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forme ed evoluzioni della moneta



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## **PRESENTAZIONE**

Il fascicolo n. 22 del 2020 ospita nella sezione monografica i saggi sollecitati dalla *call for papers* su “*Money and Indebtedness Sustainability in the EU and beyond*”, la terza promossa nel progetto Jean Monnet Chair in EU Money Law (2018-2021) coordinato dalla Dott.ssa Gabriella Gimigliano, ricercatrice in diritto commerciale presso il Dipartimento di Studi Aziendali e Giuridici dell’Università di Siena. Sono stati selezionati quattro saggi che esaminano le monete complementari, le *stablecoin*, la Central Bank Digital Currency (CBDC).

La sezione dedicata ad altri saggi ospita due contributi, l’uno sull’evoluzione del diritto all’oblio nell’ordinamento italiano e l’altro sul Reg. UE 679/16 in materia di sicurezza del trattamento dei dati personali.

**Call for Papers:**  
**Money and Indebtedness Sustainability in the EU and beyond**

**MONETE COMPLEMENTARI, STABLECOIN, CBDC:  
FORME ED EVOLUZIONI DELLA MONETA**



# **LEGAL STATUS AND PRACTICE OF COMPLEMENTARY CURRENCY IN RUSSIA<sup>°</sup>**

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*In fasi di crisi finanziaria e shock economici esterni, le monete complementari (CC) possono svolgere un ruolo cruciale come strumento di scambio compensativo. Le monete complementari possono potenzialmente avere positivi effetti socio-economici ma questo dipende dalla struttura e dale condizioni d'uso che, a loro volta, sono influenzate dal quadro giuridico nazionale. Il presente articolo, che combina esame dottrinale e casistico, si concentra sull'analisi delle contraddizioni che esistono tra la disciplina delle monete complementari e i bisogni sociali sottostanti prendendo ad esame il contesto finanziario russo. La ricerca delle interazioni economiche con il quadro regolativo rivela la spinta costruttiva delle monete complementari come strumento di sviluppo locale. Tuttavia, emerge altresì l'esigenza di fugare i dubbi sulla legittimità delle monete complementari nel sistema giuridico russo per coglierne appieno le potenzialità nel perseguimento degli obiettivi di sviluppo sostenibile.*

*In circumstances of financial crises and external economic shocks, complementary currencies (CCs) play a crucial role as a compensatory exchange instrument. CC's potential for positive social-economic effects is defined by its design and conditions of using which, in their turn, substantially depend on their national legal status. This article focuses on the analysis of contradictions between the legal status of CCs and existing social needs in using them. The analysis of law regulating the Russian finance system allowed to identify a legal framework of using CCs in local economic practice. This doctrinal research was combined with a case study of the existing practice of using CCs revealed a reasonable social request for CCs. Thus, research of economic interactions as a part of social life in the current legal context allowed to reveal the actual constructive social needs in CCs as a legal tool of local exchange which conflicts with the current legal system and should be considered in its further development. At first, it requires the unambiguous legitimacy of CCs in Russia. Expanding the effective practice of using CCs in Russia needs a participative system of developing legal frameworks considering the interests of all economic agents for the common goals of sustainable development.*

## **Summary**

1. Introduction
2. Basic Rules of monetary system in Russia
  - 2.1 The National currency
  - 2.2 The legitimacy of other types of currency in Russia
3. Cases of using CCs in Russia: analysis in the current legal context
  - 3.1. Shaimuratovo
  - 3.2. Kolionovo
4. Conclusions

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<sup>°</sup> Double blind peer-reviewed paper.

## 1. Introduction

Money is a multi-aspect phenomenon studied at the intersection of economic and legal sciences. A broad economic interpretation of money includes all the means that can fulfill any functions of money and narrow economic interpretation implies only those instruments that can fulfill the main function of money - a means of circulation.

National Monetary Law bases on the main idea of money which is discursive. In particular, under Islamic law, money is regarded as a mere means of exchange, devoid of any value in itself, as opposed to the Western legal tradition which considers it a store of value.<sup>1</sup>

In the legal context, money is only those instruments to which the ability to fulfill the functions of money has been given in the prescribed manner by a state or a group of states, that is, by a carrier of monetary sovereignty. The legal category for money in the legal sense is legal tender. Other instruments that can fulfill the economic functions of money, but are not legal tender consider to be negotiable monetary instruments.

Depending on the national concept of legal tender and the history of developing a centralized or de-centralized monetary system, specific current national monetary law defines the legal status of complementary currencies (CCs).

CCs are widely used all over the world to solve the complex tasks of local communities' sustainable development but still, there is not enough government and social support to gain maximum benefit of CCs usage. CCs have a wide variety of specific forms and designs stipulated by their purposes to satisfy the specific current social needs in a resource exchange that cannot be satisfied by the traditional monetary system.

CCs aimed to enhance the resilience of local communities, increasing the level of economic activity, trust, and cooperation among its users<sup>2</sup>. B. Lietaer, G. Hallsmith, and J. Blanc demonstrate how vibrant, healthy, sustainable local economies flourish through implementing such innovative practices as time banks, systems of barter and exchange, and local currencies<sup>3</sup>. B. Lietaer

<sup>1</sup> BORRONI, *A Sharia-compliant payment system within the Western world*, Janus 2014, 67 - 110.

<sup>2</sup> FAMA ET AL., *Rethinking Money, Rebuilding Communities: A Multidimensional Analysis of Crypto and Complementary Currencies*, Partecipazione E Conflitto (13) 2020 , <http://siba-e.unisalento.it/index.php/paco/article/view/21992> (last visited Apr 25, 2020)

<sup>3</sup> HALLSMITH ET AL., *Creating Wealth: Growing Local Economies with Local Currencies* (New Society Publishers) (2011); BLANC, *Free Money for Social Progress: Theory and Practice of Gesell's Accelerated Money*, *The American Journal of Economics and Sociology* (57), 469–483, <https://www.jstor.org/stable/3487118> (last visited Feb 17, 2020)

considers that “communities break down whenever non-reciprocal monetary exchanges replace gift exchanges”<sup>4</sup> and focuses on developing local currencies which support the reciprocal relationships in communities and compensate for the scarcity of national currency. CCs are considered to be one of the instruments of creating economically viable cities based on a fierce commitment to the power of the community<sup>5</sup>. G. Bazzani noted the ability of CCs to favor community prosperity through collective actions<sup>6</sup>. Increased collective actions stimulate both people-to-people and business-to-business contacts and partnerships, developing shared values and consolidated efforts towards common prosperity. Thus, CCs favor developing more resilient communities not only by the social-effective effects of its implementation but also by its method and inherent nature based on trust and collective action of people.

In general, CCs are seen as an effective instrument to create a social-economic wealth of resilient communities<sup>7</sup>. CCs are conventional local money used at some territory for a long time or situationally (temporarily) as an alternative to fiat money exchange tools. Usually, CCs are issued to meet the current needs of the people and businesses in the context of an economic crisis or difficult economic situation in some particular territories.

Nevertheless, there is an ambiguous attitude of the state and society towards issuing and using CCs. B. Lietaer explains these ambiguous attitudes to CCs by misunderstanding the effects of local or complementary currencies which “solve problems that would otherwise be too expensive for the state.”<sup>8</sup> This ambiguous attitude stipulates a well-known gap existing between the legal framework and the practical uses of CCs. Although many legal studies

<sup>4</sup> LIETAER, *The Future of Money : Creating New Wealth, Work and a Wiser World*, Dallas (Texas), 2001.

<sup>5</sup> PHILLIPS ET AL., *Sustainable communities : creating a durable local economy*, UK, 2013.

<sup>6</sup> BAZZANI, *Money as a Tool for Collective Action*, in *Partecipazione E Conflitto* (13), 2020, 438–461, at: <http://siba-ese.unisalento.it/index.php/paco/article/view/21996> (last visited Apr 25, 2020)

<sup>7</sup> SEYFANG, *Community currencies: Small change for a green economy*, in *Environment and Planning* 2001 (33), 975–996; DITTMER, *Local currencies for purposive degrowth? A quality check of some proposals for changing money-as-usual*, in *Journal of Cleaner Production*, 2013, 40; GARCÍA-CORRAL ET AL., *Complementary Currencies: An Analysis of the Creation Process Based on Sustainable Local Development Principles*, in *Sustainability* (12), 2020, 5672, <https://www.mdpi.com/2071-1050/12/14/5672> (last visited Oct 4, 2021)

<sup>8</sup> CRYPTOCURRENCIES AS A KIND OF COMPLEMENTARY CURRENCIES, <https://www.if24.ru/bernarlitar-kriptovalyuty/> (last visited Apr 24, 2020)

identify this gap<sup>9</sup>, there is little research aimed at finding the fundamental solution of legitimizing CCs as a constructive social practice, necessary for the sustainable development of local communities. Current CCs' research is to some extent in a trap of a "vicious circle". Current monetary rules of issuing and regulating CCs prevent main contemporary monetary approaches to recognize and legitimate them<sup>10</sup> making them difficult to study in legal and interdisciplinary research. At the same time, there is an urgent need in the complex investigation of the CC phenomenon for developing the theoretical base of contemporary monetary approaches and legal rules for monetary systems in compliance with sustainable development goals<sup>11</sup> as a monetary ecosystem has developed in recent years transforming the concept of money and its status quo<sup>12</sup>. This research aimed at revealing the contradictions between the legal status of CCs and existing social needs in using them. Understanding these contradictions required to apply two approaches for solving relevant research tasks: "black-letter law" – for descriptive analysis of legal rules and identifying a formal legal framework for CCs and "law in context" – for empirical research of social problems of using CCs in the current legal context.

The black-letter (doctrinal) legal research of primary sources was used to identify the main legal rules of the financial and monetary system in Russia concerning issuing and using CCs, and, therefore, formal possibilities and obstacles of using CCs in local communities. Finding contradictions between the current legal framework and existing social needs implies looking at the situation from both points of view: law and the social problem itself. The "Low in context" approach implies seeing the problem from the point of "social": social needs, behavior, interests, etc. This approach implies law becomes problematic both in the sense that it may be a contributor to or the cause of the social problem<sup>13</sup>. A case study method applied in a line with this

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<sup>9</sup> LIETAER & DUNNE, *Rethinking money: how new currencies turn scarcity into prosperity*, Oakland, California, 2013.

<sup>10</sup> FARE & OULD AHMED, *Why Are Complementary Currency Systems Difficult to Grasp within Conventional Economics?*, in *Interventions économiques* 2017, at <http://journals.openedition.org/interventionseconomiques/3960> (last visited Oct 4, 2021)

<sup>11</sup> VON WEIZSÄCKER & WIJKMAN, *Come On!: Capitalism, Short-termism, Population and the Destruction of the Planet*, New York, NY, 2018.

<sup>12</sup> ARGINIEGA GIL ET AL., *A legal analysis of complementary and virtual currencies for sustainable economic development A legal analysis of complementary and virtual currencies for sustainable economic development*, 1st International Conference on Law, International Business and Economic Development (ICLIBED-2019), Nov 2019, Danang, Vietnam.

<sup>13</sup> McCONVILLE & CHUI (eds), *Research Methods for Law*, II ed., Edinburgh, 2007.

approach focused on the analysis of empirical data of using CCs: reasons of issuing CCs, legal obstacles of using them, design development, and social-economic effects. Two currently known cases of using CCs in Russia were analyzed: the case of Kolions (Russia, village Kolionovo) and the case of Shaimuratiki (Russian, village Shaimuratovo). The analysis of the existing practice of using CCs focused on revealing obstacles for gaining maximum social-economic effects from using CCs for communities' sustainable development, especially shortcomings of the legal framework for using CCs. The combination of "black-letter law" and "law in context" approaches involves finding gaps in the current legal framework which overcoming may sufficiently contribute to the solution of social-economic problems of communities' sustainable development. needs and current legal framework

## **2. Basic Rules of monetary system in Russia**

### **2.1 The National currency**

The legal foundations of the monetary system of the Russian Federation are determined by the Constitution of the Russian Federation, the Civil Code of the Russian Federation, and the federal laws of the Russian Federation.

The Constitution is the basic law of the state, a special regulatory legal act, which has the highest legal force. The Constitution of the Russian Federation (Art.2) states the main national values, the highest values are considered a person, his rights and freedoms. Recognition, observance, and protection of the rights and freedoms of man and citizen is the duty of the state<sup>14</sup>. Article 71, paragraph "ж" defines the frames and scale of government regulation of the national monetary system and financial policy. According to the Art.71, the government of the Russian Federation has to: establish the legal foundations of a national market and pricing policy framework; manage financial, currency, credit, customs, money issue, federal economic services, including federal banks. According to Article 75, of the Constitution of the Russian Federation, the only legal money/currency of the Russian Federation is the ruble, and money emission is carried out exclusively by the Central Bank of the Russian Federation.

The government of the Russian Federation and Central Bank are the main bodies responsible for the monetary policy of the Russian Federation.

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<sup>14</sup> CONSTITUTION OF RUSSIAN FEDERATION. ARTICLE 75., <https://gosuslugi-online.ru/novaya-konstituciya-rf-2020/> (last visited Apr 23, 2020)

According to the Constitution, the protection and stability of the ruble are the main functions of the Central Bank of the Russian Federation, which it performs independently of other government bodies. The implementation of a unified financial, credit, and monetary policy in the Russian Federation is a responsibility of the national government according to the Art. 114 of the Constitution. State Duma initiate federal laws regulating issues of financial, currency, credit, customs, and monetary emission, which are subject to mandatory approval by the Council of the Russian Federation.

The next level of regulating issuing and circulation of money is the Civil Code. The Civil Code of the Russian Federation is a main federal law of the Russian Federation that regulates civil law relations, having priority over other federal laws and other regulatory legal acts in the field of civil law. According to the Art. 140 of the Civil Code of the Russian Federation, the Ruble is a legal tender, which must be accepted at face value throughout the Russian Federation<sup>15</sup>.

The next level of currency legal regulation is federal laws. The Federal Law on the Central Bank of the Russian Federation is the main document regulating the activities of the Central Bank of the Russian Federation. Article 27 of the Federal Law on the Central Bank of the Russian Federation states that the official monetary unit (currency) of the Russian Federation is the ruble. One ruble consists of 100 kopecks. The introduction of other monetary units and the issue of monetary surrogates in the Russian Federation are prohibited. Article 29 of the same Federal Law says that “The issue of cash (banknotes and coins), the organization of their circulation and withdrawal from circulation on the territory of the Russian Federation are carried out exclusively by the Bank of Russia. Banknotes and a Bank of Russia coin are the only legal means of cash payment in the Russian Federation. Their falsification and illegal manufacture are punishable by law”<sup>16</sup>.

Thus, the introduction and issue of other money in the Russian Federation is not allowed by the Constitution of the Russian Federation. Issuing and using CCs which does not have the characteristics and functions of the legal national currency is not considered in the Constitution. At the same time the Federal Law of the Central Bank which directly prohibits issuing “other monetary units” and “monetary surrogates” sets a sufficiently tighter legal framework for using CCs.

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<sup>15</sup> CIVIL CODE OF THE RUSSIAN FEDERATION (2019), <http://docs.ctnd.ru/document/9027690> (last visited Apr 23, 2020)

<sup>16</sup> FEDERAL LAW ON THE CENTRAL BANK OF THE RUSSIAN FEDERATION (2020), <http://docs.ctnd.ru/document/901822004> (last visited Apr 23, 2020)

## 2.2 The legitimacy of other types of currency in Russia

Monetary transactions in the legal currencies of other countries are traditionally regulated by the Currency Regulation Law. Digital trends made sufficient adjustments to the financial market and required new Federal Laws regulating transactions using cryptocurrency. Since the beginning of the second decade of our century “digital cash” has begun to have a major impact on the global, national, and local economies. The first important steps towards the official settlement of cryptocurrencies were taken in March 2013 when FinCEN asserted that virtual assets should be equated with fiat money and controlled in the same way<sup>17</sup>. FinCEN Guidance accumulated rules and interpretations of common business models involving convertible virtual currencies<sup>18</sup>.

In Russia, the process of legalization of cryptocurrency stretched over several years and continues. In October 2017, a meeting was held in Sochi (Russia) to find a solution to regulate the cryptocurrency market which laid the basic ideas for a future bill<sup>19</sup>. In May 2018, the State Duma of the Russian Federation approved in the first reading three laws aimed at regulating cryptocurrencies: “On Digital Rights”, “On Digital Financial Assets”, and "About crowdfunding." Federal Law of March 18, 2019, N 34-ФЗ “On Amendments to Parts One, Two and Article 1124 of Part Three of the Civil Code of the Russian Federation” is a normative act that creates the basis for regulating relations in the digital economy of Russia. The law enacted on October 1, 2019, fixed the basic definition of “digital law”, legalized the processing of big data, and smart contracts got a green light<sup>20</sup>. Draft Federal Law On Digital Financial Assets obliges ICO to have a registration in state institutions, as well as the signing of agreements with each investor. According to this regulatory document, cryptocurrency exchanges for fiat are possible only through authorized exchange operators, who will

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<sup>17</sup> Application of FinCEN’s Regulations to Persons Administering, Exchanging, or Using Virtual Currencies | FinCEN.gov, <https://www.fincen.gov/resources/statutes-regulations/guidance/application-fincens-regulations-persons-administering> (last visited Apr 25, 2020)

<sup>18</sup> APPLICATION OF FINCEN’S REGULATIONS TO CERTAIN BUSINESS MODELS INVOLVING CONVERTIBLE VIRTUAL CURRENCIES | FINCEN.GOV, <https://www.fincen.gov/resources/statutes-regulations/guidance/application-fincens-regulations-certain-business-models> (last visited Apr 25, 2020)

<sup>19</sup> Vladimir Putin held a meeting on cryptocurrencies and blockchain in Sochi, <https://bits.media/putin-provedet-v-sochi-vstrechu-po-kriptovalyutam-i-blokcheynu/> (last visited Apr 24, 2020)

<sup>20</sup> FEDERAL LAW OF MARCH 18, 2019 NO. 34-FZ FEDERAL LAW ON AMENDMENTS TO PARTS ONE, TWO, AND SECTION 1124 OF THE THIRD PART OF THE CIVIL CODE OF THE RUSSIAN FEDERATION., <http://www.kremlin.ru/acts/bank/44088> (last visited Apr 24, 2020)

need to have a wallet<sup>21</sup>. Federal Law dated July 31, 2020, No. 259-FZ "On digital financial assets, digital currency" officially defines digital currency and cryptocurrency as one of the types of digital currency. The Law states that cryptocurrency has no material embodiment, thus, it is not a monetary unit. Cryptocurrency, like any other digital currency, is recognized as property. Transactions in cryptocurrency are processed with the help of a special address based on blockchain technology. According to the definition in this Law, cryptocurrency is mining and exchanging based on blockchain technologies. The first cryptocurrency was bitcoins, which were issued 12 years ago. However, Legal Regulation has only now legalized digital currency. Now using blockchain technology is far wider than just mining and exchanging cryptocurrencies. It is used for transferring and exchanging different types of units, including any type of CC. The current law on digital currency does not consider the fast development of blockchain technologies and financial actives. In particular, it does not clarify the legal status of CCs.

