugano: passé, present et devenir*, Schulthess, 2007

Borges G., Schwenk J., *Cloud computing, e-government und e-commerce*, Springer, 2012

Boschiero N., *Il principio di territorialità in materia di proprietà intellettuale: conflitti di leggi e giurisdizione*, in *Annali italiani del diritto d'autore*, *della cultura e dello spettacolo*, 2007, p. 35

Boschiero N., *La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I)*, Giappichelli, 2009

Briggs A., *Agreements on Jurisdiction and Choice of Law*, Oxford University Press, 2008

Briggs A., Rees P., *Civil Jurisdiction and Judgments*, Informa, 2009

Brkan M., *Data protection and European private international law*, in *International Data Privacy Law*, 2015, p. 257

Burkert H., *Privacy-data protection: a German/European perspective*, in *Proceedings of the second symposium of the Max Planck Project Group on the Law of Common Goods and Computer Science and Telecommunication Board of the National Research Council*, 1999, p. 43

Bygrave L.A., *Data protection pursuant to the right to privacy in human rights treaties*, in *International journal of law and information technology*, 1998, p. 247

Bygrave L.A., *Determining applicable law pursuant to European data protection legislation*, in *Computer Law and Security Report*, 2000, p. 252

Bygrave L.A., *International agreements to protect personal data*, in Rule J.B., Greenleaf G., *Global privacy protection, the first generation*, Elgar, 2008, p. 15

Bygrave L.A., *Data privacy law: an international perspective*, Oxford University Press, 2014

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Calvo Caravaca A.L., Carrascosa González J., *Las obligaciones extracontractuales en derecho internacional privado: el reglamento «Roma II»*, Comares, 2008

Campiglio C., *La legge applicabile alle obbligazioni extracontrattuali (con particolare riguardo alla violazione della privacy)*, in *Rivista di diritto internazionale privato e processuale*, 2015, p. 857

Carey P., *Data protection*, III ed., Oxford University Press, 2009

Carbone S.M., *Lo spazio giudiziario europeo in materia civile e commerciale – da Bruxelles I al regolamento (CE) n. 805/2004*, Giappichelli, 2009

Carbone S.M., Tuo C.E., *Il nuovo spazio giudiziario europeo in materia civile e commerciale: il regolamento (UE) n. 1215/2012*, Giappichelli, 2016

Carrascosa González J., *Ley aplicable a los contratos internacionales: el reglamento de Roma I*, Colex, 2009

Carrascosa González J., *The Internet – privacy and rights relating to personality*, Collected courses of the Hague Academy of International law, Vol. 378, Brill, 2016

Cate F.H., *The changing face of privacy protection in the European Union and the United States*, in *Indiana Law Review*, 1999, p. 173

Chen J., *When the safe harbour is not safe: what next for the EU*, in *SCRIPT-ed*, 2015, p. 167

Christo E.D., *Data protection in Trinidad and Tobago*, in *International Data Privacy Law*, 2013, p. 202

Coester-Waltjen D., *Internationale Zustandigkeit bei Persönlichkeitsrechtsverletzungen*, in Geimer R., *Wege zur Globalisierung des Rechts: Festschrift Schütze*, Beck, 1999, p. 175

Conti R., *Convenzione di Bruxelles, competenza giurisdizionale e responsabilità precontrattuale*, in *Corriere Giuridico*, 2004, p. 482.

Cooper D., *Redefining 'personal data': can the opinion live up to the hype?*, in *Data Protection Ireland Journal*, 2007, p. 7

Craig P., De Búrca G., *EU law: text, cases, and materials*, Oxford University Press, 2015

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Crespi Reghizzi Z., *Regolamento (CE) n. 864/2007 dell'11 luglio 2007 sulla legge applicabile alle obbligazioni extracontrattuali*, in Pocar F., Baruffi M.C., *Commentario breve ai trattati dell'Unione europea*, Cedam, 2014, p. 586

Cuijpers C., *A private law approach to privacy; mandatory law obliged?*, in *SCRIPT-ed*, 2007, p. 304

Cunningham M., *Diminishing sovereignty: how European privacy law became international norm*, in *Santa Clara Journal of International Law*, 2013, p. 421

Curzon L.B., Richards P.H., *The Longman dictionary of law*, Longman, 2011

Danov M., *Jurisdiction and judgments in relation to EU competition law claims*, Hart Publishing, 2011

Dasser F., Oberhammer P., *Lugano-Übereinkommen*, II ed., Staempfli, 2011

De Cesari P., *Disposizioni alle quali non è permesso derogare convenzionalmente e norme di applicazione necessaria*, in Venturini G., Bariatti S., *Nuovi strumenti del diritto internazionale privato – Liber Fausto Pocar*, Giuffrè, 2009, p. 257

De Goetzen E., *La licenza d'uso di diritto di proprietà intellettuale nel regolamento Bruxelles I: il caso Falco*, in *Rivista di diritto internazionale privato e processuale,* 2010, p. 383

De Hert P., Gutwirth S., *Data protection in the case law of Strasbourg and Luxemburg: constitutionalisation in action*, in Gutwirth S., *Reinventing data protection?*, Springer, 2009, p. 3

De Hert P., Papakonstantinou V., *The proposed data protection regulation replacing directive 95/46/EC: a sound system for the protection of individuals*, in *Computer Law and Security Review*, 2012, p. 130

De Franceschi A. (ed), *European contract law and the digital single market: the implications of the digital revolution*, Intersentia, 2016

De Miguel Asensio P., *Cross-border adjudication of intellectual property rights and competition between jurisdictions*, in *Annali italiani del diritto d'autore, della cultura e dello spettacolo*, 2007, p. 105

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

De Nova R., *Historical and comparative introduction to conflict of laws*, Collected courses of the Hague Academy of International law, Vol. 118, Brill, 1966

Del Pilar Diago M., *La residencia digital como nuevo factor de vinculación en el derecho internacional privado del ciberespacio: ¿posible conexión de futuro?*, in *Diario La Ley*, 2014, p. 406

Determann L, *Determann's field guide to data privacy law: international corporate compliance*, Elgar, 2015

Dhont J., Poullet Y., *Data protection – Belgium: an analysis of the new law*, in *Computer Law and Security Report*, 2000, p. 5

Di Blase A., *Connessione e litispendenza nella convenzione di Bruxelles*, Cedam, 1993

Dickinson A., *The Rome II Regulation: the law applicable to non-contractual obligations*, Oxford University Press, 2008

Dickinson A., Lein E., *The Brussels I Regulation Recast*, Oxford University Press, 2015

DLA Piper, *New rules for a new age?*, 2009, on *dlapiper.com*

Dodge M., *Mapping how data flows*, in *e-OTI*, 2000, on *isoc.org*

Draetta U., *Internet e commercio elettronico nel diritto internazionale dei privati*, Giuffrè, 2005

EFTA Court (ed), *Judicial protection in the European Economic Area*, German Law Publishers, 2012

Ehmann H., Thorn K., *Erfolgsort bei grenzüberschreitenden Persönlichkeitsverletzungen*, in *AfP Medien, Zeitschrift für Medien- und Kommunikationsrecht*, 1996, p. 20

Ellger R., *Der Datenschutz im gernzueberschreitenden Datenverkehr: eine rechtsvergleichende und kollisionsrechtlichen Untersuchung*, Nomos, 1990

Fadda S., *L'Electronic Data Interchange nella normativa italiana e straniera*, in *Diritto dell'informazione e dell'informatica*, 1994, p. 91

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Fairgrieve D., Lein E., *Extraterritoriality and collective redress*, Oxford University Press, 2012

Feraci O., *La legge applicabile alla tutela dei diritti della personalità nella prospettiva comunitaria*, in *Rivista di diritto internazionale*, 2009, p. 1020

Ferrari F., Leible S. (eds), *Rome I Regulation – The law applicable to contractual obligations in Europe*, Sellier, 2009

Ferrari F. (ed), *Rome I Regulation*, Sellier, 2015

Forno R., *Defining privacy interests*, in *Blog of the Center for Internet and Society at Stanford Law School*, 12 November 2014, on *cyberlaw.stanford.edu*

Franzina P., *La responsabilità precontrattuale nello spazio giudiziario europeo,* in *Rivista di diritto internazionale*, 2003, p. 714

Franzina P., *La giurisdizione in materia contrattuale*, Cedam, 2006

Franzina P., *Jurisdiction regarding claims for the infringement of privacy rights under the General Data Protection Regulation*, in De Franceschi A. (ed), *European contract law and the digital single market: the implications of the digital revolution*, Intersentia, 2016, p. 81

Fried C., *Privacy*, in *Yale Law Journal*, 1968, p. 475

Frigo M., *Recognition and enforcement of judgments in matters relating to personality rights and the recast of the Brussels I Regulation*, in Pocar F., Viarengo I., Villata F.C. (eds), *Recasting Brussels I*, Cedam, 2012, p. 183

Gardella A., *Diffamazione a mezzo stampa e convenzione di Bruxelles del 27 settembre 1968*, in *Rivista di diritto internazionale privato e processuale*, 1997, p. 657

Garner B.A. (ed), *Black's Law Dictionary*, West Group, 1999

Garnet R., Richardson M., *Libel tourism or just redress? reconciling the (English) right to reputation with the (American) right to free speech in cross-border libel cases*, in *Journal of Private International Law*, 2009, p. 471

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Garrow D.J., *Privacy and the American Constitution*, in *Social Research*, 2001, p. 55

George M., *The concept of domicile*, in A. Dickinson, E. Lein, *The Brussels I Regulation Recast*, Oxford University Press, 2015

Geimer R., *Wege zur Globalisierung des Rechts: Festschrift Schütze*, Beck, 1999

Gidron T., *Privacy protection as a case study in personal rights protection in Israeli law*, in *Computer Law and Security Review*, 2012, p. 283

Giuliano M., Lagarde P., *Report on the convention on the law applicable to contractual obligations*, in *Official Journal*, 1980, C 282, p. 1

Glenn R.A., *The right to privacy: rights and liberties under the law*, ABC-CLIO, 2003

Gola P. *et al*., *BDSG - Bundesdatenschutzgesetz: Kommentar*, Beck, 2015

González Fuster G., *The emergence of personal data protection as a fundamental right of the EU*, Springer, Berlin, 2014

Gutwirth S. *et al.* (eds), *Reinventing data protection?*, Springer, 2009

Hansen M., *Datenschutz im Cloud Computing*, in *Daten- und Identitätsschutz*, in Borges G., Schwenk J., *Cloud computing, e-government und e-commerce*, Springer, 2012, p. 79

Hare C., *Forum non conveniens in Europe: game over or time for reflexion?*, in *Journal of business law*, 2006, p. 157

Hartley T., *Article 5(3): The place of commission of a tort*, in *European Law Review*, 1977, p. 143

Hartley T., *'Libel tourism' and conflict of laws*, in *International & Comparative Law Quarterly*, 2010, p. 25

Hartley T., *Choice-of-Court agreements under the European and international instruments*, Oxford University Press, 2013

Heisenberg D., *Negotiating privacy: the European Union, the United States, and personal data protection*, Lynne Rienner Publishers, London, 2005

Hervey T.K., Peers S., *The EU Charter of fundamental rights*, Hart Publishing, 2014

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Hess B., *Der Schutz der Privatsphäre im Europäischen Zivilverfahrensrecht*, in *Juristenzeitung*, 2012, p. 189

Hess B., *The Brussels I Regulation: Recent case law of the Court of Justice and the Commission's proposed recast*, in *Common Market Law Review*, 2012, p. 1075

Hess B., *The protection of privacy in the case-law of the CJEU*, in Hess B., Mariottini C.M. (eds), *Protecting privacy in private international and procedural law and by data protection*, Nomos, 2015, p. 94.