Nevertheless, CCs can be recognized as a type of digital currency which defined in the Law as a set of electronic data (digital code or designation) contained in the information system, which is offered and (or) can be accepted as a means of payment that is not a national, foreign or international legal monetary.

Thus, the current national legislation of the Russian Federation prohibits issuing and circulation of CCs as money/legal tender but does not limit the usage of CCs as a digital currency that can fulfill all functions of money.

### **3. Cases of using CCs in Russia: analysis in the current legal context**

#### **3.1. Shaimuratovo**

CC Shaimuratiki was issued in May 2010 by the initiative of economist R. Davletbaev. This CC was designed on the principles of Gezellian money. In 2010, Saimuratovo farm was on the verge of bankruptcy because of the economic crises of 2008 and the drought of 2010. The prior purpose of using Shaimuratiki was to facilitate the exchange of resources in the situation of the lack of fiat money<sup>22</sup>. CC was issued in the form of the commodity coupons

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<sup>21</sup> DRAFT FEDERAL LAW ON DIGITAL FINANCIAL ASSETS, [https://www.minfin.ru/ru/document/?id\\_4=121810-proekt\\_federalnogo\\_zakona\\_o\\_tsifrovym\\_finansovym\\_aktivam](https://www.minfin.ru/ru/document/?id_4=121810-proekt_federalnogo_zakona_o_tsifrovym_finansovym_aktivam) (last visited Apr 24, 2020)

<sup>22</sup> DAVLETBAEV, *Alternative financial systems. Shaimuratiki - an economic miracle*, 2015, <https://youtu.be/qcgKsUM9vGY>

which could be exchanged on any commodity in the Shaimurat stores in compliance with the current legislation in the Russian Federation. Nevertheless, despite the official usage of Shaimuratiki only as commodity coupons, they were banned by the court in January of 2012. The conclusion of the prosecutor's office was based on the violation of Civil law which forbids to replace salaries with commodity coupons (Prosecutor's Office of the Republic of Bashkortostan, 2012).

After entry into force of a court decision, the second scheme of using Shaimuratiki was developed. Formally, the CC was sold like "gift cards" in the Shaimurat stores and could be bought for part of a salary. Essentially, nothing changed in the real usage of the commodity coupons. However, from the legal point of view, the system of applying Shaimuratiki changed radically. Shaimuratiki was removed from the focus of Russian labor legislation. In the sphere of labor relationships, the employer fulfilled his obligation to pay salaries to employees. And the commodity coupons were sold in the field of civil relationships. Employees bought Shaimuratiki on account of their future salary. The second scheme of applying the commodity coupons confirmed its viability. The director of the Shaimurat farm successively won four lawsuits which were initiated by the local government to ban the usage of the commodity coupons. The last ban on the coupons was lifted in 2015 by the Supreme Court of Bashkiria. The court decision was "it is not forbidden to issue and use commodity coupons in circulation, however, it is forbidden to replace salaries with commodity coupons"<sup>23</sup>. Thus, the second scheme of using Shaimuratiki met legal requirements and, in fact, allowed to exchange labor for goods.

Due to the using Shaimuratiki agricultural business in Shaimuratovo was saved. In its turn, it provided the survival and prosperity of the local community in crises times<sup>24</sup>. But the courts distracted a lot of time and efforts of entrepreneurs and members of the community to prove the legacy of using CCs, decreased trust in Shaimuratiki among local citizens, and increased fears of other entrepreneurs and communities in repeating similar experiments with CCs. Nevertheless, sufficient positive social-economic effects of using CCs in the local community as commodity coupons attracted a lot of attention from some progressive economists and entrepreneurs.

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<sup>23</sup> SUPREME COURT OF THE REPUBLIC OF BASHKORTOSTAN. DECISION No. 33-124 (2013), <https://sudact.ru/regular/doc/4emrAuBMtKWt/>

<sup>24</sup> LJOVKINA & LJOVKIN, *Bashkir Wörgl: Successful Farm Rescue. Implementing Gesell Money in the Shaimurat Farm, Russia*, in *Partecipazione E Conflitto Conflitto*, 2020 (13), <http://siba-ese.unisalento.it/index.php/paco/article/view/22001> (last visited Jul 14, 2020)

### 3.2. Kolionovo

CC Kolion was issued by farmer M. Shlyapnikov in 2014 to facilitate the exchange of goods and resources between neighbors, partners and to provide investment and preorders. The situation in Kolionovo was similar to Shaimuratovo: a crisis of local businesses and devastating the village in the situation of the lack of fiat money.

Kolions are secured by real farm goods (potatoes, geese, seedlings, etc.). At first, they were in paper form. The circulation of Kolions allowed Shlyapnikov to save the agricultural business in the village by activating the exchange of goods, services, labor, and assets with the use of CC. The local community began to trust Kolions, and use it widely including the transactions with neighboring villages. It led to a wide range of synergetic positive social, economic and social-psychological effects: the growth of local businesses, increased employment and income of local people, investing in local business, improving local infrastructure, decreases debts of people and businesses.

However, Kolions faced serious legal obstacles. On 3d June 2015, the state court concluded that Kolions "posed a threat to the unity of the financial system of the Russian Federation, also posed a threat to the monopoly of the Russian Federation on the issue of money and disoriented the population in the conditions of economic crisis"<sup>25</sup>. Considering the final court decision and new trends of increasing transactions in cryptocurrency, M. Shlyapnikov in 2016 transferred Kolions into a virtual space issuing tokens Kolions (KLN) based on a blockchain platform.

The first wide crowdfunding campaign in KLN brought him more than 500,000 USD \$ of investment in one month. On July 4th, 2017 the farm of M. Shlyapnikov paid the first dividends to new KLN holders. The success of digital CC motivated local citizens to experiment with some other forms of Kolions on the WavesPlatform platform – Kolion Plus (loyalty bonuses for the payments in KLN), “time records” (the working)<sup>26</sup>, and even local additional pension funds<sup>27</sup>.

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<sup>25</sup> Russian Farmer Alters Rural Economy With Virtual Currency, as Moscow Watches Warily The Wall Street Journal, <https://www.wsj.com/articles/russian-farmer-alters-rural-economy-with-virtual-currency-as-moscow-watches-warily-1524398400> (last visited Aug 17, 2020)

<sup>26</sup>

<https://bitcointalk.org/index.php?topic=1848059.msg52143094#msg52143094> BITCOINTALK,

<sup>27</sup> PENSION ON THE BLOCKCHAIN,  
[https://www.facebook.com/permalink.php?story\\_fbid=2054898774580175&id=100001802183805](https://www.facebook.com/permalink.php?story_fbid=2054898774580175&id=100001802183805) (last visited Aug 19, 2020)

Now Kolions popularity grows in the network of farm suppliers and partners all over the world. Kolions have been already used Kolions with Australian, Greek, and other international partners. Kolionovo ecosystem already includes manufacturers from Moldova, Belarus, China, and Greece<sup>28</sup>.

Thus, the digital form of Kolions allowed their more free, wide, and various using, than Shaimuratiki. Nevertheless, Kolions stayed local currency in its essence and their value has natural growth as they are secured by a liquid inventory of own farm production, in particular by seedlings in the greenhouses, which have a natural value growth in time. Blockchain technology has not changed the nature of Kolions but just incarnated them in the digital world. The value of KLN has been created by the farm enterprise operating in a certain physical space but not in a virtual one.

Thus, according to the current legislation, KLN is a digital financial active, regulated by the Federal Law of April 22, 1996, N 39-FZ "On the Securities Market" which does not clearly define the list of transactions that can be made. Together with that, KLN can be recognized as a digital currency, regulating by 259-FZ "On digital financial assets, digital currency" which prohibits accepting payment for goods, works, and services in digital currency. Thus, the legal conditions for KLN stay unfavorable in Russia.

#### **4. Conclusions**

The increasing complexity of today's social-economic system supposes a more flexible and "natural" approach to the finance system to provide the sustainable development of local communities. The world crisis financial system together with external economic shocks caused by ecological problems, biological threats, natural disasters require the search for legal solutions that meet goals of providing a sustainable exchange of resources, collaborative work and providing mutual help in unfavorable situations.

CCs proved their effectiveness for developing resilient communities in many cases all over the world, and their use is supported by the legal system of many countries. Russian legal system develops traditionally in compliance with the national highly centralized monetary system. The issue of other money in the Russian Federation is not allowed by the Constitution of the Russian Federation. Nevertheless, it is not directly prohibited to issue and use

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<sup>28</sup> Kolionovo ecosystem: <https://kolionovosystem.com/> (last visited Aug 18, 2020)

a complementary currency that does not have the features of the legal national currency.

Shaimuratovo and Kolionovo projects demonstrated high impact both for local and national economies. Both projects had a great impact on rising local agricultural business, which is usually depressed and underdeveloped in Russia, and by creating workplaces in the remote territories. The solution of these two important social-economic problems in Russia (developing agriculture and remote territories) are usually subsidized by the state budget, which is expensive and ineffective in the long-term run. Both studied cases proved the ability of a complementary currency to solve a wide range of social-economic problems, which usually require spending a sufficient amount of tax budget on them through permanent subsidizing<sup>29</sup> and supported the same results of other similar cases<sup>30</sup>. Thus, there is a strong need in using CCs at least for the local communities living in remote territories or the cities/villages in crisis economic conditions.

Investigation of the real cases of using CCs in Russia revealed the sufficient legal obstacles for using CCs which had destructive consequences for developing resilient local communities. The combination of “black-letter law” and “law in context” approaches allowed to find gaps between the actual social request for effective tools of local exchange, considering modern trends and possibilities of new technologies and current legislation.

To bring maximum benefits for the local economies, CCs should be at first legitimized in Russian Federation as a complementary currency, which does not compete with the national currency but can fully function as local money. Expanding the effective practice of using CCs in Russia needs a participative system of developing legal frameworks considering the interests of all economic agents for the common goals of sustainable development. This complex issue requires further interdisciplinary investigations of the system social-economic effects from the changes in national monetary law, tax system, and practice of using CCs; comparative research of the legal status of CCs in different national legal systems; investigating trends of developing local cryptocurrencies and best practices of legitimizing crypto CCs in the national rules of financial, monetary and tax system.

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<sup>29</sup>LIETAER, *The Future of Money : Creating New Wealth, Work and a Wiser World*, cit.

<sup>30</sup> GARCÍA-CORRAL ET AL., *Complementary Currencies: An Analysis of the Creation Process Based on Sustainable Local Development Principles*, cit.

**L'INQUADRAMENTO GIURIDICO DEI TOKEN.  
UN'ANALISI COMPARATISTICA DELLA REGOLAMENTAZIONE  
ITALIANA E SAMMARINESE<sup>°</sup>**

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*L'innovazione tecnologica ha investito, ormai da tempo, il settore degli strumenti finanziari, invadendo il mercato con prodotti e tecniche di finanziamento alternative che potrebbero portare più alti livelli di liquidità. Il presente saggio si propone di analizzare, nello specifico, il fenomeno dei token illustrando alcuni approcci regolamentari, in ottica comparata, adottati a livello nazionale nell'esperienza italiana e sammarinese.*

*The technological innovation has long been affecting the securities domain with products and alternative investment mechanisms potentially offering a higher liquidity to the companies. The present essay aims at analyzing specifically the phenomenon of the token illustrating some of the regulatory approaches, in a comparative perspective, adopted at a national level in Italy and San Marino.*

**Sommario:**

1. Introduzione
2. La qualificazione giuridica nel quadro italiano
  - 2.1. L'approccio regolamentare della CONSOB
3. Il caso di San Marino
  - 3.1. Una regolamentazione “all'avanguardia”
4. Conclusioni

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<sup>°</sup> Saggio sottoposto a *double-blind peer review*.

## 1. Introduzione

Le differenti scelte regolamentari operate dagli Stati in merito ai cc.dd. *token* dipendono largamente dall'inquadramento giuridico degli stessi.

In un contesto tanto fluido ed evanescente, al fine di giungere a una risposta efficace a tali quesiti è necessario ricorrere a distinguo descrittivi, ancor prima che definitori.

La regolamentazione dei mercati finanziari, in quest'ottica, è tecnologicamente “neutrale”; ciò significa, dunque, che la normativa in vigore si applica ai servizi finanziari offerti e agli scambi effettuati, a prescindere dal tipo di tecnologia utilizzata<sup>1</sup>.

I primi reali sforzi sul piano regolamentare sono iniziati a partire dalla seconda metà del 2017. In alcuni casi, si è provveduto a una regolamentazione ad hoc per i *token*; altrove, viceversa, si è optato per l'applicazione in via analogica di regole preesistenti<sup>2</sup>.

In questo contesto, la qualifica del *token* come diritto o come bene rischierebbe di esaurirsi in mero esercizio di stile; infatti, le regole relative agli strumenti finanziari operano, di fatto, a prescindere dall'effettiva qualificazione privatistica dello stesso<sup>3</sup>.

Tuttavia, le normative verranno applicate con sfumature differenti, tenendo conto del modello aziendale, delle dimensioni, della rilevanza sistemica, nonché della complessità e dell'attività transfrontaliera delle entità regolamentate<sup>4</sup>.

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<sup>1</sup> Si veda, per esempio, COMMISSIONE EUROPEA, *FinTech: A More Competitive and Innovative European Financial Sector*, Directorate General Financial Stability, 2015, in relazione alla regolamentazione della tecnologia in campo finanziario, sottolineando come, in generale, «most regulators follow the neutrality approach». In merito alla “neutralità tecnologica”, si veda, *inter alia*, SURUJNATH, *Off the Chain! A Guide to Blockchain Derivatives Markets and the Implications on Systemic Risk*, in *Fordham J. Corp. & Fin. L.*, 2017, 291-304.

<sup>2</sup> Sul punto LUVAI, *The End of the Ico Gold Rush? The Regulatory Squeeze on Token Offerings as a Funding Mechanism for Blockchain-Related Ventures*, *Utah Bar J.*, 2018, 20-21. Ovviamente, la regolamentazione tiene in considerazione la classificazione dei *token*, come *utility* o *security*.

<sup>3</sup> ANNUNZIATA, *Distributed Ledger Technology e mercato finanziario: le prime posizioni dell'ESMA*, in FINTECH. *Introduzione ai profili giuridici di un mercato unico tecnologico dei servizi finanziari*, PARACAMPO (a cura di), Torino, 2017, 43-44.

<sup>4</sup> È opportuno osservare come la regolamentazione finanziaria all'interno dell'Unione Europea si presenti come un mosaico di normative – a livello sovranazionale (UE) e nazionale (dei singoli Stati membri). In tal senso, infatti, gli Stati membri hanno predisposto una serie di atti normativi differenti, evidenziando come la legislazione in Europa segua velocità diverse. DE FILIPPI *et al.*, *Regulatory Framework for Token Sales: An Overview of Relevant Laws and Regulations in Different Jurisdictions*, Blockchain Research Institute, 2018, 61. Di

In tal senso, prima di procedere oltre nell’analisi, è d’uopo sottolineare come a livello sovranazionale (UE) sono state intraprese numerose azioni, di diversa portata e natura, sia con la Direttiva MiFID II che con la più recente proposta MiCAR<sup>5</sup>. Tuttavia, il presente articolo si pone l’obiettivo di analizzare il modo in cui si sono “mossi” gli ordinamenti giuridici nazionali italiano e sanmarinese che, seppure accomunati dai confini territoriali, hanno adottato soluzioni distanti una dall’altra se non diametralmente opposte – esulando, dunque, lo studio del panorama sovranazionale dalla presente trattazione.

## 2. La qualificazione giuridica nel quadro italiano

Nel panorama giuridico italiano, la CONSOB è l’ente preposto a regolamentare le *Initial Coin Offerings* (ICOs) e i *tokens*, essendo essi

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conseguenza, alcuni Stati membri hanno una legislazione “accessoria”, accanto alle norme dell’UE mentre altri, per converso, non hanno provveduto a predisporre proprie regolamentazioni specifiche. Si veda, per un’analisi generale dello sviluppo e della crescita all’interno dell’Unione Europea di tale fenomeno (in particolare, delle criptovalute) CATTELAN – GIMIGLIANO, *Digital currency schemes: more or less sustainable? Limits to growth and electronification of money in Europe*, in *Ianus, Rivista di studi giuridici*, no. 21, 2020, 21, in cui gli autori affermano come «the European Union is fertile and interesting terrain for the experimental innovation of means of payment and settlement». *Ibid.* Del medesimo avviso PERNICE, *Criptovalute, tra legislazione vigente e diritto vivente*, in *Ianus, Rivista di studi giuridici*, no. 21, 2020, 46, afferma come il legislatore europeo, «nel tentativo di offrire una sia pur embrionale disciplina del fenomeno, è intervenuto in materia con una definizione di valuta virtuale volutamente ampia», sottolineando la volontà, allo stesso tempo, di circoscrivere il fenomeno senza, tuttavia, limitarne la portata e l’espansione.

<sup>5</sup> Si veda, generalmente, STEVERDING – ZURECK, *Initial Coin Offerings in Europe – The Current Legal Framework and its Consequences for Investors and Issuers*, Essen, 2020, 43. Gli autori affermano, in relazione ai *tokens*, che se essi «are transferable securities as defined in MiFID 2, they are subject to the full scope of EU financial markets regulation. This includes prospectus requirements and prospectus liability for offering tokens». Inoltre, MATTASSOGLIO, *Waiting for the EU... The paradoxical effect of ICO’s: a national regulation for a global phenomenon*, in RIV. REGOLAZ. MERC., 2020, 348-366, analizzando la proposta MiCAR sottolinea come questa «proposes a bespoke regime for utility tokens and the so-called stablecoins, in other words, the typologies which fall outside the financial and e-money regulatory frameworks». *Ibid.* Ancora, «la Proposta provvede a regolare in maniera specifica l’offerta di particolari categorie di cripto-attività. Queste sono sostanzialmente tre e [...] nonostante il loro numero richiami la tripartizione tradizionale in criptovalute, utility token e investment token, la Proposta si discosta almeno parzialmente da questa classificazione». LENER – FURNARI, *Cripto-attività: prime riflessioni sulla proposta della commissione europea. Nasce una nuova disciplina dei servizi finanziari “crittografati”?*, DirittoBancario.it, 2020.

assimilabili a strumenti finanziari<sup>6</sup>.

La funzione di vigilanza della CONSOB, infatti, si rivolge anche ai progetti miranti alla raccolta di fondi effettuata attraverso l'emissione di *token*, ovvero le ICOs<sup>7</sup>.

A tal proposito, stando a quanto affermato dal rapporto stilato dalla CONSOB, in particolare, le ICOs «in base alle caratteristiche dei token offerti, possono determinare negli acquirenti aspettative di rendimenti/ritorni economici rappresentati, a grandi linee, da proventi: i) in via diretta (rendimenti parametrati all'andamento dei ricavi, dei volumi di beni e servizi venduti o dei profitti dell'iniziativa imprenditoriale); ii) in via indiretta, correlati al potenziale apprezzamento del valore dei token negoziati in dedicati exchange»<sup>8</sup>.

Pertanto, le soluzioni adottate in tal senso dovranno essere in grado di assicurare la liquidità per gli investimenti e, al contempo, un'elevata affidabilità delle piattaforme sulle quali vengono scambiati i *token*<sup>9</sup>.