Hess B., Mariottini C.M. (eds), *Protecting privacy in private international and procedural law and by data protection*, Nomos, 2015

Hijmans H., Kranenborg H., *Data protection anno 2014: how to restore trust?*, Intersentia, 2014

Hirshleifer J., *Privacy: its origin, function and future*, in *The Journal of Legal Studies*, 1980, p. 649

Hixson R.F., *Privacy in a public society: human rights in conflict*, Oxford University Press, 1987

Honorati C., *Concorso di responsabilità contrattuale ed extracontrattuale e giurisdizione ai sensi della convenzione di Bruxelles del 1968*, in *Rivista di diritto internazionale privato e processuale*, 1994, p. 281

Honorati C., *Responsabilità per fatto illecito*, in Baratta R. (ed), *Diritto internazionale privato*, Giuffrè, 2010, p. 373

Honorati C. (ed), *Luci e ombre del nuovo sistema UE di tutela brevettuale*, Giappichelli, 2014

Honorati C., *Regolamento (CE) n. 593/2008 del 19 giugno 2008 sulla legge applicabile alle obbligazioni contrattuali*, in Pocar F., Baruffi M.C., *Commentario breve ai trattati dell'Unione europea*, Cedam, 2014, p. 613

Hornung G., *A General Data Protection Regulation for Europe? Light and Shade in the Commission's Draft of 25 January 2012*, in *SCRIPTed*, 2012, p. 64

Huber P., *Rome II Regulation: pocket commentary*, Sellier, 2011

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Hughes R.L.D., *Two concepts of privacy*, in *Computer Law and Security Review*, 2015, p. 527

Ismail N., Yong Cieh E.L. (eds), *Beyond data protection*, Springer, 2013

Jametti Greiner M., *Le espace judiciaire européen en metière civile: la nouvelle convention de Lugano*, in Bonomi P. *et al*. (eds), *La convention de Lugano: passé, present et devenir*, Schulthess, 2007

Jingchun C., *Protecting the right to privacy in China*, in *Victoria University of Wellington Law Review*, 2005, p. 645

Kalven H.J., *Privacy in tort law – Were Warren and Brandeis wrong?*, in *Law & Contemporary Problems*, 1966, p. 326

Kang J., *information privacy in cyberspace transactions*, in *Stanford Law Review*, 1998, p. 1193

Kobrin S.J., *Safe harbours are hard to find: the trans-Atlantic data privacy dispute, territorial jurisdiction and global governance*, in *Review of International Studies*, 2003, p. 111

Kohler C., *The interpretation of the Lugano Convention of 2007 and the Brussels instruments on jurisdiction and judgments in civil and commercial matters*, in EFTA Court (ed), *Judicial protection in the European Economic Area*, German Law Publishers, 2012, p. 219

Kohler C., *Conflict of law issues in the 2016 Data Protection Regulation of the European Union*, in *Rivista di diritto internazionale privato e processuale*, 2016, p. 653

Kokott J., Sobotta C., *The distinction between privacy and data protection in the jurisprudence of the CJEU and the ECtHR*, in Hijmans H., Kranenborg H., *Data protection anno 2014: how to restore trust?*, Intersentia, 2014, p. 83

Kosta E., *Consent in European data protection law*, Martinus Nijhoff, 2014

Kotschy W., *The proposal for a new General Data Protection Regulation: problems solved?*, in *International Data Privacy Law*, 2014, p. 274

Kropholler J., von Hein J., *Europäisches Zivilprozessrecht*, IX ed., 2011

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Kudyba S., *Big Data, Mining, and Analytics: Components of Strategic Decision Making*, Auerbach, 2014

Kuipers J.J., *Joined Cases C-509/09 & C-16l/10, eDate Advertising v X and Oliver Martinez and Robert Martinez v MGN Limited, Judgment of the Court of Justice (Grand Chamber) of 25 October 2011*, in *Common Market Law Review*, 2012, p. 1211

Kulesza J., *International law challenges to location privacy protection*, in *International Data Privacy Law*, 2013, p. 158

Kuner C. *et al*., *Editorial*, in *International Data Privacy Law*, 2011, p. 1

Kuner C., *Data protection law and international jurisdiction on the internet (Part 1)*, in *International Journal of Law and Information Technology*, 2010, p. 176

Kuner C., *Transborder data flows and data privacy law*, Oxford, 2013

Kuner C., *European data protection law: corporate compliance and regulation*, II ed., Oxford University Press, 2007, p. 91

Kuner C., *Extraterritoriality and regulation of international data transfers in EU data protection law*, in *International Data Privacy Law*, 2015, p. 235

Lagarde P., *Le nouveau droit international privé des contrats après l'entrée in vigueur de la Convention de Rome du 19 Juin 1980*, in *Revue critique de droit international privé*, 1991, p. 301

Lein E., *Jurisdiction and applicable law in cross-border mass litigation*, in Pocar F., Viarengo I., Villata F.C. (eds), *Recasting Brussels I*, Cedam, 2012, p. 159

LeSieur F., *Regulating cross-border data flows and privacy in the networked digital environment and global knowledge economy*, in *International Data Privacy Law*, 2012, p. 93

Lessig L., *Code and other laws of cyberspace*, Basic, 1999

Lessig L., *Code and other laws of cyberspace: version 2.0*, II ed., Basic, 2006

Litman J., *Information privacy/information property*, in *Stanford Law Review*, 2000, p. 1283

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Locke J., *Two treatises on government*, Cambridge University Press, 1988

Lopes Pegna O., *Criteri di collegamento*, in Baratta R. (ed), *Diritto internazionale privato*, 2010, p. 91

Loring T.B., *An analysis of the informational privacy protection afforded by the European Union and the United States*, in *Texas International Law Journal*, 2002, p. 421

Lynskey O., *The foundations of EU data protection law*, Oxford University Press, 2011

Magagni M., *La prestazione caratteristica nella convenzione di Roma del 19 giugno 1980*, Giuffrè, 1989

Magnus U., Mankowski P. (eds), *Brussels I Regulation*, II ed., Sellier, 2012

Magnus U., *Rome I Regulation*, Sellier 2014

Magnus U., Mankowski P. (eds), *Brussels Ibis Regulation*, Otto Schmidt, 2016

Makulilo A.B., *Privacy and data protection in Africa: a state of the art*, in *International Data Privacy Law*, 2012, p. 163

Malatesta A. (ed), *The unification of choice of law rules on torts and other non-contractual obligations in Europe – The 'Rome II' proposal*, Cedam, 2006

Malatesta A., *Regolamento (CE) n. 44/2001 del 22 dicembre 2000 concernente la competenza giurisdizionale, il riconoscimento e l'esecuzione delle decisioni in materia civile e commerciale*, in Pocar F., Baruffi M.C., *Commentario breve ai trattati dell'Unione europea*, Cedam, 2014, p. 517

Malatesta A., *Regolamento (UE) n. 1215/2012 del 12 dicembre 2012 concernente la competenza giurisdizionale, il riconoscimento e l'esecuzione delle decisioni in materia civile e commerciale*, in Pocar F., Baruffi M.C., *Commentario breve ai trattati dell'Unione europea*, Cedam, 2014, p. 536

Malatesta A. (ed), *La riforma del regolamento Bruxelles I. Il regolamento (UE) n. 1215/2012 sulla giurisdizione e l'efficacia delle decisioni in materia civile e commerciale*, Giuffrè, 2016

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Mankowski P., *Section 2: special jurisdiction*, in Magnus U., Mankowski P. (eds), *Brussels I Regulation*, II ed., Sellier, 2012, p. 232

Mantelero A., *Competitive value of data protection: the impact of data protection regulation on online behaviour*, in *International Data Privacy Law*, 2013, p. 229

Marino S., *Metodi di diritto internazionale privato a tutela del contraente debole nel diritto comunitario*, Giuffrè, 2010

Marino S., *La violazione dei diritti della personalità nella cooperazione giudiziaria civile comunitaria*, in *Rivista di diritto internazionale privato e processuale*, 2012

Marongiu Buonauti F., *Litispendenza e connessione internazionale: strumenti di coordinamento tra giurisdizioni statali in materia civile*, Jovene, 2008

Marongiu Buonaiuti F., *Litispendenza internazionale*, in Baratta R. (ed), *Diritto internazionale privato*, Giuffrè, 2010, p. 208

Marongiu Buonaiuti F., *Le obbligazioni non contrattuali nel diritto internazionale privato*, Giuffrè, 2013

Marrella F., *Funzione ed oggetto dell'autonomia della volontà nell'era della globalizzazione del contratto*, in Boschiero N., *La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I)*, Giappichelli, 2009, p. 35

Martino A., *Artificial intelligence and law*, in *International Journal of Law and Information Technology*, 1994, p. 154

Martino R., *La giurisdizione italiana nelle controversie civili transnazionali*, Cedam, 2000

Màrton E., *Violation of personality rights through the internet: jurisdictional issues under European law*, Nomos, 2016

Mastroianni A. *et al.* (eds), *Carta dei diritti fondamentali dell'Unione europea*, Giuffrè. 2017

McGuire M.R., *Verfahrenskoordination und Verjährungsunterbrechung im europäischen Prozessrecht*, Mohr Siebeck, 2004

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

McParland M., *The Rome I Regulation on the law applicable to contractual obligations*, Oxford University Press, 2015

Mellone M., *La nozione di residenza abituale e la sua interpretazione nelle norme di conflitto comunitarie*, in *Rivista di diritto internazionale privato e processuale*, 2010, p. 685

Millard C., *Impact of the EU data protection directive on transborder data flows*, in *Information Security Technical Report*, 1997, p. 47

Miller A.R., *Personal privacy in the computer age: the challenge of a new technology in an information-oriented society*, in *Michigan Law Review*, 1969, p. 1089

Mills B., *Television wildlife documentaries and animals' right to privacy*, in *Continuum*, 2010, p. 193

Miyashita H., *The evolving concept of privacy in Japanese law.*, in *International Data Privacy Law*, 2011, p. 229

Moerel L., *The long arm of EU data protection law: does the data protection directive apply to processing of personal data of EU citizens by websites worldwide ?*, in *International Data Privacy Law*, 2011, p. 28

Moss G. QC *et al*. (eds), *The EC Regulation on insolvency proceedings*, Oxford University Press, 2009

Mosconi F., Campiglio C., *Diritto internazionale privato e processuale*, VII ed., Utet, 2015

Murphy R., *Property rights in personal information: an economic defence of privacy*, in *The Georgetown Law Journal*, 1996, p. 2381

Netwon C., *Facebook says it will stop writing descriptions for Trending Topics*, on *The Verge*: *theverge.com*

Nielsen P.A., *Libel tourism: English and EU private international law*, in *Journal of Private International Law*, 2013, p. 269

Nielsen P.A., *The new Brussels I Regulation*, in *Common Market Law Review*, 2013, p. 503