A onor del vero, l'emissione di *token* potrebbe essere interessata dall'applicazione analogica di norme predisposte per tipologie simili di *asset* finanziari<sup>10</sup>.

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<sup>6</sup> CAVICCHIOLI, *La Consob italiana si pronuncia sull'emissione di nuovi token e sdogana le ICO*, Tiscali Innovazione, 2019. Disponibile al sito <https://innovazione.tiscali.it/news/articoli/la-consob-italiana-si-pronuncia-sull-emissione-di-nuovi-token-e-sdogana-le-ico>. Consultato il 06 maggio 2020.

<sup>7</sup> *Ibid.* Va, comunque, sottolineato come allo stato attuale «se, da un lato, l'ordinamento italiano ha dato una definizione legale di criptovaluta (peraltro solo a fini di normativa antiriciclaggio [...] dall'altro, nemmeno la CONSOB ha ancora regolamentato le ICO». MURINO, *L'oggetto del conferimento di s.r.l. nelle massime notarili e i token*, in *Riv. Not.*, 2018, cit., 1297. Pertanto, al momento, non è possibile rinvenire vere e proprie regolamentazioni in materia, ma solo linee guida e report definitori e orientativi.

<sup>8</sup> CONSOB, *Le offerte iniziali e gli scambi di cripto-attività*, 2020, cit., 6. Disponibile al sito [http://www.consocb.it/documents/46180/46181/ICOs\\_rapp\\_fin\\_20200102.pdf](http://www.consocb.it/documents/46180/46181/ICOs_rapp_fin_20200102.pdf). Consultato il 3 marzo 2021.

<sup>9</sup> CAVICCHIOLI, *supra* nota 6. Il suggerimento della CONSOB, più specificamente, è stato quello di adottare due soluzioni, molto simili tra di loro, al fine di fornire garanzie agli investitori in ogni ‘momento’ dell’attività di scambio dei *token*.

<sup>10</sup> CONSOB, *Le offerte iniziali e gli scambi di cripto-attività*, Divisione Strategie Regolamentari, 2020, 8. Disponibile al sito [http://www.consocb.it/documents/46180/46181/doc\\_disc\\_20190319.pdf](http://www.consocb.it/documents/46180/46181/doc_disc_20190319.pdf). Consultato il 3 marzo 2021. A tal proposito, per esempio, si pensi alla normativa per l'*equity-based crowdfunding*, che in Italia è stata recentemente introdotta dalla CONSOB. Si veda, CONSOB, *L'equity-crowdfunding. Analisi sintetica della normativa e aspetti operativi*, 2016. Disponibile <http://www.consocb.it/documents/>. Consultato il 3 marzo 2021. Mediante tale forma di finanziamento, le imprese utilizzano piattaforme per offrire azioni al pubblico. *L'equity gap* riduce il successo delle nuove start-up impedendo loro di concentrare le proprie energie e risorse sul loro *core business*. Si veda, HAGEDORN – PINKWART, *The Financing Process of Equity*-

Ciò posto, la CONSOB, dal punto di vista regolamentare, utilizza un doppio *sandbox* (legato all'emissione di *token* e alla successiva circolazione)<sup>11</sup>.

## 2.1. L'approccio regolamentare della CONSOB

Nello specifico, l'approccio proposto dalla Commissione, quindi, intende «identificare le “cripto-attività” nelle attività diverse dagli strumenti finanziari di cui all'art. 1 comma 2 TUF e da prodotti di investimento [...] consistenti nella rappresentazione digitale di diritti connessi a investimenti in progetti imprenditoriali, emesse, conservate e trasferite mediante tecnologie basate su registri distribuiti, nonché negoziate o destinate a essere negoziate in uno o più sistemi di scambi»<sup>12</sup>.

A questo proposito tale approccio non è inteso a «catturare cripto-attività che siano strumenti di pagamento, né cripto-attività che, per le loro caratteristiche, ricadano in categorie disciplinate da normativa di derivazione UE (strumenti finanziari, IBIP)». Infatti, in questo senso, in particolare, anche qualora i *token* «non possano definirsi quali valori mobiliari, si è ammessa la possibilità di ricondurle nella più ampia definizione (peraltro non tassativa) dei c.d. “prodotti finanziari”, quantomeno per quelli “atipici”»<sup>13</sup>.

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*Based Crowdfunding: An Empirical Analysis*, in *Crowdfunding in Europe. State of the Art in Theory and Practice*, BRÜNTJE – GAJDA (eds.), *Studies in Small Business and Entrepreneurship*, Cham, 2016, 71-73.

<sup>11</sup> Si permetta riferimento a ZAMBARDINO, *Blockchain Technology and Regulatory Issues*, in *Legal Perspective on Blockchain Theory, Outcomes, and Outlooks*, BORRONI (ed.), Pubblicazioni del Dipartimento di Scienze Politiche Jean Monnet dell'Università degli Studi della Campania Luigi Vanvitelli, ESI, 2019, 99. In particolare, il termine *sandbox* prende le mosse dalla recente iniziativa della *Financial Conduct Authority* di predisporre un *sandbox*, appunto, regolamentare nel Regno Unito. Nello specifico, si tratta di «a safe space in which fintech companies targeting British markets can test out new technologies within a ‘light touch’ regulatory environment under close government supervision and for a defined period of time». MAUPIN, *Mapping the Global Legal Landscape of Blockchain Technologies*, Max Planck Institute for Comparative Public Law & International Law, Centre for International Governance Innovation, 2017, cit., 12.

<sup>12</sup> SARZANA, *La CONSOB interviene su Blockchain e token*, Il Sole24Ore, 2020, cit. Disponibile al sito <https://fulviosarzana.nova100.ilsole24ore.com/2020/01/02/la-consob-interviene-su-blockchain-e-token/>. Consultato il 3 marzo 2021.

<sup>13</sup> *Ibid.* Si veda, sul medesimo punto, MICHI, *Criptovalute e capitale sociale: un binomio imperfetto?*, in *Riv. Not.*, 2019, 604 ss. Si tratta, nello specifico, di una tipologia di prodotti finanziari che circolano con le medesime forme e con i medesimi effetti dei titoli di credito, ma che non rientrano in alcuna delle tipologie menzionate dal legislatore sia nel codice civile, sia nel codice della navigazione, sia in leggi speciali.

La CONSOB, quindi, non considera il *token* di pagamento come equivalente alla moneta, bensì, dal punto di vista della circolazione secondaria predilige una circolazione attraverso portali di emissione/exchange, denominati *Initial Exchange Offering* (IEO)<sup>14</sup>, che rappresenta una raccolta di fondi amministrata da un *exchange*. Dal punto di vista della distribuzione dei *token*, in particolare, le IEO sono condotte dai *crypto-exchange* per conto dei team di sviluppo del nuovo progetto *blockchain* a cui il *token* da promuovere è legato<sup>15</sup>.

Tuttavia, la CONSOB pone l'attenzione sulle piattaforme di custodia e di trasferimento – dunque, attività *post-trading* – che, al contrario, non risultano ancora avere relativa regolamentazione. È utile ricordare, infatti, sul punto, come le piattaforme per la negoziazione dei *token* vengano indicate come “*exchanges*” mentre, per converso, la custodia degli stessi viene effettuata mediante i c.d. “*wallets*”. Tali concetti sono sovente sovrapposti in quanto le piattaforme di *exchange* operano, in taluni casi, anche come *wallet provider*<sup>16</sup>.

A tal proposito, la CONSOB richiede che, per poter operare sul mercato, vengano creati due registri pubblici, gestiti dalla stessa Commissione, all'interno dei quali siano registrati tutti i servizi di custodia e di scambio di *crypto-asset*<sup>17</sup>.

<sup>14</sup> SARZANA, *supra* nota 12. Si afferma, in particolare, che «sui sistemi di scambio registrati presso la Consob possa essere realizzata, se finalizzata alla successiva negoziazione sui medesimi, anche una Initial Exchange Offering. [...] Nelle IEO, in particolare, si assisterebbe ad una riduzione dei costi dell'operazione a carico dell'emittente, che si rapporterebbe con una sola piattaforma (l'*exchange*), e ad una maggiore tutela dei sottoscrittori sotto il profilo della “liquidabilità”, in ragione del fatto che i token di nuova emissione sarebbero immediatamente scambiabili sul “secondario”». *Ibid.*

<sup>15</sup> C. BRUMMER – Y. YADAV, *Fintech and the Innovation Trilemma*, in *Geo. L. J.*, 2019, 235. Vi sono importanti differenze tra IEO e ICO. La prima importante differenza consiste nella presenza di un intermediario, l'*exchange*, tra la società emittente e gli investitori. Inoltre, rispetto ad una ICO, una IEO implica sicuramente minori spese e sforzi di pubblicizzazione della raccolta. Tuttavia, la principale differenza riguarda l'aspetto regolmentativo, in quanto è diverso il soggetto che si occupa di adempire alla normativa antiriciclaggio, nonché la normativa applicabile in base ai casi alla singola emissione sulla base delle caratteristiche dei *token*. Se nelle ICO, infatti, la maggioranza degli obblighi gravavano sulla società emittente, nelle IEO, per converso, questi possono essere adempiuti dall'*exchange* stesso.

<sup>16</sup> CONSOB, *supra* nota 10. In tal modo, dunque, l'*exchange* agisce anche da «internalizzatore di regolamento», attraverso la registrazione sui propri sistemi del trasferimento di *token* (ed eventualmente di valuta corrente) conseguente alle negoziazioni.

<sup>17</sup> CONSOB, *supra* nota 10. Quanto previsto dalla CONSOB non rappresenta una novità radicale in quanto, ad esempio, già in Giappone e Corea del Sud si è introdotta una disciplina di tal fatta e ha prodotto risultati incoraggianti nell'ambito dei mercati *crypto*. CAVICCHIOLI, *supra* nota 6. In tal senso, quindi, l'obiettivo della CONSOB è fondamentalmente «solo quello di ridurre i rischi, soprattutto per quanto riguarda gli investitori c.d. *retail* (ovvero quelli non

Con particolare riferimento all'elemento della negoziazione, nel proprio report la CONSOB sottolinea come alcuni tipi di *token* possano non essere specificamente destinati alla negoziazione «almeno non sin dal momento della loro emissione, pur svolgendosi questa attraverso un'offerta (ICO) destinata a una platea vasta di potenziali investitori e come, al contrario, esisterebbero anche cripto-attività emesse direttamente in fase di exchange (Initial Exchange Offering) senza una preliminare Initial Coin Offering»<sup>18</sup>.

La stessa Commissione stabilisce che, al fine di una adeguata regolamentazione, in merito all'elemento della negoziazione, all'interno del documento stesso di informativa preliminare sull'offerta (il *whitepaper*, appunto) dovrà essere verificabile tale caratteristica del *token* attraverso le informazioni contenute<sup>19</sup>.

Considerato quanto affermato nei paragrafi precedenti, al fine di poter individuare la normativa applicabile al caso di specie è importante analizzare, di volta in volta, le diverse tipologie di *token*, oggetto di emissione della ICO – *i.e. security token o utility token*<sup>20</sup>.

Nel caso dei *security token*, essendo riconducibili a strumenti finanziari, le relative ICO «sono soggette alla normativa finanziaria e l'emittente dovrà dotarsi di un prospetto informativo ed effettuare le previste comunicazioni ai

professionali), visto che tali registri servirebbero allo stesso ente per poter controllare l'operato delle piattaforme di custodia e di scambio in modo da verificare che non si macchino di comportamenti illeciti». *Ibid.*

<sup>18</sup> CONSOB, *supra* nota 10, 6.

<sup>19</sup> Non solo, all'interno del documento si dovrà considerare, inoltre, anche quelli che sono gli accordi conclusi dal promotore dell'operazione di ICO con la piattaforma che si occuperà dell'*exchange*. *Ibid.* Inoltre, con riferimento ai requisiti delle cripto-attività negoziabili, il documento della CONSOB prevede che i gestori dei sistemi di scambio registrati presso la Commissione stessa rendano disponibili anche cripto-attività «che non siano state oggetto di un'offerta per il tramite di una delle piattaforme regolamentate di ICOs, a condizione che sia disponibile al pubblico un sufficiente set informativo relativo alle medesime». *Ibid.* Tale previsione ha l'obiettivo di attrarre nell'area della regolamentazione un ventaglio quanto più ampio possibile di cripto-attività; ciò rimane, tuttavia, possibile a condizione che le cripto-attività «in questione rispettino le condizioni di ammissione previste in via generale dall'organizzatore del sistema di scambi e che, come suggerito in sede di consultazione, siano (rese) disponibili adeguate informazioni per gli investitori». *Ibid.*

<sup>20</sup> BATTAGLINI, *ICO: tipologia di token e profili regolamentari*, 4C Legal, 2017. Disponibile al sito <https://www.4clegal.com/opinioni/ico-tipologia-token-profilo-regolamentari>. Consultato il 3 marzo 2021. Va, inoltre, precisato che le «ICO non seguono il modello legale di alcun ordinamento, con la conseguenza che agli Stati non resta che agire di rimessa». LANGENBUCHER, *Initial coin offerings – where do we stand and should we move?*, in *Rev. Trim. Dr. Fin.*, 2018, 40 ss.

pubblici regolatori»<sup>21</sup>.

A tal fine, in Italia è intervenuta ancora la CONSOB, con la delibera n. 20110 del 13 settembre 2017<sup>22</sup> – avente ad oggetto la sospensione dell’offerta al pubblico di attività in investimenti finanziari – rimarcando quali siano i criteri da tenere in considerazione per capire quando ci si trovi di fronte a un investimento di natura finanziaria<sup>23</sup>.

Gli *utility token*, per converso, rappresentano un diritto di accesso futuro a un determinato prodotto o servizio proposto dall’emittente, la cui progettazione non abbia finalità di investimento né speculative, partecipative e / o monetarie. In tal caso, l’ICO potrebbe essere ricondotta nell’alveo dell’offerta al pubblico e, in quanto tale, disciplinata dall’articolo 1336 del codice civile<sup>24</sup>.

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<sup>21</sup> *Ibid.* La nozione di strumenti finanziari è stata introdotta nell’ordinamento italiano dal d.lg. 23 luglio 1996 n. 415 (art.1), in attuazione della direttiva comunitaria no. 22 del 10.5.1993 relativa ai servizi di investimento. Uno strumento finanziario, in breve, è un contratto monetario tra due parti, che può essere negoziato e saldato. Questa tipologia di contratto si configura, per una delle parti (il compratore), come un *asset*, mentre, per contro, per l’altra parte (il venditore) rappresenta una passività. Tali strumenti finanziari, secondo una definizione della CONSOB, «rientrano nella categoria dei prodotti finanziari e sono costituiti da azioni, obbligazioni, altri titoli di debito, titoli di Stato, altri strumenti finanziari negoziabili sul mercato dei capitali, quote di fondi comuni d’investimento, altri titoli negoziati sul mercato dei capitali e sul mercato monetario, strumenti finanziari derivati». CONSOB, *I titoli di credito e gli strumenti finanziari*. Disponibile al sito <http://www.consocb.it/web/investor-education/i-titoli-di-credito>. Consultato il 06 maggio 2020.

<sup>22</sup> CONSOB, *Sospensione, ai sensi dell’art. 99, comma 1, lett. b), del D. lgs. n. 58/1998, dell’offerta al pubblico residente in Italia effettuata dalla società Cryp Trade Capital avente ad oggetto investimenti di natura finanziaria promossi tramite il sito internet https://cryp.trade*, Delibera n. 20110, 2017. Disponibile al sito <http://www.consocb.it/it/web/area-pubblica/bollettino/documenti/hide/interdittivi/divieto/2017/d20110.htm>. Consultato il 06 maggio 2020. La CONSOB ha rimarcato, in tal caso, il proprio potere ex art. 99, comma 1, lett. b) del TUF, in base al quale «può sospendere in via cautelare, per un periodo non superiore a novanta giorni, l’offerta avente ad oggetto prodotti diversi da quelli di cui alla lettera a) [ovvero strumenti finanziari comunitari], in caso di fondato sospetto di violazione delle disposizioni del presente Capo [che disciplina l’offerta al pubblico di prodotti finanziari] o delle relative norme di attuazione».

<sup>23</sup> R. BATTAGLINI, *supra* nota 20. Nello specifico, i criteri cui si fa qui riferimento sono, *inter alia*, impiego di capitale, aspettativa di rendimento di natura finanziaria, assunzione di un rischio connesso all’impiego di capitale

<sup>24</sup> Gli *utility token* sono stati, in tal senso, qualificati dalla CONSOB al pari dei *vouchers*. Pertanto, «these tools acquire fiscal relevance once they are used to buy the object or the service they do incorporate. According to Italian regulatory provisions, utility token, having voucher’ characteristic, may be qualified as means of legitimization as provided – in aggiunta – for in art. 2002 Italian Civil Code». CAPIELLO, *Cepet Leges in Legibus. Cryptoasset and Cryptocurrencies Private International Law and Regulatory Issues from the Perspective of EU*

Tuttavia, va considerato che, «nel caso di pre-vendita, vi potrebbe comunque essere il rischio che i pagamenti possano essere considerati depositi bancari: è pertanto consigliabile, sebbene non vi sia certezza giuridica sulla forza di tale approccio, caratterizzare lo utility token come bene digitale e il relativo SAFT come vendita di cosa futura»<sup>25</sup>.

Ne consegue, pertanto, che gli *utility token* possano rappresentare dei diritti amministrativi non trasferibili e non negoziabili; per contro, i *security token* sono trasferibili e negoziabili e, dal punto di vista operativo, rappresentano una serie di diritti quali, per esempio, diritti di voto, diritti su flussi di cassa, diritti di proprietà su attività finanziarie<sup>26</sup>.

*and Its Member States, Dir. Comm. Int.*, fasc. 3, 2019, nota 15.

<sup>25</sup> R. BATTAGLINI, *supra* nota 20. Per quel che concerne, brevemente, la definizione di *Simple Agreement for Future Token* (SAFT), si tratta di una procedura proposta per le aziende che conducono ICO. Tale procedura è, essenzialmente, un contratto a termine con investitori accreditati per la consegna di token. Il SAFT, nello specifico, è uno strumento negoziale ideato al fine di trasmettere diritti sui token in una fase preliminare all'emissione e circolazione degli stessi. Questa tipologia di ICO prevede che i *token* non vengono consegnati fino al completamento della rete e, quindi, fino a tale data ne è sospesa la negoziazione. Inoltre, tale procedura esclude i piccoli investitori dalla possibilità di agire come investitori e *venture capitalist*. Il fatto che un *token* che non possa essere immediatamente negoziato costituisce un evidente limite alla sua appetibilità. ESSAGHOOLIAN, *Initial Coin Offerings: Emerging Technology's Fundraising Innovation*, in *UCLA L. Rev.*, 2019, 335-336.