Nygh P., *Autonomy in International Contracts*, Oxford University Press, 1999

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Nisi N., *La giurisdizione in materia di responsabilità delle agenzie di rating alla luce del regolamento Bruxelles I*, in *Rivista di diritto internazionale privato e processuale,* 2013, p. 385

Nowak M., *U.N. Covenant on Civil and Political Rights – CCPR commentary*, Engel, 2005

Nuyts A. (ed), *International litigation in intellectual property and information technology*, Kluwer Law International, 2008

Nuyts A., *La refonte du Règlement Bruxelles I*, in *Revue critique de droit international privé*, 2013, p. 1

O'Connel N., *Data protection and privacy issues in the Middle East*, in *Report of the Telecommunications law and regulation in the Middle East conference*, 2011

Öman S., *Implementing data protection in law*, in *Scandinavian Studies in Law*, 2004, p. 389

Ong R., *Recognition of the right to privacy on the internet in China*, in *International Data Privacy Law*, 2011, p. 172

Pearce G., Platten N., *Orchestrating transatlantic approaches to personal data protection: a European perspective*, in *Fordham International Law Journal*, 1999, p. 2024

Pineschi L., *La Dichiarazione universale dei diritti umani*, in Pineschi L. (ed), *La tutela internazionale dei diritti umani*, Giuffrè, 2015

Piroddi P., *Between Scylla and Charybdis. Article 4 of the Rome I Regulation navigating along the cliffs of uncertainty and inflexibility*, in Venturini G., Bariatti S., *Nuovi strumenti del diritto internazionale privato – Liber Fausto Pocar*, Giuffrè, 2009, p.819

Pizzetti F., *Privacy e il diritto europeo alla protezione dei dati personali: dalla Direttiva 95/46 al nuovo Regolamento europeo*, Giappichelli, 2016

Pizzolante G., *Art. 6 – Contratti conclusi da consumatori*, in *Le Nuove Leggi Civili Commentate*, 2009, p. 727

Plender R., Wilderspin M., *The European private international law of obligations*, IV ed., Sweet & Maxwell, 2015

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Pocar F., *La legge applicabile ai contratti con i consumatori*, in Treves T. (ed), *Verso una disciplina comunitaria della legge applicabile ai contratti*, Cedam, 1983, p. 303

Pocar F., *Articolo 62 (responsabilità per fatto illecito)*, in *Rivista di diritto internazionale privato e processuale*, 1995, p. 1210

Pocar F., *Commentario del nuovo diritto internazionale privato*, Cedam, 1996

Pocar F., Viarengo I., Villata F.C. (eds), *Recasting Brussels I*, Cedam, 2012, p. 159

Pocar F., Baruffi M.C., *Commentario breve ai trattati dell'Unione europea*, Cedam, 2014

Pollicino O., Bassini M., *La carta dei diritti fondamentali dell'Unione europea nel reasoning dei giudici di Lussemburgo*, in *Diritto dell'informazione e dell'informatica,* 2015, p. 741

Pollicino O., Bassini M., *Protezione dei dati di carattere personale*, in Mastroianni A. *et al.* (eds), *Carta dei diritti fondamentali dell'Unione europea*, Giuffrè. 2017, p. 134

Post R.C., *Three concepts of privacy*, in *The Georgetown Law Journal*, 2001, p. 2087

Prosser W.L., *Privacy*, in *California Law Review*, 1960, p. 383

Purtova N., *Private law solutions in European data protection: relationship to privacy, and waiver of data protection rights*, in *Netherlands Quarterly of Human Rights*, 2010, p. 179

Purtova N., *Property rights in personal data: a European perspective*, Wolters Kluwer, 2012

Queirolo I., *Prorogation of jurisdiction in the proposal for a Recast of the Brussels I Regulation*, in Pocar F., Viarengo I., Villata F.C. (eds), *Recasting Brussels I*, Cedam, 2012, p. 183

Rabel E., *The conflict of laws: a comparative study*, II ed., University of Michigan Law School, 1960

Ragno F., *The law applicable to consumer contracts*, in Ferrari F., Leible S. (eds), *Rome I Regulation – The Law Applicable to Contractual Obligations in Europe*, Sellier, 2009, p. 129

Rauscher T., *Internationales Privatrecht (mit internationalem Verfahrensrecht)*, IV ed., Mueller, 2012

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Re J., *Le successioni mortis causa nel diritto internazionale privato dell'Unione europea. Ambito di applicazione e diritto applicabile*, Aracne, 2016

Rees C., *Tomorrow's privacy: personal information as property*, in *International Data Privacy Law*, 2013, p. 220

Rees C., *Who owns our data?*, in *Computer Law and Security Review*, 2014, p. 75

Reidenberg J.R., *Resolving conflicting international data privacy rules in cyberspace*, in *Stanford Law Review*, 1999, p. 1315

Rengel A., *Privacy in the 21st century*, Martinus Nijhoff, 2013

Resta F., Fabiano N., *Legal analysis of the new proposed EU Regulation on data protection*, in *The Privacy Advisor*, 2012, on *iapp.org*

Rodotà S., *Data protection as a fundamental right*, in Gutwirth S. *et al*. (eds), *Reinventing data protection?*, Springer, 2009, p. 77

Rule J.B., Greenleaf G., *Global privacy protection, the first generation*, Elgar, 2008

Rykwert J., *Privacy in Antiquity*, in *Social Research*, 2001, p. 29

Ryngaert C., *Symposium issue on extraterritoriality and EU data protection*, in *International Data Privacy Law*, 2015, p. 221

Salerno F., *Giurisdizione ed efficacia delle decisioni straniere nel regolamento (CE) n. 44/2001 (La revisione della convenzione di Bruxelles del 1968)*, Cedam, 2006

Salerno F., G*iurisdizione ed efficacia delle decisioni straniere nel regolamento (UE) n. 1215/2012 (rifusione)*, Cedam, 2015

Samuelson P., *Privacy as intellectual property?*, in *Stanford Law Review*, 2000, p. 1125

Saravalle A., *Riforma del sistema di diritto internazionale privato – Art. 62 (responsabilità per fatto illecito)*, in *Nuove leggi civili commentate*, 1996, p. 1441

Sartor G., *Providers' liabilities in the new EU data protection Regulation: a threat to internet freedoms?*, in *International Data Privacy Law*, 2012, p. 3

Schwartz P.M., *Property, privacy and personal data*, in *Harvard Law Review*, 2003, p. 2056

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Schwartz, P.M., Solove D.J., *Reconciling personal information in the United States and European Union*, in *California Law Review*, 2014, p. 877

Seidl-Hohenveldern I., *International economic 'soft law'*, Collected courses of the Hague Academy of international law, Vol. 163, Brill, 2016

Seiler D., *Why EU data protection regulation also concerns Switzerland*, in *KPMG Blog,* 2016, on *blog.kpmg.ch*

Shapiro F.R., Pearse M., *The most-cited law review articles of all time*, in *Michigan Law Review*, 2012, p. 1483

Siehr K., *European private international law of torts. violations of privacy and rights relating to the personality*, in *Rivista di diritto internazionale privato e processuale*, 2004, p. 1201

Simitis S., *Datenschutz und Europaeischer Gemeinschaft*, in *Recht der Datenverarbeitung*, 1990, p. 3

Smith G.J.H., *Internet law and regulation*, Thomson/Sweet & Maxwell, 2007

Solove D.J., *Conceptualizing privacy*, in *California Law Review*, 2002, p. 1087

Solove D.J., *Understanding privacy*, Harvard University Press, 2009

Stedron B., *Law or artificial intelligence? New trends in the data protection*, in *Masaryk University Journal of Law and Technology*, 2007, p. 209

Steele J., van Boom W.H, *Mass justice: challenges of representation and distribution*, Elgar, 2011

Svantesson D.J.B., *The regulation of cross-border data flows*, in *International Data Privacy Law*, 2011, p. 180

Svantesson D.J.B., *Extraterritoriality in data privacy law*, Ex Tuto, 2013

Svantesson D.J.B., *The extraterritoriality of EU data privacy law: its theoretical justification and its practical effect on US businesses*, in *Stanford Journal of International Law*, 2014, p. 53

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Svantesson D.J.B., *Extraterritoriality and targeting in EU data privacy law: the weak spot undermining the regulation*, in *International Data Privacy Law*, 2015, p. 1

Svantesson D.J.B., *Private international law and the internet*, II ed., Kluwer Law International, 2016

Tesauro G., *Diritto dell'Unione europea,* Cedam, 2012

Thomson J.J., *The right to privacy*, in *Philosophy and Public Affairs*, 1975, p. 295

Torremans P., *The widening reach of the exclusive jurisdiction: where can you litigate IP rights after GAT?*, in Nuyts A. (ed), *International litigation in intellectual property and information technology*, Kluwer Law International, 2008, p. 72

Traça J.L., Embry B., *An overview of the legal regime for data protection in Cape Verde*, in *International Data Privacy Law*, 2011, p. 249

Traça J.L., Embry B., *The Angolan data protection act: first impressions*, in *International Data Privacy Law*, 2012, p. 40

Treves T. (ed), *Verso una disciplina comunitaria della legge applicabile ai contratti*, Cedam, 1983

Treves T., *Art. 17 (Norme di applicazione necessaria)*, in Pocar F., *Commentario del nuovo diritto internazionale privato*, Cedam, 1996, p. 84

Trimble M., *Advancing national intellectual property policies in a transnational context*, in *Maryland Law Review*, 2015, p. 203

Ubertazzi B., *Exclusive Jurisdiction in Intellectual Property*, Mohr Siebeck, 2012

Vlas P., *General provisions*, in Magnus U., Mankowski P. (eds), *Brussels I Regulation*, II ed., 2012, p. 232

Van Calster G., *European private international law*, II ed., Bloomsbury, 2016

Venturini G., Bariatti S., *Nuovi strumenti del diritto internazionale privato – Liber Fausto Pocar*, Giuffrè, 2009

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Villani U., *Aspetti problematici della prestazione caratteristica*, in *Rivista di diritto internazionale privato e processuale,* 1993, p. 507

Villata F.C., *La legge applicabile ai 'contratti dei mercati regolamentati' nel Regolamento Roma I*, in Venturini G., Bariatti S., *Nuovi strumenti del diritto internazionale privato – Liber Fausto Pocar*, Giuffrè, 2009, p. 967

Villata F.C., *L'attuazione degli accordi di scelta del foro nel regolamento Bruxelles I*, Cedam, 2012

E. Vitta, *Diritto internazionale privato – Volume I*, UTET, 1972

Vitta E., *Cours general de droit international privé*, Collected courses of The Hague Academy of International law, Vol. 162, Brill, 1979

Vogel B., *Das Medienpersoenlichkeitsrecht im Internationalen Privatrecht – Eine Untersuchung zur Harmonisierung der Kollisionsnormen in Europa*, Nomos, 2016

Von Hein J., *Das Günstigkeitsprinzip im Internationalen Deliktsrecht*, Mohr Siebeck, 1999

Von Hein J., *Von Hein on Rome II and Defamation*, on *ConflictOfLaws.net*

Volovelsky U., Raynzilber R., *The liability of website owners for defamation in Israel: a challenge yet to be solved?*, in *Computer Law and Security Review*, 2013, p. 590