<sup>26</sup> CAPONERA & GOLA, *Aspetti economici e regolamentari delle «cripto-attività»*, Banca d'Italia, Occasional Paper, *Questioni di Economia e Finanza*, no. 484, 2019, *cit.*, 6. Il Documento della Banca d'Italia, a differenza di quanto fatto dalla CONSOB, si propone di analizzare prevalentemente gli aspetti relativi al trattamento contabile e prudenziale delle cripto-attività. I profili economici, le criticità relative agli *exchanges* e ai *wallet provides*, nonché il problema della tracciabilità delle transazioni e le principali iniziative regolamentari adottate nelle varie giurisdizioni, sono solo accennati. Con la delibera CONSOB n. 20660 del 31 ottobre 2018, è stata sospesa *ex art.* 99, primo comma, lett. b), del TUF, l'ICO lanciata dalla *Togacoin LTD* che aveva per oggetto la collocazione sul mercato del *token TGA*. La CONSOB, in questo caso, ha sospeso «in via cautelare l'offerta al pubblico di token in quanto posta in essere in violazione delle disposizioni normative e regolamentari che disciplinano l'offerta al pubblico di prodotti finanziari» PIRANI, *Gli strumenti della finanza disintermediata: "Initial Coin Offering" e "blockchain"*, in *Analisi Giur. Econ.*, 2019, 341. Proprio la qualificazione dei *token* in questione come prodotti finanziari rappresenta il profilo più interessante della delibera n. 20660/2018. L'Autorità di vigilanza, dopo aver richiamato la definizione fornita dall'art. 1, primo comma, lettera t), del TUF, individuava gli elementi costitutivi dell'offerta al pubblico nella (i) circostanza che l'attività di collocamento abbia a oggetto «prodotti finanziari; (ii) presenza di una comunicazione al pubblico diretta a far acquistare o sottoscrivere i prodotti finanziari oggetto dell'offerta; (iii) la destinazione dell'offerta al pubblico residente in Italia. In questo senso, «se appare difficile negare la sussistenza dei requisiti ii) e iii) nell'ICO lanciata dalla Togacoin LTD potrebbero sorgere dubbi in merito alla qualificazione del token TGA come prodotto finanziario» *Ibid.*

La CONSOB, di conseguenza, ha proposto un regime specifico, c.d. di *opt-in*, riservato a coloro i quali intendano avviare offerte di critpo-attività in Italia. In questo modo, l’approccio delineato per lo svolgimento delle offerte in sede di nuova emissione di cripto-attività sarebbe in grado di conciliare le caratteristiche del fenomeno con le esigenze di tutela degli investitori<sup>27</sup>.

Tale previsione, in particolare, è subordinata alla necessità di non cristallizzare il fenomeno all’interno di schemi preesistenti, soprattutto in considerazione della continua evoluzione dello stesso<sup>28</sup>.

Il mezzo con cui veicolare l’offerta è principalmente la “piattaforma per le offerte di cripto-attività”, intesa come piattaforma online il cui fine esclusivo sia la promozione e realizzazione di offerte di cripto-attività di nuova emissione<sup>29</sup>.

Il medesimo regime di *opt-in*, di conseguenza, sarà garantito, in base al regolamento, anche alla successiva fase di scambio delle cripto-attività; nello specifico, dunque, con riferimento ai mercati secondari in cui esse possono essere negoziate<sup>30</sup>.

Va sottolineato, comunque, che la natura del regime di *opt-in* adottato nel documento della CONSOB rischia di apparire puramente teorica; infatti, alla

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<sup>27</sup> VILLANUEVA COLLAO, *Le offerte iniziali e gli scambi di cripto-attività*, in *U. Ill. L. Rev.*, 2019, 5-6.

<sup>28</sup> M. NICOTRA, *ICO Initial Coin Offering: una ricostruzione giuridica del fenomeno*, Blockchain4Innovation, 2019. Disponibile al sito <https://www.blockchain4innovation.it>. Consultato il 08 marzo 2021. Pertanto, è stata introdotta «una disciplina facoltativa a cui l’offerente può scegliere di accedere o meno: nel caso in cui opti per l’adesione il pubblico di investitori avrà maggiori sicurezze circa la serietà dell’iniziativa, potendo essere attuati una serie di controlli e tutele non presenti nel caso in cui l’offerta sia veicolata tramite canali diversi». *Ibid.*

<sup>29</sup> CONSOB, *supra* nota 10, 10. In tal senso, la stessa CONSOB all’interno del proprio documento afferma come la creazione di «un ecosistema di piattaforme abilitate che offrono i crypto-alternative product comparteciperà sicuramente alla generazione di un sistema più efficiente in termini di sicurezza, per le informazioni e documentazioni richieste alla società proponente ed efficienza in termini di confronto per il cliente delle possibilità di investimento da un numero di portali limitato». Inoltre, la gestione di tali piattaforme potrebbe essere effettuata «in primis da coloro che sono autorizzati, ai sensi dell’art. 50 quinque TUF e del regolamento n. 18592/2013 della Consob, a gestire le piattaforme di equity crowdfunding, la cui attività verrebbe quindi estesa a tali nuovi strumenti». NICOTRA, *supra* nota 28.

<sup>30</sup> Si fa riferimento a tal proposito ai c.d. *exchange*, i quali non sono soggetti ad alcuna normativa specifica, stante l’attuale quadro normativo. Si potrebbe, in questo caso, «optare per l’iscrizione in un apposito albo, vincolandosi al rispetto dei requisiti di organizzazione, funzionamento e sicurezza stabiliti dalla Consob. Ciò consentirebbe di fornire al pubblico degli investitori un criterio per valutare la maggior affidabilità della piattaforma di negoziazione, incentivando così la scelta di effettuare le negoziazioni su quelle piattaforme che si sono avvalse del regime facoltativo». M. NICOTRA, *supra* nota 28.

luce del modello di *business* delle ICOs, la semplice ipotesi di affidare agli intermediari qualificati le attività di “promozione e collocamento / emissione” nell’ambito di un’ICO, seguendo i tradizionali schemi operativi di “marketing remoto” ai sensi dell’articolo 32 del Testo Unico della Finanza, probabilmente si rivelerebbe tecnicamente impossibile e operativamente irrealizzabile<sup>31</sup>.

Per concludere, l’obiettivo di predisporre una disciplina *ad hoc* nei confronti di quelle tipologie di *token* che «in astratto potrebbero ricadere nella definizione di “prodotto finanziario” unito al regime facoltativo di opt-in per gli operatori, mira a creare una sorta di “sandbox” in cui coloro che intendano avviare delle ICO, o offerte iniziali di cripto-attività, riescano a realizzare il loro progetto in un contesto di certezza giuridica, introducendo nel contempo una serie di requisiti sotto la vigilanza della Consob a tutela del pubblico dei potenziali investitori che sarebbero così in grado di valutare più compiutamente la serietà ed affidabilità degli operatori stessi»<sup>32</sup>.

### **3. Il caso di San Marino**

La Repubblica di San Marino è tra gli Stati più attivi in merito alla regolamentazione dei *token* e, più in generale, delle criptovalute e della tecnologia *blockchain*. Una delle normative più importanti in tal senso è rappresentata dal Decreto Delegato 27 febbraio 2019 no. 37, intitolato “Norme sulla tecnologia blockchain per le imprese”<sup>33</sup>.

La norma, *inter alia*, effettua una ricostruzione sistematica ed esaustiva del fenomeno dei *token* digitali, distinti anche in questo caso, in *utility* e *security*<sup>34</sup>.

<sup>31</sup> CARRIÈRE, *The Italian Regulatory Approach to Crypto- Assets and the Utility Tokens’ ICOs*, BAFFI CAREFIN, Centre for Applied Research on International Markets, Banking, Finance and Regulation Research Paper Series, Working Paper n. 113, 2019, 19.

<sup>32</sup> NICOTRA, *supra* nota 28.

<sup>33</sup> Decreto Delegato 27 febbraio 2019 n.37, *Norme sulla tecnologia blockchain per le imprese*. Disponibile al sito <https://www.consigliograndeegenerale.sm/on-line/home/lavori-consiliari/dettagli-delle-convocazioni>. Consultato il 06 maggio 2020. In particolare, il decreto è relativo a quei *token* che «sono riconosciuti universalmente come mezzo di pagamento equivalente alla moneta». Si veda, MOTTOLA, *Decreto Blockchain della Repubblica di San Marino. Norme sulla Tecnologia Blockchain per le imprese*, San Marino Innovation, 2019, cit., 16. Disponibile al sito <https://DecretoBlockchain-SanMarino.pdf>. Consultato il 06 maggio 2020.

<sup>34</sup> Infatti, in tale sede di discussione, per il momento l’inquadramento giuridico degli *utility token*, che «consentono l’accesso futuro ai prodotti e servizi offerti da un’azienda e, pertanto, non costituiscono un investimento né soggiacciono alle regole proprie delle attività di investimento» non è preso in considerazione. SARZANA, *Blockchain: San Marino alla prova*

In particolare, in base a quanto previsto dall'art 9 del Decreto, in caso di offerta al pubblico di *token* d'investimento, è prevista la necessità di predisporre un apposito prospetto informativo, nonché le informazioni sull'azienda, la situazione economico-patrimoniale e gestionale e la evoluzione dell'attività dell'emittente, conformemente con quanto previsto dalla Direttiva Prospetti<sup>35</sup>.

Secondo dottrina autorevole, però, «i token asset digitali, pur rientrando nel genus del prodotto finanziario, sarebbero più propriamente uno strumento finanziario e perciò ad essi si applicherebbe non solo la Direttiva prospetti ma anche e soprattutto una diversa disciplina, la Direttiva 2014/65/UE (“MiFID II”)»<sup>36</sup>.

In particolare, per quel che concerne le norme che regolano l'emissione di *token*, per entrambe le tipologie si articolano su due principali linee direttive. *In primis*, l'obbligo di *disclosure* di informazioni rilevanti da parte dell'ente che utilizza la blockchain; in secondo luogo, la possibilità di condizionare l'offerta a una serie di misure rafforzate al fine di tutelare l'utente e del mercato<sup>37</sup>.

Il decreto *blockchain* di San Marino, comunque, non si limita soltanto alla definizione dei *token*, ma fornisce anche una serie di vantaggi sotto il profilo fiscale; a tale proposito, tutti i ricavi provenienti da operazioni effettuate utilizzando i *token* saranno esentasse<sup>38</sup>.

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*degli ICO e dei Token digitali. Prodotti finanziari o strumenti finanziari?*, Il Sole24Ore, 2019. Per completezza, la definizione di *utility token*, così come contenuta nel Decreto *Blockchain* stabilisce che essi «altro non sono che voucher per l'acquisto di beni o servizi offerti dall'Ente che li emette». MOTTO LA, *supra* nota 33, 16. Per converso, la definizione di *token* d'investimento, come contenuta nel Decreto delegato è la seguente: «[i] token di investimento di cui all'articolo 7, comma 2, lettera b) sono asset digitali che rappresentano, alternativamente, a seconda dello strumento sottostante: a) azioni dell'emittente; b) strumenti finanziari partecipativi dell'emittente; c) titoli di debito dell'emittente». Decreto Delegato, *supra* nota 33, art. 9.

<sup>35</sup> SARZANA, *supra* nota 12. Si tratta, dunque, essenzialmente di quanto previsto in relazione all'offerta al pubblico di un prodotto finanziario.

<sup>36</sup> *Ibid.*

<sup>37</sup> MOTTO LA, *supra* nota 33, 17.

<sup>38</sup> Anche se, tale affermazione merita una dovuta precisazione. La previsione di una totale esenzione fiscale vale soltanto nei casi in cui le operazioni sono effettuate all'interno dello Stato. Come previsto dall'art 11 c. 3 del Decreto Delegato che afferma che «[i] redditi realizzati attraverso operazioni effettuate con i token di cui all'articolo 7, comma 2, lettere a) e b) sono esenti da imposizione ai fini dell'Imposta Generale sui Redditi cui alla Legge 16 dicembre 2013 n.166 e successive modifiche». Per converso, saranno sottoposti alle norme in materia fiscale previste dal Paese di destinazione nel caso in cui le transazioni siano da San Marino verso l'estero. MOTTO LA, *supra* nota 33, 19.

L’aspetto principale di tale previsione, dunque, è legato alla convenienza fiscale che garantisce. Tale previsione, dal punto di vista della classificazione e regolamentazione dei *token*, pone la Repubblica di San Marino in netto vantaggio rispetto ad altre giurisdizioni, grazie ad un sistema giuridico-fiscale chiaro, conveniente e flessibile.

### **3.1. Una regolamentazione “all'avanguardia”**

La regolamentazione proposta dalla Repubblica di San Marino desta interesse per l’espresso richiamo, in alcuni suoi punti, alle normative europee e ai principi che disciplinano l’offerta di prodotti finanziari<sup>39</sup>.

Operativamente, la normativa in esame ha l’obiettivo di essere applicabile a livello universale nei confronti dei soggetti che, «seppur non residenti nella Repubblica di San Marino, si avvalgono di sistemi blockchain»<sup>40</sup>.

Successivamente al riconoscimento e all’iscrizione nell’apposito registro, il richiedente rientra nella categoria di “Ente Blockchain” e, in quanto tale, è soggetto alla vigilanza da parte di *San Marino Innovation*, il quale ha specifici compiti di supervisione e, eventualmente, sanzionatori nei confronti dei soggetti emittenti.

Il decreto, in tal senso, è volto a regolare esclusivamente le offerte di *utility token* e di *security token* – le c.d. “*Initial Token Offering*” (ITO) – non contemplando alcuna disciplina per i token di pagamento<sup>41</sup>.

In particolare, i *token* di utilizzo sono qualificati come *voucher* che possono essere utilizzati per l’acquisto beni o servizi offerti dall’Ente Blockchain. In questo senso, in base a quanto previsto dalla normativa, le funzionalità del *token* «devono essere limitate all’accesso ai servizi e/o all’acquisto dei beni dell’Ente Blockchain ed i medesimi possono essere emessi solo ed esclusivamente qualora il bene o il servizio siano già

<sup>39</sup> NICOTRA, *supra* nota 28. È necessario ricordare, infatti, che tra l’Unione Europea e San Marino è stata sottoscritta il 22 marzo 2012 una Convenzione Monetaria – da ultimo modificata con decisione UE n. 2018/492 – con cui la Repubblica si è obbligata ad un progressivo adeguamento della normativa interna a quella europea.

<sup>40</sup> *Ibid.* Il riconoscimento «può essere concesso anche per emissioni di *token* effettuate in Paesi esteri, attraverso un meccanismo, quindi, che permetterebbe all’emittente di scegliere la giurisdizione e normativa applicabile senza dover necessariamente operare fisicamente dalla Repubblica di San Marino».

<sup>41</sup> Come dichiarato nel sito Internet di San Marino Innovation «[i]n questa prima fase si è deciso di non disciplinare le cosiddette criptovalute (o token di pagamento o payment token), dal momento che ad oggi rappresentano una fetta residuale del mercato di riferimento e poiché questa tipologia di token non può prescindere dalle regole del mercato monetario e dei servizi di pagamento». MOTTOLA, *supra* nota 33, 16.

disponibili al momento dell'emissione»<sup>42</sup>.

Inoltre, appare ineludibile la direzione della normativa alla disciplina dei *token* di utilizzo *stricto sensu* intesi, considerato il requisito per il quale «la loro funzionalità sia limitata ad accedere ai servizi o acquistare i beni dell'emittente, con esclusione, pertanto, dei c.d. token ibridi che possono incorporare anche diritti diversi i quali, in alcune ipotesi, li accomunano ai prodotti finanziari»<sup>43</sup>.

I *token* di investimento, per converso, sono considerati alla stessa stregua di *asset* digitali, il cui sottostante è costituito, alternativamente, (i) da azioni dell'emittente, (ii) da strumenti finanziari partecipativi dell'emittente (iii) da titoli di debito dell'emittente<sup>44</sup>.

Infine, il decreto 37/2019 della Repubblica di San Marino permette anche la possibilità gestire i rapporti con gli acquirenti dei *token* attraverso un apposito sistema di *trust*, il quale prevede l'esenzione fiscale per i redditi che si sono realizzati attraverso le *Initial Token Offerings* equiparando, in tal modo, quantomeno ai fini fiscali, i *token* di utilizzo alle valute straniere e i *token* di investimento a strumenti partecipativi<sup>45</sup>.

#### 4. Conclusioni

Le soluzioni adottate dai due ordinamenti considerati divergono in maniera sostanziale.

A San Marino è stato scelto lo strumento del Decreto Delegato per dettare

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<sup>42</sup> NICOTRA, *supra* nota 28. Tali limitazioni «relative alle offerte iniziali dei token di utilizzo inducono a ritenerne che San Marino abbia voluto precludere alle iniziative imprenditoriali i cui progetti siano ancora in fase di early stage la possibilità di avvalersi di tale strumento di raccolta di capitali, in quanto, soprattutto nel settore tecnologico, nelle fasi iniziali di progetto i fondi tipicamente sono necessari per sviluppare le piattaforme o le applicazioni da cui saranno poi commercializzati i prodotti o servizi oggetti dell'iniziativa». *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> MOTTOLA, *supra* nota 33, 16.

<sup>45</sup> PISANU, *Blockchain per l'antiriclaggio, quali regole: il caso di San Marino*, Agenda Digitale, 2019. Disponibile al sito <https://www.agendadigitale.eu/documenti/blockchain-per-lantiriclaggio-quali-regole-il-caso-di-san-marino/>. Consultato il 06 maggio 2020. In particolare, «[i]l trust si pone come interlocutore unico verso l'emittente dei token. Tramite il trust, si potranno gestire separatamente dall'attività del soggetto che emette i token sia l'emissione dei token stessi che i rapporti con i clienti». Si veda, inoltre, sul medesimo punto, LOCONTE, *San Marino in prima linea con il decreto Blockchain*, Milano, 2019. Si stabilisce, inoltre, «l'applicabilità a tutte le operazioni in esso contemplate della normativa a contrasto del riciclaggio di denaro». *Ibid.*

le basi regolamentari e si sta puntando verso il “modello *sandbox*”, che predispone per gli operatori uno strumento finalizzato a consentire sperimentazioni di applicazioni *FinTech* che, mediante nuove tecnologie, come per esempio la *blockchain*, possano consentire l’innovazione di servizi e prodotti.

Il legislatore sanmarinese, in questo senso, ha intrapreso una via più impervia e propositiva; già la scelta di regolamentare un fenomeno tanto sfuggente e intangibile è soggetta a critiche e a rischi di cambi repentinii. Tuttavia, i *regulatory sandbox* hanno avuto successo in altri sistemi giuridici – come, per esempio, il caso del Bahrain<sup>46</sup> e degli Emirati Arabi<sup>47</sup> – e San Marino potrebbe diventare un naturale approdo per queste tipologie di programmazioni.

Il legislatore italiano, per converso, ha fissato solo regole comuni all’emissione e all’offerta delle categorie di *token* – *i.e.* presentazione di una richiesta di autorizzazione, redazione del *whitepaper* e di una nota di sintesi e obbligo di pubblicizzare l’offerta in modo accurato e veritiero<sup>48</sup>.

In Italia, infatti, il fenomeno non ha un riconoscimento normativo primario. Le esigenze di regolazione sin qui perseguitate dalla Consob prendono le mosse da una particolarità giuridica domestica che prevede – a fianco alle regole discendenti dall’Unione Europea – una nozione più ampia di “prodotti finanziari”, nell’ambito della quale possono talora essere ricompresi i *token*. Le paure e le profilature dei rischi hanno prevalso sulle tendenze espansive finendo per privilegiare un approccio cauto e difensivo.