Wang F., *Jurisdiction and cloud computing: further challenges to internet jurisdiction*, in *European Business Law Review*, 2013, p. 589

Warren S.D., Brandeis L.D., *The right to privacy*, in *Harvard Law Review*, 1890, p. 193

Westin A., *Privacy and freedom*, Atheneum, 1967

Whitman J.Q., *The two western cultures of privacy: dignity versus liberty*, in *Yale Law Journal*, 2004, p. 1151

Wong J.I. *et al*., *Facebook is trying to get rid of bias in Trending news by getting rid of humans*, on *Quartz: qz.com*

Wuermeling U.U., *Harmonisation of European Union privacy law*, in *Mashall Journal of Computer & Information Law*, 1996, p. 412

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Yilma, K.M. *Data privacy law and practice in Ethiopia*, in *International Data Privacy Law*, 2015, p. 177

Yong Cieh E.L., *Personal data protection and privacy law in Malaysia*, in Ismail N., Yong Cieh E.L. (eds), *Beyond data protection*, Springer, 2013, p. 5

Zanobetti A., *La convenzione di Lugano del 16 settembre 1988*, in *Le nuove leggi civili commentate*, 1994, p. 238

Zogg S., *Accumulation of contractual and tortious causes of action under the Judgments Regulation*, in *Journal of Private International Law*, 2013, p. 39

Unless otherwise stated, websites have been last accessed on 7 October 2016.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

CASES

Court of Justice of the European Union:

Case C-6/64, *Costa v ENEL*, ECLI:EU:C:1964:66

Case C-41/74, *van Duyn*, ECLI:EU:C:1974:133

Case C-21/76, *Bier v Mines de Potasse d'Alsace*, ECLI:EU:C:1976:166

Case C-106/77, *Simmenthal*, ECLI:EU:C:1978:49

Case C-102/79, *Commission v Belgium*, ECLI:EU:C:1980:120

Case C-270/81, *Felicitas Rickmers*, ECLI:EU:C:1982:281

Case C-34/82, *Martin Peters*, ECLI:EU:C:1983:87

Case C-288/82, *Duijnstee*, ECLI:EU:C:1983:326

Case C-9/87, *Arcado*, ECLI:EU:C:1988:127

Case C-189/87, *Kalfelis*, ECLI:EU:C:1988:459

Case C-365/88, *Kongress Agentur Hagen*, ECLI:EU:C:1990:203

Case C-26/91, *Handte*, ECLI:EU:C:1992:268

Case C-89/91, *Shearson Lehmann Hutton*, ECLI:EU:C:1993:15

Case C-68/93, *Fiona Shevill*, ECLI:EU:C:1995:61

Case C-364/93, *Marinari v Lloyd's Bank*, ECLI:EU:C:1995:289

Case C-28/95, *Leur-Bloem*, ECLI:EU:C:1997:369

Case C-130/95, *Giloy*, ECLI:EU:C:1997:372

Case C-51/97, *Réunion européenne*, ECLI:EU:C:1998:509

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Case C-412/98, *Group Josi v UGIC*, ECLI:EU:C:2000:399

Case C-1/99, *Kofisa Italia*, ECLI:EU:C:2001:10

Case C-167/00, *Henkel*, ECLI:EU:C:2002:555

Case C-334/00, *Fonderie officine meccaniche Tacconi*, ECLI:EU:C:2002:499

Case C-168/02, *Kronhofer*, ECLI:EU:C:2004:364

Case C-281/02, *Owusu v Jackson*, ECLI:EU:C:2005:120

Case C-4/03, *Gesellschaft für Antriebstechnik*, ECLI:EU:C:2006:457

Case C-3/04, *Poseidon Chartering*, ECLI:EU:C:2006:176

Case C-73/04, *Klein v Rhodos*, ECLI:EU:C:2005:607

Case C-77/05, *United Kingdom v Council*, ECLI:EU:C:2007:803

Case C-386/05, *Color Drack*, ECLI:EU:C:2007:262

Case C-533/07, *Falco*, ECLI:EU:C:2009:257

Case C-28/08, *Bavarian Lager*, ECLI:EU:C:2010:378

Case C-314/08, *Filipiak,* ECLI:EU:C:2009:719

Case C-381/08, *Car Trim*, ECLI:EU:C:2010:90

Case C-482/08, *United Kingdom v Council*, ECLI:EU:C:2010:631

Case C-585/08, *Pammer*, ECLI:EU:C:2010:740

Joined cases C-92/09 and C-93/09, *Schecke and Eifert*, ECLI:EU:C:2010:662

Joined cases C-509/09 and C-161/10, *eDate* and *Martinez*, ECLI:EU:C:2011:685

Case C-189/10, *Abdeli*, ECLI:EU:C:2010:206

Case C-327/10, *Hypoteční banka*, ECLI:EU:C:2011:745

Case C-523/10, *Wintersteiger*, ECLI:EU:C:2012:220

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Case C-18/11, *Philips*, ECLI:EU:C:2012:532

Case C-190/11, *Muehlleitner,* ECLI:EU:C:2012:542

Case C-84/12, *Unamar*, ECLI:EU:C:2013:663

Case C-131/12, *Google Spain*, ECLI:EU:C:2014:317

Case C-170/12, *Pinckney*, ECLI:EU:C:2013:635

Case C-184/12, *Unamar*, ECLI:EU:C:2013:663

Case C-478/12, *Maletic v lastminute.com and TUI Österreich*, ECLI:EU:C:2013:735

Case C-375/13, *Kolassa v Barclays*, ECLI:EU:C:2015:37

Case C-441/13, *Hejduk*, ECLI:EU:C:2015:28

Case C-230/14, *Weltimmo*, ECLI:EU:C:2015:639

Case C-362/14, *Schrems,* ECLI:EU:C:2015:650

Case C-191/15, *Verein für Konsumenteninformation v Amazon*, ECLI:EU:C:2016:612

European Court of Human Rights:

Klass v Germany, 6 September 1978, Case No 5029/71

Malone v United Kingdom, 2 August 1984, Case No 8691/79

Halford v United Kingdom, 25 June 1997, Case No 20605/92

Amann v Switzerland, 16 February 2000, Case No 27798/95

P.G. and J.H. v United Kingdom, 25 September 2001, Case No 44787/98

Peck v United Kingdom, 28 January 2003, Case No 44647/98

Copland v United Kingdom, 3 April 2007, Case No 62617/00

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Germany:

Bundesgerichtshof, 25 June 1957, *Schacht*, in *BGHZ*, 13, 334

Bundesverfassungsgericht, 15 December 1983, Az. 1 BvR 209/83, 1 BvR 484/83, 1 BvR 440/83, 1 BvR 420/83, 1 BvR 362/83, 1 BvR 269/83

Bundesgerichtshof, 27 May 2008, in *IPRax*, 2009, p. 150

Amtsgericht Köln, 19 October 2015, 142 C 232/13. in *EUPILLAR database* at w3.abdn.ac.uk/clsm/eupillar/#/home (summary)

Italy:

Supreme Court of Cassation, No 5259/1984, in *Il Foro italiano*, 1984, p. 2712

Tribunal of Padua, 11 April 1985, in *Rivista di diritto internazionale privato e processuale*, 1986, p. 391

Supreme Court of Cassation, No 1821/1993, in *Rivista di diritto internazionale privato e processuale*, 1994, p. 354

Supreme Court of Cassation, No 1141/2000, in *Rivista di diritto internazionale privato e processuale,* 2001, p. 678

Supreme Court of Cassation, No 19550/2003, in *Rivista di diritto internazionale privato e processuale*, 2004, p. 1372

Supreme Court of Cassation, No 25275/2006, in *Rivista di diritto internazionale privato e processuale*, 2007, p. 1083

Supreme Court of Cassation, No 19595/2008, in *Rivista di diritto internazionale privato e processuale*, 2010, p. 93

Supreme Court of Cassation, No 21053/2009, in *Rivista di diritto internazionale privato e processuale*, 2010, p. 462

Supreme Court of Cassation, No 22239/2009, in *Rivista di diritto internazionale privato e processuale*, 2010, p. 481

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Tribunal of Trapani, 9 June 2010, in *Pluris*

Supreme Court of Cassation, No 8034/2011, in *Rivista di diritto internazionale privato e processuale*, 2011, p. 1103

Supreme Court of Cassation, No 22883/2011, in *Rivista di diritto internazionale privato e processuale*, 2012, p. 923

Tribunal of Como, 22 February 2011, in *Rivista di diritto internazionale privato e processuale*, 2011, p. 782

Supreme Court of Cassation, No 5765/2012, in *Rivista di diritto internazionale privato e processuale*, 2013, p. 156

Supreme Court of Cassation, No 8076/2012, in *Rivista di diritto internazionale privato e processuale*, 2013, p. 431

Supreme Court of Cassation, No 4211/2013, in *Rivista di diritto internazionale privato e processuale*, 2013, p. 482

Supreme Court of Cassation, No 17863/2013, in *Rivista di diritto internazionale privato e processuale,* 2014, p. 633

Tribunal of Bologna, 17 March 2015, in *Pluris*

Tribunal of Bologna, 9 November 2015, in *Pluris*

Netherlands:

Hoge Raad, 28 March 2008, case *Intercontainer Interfrigo v Balkenende*

United Kingdom:

Entick v Carrington [1765] EWHC, KB, J98

Jarret v Barclays [1999] Q.B.1

Durant v Financial Services Authority [2003] EWCA Civ 1746

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Smith v Lloyds TSB Bank Plc [2005] EWHC 246

Oakley v Ultra vehicle design [2005] EWHC 872

Golden Ocean v Salgaocar [2012] EWCA Civ 265

United States of America:

Pavesich v New England Life Ins. Co. et al., 50 S.E. 68 (1905)

Griswold v Connecticut, 381 US 479 (1965)

Roe v Walde, 410 US 113 (1973)

Johnson v Johnson, 493 S.E.2d 668 (1997)

Reno v American Civil Liberties Union, 521 U.S. 844 (1997)

Mozes v Mozes, 239 F.3d 1067 9th Cir. (2001)

Lawrence v Texas, 539 US 558 (2003)

Microsoft Corporation v The United States of America, Docket No. 14-2985 (2016)

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

ACKNOWLEDGEMENTS

Financial support for conducting research at the Peace Palace Library and for attending the 2015 Summer School in Private International Law at the Hague Academy of International Law was granted by the ***FONDAZIONE CARIPLO*** (www.fondazionecariplo.it) under the 'Cariplo Mobility Grants' scheme. The Fondazione Cariplo also covered travel expenses for the author to present his research findings in the context of the meetings held by the ILA committee 'The Protection of Privacy in Private International and Procedural Law' in 2014 and 2015.

Financial support for conducting research at the Max Planck Institute Luxembourg for International, European, and Regulatory Procedural Law was granted by the ***MAX PLANCK INSTITUTE LUXEMBOURG*** (www.mpi.lu) under the 'Max Planck Luxembourg PhD Scholarships 2016' scheme.

The author thanks the ***FONDAZIONE CARIPLO*** and the ***MAX PLANCK INSTITUTE LUXEMBOURG*** for said financial support.

Tesi di dottorato "Internet Data Privacy in European Union Private International Law"
di MARCHETTI FILIPPO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2017
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.