In particolare, l’orientamento italiano estende regole operazionali già conosciute, mimando con una certa elasticità le scelte effettuate dal legislatore per l’offerta pubblica. Sono, pertanto, regole non *ad hoc* che necessariamente devono essere adattate al caso concreto.

La loro predisposizione per i *token* le rende il frutto di un parto forzoso, una soluzione forse semplicistica che, inevitabilmente, lascia spazio a critiche e debolezze.

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<sup>46</sup> In particolare, nel 2017, la Banca centrale del Bahrain ha emanato la *Regulatory Sandbox Framework directive*, che «includes the eligibility criteria, filing requirements and timeline for the process». Si veda il sito della Banca centrale del Bahrain <https://www.cbb.gov.bh/fintech/>.

<sup>47</sup> Si tratta, nello specifico, del *ADGM RegLab* « a specially-tailored regulatory framework which provides a controlled environment for FinTech participants to develop and test innovative FinTech solutions». Si veda <https://u.ae/en/about-the-uae/digital-uae/regulatory-sandboxes-in-the-uae>. Consultato il 07 luglio 2021.

<sup>48</sup> In ipotesi di *token* di investimento è prevista anche la pubblicazione di un prospetto.



## DIGITAL EURO: OPPORTUNITY OR (LEGAL) CHALLENGE?<sup>°</sup>

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*«The euro belongs to Europeans and we are its guardian. We should be prepared to issue a digital euro, should the need arise.» (C. Lagarde, European Central Bank)*

*Al giorno d'oggi, nell'area dell'euro vi sono due modi in cui la banca centrale fornisce denaro alla propria economia. Il primo consiste nell'emissione di banconote, mentre il secondo si esprime attraverso l'accreditamento elettronico dei depositi sui conti correnti che gli istituti di credito detengono presso la banca centrale. Negli ultimi cinque anni, a seguito sia dell'aumento della digitalizzazione dell'economia moderna sia dell'esempio di economie egemoniche (come la Cina), la possibile introduzione di una nuova forma di moneta per fornire un mezzo di pagamento sicuro e stabile ai cittadini dell'area dell'euro ha avuto il potere di creare un interesse crescente verso soluzioni così ambiziose. Di conseguenza, in un futuro molto prossimo potremmo sperimentare un modo diverso in cui funziona il denaro. Ci riferiamo al mondo inesplorato delle valute digitali della banca centrale (central bank digital currencies - CBDC). Mentre i progetti per la creazione di valute digitali della banca centrale stanno esplodendo in tutto il mondo, tale interesse è guidato da vari motivi che verranno analizzati in questo saggio, tra cui la necessità di reagire a iniziative private per la creazione di criptovalute e stablecoin e, una crescente domanda di strumenti e prodotti finanziari digitali veloci e interconnessi.*

*Nell'area dell'euro, anche se è stato recentemente avviato il dibattito per la creazione di un Euro digitale, la BCE ha dimostrato di essere già impegnata in indagini, consultazioni pubbliche e discussioni con «focus group» con l'obiettivo di fornire a cittadini, imprese e intermediari uno strumento di pagamento «pubblico» adatto ad una nuova era digitale. In questo quadro, il ruolo di una valuta digitale della banca centrale dell'Eurosistema sarà analizzato da un punto di vista giuridico. In primo luogo, a parte le ragioni sopra menzionate che hanno portato alla creazione di una CBDC, sarà fondamentale esaminare la struttura e il «design» dell'Euro digitale, insieme ai suoi obiettivi e alle esigenze dei suoi utenti. Di conseguenza, mentre indagheremo sul quadro giuridico che consentirà l'introduzione di questa moneta digitale, attraverso una leggera revisione di modelli simili adottati (o in adozione) da altri paesi, cercheremo di valutare se delle problematiche giuridiche potrebbero ostacolare la realizzazione di questo progetto o la sua effettiva attuazione, soprattutto per quanto riguarda l'impatto sulla politica monetaria, il ruolo internazionale dell'euro e il settore bancario.*

*In the euro area today, there are two ways in which the central bank provides money to its economy. The first consists in the issue of physical banknotes, while the second is expressed through the electronic accreditation of deposits on current accounts that credit institutions hold at the central bank. In the last five years, following both the increase in the digitalisation of the*

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*modern economy and the example of hegemonic economies (such as China), the possible introduction of a new form of currency to provide a safe and stable mean of payment to citizens of the euro area has had the power to create a growing interest towards such ambitious solutions. As a result, in the very near future we could experience a different way in which money works. We refer to the uncharted world of central bank digital currencies (CBDC). While projects for the creation of central bank digital currencies are booming all around the world, such interest is driven by various reasons that will be analysed in this paper, including the need to react to private initiatives for the creation of cryptocurrencies and stablecoins and, an increasing demand for fast and interconnected digital financial instruments and products.*

*In the euro area, even if the debate for the creation of a Digital Euro has recently started, the ECB has proven to be already engaged in investigations, public consultations, and discussions with focus groups with the aim to provide European citizens, firms, and intermediaries with a “public” payment instrument suitable for a new digital era. In this framework, the role of a Eurosystem central bank digital currency will be analysed from a legal perspective. First, apart from the abovementioned reasons leading to the creation of a CBDC, it will be crucial to examine the structure and design of the Digital Euro, together with its objectives and the needs of its users. Consequently, while investigating on the legal framework which will permit the introduction of this digital currency, through a light review of similar models adopted (or in adoption) by other countries, we will seek to assess whether legal issues might hinder the realisation of this project or its actual implementation, especially concerning the impact on monetary policy, the international role of the euro and the banking sector.*

**Summary:**

1. Introduction
2. Background
3. The birth of alternative currencies
4. From alternative to crypto (and digital) currencies
5. Road to the Digital Euro
6. Models of CBDC and the Digital Euro
7. Features and risk accompanying the adoption of the Digital Euro
8. Key legal challenges
9. Concluding remarks

## 1. Introduction

A challenging and forward-looking project such as the digitalisation of central bank money has the potential to act as an engine for the growth of a sector that suffers from the absence of a big player able to compete with internal and external market rivals, other central bank digital currencies and private initiatives as cryptocurrencies and stablecoins of a global reach. We already briefly signalled that, in the euro area, the project of issuing this new form of money is the result of two main reasons. First, the need of more digital, fast and accessible means of payment which is the product of a strong digitalisation of our economies, accompanied by a considerable decrease in the use of cash, especially driven by the ongoing pandemic and, second, a steady increase of online purchases. Making payments more digital is not only a key concern for the European economy as such but, as we will see, it will have strong implications with regards to the international role of the euro.<sup>2</sup>

At the same time, crypto assets, an innovative and entirely private type of money, are aiming at positioning themselves as a parallel form of mean of payment next to the traditional ones, those made through central bank or commercial bank money. This particular innovation in the panorama of currencies and means of payment is raising, among others, financial stability concerns. The real possibility of BigTechs (i.e., Google<sup>3</sup> and Facebook<sup>4</sup>) joining the race to create their own private currencies creates the risk to disrupt monetary sovereignty, which has been in the hands of public institutions for centuries and which would have an impact that goes way beyond monetary policy or the economy as such. Scholars agree on additional risks that can be brought by crypto currencies, which range from «counterparty risk, liquidity

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<sup>2</sup> The influence of a Digital Euro for the international role of the euro is explored in EUROPEAN CENTRAL BANK, *The international role of the Euro*, June 2021. Available online at: <https://www.ecb.europa.eu/pub/ire/html/ecb.ire202106~a058f84c61.en.html> and PASSACANTANDO, *Could a digital currency strengthen the euro?*, May 2021, LUISS Policy Brief, 9. Available online at: <https://sep.luiss.it/sites/sep.luiss.it/files/Could%20a%20digital%20currency%20strengthen%20the%20euro.pdf>.

<sup>3</sup> See JOHNSON, *Google Goes Blockchain? New Deal Opens A Door To Crypto*, May 2020, *Forbes*. Available online at: <https://www.forbes.com/sites/coryjohnson/2020/05/27/google-goes-blockchain/?sh=1f75b42a6593>.

<sup>4</sup> In 2019, Facebook's CEO Mark Zuckerberg announced a stablecoin project called Libra. See LIBRA ASSOCIATION MEMBERS, *White Paper*, 2020. Available online at: [https://wp.diem.com/en-US/wp-content/uploads/sites/23/2020/04/Libra\\_WhitePaperV2\\_April2020.pdf](https://wp.diem.com/en-US/wp-content/uploads/sites/23/2020/04/Libra_WhitePaperV2_April2020.pdf).

risk and business continuity»,<sup>5</sup> together with an issue which is under the eyes of everyone, their strong exposure to volatility. Those unconventional market developments have had the «benefit» to create awareness among central banks and policy makers of the need to reflect and possibly intervene on the issue. While central banks have always shown their willingness to support financial innovation, they should always guarantee, in line with their main objectives, financial stability and widespread access to money and payment systems, together with duties such as the prudential monitoring in order to avoid malfunctions of markets and intermediaries.

Concerning the structure of this paper, we believe that next to the theoretical analysis of forms and tools that are going to compose the Digital Euro, in order to identify legal issues, we need to provide the necessary space to discussions and experiments that central banks inside and outside Europe have undertaken to assess the validity of such innovative project for the future of payments. Indeed, technical issues relating to accessibility, security and privacy are of equal importance: the success and approval (i.e., degree of trust) of the Digital Euro among citizens and, ultimately, the credibility of the ECB itself will depend on how they will be addressed. More in detail, as we will focus on legal issues surrounding the project of a Digital Euro, it will be instrumental to proceed analysing all the various arguments according to the reasons for which the ECB might be definitively persuaded to adopt such digital currency. In brief, having in mind the report on the digital euro<sup>6</sup> as a reference base, we will take into account different design options, for example, related to an online or offline system or whether such system will depend on a centralised interface owned and managed by the central bank or if it will function through a series of authorised intermediaries.

Therefore, what will convince the ECB to definitively engage in the adoption of a Digital Euro? Several options are envisaged and will be analysed in this paper. Here we will shortly introduce them.<sup>7</sup> First of all, taking example

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<sup>5</sup> FASQUELLE, *CBDC: how central banks approach innovation*, February 2021, in *ESCB Legal Conference 2020*, 183. Available online at: <https://www.ecb.europa.eu/pub/pdf/other/ecb.escblegalconferenceproceedings2020~4c11842967.en.pdf>.

<sup>6</sup> EUROPEAN CENTRAL BANK, *Report on a digital euro*, October 2020. Available online at: [https://www.ecb.europa.eu/pub/pdf/other/Report\\_on\\_a\\_digital\\_euro~4d7268b458.en.pdf](https://www.ecb.europa.eu/pub/pdf/other/Report_on_a_digital_euro~4d7268b458.en.pdf).

<sup>7</sup> Apart from what analysed in this paper, the BIS provides a brief but concise analysis of the benefits of CBDC for current monetary systems. See BANK FOR INTERNATIONAL SETTLEMENTS, *CBDCs: an opportunity for the monetary system*, 2021, *BIS Annual Economic Report 2021*. Available online at: <https://www.bis.org/publ/arpdf/ar2021e3.pdf>.

from the case of Sweden,<sup>8</sup> the ECB could be motivated as a result of a significant decline in the use of cash throughout the Eurosystem and a subsequent preference for digital means of payment. In this case, we argue that a Digital Euro would need to allow offline solutions,<sup>9</sup> which are closest to cash and that will be particularly useful for vulnerable groups. Such model should also be free of charge and anonymous,<sup>10</sup> raising obstacles that are going to be examined in the text. Another reason could be a serious advancement of a foreign “competing” CBDC (as the Chinese Digital Yuan) or, especially, private initiatives (as stablecoins) that could become widely used in the euro area. This would have implications for trade and, therefore, for the international role of the euro. The one who will lead the race, once all major economies will adopt their own CBDC, could have a significant advantage at the world stage. Additionally, monetary sovereignty could be put at risk if private digital currencies will be able to provide financial services with more attractivity in comparison to public solutions. This could weaken national monetary policy and become a threat for central banks and their autonomy, being one of their fundamental features. Also, whoever entity or platform, public or private, that will “host” the largest share of transactions will definitely gather a prominent position in consideration to the amount of sensitive data that it will store. Undeniably, we all have learned that today’s value of data is almost countless.

As a consequence of the competition that the ECB would have to face (or that is already facing), it would have to consider building a currency that performs better than private services. Apart from the user-friendliness, the Digital Euro could outperform private currencies by better mitigating risks such as cyberattacks or failures of technological infrastructure due to extreme events like pandemics or natural disasters.<sup>11</sup> Likewise, it will be crucial to

<sup>8</sup> GIFF, *The risks (and benefits) of Sweden’s proposed e-krona*, June 2020, *Europeanceo*. Available online at: <https://www.europeanceo.com/finance/the-risks-and-benefits-of-swedens-proposed-e-krona/>.

<sup>9</sup> Offline solutions would also facilitate the recognition as legal tender. See BINDSEIL, *Issuing a digital euro*, 2020, *ESCB Legal Conference 2020*, 177. Available online at: <https://www.ecb.europa.eu/pub/pdf/other/ecb.escblegalconferenceproceedings2020~4c11842967.en.pdf>.

<sup>10</sup> Although it acknowledges that some degree of regulatory oversight is needed, the ECB supports the anonymity of the Digital Euro. See ARNOLD, *Digital euro will protect consumer privacy, ECB executive pledges*, June 2021, *Financial Times*. Available online at: <https://www.ft.com/content/e59e5d61-043a-4293-8692-f8267e5984c2>.

<sup>11</sup> Cfr. EUROPEAN CENTRAL BANK, *Report on a digital euro*, 33-34.

maintain resilience of the payment system and the separation from ordinary payment systems that are already in place.

In our opinion, one of the main issues that are under examination in this paper is the recognition of the Digital Euro as legal tender. Other legal matters concern more practical aspects as the distribution, access to the currency and supervision. Furthermore, as we will see towards the end of this paper, we will identify implications both for monetary policy and the banking sector. Concerning the former, monetary policy could benefit of a more effective implementation through the establishment of a direct relationship between the central bank and the general public, favoured by the digitalisation of money. However, for the latter, the disintermediation of payment systems might represent a threat to euro area banks and, consequently, to financial stability. Therefore, those issues require further analysis in order to make certain that the creation and the development of the Digital Euro will operate in parallel, or synergy with the banking sector, but not against it.

## 2. Background

It is important to state that, in the current panorama of the means of payment, virtual or digital currencies would exist along other forms of dematerialised money, we refer to currency having legal tender not existing in physical form or, in other words, e-money (or mobile money). While public and private law discipline official currencies regardless of whether they are in the form of cash or in a dematerialised form (i.e., on bank accounts), in most jurisdictions we do not encounter regulation of crypto or virtual currencies that have been recently developed and that enjoy great circulation in markets. When we speak of private virtual cryptocurrencies, Bitcoin usually comes first to our minds for its underlining technology which characterises specific protocols that express the form in which these alternative currencies circulate.<sup>12</sup> In order to better understand the role of these new virtual currencies, we need to do a step behind. First of all, we should analyse what is meant for money through its traditional and legal notion. This can be done from a functional and from a legal point of view. The former is typically related to the economic approach, in relation to its function as a unit of

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<sup>12</sup> On difference between Bitcoin and electronic money, see ROTMAN, *Bitcoin Versus Electronic Money*, January 2014, *Consultative Group to Assist the Poor, World Bank*. Available online at: <https://openknowledge.worldbank.org/bitstream/handle/10986/18418/881640BRI0Box30WLEDGENOTES0Jan02014.pdf?sequence=1>.

account, a medium of exchange (or a form of payment) and a store of value, meaning something that can be stored and spent in the future. Alongside traditional forms of money, we can make use of private or alternative currencies, which are digital, as cryptocurrencies, but not exclusively.

From a legal point of view, what qualifies money as being an official currency having a legal tender is the function that becomes relevant in payments, represented by the fact that whatever payment is made using an official currency, it will lawfully discharge the payer.<sup>13</sup> This means that the payment will discharge his/her debt and the creditor is obliged to accept such payment, if made in official currency. In the field of private law, an official currency is associated with principles of public order regulating the payment of debts or the repayment of loans. According to such rules, inspired by the principle of nominalism<sup>14</sup> and expressly qualified in national codes (or specific statutes), when a person receives a sum in national tender, unless there is a different agreement among the parties, he/she is entitled to repay and be lawfully discharged when giving back the exact same sum undertaken as an obligation, even if several years pass from the first payment, therefore regardless of inflation.

### 3. The birth of alternative currencies

Having set the above framework, it is possible now to speak about (dematerialised) assets or digital/virtual entities which aim to embed the function of money. We should warn that such assets do not necessarily coincide with what is official money from a legal point of view, as explained in the previous section. In order to clarify the legal boundaries in which virtual assets are moving, it is useful to make a parallel with ordinary banknotes. The latter are authorised by our legal systems via norms that are based on principles associated the idea of the sovereign as the entity which guarantees that there is trust in a specific medium of exchange. This is associated with traditional ideas of money of intrinsic value (i.e., gold or silver coins) tied to the material which it was made of. With the evolution of the economy, we gradually began to see the birth of notes of exchange and paper money until

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<sup>13</sup> See Commission Recommendation of 22 March 2010 on the scope and effects of legal tender of euro banknotes and coins, OJ L 83, 30.3.2010, 70.

<sup>14</sup> See MILTON MARTIN, *The Principle of Nominalism*, April 1963, *14 Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition*. Available online at: [https://www.jstor.org/stable/4318440?seq=1#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/4318440?seq=1#metadata_info_tab_contents).

we reached the current dematerialisation of money, for which the material is not important as it is tied only to the national entity, the central bank which ensures that there is trust in the money that circulates. Likewise, we experienced several developments concerning means of payment, from those consisting in coins with intrinsic value, to paper money and other titles representing value that, starting in 1920s and 1930s, and following the Bretton Woods agreements<sup>15</sup> signed the end of gold standards. In brief, this system worked via national currencies (i.e., pound, dollar) that could be converted into a certain fix amount of gold, having an intrinsic value. This means that pound bills that were circulating represented a title with an underlining value in gold. However, when the gold standard was abandoned,<sup>16</sup> we remained with what is known as fiat (or paper) currency. Arguably, all of these circumstances created the basis for the creation of modern payment systems, for the circulation of dematerialised money and, as a result, for the creation and circulation of alternative or, at the moment, unofficial forms of money. More into detail about modern payment systems, we should distinguish between official ones carried out by intermediaries (e.g., private banks) and the so-called surrogates of official currency. While the first are guaranteed by central banks and include recognised, disciplined and regulated “ordinary” payments systems (e.g., bank transfers), the others, created under private initiatives, are used for payments which perform the function of means of exchange and that qualify as e-money.<sup>17</sup> Nevertheless, they exist and are regulated under EU level legislation<sup>18</sup> which states that it is considered as electronic money a «stored monetary value as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions».<sup>19</sup> This

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<sup>15</sup> GHIZONI, *Creation of the Bretton Woods System*, November 2013, *Federal Reserve History*. Available online at: <https://www.federalreservehistory.org/essays/bretton-woods-created>.

<sup>16</sup> RICHARDSON, KOMAI AND GOU, *Roosevelt's Gold Program*, November 2013, *Federal Reserve History*. Available online at: <https://www.federalreservehistory.org/essays/roosevelts-gold-program>.

<sup>17</sup> See EUROPEAN CENTRAL BANK, *Electronic Money*. Available online at: [https://www.ecb.europa.eu/stats/money\\_credit\\_banking/electronic\\_money/html/index.en.html](https://www.ecb.europa.eu/stats/money_credit_banking/electronic_money/html/index.en.html)

<sup>18</sup> See EUROPEAN COMMISSION, *E-money*. Available online at: [https://ec.europa.eu/info/business-economy-euro/banking-and-finance/consumer-finance-and-payments/payment-services/e-money\\_en](https://ec.europa.eu/info/business-economy-euro/banking-and-finance/consumer-finance-and-payments/payment-services/e-money_en).

<sup>19</sup> Article 2(2) Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC (e-Money Directive). Please note that Article 2(2) refers to Directive 2007/64/EC has been repealed by Directive (EU) 2015/2366 (PSD2).

intermediary ensures that against the payment of funds in the official currency, it will take care of making the payment order, for this reason this system is sometimes been defined as “open system” for the possibility to make the payment to anybody.

The circulation of dematerialised money is the natural consequence of the fact that we have allowed values to be stored in bank accounts available to be transferred in a non-physical manner which, as a result, has opened the possibility for non-official or alternative forms of money to be created and to circulate. This last point is interesting when we look at private digital currencies. When talking about the latter, we refer to a wider category, that of alternative currencies. Alternative currencies can be digital (e.g., Bitcoins) or physical (e.g., Sardex).<sup>20</sup> For the sake of this study we will focus on the digital model, but it is important to state that both types are non-official currencies which are not (yet) recognised by States. For the time being, they enjoy a certain recognition to circulate in the digital platforms which support them. However, they cannot be considered at the same level as official currencies, because they're mostly unregulated by national and international bodies, although they follow rules established by the private organisation, companies, or programmers that created them. The increasing attention towards them is not only related to their innovativeness but also with regards to the fact that many of them are convertible with official currencies<sup>21</sup> despite such conversion is not guaranteed by central banks, or governments.<sup>22</sup> In this sense, States, central banks and (more generally) monetary authorities are not stopping the possibility for such digital currencies to circulate and for consumers in their States (or Member States if we refer to the Eurosystem) to purchase and exchange them with fiat currency.<sup>23</sup> From a legal point of view,

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<sup>20</sup> Sardex can be considered as a pure mean of payment which, unlike Bitcoin, deals strictly with goods and services that can be exchanged, using Sardex, within its local community. It is present on the financial scene of the island of Sardinia, in Italy, since 2008 with the aim to give a pulse to the local economy that had been strongly hit by the Global Financial Crisis. See POSNETT, *The Sardex factor*, September 2015, *Financial Times*. Available online at: <https://www.ft.com/content/cf875d9a-5be6-11e5-a28b-50226830d644>.

<sup>21</sup> Including the euro.

<sup>22</sup> The case of El Salvador which recently announced the recognition of Bitcoin as legal tender is definitely curious. See RENTERIA, WILSON AND STROHECKER, *In a world first, El Salvador makes bitcoin legal tender*, June 2021, *Reuters*. Available online at: <https://www.reuters.com/world/americas/el-salvador-approves-first-law-bitcoin-legal-tender-2021-06-09/>.

<sup>23</sup> However, it is important to mention that certain States, as for example China, are taking an active stance against cryptocurrencies created and managed by private companies (such as Bitcoin) by prohibiting its banks and payment institutions to «providing services related to cryptocurrency

we could frame those activities in the sphere of transactions between natural persons or legal entities within their freedom to conclude lawful contracts. While this has numerous advantages which have been largely mentioned in this paper and in almost all the conferences and discussions on digital currencies, one of the main side effects for consumers and businesses which engage in such type of digital transactions is the possibility to incur various risks as counterparty risk, fraud and volatility. Thus, in the name of the digitalisation of our economies, by virtue to the absence of an official regulation, recognition and/or authorisation, we have opened to the highest risk represented by the possibility of the loss of the funds “invested” (or converted into digital currencies) without the protection granted by States as it happens, for example, to bank deposits.<sup>24</sup>

#### **4. From alternative to crypto (and digital) currencies**

After having described how we arrived at the conception of alternative currencies and, especially, of virtual/digital currencies, we can now concentrate our attention on cryptocurrencies, in order to closely approach the market and financial innovation reasons that have encouraged the birth of CBDC. Cryptocurrencies are named after the cryptographic technologies which are used to certify related transactions. Such cryptocurrencies are the product of protocols which have been developed, Bitcoin being the prominent one, on the base of a distributed ledger technology (DLT). Such technology allows for two models, meaning that the entity wishing to create a digital currency can choose between a centralised model, which can be public or private, or a decentralised model.<sup>25</sup> The Distributed Ledger Technology is a database distributed on different nodes or IT devices, which participate separately and independently in the network, where they replicate and save a copy of the ledger. What is important is the complete absence of a central authority in command, there is no arbitrator, and each node that proceeds with the registration and the rescue, works independently.

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transactions», especially mentioning the possible speculative nature of such investments. See SHEN AND SIU, *China bans financial, payment institutions from cryptocurrency business*, May 2021, *Reuters*. Available online at: <https://www.reuters.com/technology/chinese-financial-payment-bodies-barred-cryptocurrency-business-2021-05-18/>.

<sup>24</sup> We refer here to the 100.000€ threshold of protected deposits by the Deposit Guaranteed Schemes in the European Union. See Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes.

<sup>25</sup> Bitcoin belongs to this group.

The principle on which the DLT is based is consent through voting. At each update, each node performs a vote to ensure that the majority agrees with the conclusion reached. Consent is the algorithm that, once resolved, automatically allows the database to be updated on all nodes, which will receive a copy. We must highlight that blockchain is, essentially, a special form of DLT. Blockchain, in fact, is the only form of DLT that uses a chain of blocks to provide consent to the distributed ledger. Likewise, also blockchain, as it is managed by peer-to-peer networks, can exist without any central authority and uses an algorithmic consensus to proceed with the database update. This feature is of a particular importance for our study, as the absence of a central control is a big source of risk for existing private virtual currencies. When shaping the Digital Euro, the ECB should have to take into account this issue as it needs to preserve ownership and control over monetary policy tools, including this CBDC.

The rise of the blockchain technology can be attributed to the launch by Satoshi Nakamoto of a white paper in 2008 on Bitcoin,<sup>26</sup> at the moment, the world's most famous cryptocurrency. However, blockchain technology allows a variety of uses and interactions other than cryptocurrencies, one of the leading being the smart contracts. All the uses which are related to financial products and instruments can be included in the sphere of the Decentralized Finance (DeFi), which differs from traditional finance due to the absence of intermediaries and central authorities, such as central banks, which, among other things, are involved in authorising and supervising the entities that deal with today's private finance. As we said, while blockchain is "out" around 10 years, DeFi is a relative recent concept of a blockchain-based finance dating late 2018.<sup>27</sup> DeFi is an ensemble of protocols which allow financial development, thus with a similar objective compared to traditional financial products with whom DeFi is in competition, because it collects funds without those being in the hands of a single company, entity, or owner. While the traditional financial system is based on intermediaries (i.e., banks) the DeFi system has the objective to put in contact all the users that want to use financial instruments without going through intermediaries (peer to peer). In this sense,

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<sup>26</sup> See NAKAMOTO, *Bitcoin: A Peer-to-Peer Electronic Cash System*, 2008. Available online at: <https://bitcoin.org/bitcoin.pdf>.

<sup>27</sup> The term DeFi, short for decentralized finance, was born in an August 2018 Telegram chat between Ethereum developers and entrepreneurs including Inje Yeo of Set Protocol, Blake Henderson of 0x and Brendan Forster of Dharma. Cfr. Russo, *What Is Decentralized Finance?: A Deep Dive by The Defiant*, September 2020, *Coinmarketcap.com*. Available online at: <https://coinmarketcap.com/alexandria/article/what-is-decentralized-finance/>.

surplus units will go to deficit units similarly to what happens in the financial markets, without the intervention of an intermediary exercising the delegated monitoring function which is typical of banks. However, while financial markets are regulated and under the supervision of central authorities, DeFi products are permissionless and decentralised. Such alternative currencies are considered fully convertible and, therefore, being part of an open system, which means that private currencies claim to be convertible to fiat currencies at any time, considering that they “work” in a digital environment which operates (in general)<sup>28</sup> without interruption, unlike the stock market where world’s official currencies are exchanged during the “opening hours” of such regulated markets. Those are issues that the ECB will have to take into account when it will have to choose the form of the Digital Euro, as it will have balance benefits and risks to answer to the new demands of the European citizens in terms of environmental protection, financial stability and resilience of the payment systems’ infrastructure. The approach of the regulators towards digital currencies has been that of running behind and sometimes “chasing” private initiatives. This is not an isolated case but, on the contrary, it is what usually happens when we talk about financial innovation and regulatory arbitrage.<sup>29</sup> In addition, public organisations issued warnings<sup>30</sup> and undertook

<sup>28</sup> Digital currencies are not entirely exempt from blockades as they are subject to the proper functioning of the servers where the blockchain, or better, the DLT environment in which they are created and “stored”. Indeed, in case of power shutdowns, system failures and other similar events can interfere with their performance. In addition, cryptocurrencies have been systematically under attack for environmental concerns related to their strong energy consumption, which in turns increased their volatility and exposure to losses. See CUTHERSTON, *Bitcoin price: Did a power cut in China cause crypto collapse?*, April 2021, *Independent*. Available online at: <https://www.independent.co.uk/life-style/gadgets-and-tech/bitcoin-price-china-power-cut-b1834446.html> and ROWLATT, *How Bitcoin's vast energy use could burst its bubble*, February 2021, *BBC*. Available online at: <https://www.bbc.com/news/science-environment-56215787>.

<sup>29</sup> Regulatory arbitrage on cryptocurrencies had already been flagged in 2019. On the matter, see MANAA ET AL., *Crypto-Assets: Implications for Financial Stability, Monetary Policy, and Payments and Market Infrastructures*, May 2019, ECB Occasional Paper No. 223. Available online at: <https://www.ecb.europa.eu/pub/pdf/scpops/ecb.op223~3ce14e986c.en.pdf>.

<sup>30</sup> See the EUROPEAN BANKING AUTHORITY, *Warning to consumers on virtual currencies*, EBA/WRG/2013/01. Available online at: <https://www.eba.europa.eu/sites/default/documents/files/documents/10180/598344/b99b0dd0-f253-47ee-82a5-c547e408948c/EBA%20Warning%20on%20Virtual%20Currencies.pdf?retry=1> and EUROPEAN SUPERVISORY AUTHORITIES’ JOINT WARNING, ESMA, EBA and EIOPA warn consumers on the risks of Virtual Currencies, March 2021. Available online at: <https://www.eba.europa.eu/sites/default/documents/files/documents/10180/2139750/313b7318-2fec-4d5e-9628-3fb007fe8a2a/Joint%20ESAs%20Warning%20on%20Virtual%20Currencies.pdf?retry=1>.

studies so as to identify whether such digital transactions or investments in digital (private) currencies could be subject to taxation.<sup>31</sup> What is clear and unanimous among all these regulatory attempts is that we are experiencing a lack of uniformity, even if there are ongoing projects and efforts to fight fragmentation.<sup>32</sup> Indeed, this issue has been flagged both by the Group of 20 (G20)<sup>33</sup> and, subsequently, by the Financial Stability Board (FSB).<sup>34</sup> When talking about regulatory aspects, the major concern that emerges from current debates is that the ensemble of the digital currencies of private nature do not enjoy the status of legal tender in major economies as they did not receive such recognition. Apart from rare exceptions, they are not universally accepted, and this should not be confused with the fact that they are currently allowed to circulate in private platforms. Indeed, this is one of the main reasons why central banks and governments all over the world are joining the race for the possible adoption of CBDC. Nevertheless, even if they are proliferating at a fast pace, their worldwide market allocation is still limited<sup>35</sup> also due to the fact that they are banned or in the process to be banned in many countries. The circulation of “money” lacking the status of legal tender is an

<sup>31</sup> In 2015, following a request for a preliminary ruling from the Swedish Supreme Administrative Court concerning the possibility to consider transactions exchanging fiat currencies into Bitcoin (or vice versa) to be taxed under Value added tax (VAT) rules, the European Court of Justice in Case C-264/14, ECLI:EU:C:2015:718, ruled that «the exchange of traditional currencies for units of the ‘bitcoin’ virtual currency and vice versa [...] are transactions exempt from VAT» also definitely labelling Bitcoin as a currency and not as a “simple” property. However, this does not mean that Bitcoins are exempt from any taxes. Bitcoin and similar virtual currencies are exempt from VAT, but they are under the consideration of each EU Member State fiscal regime, which means that these transactions are taxed, or not in different ways and percentages. For example, in Germany if the amount of the transaction is below 600 euros it is exempted from tax, but even if the amount is higher than that, it is sufficient to keep possession of these currencies for at least one year to avoid paying taxes. See Einkommensteuergesetz (EStG) § 23 Private Veräußerungsgeschäfte. Available online at: [https://www.gesetze-im-internet.de/estg/\\_23.html](https://www.gesetze-im-internet.de/estg/_23.html).

<sup>32</sup> A study from the Bank for International Settlements (BIS) tries to give some indication for a wider and harmonised regulation of cryptocurrencies, see AUER AND CLAESSENS, *Regulating cryptocurrencies: assessing market reactions*, September 2018, BIS QUARTERLY REVIEW. Available online at: [https://www.bis.org/publ/qtrpdf/r\\_qt1809f.pdf](https://www.bis.org/publ/qtrpdf/r_qt1809f.pdf).

<sup>33</sup> See GROUP OF 20, *Communiqué, G20 Finance Ministers and Central bank Governors Meeting, Buenos Aires*, March 2018. Available online at: [https://www.mof.go.jp/english/policy/international\\_policy/convention/g20/180320.htm](https://www.mof.go.jp/english/policy/international_policy/convention/g20/180320.htm).

<sup>34</sup> See FINANCIAL STABILITY BOARD, *Crypto-assets: Report to the G20 on work by the FSB and standard-setting bodies*, July 2018. Available online at: <https://www.fsb.org/wp-content/uploads/P160718-1.pdf>.

<sup>35</sup> Check THOMSON REUTERS, *Cryptocurrencies by country*, October 2017. Available online at: <https://www.thomsonreuters.com/en-us/posts/news-and-media/world-cryptocurrencies-country/>.

important source of risk for the economy of the Eurosystem not only for the fragility, the lack of regulation and the volatility of cryptocurrencies and stablecoins, but for the fact that they are putting themselves as a competitor for the provision of financial services along those related to payment services (e.g., loans, mortgages) and, most of all, for future issues related to a smooth provision of monetary policy by the central bank.

## 5. Road to the Digital Euro

The Digital Euro should not be confused with stablecoins which represent, as we stated, one of the main causes that are motivating central banks towards the creation of centralised digital currencies. Stablecoins<sup>36</sup> are composed of tokens linked to a collateral of a fix value, deposited in a smart contract or in a bank which acts as a custodial. Nowadays, different types of stablecoins exist. They range from fiat-based stablecoins (i.e., USDT Tether); commodity-backed stablecoins as Venezuelan's Petro,<sup>37</sup> which is linked to the country's oil and mineral reserves; crypto-backed stablecoins; and seigniorage-style stablecoins. Early versions of stablecoins have been created on the Ethereum blockchain with the following scheme: in principle,<sup>38</sup> for every dollar deposited, a token of equal value was "mined" in the blockchain. Therefore, the value should have been of one Tether for every dollar. On the contrary, the Digital Euro is supposed to be released directly by the ECB as it would have had to print physical euros. In this sense, the Digital Euro is not linked to physical euros, but it represents itself "ordinary" euros, with the main difference being the different infrastructure where the Digital Euro is created and distributed.<sup>39</sup> That is why, in 2018, following Venezuela's experiment, discussions intensified around the introduction of the so-called Central Bank

<sup>36</sup> For a comprehensive taxonomy and description of stablecoins, see BULLMANN, KLEMM AND PINNA, *In search for stability in crypto-assets: are stablecoins the solution?*, August 2019, European Central Bank Occasional Paper Series, 230. Available online at: <https://www.ecb.europa.eu/pub/pdf/scrops/ecb.op230-d57946be3b.en.pdf>.

<sup>37</sup> ROSALES, *Radical rentierism: gold mining, cryptocurrency and commodity collateralization in Venezuela*, July 2019, 26 *Review of International Political Economy*. Available online at: <https://doi.org/10.1080/09692290.2019.1625422>.

<sup>38</sup> However, price moves captured the attention of US prosecutors. Cfr. ROBINSON AND SCHOENBERG, *Bitcoin-Rigging Criminal Probe Focused on Tie to Tether*, November 2018, Bloomberg. Available online at: <https://www.bloomberg.com/news/articles/2018-11-20/bitcoin-rigging-criminal-probe-is-said-to-focus-on-tie-to-tether>.

<sup>39</sup> As described in the course of the text, the distribution is still unclear.

Digital Currencies (CBDC), also referred to as “sovereign digital currencies”.<sup>40</sup> All the features, forms, elements and critical points which have been described above have the purpose of leading us to discover and assess what brought central banks to embrace such technological innovation and what are the legal challenges which they will have to engage in. In addition, the analysis of digital currencies will serve as base point to cross reference the features that will be taken into account also for the creation and/or adoption of CBDC. Scholars are unanimous in stating that the growing interest and development of private initiatives linked to virtual currencies<sup>41</sup> have had the consequence of enhancing competition and pressure over central banks and governments for the engagement in considering the adoption of CBDC, which has been also fostered by the current COVID-19 pandemic that further increased the use of digital payments<sup>42</sup> (i.e., credit card payments and online purchases) and the requests of consumers and businesses of an even more digitalised and interconnected economy. As a result, a number of proposals have been undertaken by several States, for example, in Sweden with the Sveriges Riksbank proposing the e-krona. Among all the parties involved in this project, China can be definitely considered at the forefront, since it has also recently announced to be ready to issue its first CBDC called Digital Yuan, which takes its name from the official Chinese currency. Indeed, the central bank already delivered the Digital Yuan as a first test which involved ordinary consumers. They received a small quota of the digital currency in order to be able to make payments for purchases in shops using an app released from the same central bank.<sup>43</sup>

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<sup>40</sup> For a comprehensive study of the development and the sources of CBDC, see DIDENKO AND BUCKLEY, *The Evolution of Currency: Cash to Cryptos to Sovereign Digital Currencies*, 2019, 42 *Fordham International Law Journal*, 4. Available online at: <https://ir.lawnet.fordham.edu/ilj/vol42/iss4/2>.

<sup>41</sup> Among those initiatives we should also consider the project of Facebook to introduce its own virtual currency, called Libra. This pressure can be evaluated in 2019's speech by Yves Mersch on this particular stablecoin. See MERSCH, *Money and private currencies: reflections on Libra*, December 2019, in *Building bridges: central banking law in an interconnected world, ECB Legal Conference 2019*. Available online at: <https://www.ecb.europa.eu/pub/pdf/other/ecb.ecblegalconferenceproceedings201912~9325c45957.en.pdf?258d648ffcf1be39f9d927e5c13f393f>.

<sup>42</sup> On the topic, see AUER, CORNELLI AND FROST, *Covid-19, cash, and the future of payments*, April 2020, *BIS Bulletin*, 3. Available online at: <https://www.bis.org/publ/bisbull03.pdf>.

<sup>43</sup> See AREDDY, *China Creates Its Own Digital Currency, a First for Major Economy*, April 2021, *Wall Street Journal*. Available online at: <https://www.wsj.com/articles/china-creates-its-own-digital-currency-a-first-for-major-economy-11617634118>.

Since this paper focuses on the Digital Euro, we are slowly getting closer the entrance at stake of the European Central Bank in the panorama of CBDC. The ECB, therefore, was not only “pushed” by new trends in the economy, by new requests from citizens and businesses and by concerns of a possible competition with private initiatives. Due to the strong engagement of several other countries and major economies all over the world, among which China is definitely leading the “race”, the ECB decided to step in and explore the feasibility of issuing a Digital Euro. Following a consolidated path for the adoption of new policies in the financial sphere and beyond, a taskforce of experts has been put in place by the ECB with the responsibility to give some first answers to the multitude of questions, doubts, uncertainties and curiosities related to the world of public digital currencies. The work of this taskforce was published as a «Report on a digital euro»<sup>44</sup> in October 2020. The report contains detailed information about the status of the project for a future adoption of a Digital Euro,<sup>45</sup> the arguments supporting the introduction of such CBDC, and the risks associated with it. An important section is devoted to the ongoing work at the international stage, where the ECB is cooperating with the central bank of Canada, the Bank of England, the Bank of Japan, the Sveriges Riksbank and the Swiss National Bank, with the coordination of the Bank for International Settlements, discussing, carrying out surveys and exchanging models with the objective of trying to build CBDC which are going to be as uniform as possible, in order to avoid future market disruptions and the fragmentation of the provision of payment services across the cooperating parties and beyond.<sup>46</sup> Those discussions intensified since 2019 but they have started some years earlier with one element being a fix matter of concern from the very beginning, the preservation of financial stability. We argue that the reason why financial stability is worrying all the parties involved in such project is because we are not talking only as a new form for centralised digital payments, but we need also to refer to a tool for the provision of monetary policy which, in our views, represents the most sensitive issue together

<sup>44</sup> EUROPEAN CENTRAL BANK, *Report on a digital euro*, October 2020. Available online at: [https://www.ecb.europa.eu/pub/pdf/other/Report\\_on\\_a\\_digital\\_euro~4d7268b458.en.pdf](https://www.ecb.europa.eu/pub/pdf/other/Report_on_a_digital_euro~4d7268b458.en.pdf).

<sup>45</sup> A preliminary goal for a decision on a possible adoption was set for the second part of 2021.

<sup>46</sup> EUROPEAN CENTRAL BANK, *Central bank group to assess potential cases for central bank digital currencies*, January 2020, Press release. Available online at: [https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200121\\_1~e99d7946d6.en.html](https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200121_1~e99d7946d6.en.html).

with the recognition as legal tender. The proliferation of private digital currencies and the possible adoption of public (official) ones raises the need to preserve the current official currency. In this sense, it was made clear, at least for what regards the Digital Euro, that its adoption will not substitute cash or other non-physical existing official forms of money. Differently, the Digital Euro aims at providing a cheap, safe, riskless, and stable alternative which should respond to new needs, at the same time non conflicting with the existing monetary architecture of the Eurosystem. Therefore, while ensuring to not create an obstacle to innovation, the ECB aims to enlarge the accessibility to this new form of money, in principle,<sup>47</sup> to everyone. The access to the Digital Euro is also linked to the use, or not, of intermediaries which will also raise concerns of financial exclusion as there is a size of the population that does not hold a bank account and that settles payments and related obligations only via cash. In such case, the Riksbank in its project to issue an “e-krona” took into serious consideration its social impact and, therefore, the fight against financial exclusion, acknowledging that «[t]he digital era might [...] mean a form of financial exclusion for certain groups»<sup>48</sup> to whom this digital currency should be addressed, as they might be left out in the future by private players.<sup>49</sup> We welcome the willingness of the ECB to proceed in the same direction and to suggest models of a Digital Euro that will facilitate inclusion.<sup>50</sup>

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<sup>47</sup> This specification is necessary to underline that the degree of accessibility of the Digital Euro will depend on the form and model which will be chosen by the ECB, especially when referring to online or offline solutions, features that will directly affect its inclusiveness. Drawing an easy parallel with cash, this still represents the easiest and most accessible type of money. However, cash has proven to be lagging behind innovation and new exigencies, which on their side will have to answer also to financial exclusion needs.

<sup>48</sup> See ARMELIUS, HANNA ET AL., *The rationale for issuing e-krona in the digital era*, 2020, 2 *Sveriges Riksbank Economic Review*, 12. Available online at: [https://www.riksbank.se/globalassets/media/rapporter/pov/artiklar/engelska/2020/200618/202\\_0\\_2-the-rationale-for-issuing-e-krona-in-the-digital-era.pdf](https://www.riksbank.se/globalassets/media/rapporter/pov/artiklar/engelska/2020/200618/202_0_2-the-rationale-for-issuing-e-krona-in-the-digital-era.pdf).

<sup>49</sup> See INTERNATIONAL MONETARY FUND, *The Pros and Cons of Central Bank Digital Currency: Insights from the Riksbank's E-Krona Project*, March 2021, 62 *IMF Staff Country Reports: Sweden*. Available online at: <https://www.elibrary.imf.org/view/journals/002/2021/062/article-A001-en.xml?ArticleTabs=fulltext> and HANNA, ARMELIUS ET AL., *The e-krona and the macroeconomy*, 2018, *Sveriges Riksbank Economic Review*, 3. Available online at: <https://www.riksbank.se/globalassets/media/rapporter/pov/artiklar/engelska/2018/181105/20183-the-e-krona-and-the-macroeconomy.pdf>.

<sup>50</sup> See EUROPEAN CENTRAL BANK, *Report on a digital euro*, October 2020, 39. Available online at: [https://www.ecb.europa.eu/pub/pdf/other/Report\\_on\\_a\\_digital\\_euro~4d7268b458.en.pdf](https://www.ecb.europa.eu/pub/pdf/other/Report_on_a_digital_euro~4d7268b458.en.pdf).

## 6. Models of CBDC and the Digital Euro

Following the analysis of the reasons and objectives accompanying the creation of CBDC, and therefore, the Digital Euro, it is important to determine what they consist of. To address such question, it is useful to make reference to the language of the BIS. Regrettably, the answer is not what is expected from a product which is desired to be uniform. Indeed, the report highlights that ‘there will be no “one size fits all” CBDC’,<sup>51</sup> meaning that all the domestic projects and solutions foresee different forms and characteristics connected to different priorities, which in turn will create divergences that will have to be tackled through «cooperation and coordination [that] are essential to prevent negative international spillovers».<sup>52</sup> In order to deepen our analysis on why central banks are working on the adoption of CBDC with different aims and objectives, alongside the reasons mentioned above, we need to focus on four elements of this rationale, meaning the users, the architecture, the technology and the scope. According to what terms central banks are building the currency in line with the above elements, then a variety of models of CBDC will come up.

Concerning the users, we need to mention which category will make most of its use, meaning citizens who will be using the currency for retail payments. About the architecture, we can talk about a decentralised type of virtual currency, on the model of cryptocurrencies or a centralised type where the central bank will be the one to authorise and assign a status to the currency.<sup>53</sup> On the technology, it is possible to build a virtual currency by making use of the blockchain technology with the means described above, although this is not the only option. Systems through which citizens can make use of digital currencies can be also closed systems which, for example, require authorisation or permission to access. Lastly, there can be a variety of scopes. Whether the central bank aims at creating a new form of money, monetary policy can be one of the leading scopes. Otherwise, if the main objective is the creation of a new payment system, for example having a parallel mean of

<sup>51</sup> See BANK FOR INTERNATIONAL SETTLEMENTS, *Central bank digital currencies: foundational principles and core features*, 2020, Report no 1. Available online at: <https://www.bis.org/publ/othp33.pdf>.

<sup>52</sup> Ibid.

<sup>53</sup> In this case the central bank could also assign the status to a currently non-official currency. Although this sounds unlikely due to the need to ensure the stability of monetary policy.

payment alongside cash, or credit cards, the features of the CBDC will clearly differ.

## 7. Features and risk accompanying the adoption of the Digital Euro

In light of the above, when analysing how the Digital Euro should look like, it is necessary to refer to the ECB report on a digital euro. What we can extract from this “bible” is that, as already mentioned, the Digital Euro is supposed to «be introduced alongside cash [and] it would not replace it»,<sup>54</sup> it should be always and fully convertible with all the other official existing forms of euro.<sup>55</sup> Likewise, it will be used for retail purposes, meaning that for its users will represent a parallel, or additional mean of payment to what is cash now. In order to satisfy the same or similar conditions that cash offers to its users, the digital solution would need to answer to a high number of requirements than those of ordinary means of payment, the majority of which have legal implications. A first requirement, already mentioned above, is the accessibility. It is important to analyse how can the ECB ensure that the Digital Euro will be accessible and available to the largest possible extent. When constructing and adopting such digital currency, the ECB would have to make sure that there will be no categories of citizens which will be left behind, especially those that are already facing troubles in accessing ordinary financial services and that, for example, do not hold a bank account or are not in possession of digital means. Consequently, the ECB will have to take into account principles of non-discrimination and equal treatment when deciding between the provision of the Digital Euro via «an account-based system or as a bearer instrument»,<sup>56</sup> the latter referred also to as a token-based system which could be DLT based, even though the ECB claims itself as not interested in the use of this technology.<sup>57</sup>

Next to the accessibility, the ECB will have to concentrate on the architecture supporting the digital currency. We are here in the territory of the safety and stability of the currency. When talking about safety of digital platforms or services, it is easy to think straight away about the resilience of

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<sup>54</sup> EUROPEAN CENTRAL BANK, *Report on a digital euro*, October 2020, 2. Available online at: [https://www.ecb.europa.eu/pub/pdf/other/Report\\_on\\_a\\_digital\\_euro~4d7268b458.en.pdf](https://www.ecb.europa.eu/pub/pdf/other/Report_on_a_digital_euro~4d7268b458.en.pdf).

<sup>55</sup> Ibid.

<sup>56</sup> EUROPEAN CENTRAL BANK, *Report on a digital euro*, 29.

<sup>57</sup> Indeed, the report states that a «bearer digital euro would not have to use DLT.» Cfr. EUROPEAN CENTRAL BANK, *Report on a digital euro*, 29.

the system from risks which vary from cyber-attacks to other types of system disruptions,<sup>58</sup> which would endanger the smooth function of the platform, the stability of the price of the currency and the possibly cause the loss of the users' funds. Therefore, the Digital Euro should encompass all the necessary features to be protected against such risks and this can be a point of strength for the Digital Euro as private digital currencies and their digital wallets have been proven to be sensitive to hackings and frauds, an exemplary case is that of the South Korean's cryptocurrency exchange Bithumb.<sup>59</sup> We argue that, while, in principle, system disruptions should be avoided through safeguarding the stability and resilience of the digital architecture, at the same time, the ECB will have to ensure a mechanism by which the user would have its balance of Digital Euro restored. Undeniably, this is an outcome that in order to be achieved will need several considerations that go beyond the nature of the digital platform. However, the authorities can take example from existing features for certain credit card payments.<sup>60</sup> Furthermore, as we are talking about a currency which is owned and issued directly by the central bank, we suppose that it would enjoy its guarantee and, which we consider an absolute synonym of security. A similar guarantee is already present in other ordinary means of payment and is taken for granted, especially concerning the money deposited in bank accounts. However, taking such relationship of trust for granted is an error, because it has been widely experienced in the past that, in case of a strong disruption of the economy, for example, due to a series of failures or crises of financial institutions,<sup>61</sup> citizens would opt for so-called bank runs<sup>62</sup> to be able to recover their deposits, thus creating a vicious circle

<sup>58</sup> Including, electric or server-related disruptions. On the overall matter, see CARSTENS, *Digital currencies and the future of the monetary system*, January 2021, *Bank for International Settlements*. Available online at: <https://www.bis.org/speeches/sp210127.pdf>.

<sup>59</sup> See CHOUDHURY, *South Korean cryptocurrency exchange Bithumb says it was hacked and \$30 million in coins was stolen*, June 2018, *CNBC*. Available online at: <https://www.cnbc.com/2018/06/19/south-korea-crypto-exchange-bithumb-says-it-was-hacked-coins-stolen.html>.

<sup>60</sup> In the US, this issue related to credit card payments was solved through the adoption of the Fair Credit Billing Act, 15 U.S.C. 1666-1666j. Available online at: <https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title15-chapter41-subchapter1-partD&edition=prelim>.

<sup>61</sup> As it happened during the last Global Financial Crisis. On the matter, see HELLEINER, *Understanding the 2007–2008 Global Financial Crisis: Lessons for Scholars of International Political Economy*, 2011, *Annual Review of Political Science*, 14. Available online at: <https://www.annualreviews.org/doi/abs/10.1146/annurev-polisci-050409-112539>.

<sup>62</sup> See MERRIAM-WEBSTER, *Definition of run on the bank*. Available online at: <https://www.merriam-webster.com/dictionary/run%20on%20the%20bank>.

that will bring the sovereign into a default because of a serious breach in the monetary system.

Another aspect that the ECB will have to take into account is privacy. This principle of privacy plays a prominent role as it is one of the main features characterising cash as a mean of payment, which is anonymous and cannot be traced. Certainly, the Digital Euro would have to entail certain characteristics of cash, but the way in which privacy and confidentiality will have to be preserved needs to be different.<sup>63</sup> While cryptocurrencies running on blockchain enjoy discretion,<sup>64</sup> the Digital Euro will have to encompass some degree of control, for instance, to prevent money laundering or terrorist financing. Current “official” digital payments allow the recognition of the identity of the payer, which is used also for tax purposes. However, having in mind recent declarations of ECB representatives, this problem could be bypassed limiting the amount of Digital Euro that each user would have available in his/her own “wallet”.<sup>65</sup> This solution will be not free from consequences as the Digital Euro could be restrained only to retail users, ruling out businesses. Issues related to data are not only linked to anonymity but also to the protection of both the identity and the data related to the transactions that are being made. As a matter of fact, banks have shown on several occasions to be targets of data breaches and cyberattacks by hackers and criminal organisations, that then expose sensitive data on the web or use them as threats to demand ransom money or even use them to withdraw money from checking accounts using viruses or other similar tools. The Digital Euro will have to prove to be resistant to this type of data leaks that could compromise the funds of its users and the stability of the entire system.

## 8. Key legal challenges

In our opinion, concerns related to the status of legal tender represent the leading legal challenge for the adoption of the Digital Euro and, in general, the main issue accompanying this new form of money.<sup>66</sup> In light of the report

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<sup>63</sup> See ARNOLD, *Digital euro will protect consumer privacy, ECB executive pledges*, June 2021, *Financial Times*. Available online at: <https://www.ft.com/content/e59e5d61-043a-4293-8692-f8267e5984c2>.

<sup>64</sup> Only the so-called oracles and programmers of the protocols in the blockchain are able to access data. However, responsibilities have not yet be assigned by regulators.

<sup>65</sup> See EUROPEAN CENTRAL BANK, *Report on a digital euro*, 28.

<sup>66</sup> We find useful to flag that some scholars state the possibility for a CBDC to be issued without the need to obtain a legal tender status. However, such solution would entail several

of the ECB taskforce, the Digital Euro can qualify as legal tender.<sup>67</sup> theoretically, EU primary law<sup>68</sup> does not prohibit or exclude for the possibility of issuing a Digital Euro as legal tender. Nonetheless, the ECB flagged that the legal basis would depend on the design.

Indeed, the report explains that the Digital Euro could be issued by the Eurosystem on the basis of the combination of Article 127(2) TFEU,<sup>69</sup> which assigns the definition and implementation of the monetary policy to the European System of Central Banks (ESCB),<sup>70</sup> and several articles of the Statute of the ESCB, depending on the design chosen. Four options are on the ground. Whether the Digital Euro will «be issued as an instrument of monetary policy, akin to central bank reserves, and only accessible to central bank counterparties»,<sup>71</sup> apart from Article 127(2) TFEU, Article 20 of the Statute of the ESCB, will give the opportunity to the Governing Council to decide over «other operational methods of monetary control».<sup>72</sup> A Digital Euro «made available to households and other

private entities through accounts held with the Eurosystem»,<sup>73</sup> could be hypothetically allowed by Article 17 of the Statute<sup>74</sup> but it will be insufficient as legal basis. If it was going «to be issued as a settlement medium for specific types of payment, processed by a dedicated payment infrastructure only accessible to eligible participants»<sup>75</sup> which, however, represents a design not in line with the inclusivity advocated above, the ECB would be able to provide the facility or platform for such digital payment system. Lastly, in our opinion Article 127(2) TFEU would be better suited to work in relation with Article

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practical problems. We argue that this is not in line with our view of the Digital Euro as an official form of currency in a different form than cash but with equal rights. Cfr. PAPAPASCHALIS, *Retail central bank digital currency: a (legal) novelty?*, 2020, ESCB Legal Conference 2020, 205. Available online at: <https://www.ecb.europa.eu/pub/pdf/other/ecb.escblegalconferenceproceedings2020~4c11842967.en.pdf>.

<sup>67</sup> See SIEKMANN, *Legal tender in the euro area*, 2018, 122 IMFS Working Paper Series. Available online at: <https://www.econstor.eu/bitstream/10419/178212/1/1019897406.pdf>.

<sup>68</sup> EUROPEAN CENTRAL BANK, *Report on a digital euro*, 24.

<sup>69</sup> OJ C 202, 7.6.2016, pp. 102-103.

<sup>70</sup> The ESCB is formed by the ECB and the national central banks (NCBs) of all the EU Member States, regardless of the fact that they have adopted the euro. See EUROPEAN CENTRAL BANK, *ECB, ESCB and the Eurosystem*. Available online at: <https://www.ecb.europa.eu/ecb/orga/escb/html/index.en.html>.

<sup>71</sup> EUROPEAN CENTRAL BANK, *Report on a digital euro*, 24.

<sup>72</sup> Protocol (No 4) attached to the EU Treaties “on the Statute of the European System of Central Banks and of the European Central Bank” (Consolidated version, OJ C 202, 7.6.2016, p. 230-250).

<sup>73</sup> EUROPEAN CENTRAL BANK, *Report on a digital euro*, 24.

<sup>74</sup> OJ C 202, 7.6.2016, p. 230-250.

<sup>75</sup> EUROPEAN CENTRAL BANK, *Report on a digital euro*, 24 and 33.

22 of the Statute<sup>76</sup> to permit the ECB to issue a Digital Euro «as an instrument equivalent to a banknote»,<sup>77</sup> being harmonious to the mostly suitable model for its users, according to the principles, objectives and needs analysed above. Moreover, if the ECB would consider the digital euro in equal terms as euro banknotes, Article 128(1) TFEU would allow its issuance by virtue of the Eurosystem's «exclusive right to authorise the issue of euro banknotes».<sup>78</sup> Whilst the above options are clearly linked to specific designs of the Digital Euro, if we refer solely to the need of ensuring the status of legal tender, the report suggests that Article 128(1) TFEU<sup>79</sup> together with Article 16 of the Statute<sup>80</sup> would suffice to grant such status.<sup>81</sup>

However, another important question of legal nature needs to be examined, the legal framework applicable to the Digital Euro. Indeed, it is crucial to understand if (and which) existing legislation would apply to this future virtual currency. We have already talked about money laundering threats that can impact the Digital Euro. Likewise, we have to consider in what terms that existing AML legislation at the European level should apply to it.<sup>82</sup> Even if having in mind the limits to the use of the Digital Euro described above, in case of the involvement of the existing network of financial institutions in the distribution of the currency, the authorities will need to apply reporting requirements to those institutions,<sup>83</sup> similarly to what currently happens to ordinary transactions. Moreover, financial institutions included in such network will be subject to a strict Eurosystem supervision. Existing expertise in the private sector will have a positive impact to the application of existing rules, even though the exact degree of application will have to be discussed in the appropriate focus groups. Furthermore, considering the relevance of data protection and confidentiality, as described above, in legal terms and in light

<sup>76</sup> OJ C 202, 7.6.2016, p. 230-250.

<sup>77</sup> EUROPEAN CENTRAL BANK, *Report on a digital euro*, 24.

<sup>78</sup> OJ C 202, 7.6.2016, p. 230-250.

<sup>79</sup> OJ C 202, 7.6.2016, p. 103.

<sup>80</sup> OJ C 202, 7.6.2016, p. 230-250.

<sup>81</sup> EUROPEAN CENTRAL BANK, *Report on a digital euro*, 24.

<sup>82</sup> Concerning current applicable EU AML legislation, see Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU (AMLD V).

<sup>83</sup> See SANDNER ET AL., *The Digital Programmable Euro, Libra and CBDC: Implications for European Banks*, July 2020, *EBA Policy Research Workshop Conference Paper*. Available online at: [https://www.researchgate.net/publication/343334690\\_The\\_Digital\\_Programmable\\_Euro\\_Libra\\_and\\_CBDC\\_Implications\\_for\\_European\\_Banks](https://www.researchgate.net/publication/343334690_The_Digital_Programmable_Euro_Libra_and_CBDC_Implications_for_European_Banks).

of the GDPR,<sup>84</sup> the issuer of the currency (in our case, the ECB) will have the “burden” to respect the regulation if it acts as the entity responsible for the collection of such data. Therefore, the right balance should be reached between the needs to adequately protect user data and, at the same time, guaranteeing that the use of the virtual currency is in line with existing legislation against money laundering and terrorist financing. Evidently, both requirements have conflicting objectives.

## 9. Concluding remarks

In light of all the elements surrounding the project for the adoption of the Digital Euro, we can state that it will definitely touch at the heart of the ECB’s monetary policy and the banks’ role in our economy. It is remarkable the willingness and the efforts of the ECB, from one side, to do not leave the current architecture of the intermediaries behind but to take an inclusive approach which has, in turn, put the most of banks and providers of payment services in a positive and cooperative stance towards this challenge.<sup>85</sup> From the discussions and the public interventions of the latest months, it seems that nearly all the parties understood that to survive and flourish it is important to fight challenges embracing innovation and technology and not being overwhelmed by it. While this approach facilitates the adoption of the Digital Euro, thanks to a cooperative environment between public authorities, private players and the useful contribution of citizens and unions, it is still not exempt from very serious legal challenges, that is why this paper took the opportunity to analyse and flag several of those challenges that are coming up, or that already present, in this domain. The importance for the ECB to act fast is crucial. However, it is suggested to proceed with caution and with the ongoing contribution of all parties involved because it is undisputed that developments in crypto assets, stablecoins and, more generally, private digital initiatives are

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<sup>84</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

<sup>85</sup> Nevertheless, please note that some banks have raised some doubts on the adoption of the Digital Euro. See PARTZ, *Demand for digital euro not yet clear, says BBVA exec*, June 2021, *Cointelegraph*. Available online at: [https://cointelegraph.com/news/demand-for-digital-euro-not-yet-clear-says-bbva-exec?utm\\_source=European%20Banking%20Federation%20newsletters%20and%20updates&utm\\_campaign=6a24d174db-EMAIL\\_CAMPAIGN\\_2018\\_04\\_25\\_COPY\\_01&utm\\_medium=email&utm\\_term=0\\_088668d33b-6a24d174db-80202884&mc\\_cid=6a24d174db&mc\\_eid=de1bcf9311](https://cointelegraph.com/news/demand-for-digital-euro-not-yet-clear-says-bbva-exec?utm_source=European%20Banking%20Federation%20newsletters%20and%20updates&utm_campaign=6a24d174db-EMAIL_CAMPAIGN_2018_04_25_COPY_01&utm_medium=email&utm_term=0_088668d33b-6a24d174db-80202884&mc_cid=6a24d174db&mc_eid=de1bcf9311).

moving swiftly. In this sense, it might be useful to include the banking sector in the governance of the Digital Euro if the ECB would decide to make use of the current financial intermediation network for its distribution.

While adopting the Digital Euro, another important issue that will have to be taken into account is the international role of the euro. The ECB should preserve the strategic independence of the euro with a view to the competition at the world stage with other strong currencies (i.e., US dollar). For this reason, it is not productive for the ECB to involve directly in retail payments as the central bank is not traditionally built to interact directly with end users. That is why the ECB representatives stated that they are offering “a raw material” that intermediaries can use in order to shape with different business models which will make use of the Digital Euro to be offered to consumers. The ECB stated to not be interested in competing with banks and understood that expertise, objectives, and resources of the existing network of financial institution is a point of strength that will facilitate the shape and distribution of the CBDC. This is true also for KYC/AML reporting and for the onboarding of customers which represent the operational base of today’s bank activity. The ECB will offer a safe and costless mean of payment. The fact that the EU institutions and the ECB at the forefront are not interested in competing with the banking sector is proven by the backing of private initiatives in the field of payment services.<sup>86</sup> Digital Euro should be constructed as an alternative to cash, it should be digital and, therefore, less costly, even though the ECB acknowledged to have started the discussion on the adoption of such digital currency due to a change in the citizens’ behaviour. Indeed, citizens started to pay more digitally both considering the use of credit cards and the increase in purchases through online payments, which confirms a trend in the reduction in the use of cash. Cash is currently the only form of money issued directly by the central bank, an entity which is completely riskless, and the Digital Euro is representing a technological progress of such mean of payment.

Therefore, in our opinion, the most feasible solution foresees that ECB will engage in building the ecosystem, which will have to be shaped by banks and other payment businesses. This will ensure the solidity of the main infrastructure granted by the ECB while incorporating the expertise of the private sector. This solution will confirm that it is in the interest of the ECB to protect the intermediation function of banks and not to compete with it, thus causing no friction and not putting at risk the provision of monetary policy that certain banks are undertaking. Expertise is indeed a delicate issue

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<sup>86</sup> European Payments Initiative. Available online at: <https://www.epiccompany.eu/>.

because, as we described in throughout the text, issuing a Central Bank Digital Currency is a highly complex process and there is no experience of issuing a CBDC on a large scale. Nevertheless, while some countries (as China<sup>87</sup> or Sweden) are at the final stages of the issuance of such “public” digital currencies, many other central banks all over the world are engaging in cooperation and talks to ensure to the maximum possible extent that future solutions will be harmonised or (at least) that their fragmentation will be avoided. Luckily, the ECB is an active part of such networks. Those networks are also important with a view that the Digital Euro should be accessible also to foreign users in the same way as euro banknotes are available in third countries.

There are several challenges that the ECB (and its network) will have to face. As we have discussed, it will be crucial to ensure a smooth implementation of monetary policy, financial stability and privacy concerns. As we anticipated, financial stability could be protected with a limit of Digital Euro that every consumer could hold, making the ECB a peculiar provider of services.

Finally, according to the latest discussions, we expect the Digital Euro to be introduced in a progressive way, in order to scale up innovation and to be able to assess how consumers, businesses and the banking sector react to such innovation. Therefore, the Digital Euro, apart to be accessible at the international level, it should be competitive, to include cost reduction and an environmentally friendly design so to become a standpoint against private currencies, which are having a very high carbon footprint.<sup>88</sup> The Digital Euro will have to promote the digitalisation of the society and the technological advancement.

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<sup>87</sup> Recently, the Chinese Digital Yuan has been flagged at a possible threat for the international role of the euro. See JONES, *ECB's Villeroy voices digital yuan threat*, June 2021, *Financial Times*. Available online at: <https://www.ft.com/content/b7ebcd86-dc33-43eb-b6bd-6d783857b4ae>.

<sup>88</sup> JIANG ET AL., *Policy assessments for the carbon emission flows and sustainability of Bitcoin blockchain operation in China*, April 2021, 12 *Nature Communications*. Available online at: <https://www.nature.com/articles/s41467-021-22256-3>.

**EUROPEAN PAYMENTS IN THE FORESEEABLE FUTURE: IN  
PURSUIT OF A COHERENT LEGAL FRAMEWORK FOR  
STABLECOINS<sup>°</sup>**

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*La proposta di regolamento sul mercato dei crypto-asset (MiCA) delinea un quadro normativo per due tipi di stablecoin, quelli collegati ad un'attività finanziaria e quelli con funzione di pagamento. Il presente lavoro intende contestualizzare la proposta nel mercato interno dei pagamenti. A questo scopo, dopo un breve richiamo alla natura giuridica dei crypto-asset, esamina la proposta di regolamento alla luce della disciplina europea in tema di servizi di pagamento e moneta elettronica.*

*The proposal for a Regulation on Markets in Crypto-assets (MiCA Regulation proposal) establishes a legal regime for two kinds of stablecoins: the asset-referenced tokens and the electronic money tokens, which are said to be intended primarily as a means of payment. This paper aims to make a first approach to their proposed regime and to analyse whether the interplay between the MiCA Regulation proposal and the standing payments legislation is coherent. For that purpose, after a short reference to the legal nature (or its lack of determination) of cryptocurrencies in general, the proposal and the particular tokens are introduced. On this basis, the scopes of the Second Directive on Payment Services, as well as the Second Directive on Electronic Money are briefly described, so afterwards the applicability of these pieces of legislation to the specific regimes of asset-referenced and electronic money tokens can be analysed, in regard to both the issuance of the tokens and the further transactions executed in relation to them.*

**Summary:**

1. Introduction
2. An approximation to the legal nature of cryptocurrencies
3. A first approach to the MiCA Regulation proposal
  - 3.1. General Layout, subject matter and scope
  - 3.2. Regulated crypto-assets and their use as a means of payment
4. The applicability of the existing European payments legislation to stablecoins under MiCA Regulation proposal
  - 4.1. General scope of PSD2 and EMD2
  - 4.2. PSD2 and EMD2 applicability to asset-referenced tokens
  - 4.3. PSD2 and EMD2 applicability to electronic money tokens
  - 4.4. Asset-referenced and e-money token arrangements as tantamount to that of a «payment system»
5. Concluding remarks

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<sup>°</sup> Double blind peer-reviewed paper.

## 1. Introduction

The Digital Finance Package was released on the twenty-fourth of September 2020. It aims to boost a single market in this area, paving the way for Europe to become a global standard-setter. The package includes the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a Digital Finance Strategy for the EU (COM/2020/591 final) and the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a Retail Payments Strategy for the EU (COM/2020/592 final); but also four legislative initiatives: the Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937 (COM/2020/593 final); the Proposal for a Regulation of the European Parliament and of the Council on pilot regime for market infrastructures based on distributed ledger technology (COM/2020/594 final); the Proposal for a Regulation of the European Parliament and of the Council on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014 and (EU) No 909/2014 (COM/2020/595 final) and the Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2009/65/EC, 2009/138/EU, 2011/61/EU, EU/2013/36, 2014/65/EU, (EU) 2015/2366 and EU/2016/2341 (COM/2020/596 final).

Digital innovation is reshaping financial markets, even disrupting established principles on how financial service providers operate and approach customers<sup>1</sup>, so the European legal framework needs to evolve accordingly. Specially distributed ledger technology (from here on referred to as DLT)<sup>2</sup> is making quite an impact on these markets, as it has a wide variety of applications in insurance services and notably in markets of financial instruments and payment services.

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<sup>1</sup> KÖNIG, *The Future of Crypto-Assets within the European Union – An Analysis of the European Commission’s Proposal for a Regulation on Markets in Crypto-Assets*, European Union Law Working Paper No. 55, Stanford-Vienna, 2021, 1.

<sup>2</sup> The World Bank describes the distributed ledger technology as «a novel and fast-evolving approach to recording and sharing data across multiple data stores (ledgers), which each have the exact same data records and are collectively maintained and controlled by a distributed network of computer servers, which are all called nodes» (KRAUSE - NATARAJAN - GRADSTEIN, *Distributed Ledger Technology (DLT) and blockchain, FinTech note No. 1*, Washington, 2017, 1). Blockchain is a type of DLT, on the difference between them and characteristics of the former see KÖNIG, *The Future of Crypto-Assets within the European Union – An Analysis of the European Commission’s Proposal for a Regulation on Markets in Crypto-Assets*, cit., 5-10.

Currently, although some crypto-assets qualify as financial instruments as defined in Directive 2014/65/EU, most of them fall outside of the scope of European legislation on financial services which leads to a lack of holders' protection and can also lead to substantial risks to market integrity in the secondary market of crypto-assets<sup>3</sup>. That is the reason why some Member States as Italy, Luxemburg or Finland have already enacted specific rules for crypto-assets, and many other Member States have established some specific provisions in their financial or banking legislation beyond anti money laundering rules, for example Germany and Sweden<sup>4</sup>. However, since there is not a minimum harmonization that could potentially result in regulatory fragmentation, circumvention of existing legal framework as well as regulatory arbitrage and a lack of users' confidence in crypto-assets.<sup>5</sup>

Furthermore, crypto-assets are inherently cross-border products so the lack of legal certainty and the divergent frameworks across the EU mean that crypto-assets service providers need to comply with several national laws and obtain multiple authorisations or registrations creating an uneven playing field for these companies depending on their location. Moreover, it has a high cost that could end up undermining companies' innovation, distorting competition in the Single Market and giving rise to regulatory arbitrage, leaving consumers and investors exposed to substantial risks.<sup>6</sup>

These are the reasons that justify the proposal for a harmonised legal framework on crypto-assets and related activities and services.

The MiCA Regulation proposal has four general objectives which are interrelated. The first objective is to provide legal certainty that enables the development of a European crypto-asset market. The second one is to support innovation by providing a proportionate regulatory treatment of all crypto-assets that ensures fair competition. The third objective is to establish appropriate levels of consumer and investor protection. And finally, the fourth objective is to ensure financial stability, in particular, considering the risks that could arise from stablecoins potentially becoming widely accepted.<sup>7</sup>

<sup>3</sup> Recital 3 MiCA Regulation Proposal.

<sup>4</sup> COINSAHERES, *Cryptocurrency Concerns vs Regulations in Europe*, Available at: <https://coinshares.com/research/crypto-concerns-regulations>

<sup>5</sup> KÖNIG, *The Future of Crypto-Assets within the European Union – An Analysis of the European Commission's Proposal for a Regulation on Markets in Crypto-Assets*, cit., 123. ZETZSCHE - ANNUNZIATA - ARNER - BUCKLEY, *The Markets in Crypto-Assets Regulation (MiCA) and the EU Digital Finance Strategy*, EBI Working Paper Series No. 77, 2020, 8.

<sup>6</sup> MiCA Regulation proposal's explanatory memorandum, 5-6.

<sup>7</sup> See KÖNIG, *The Future of Crypto-Assets within the European Union – An Analysis of the European Commission's Proposal for a Regulation on Markets in Crypto-Assets*, cit., 16-17.

It has been said that the proposed regulation has four driving forces. First, eliminating the doubts about the issuance of security tokens. Second, to supervise the crypto market in its entirety. Third, to put an end to regulatory arbitrage and forum shopping in the crypto sector. Finally, and most importantly, to put a regulatory stop to stablecoins projects such as Facebook's Diem (formerly known as Libra), whose potential impact could reach millions of people right away.<sup>8</sup>

Nowadays the dimension of crypto-asset market is still relatively small. But there is a serious concern that those crypto-assets commonly referred to as stablecoins, which link their value to either fiat currencies, assets or a combination of various of the previous ones, could be widely adopted as a means of payment by consumers, posing a threat not only to financial stability but also to monetary policy transmission and to monetary sovereignty.<sup>9</sup> The purpose of this paper is to attempt a first approach to the legal regime proposed on the MiCA Regulation for such types of crypto-assets and analyse the level of coherence and how it would interplay with Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (hereinafter, PSD2), and Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC (hereinafter, EMD2). This study might be of particular interest at this point considering, on one side, that the MiCA Regulation proposal is in an early stage of debate and, on the other side, that the PSD2's review procedure is beginning by the end of 2021.<sup>10</sup>

<sup>8</sup> MARTÍ, *Aproximación a la propuesta de Reglamento UE relativo a los mercados de criptoactivos: Mica*, in BELANDO - MARIMÓN (eds.), *Retos del mercado financiero digital*, Cizur Menor, 2021, 2.

<sup>9</sup> LARA, *Criptomonedas ¿Riesgos o ventajas?*, in BELANDO - MARIMÓN (eds.), *Retos del mercado financiero digital*, Cizur Menor, 2021, 6.

<sup>10</sup> In accordance to the review clause set in article 108 PSD2, the Commission should have prepared a report on the application and impact of this Directive by 13 January 2021. This new expected date was announced in the Payments Strategy for the EU, as well as the plan to present a legislative proposal for an Open Finance framework by mid-2022. It remains to be seen whether there is a new PSD3 or the PSD2 content is updated and embedded in that new law (COM/2020/592 final, 17). Two public consultations on instant payments have been already launched, one is addressed to a broad range of stakeholders (<https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12931-Instant>-

## 2. An approximation to the legal nature of the cryptocurrencies

As it will be shown later, crypto-asset is a broad concept. When talking about its legal nature its different types should be distinguished. A first distinction is made between protocol tokens and application tokens. The former are the ones created and initially distributed as a reward for members of a network that contribute to the maintenance of the blockchain and its network assets. The latter, in contrast, are crypto-assets that created through a smart contract that creates an application on a blockchain. So, the distinction depends on the creation of the crypto-asset. Further, literature typically differentiates crypto-assets according to their predominantly intended use case: payment, utility or investment. A payment token is a crypto-asset intended to be used as digital cash. A utility token grants the holder some functional utility other than payment for external goods or services, commonly in the form of access to a product or service of the issuer of the crypto-asset. Finally, an investment or security token represents a derivative, shares in a company, bonds, etc.<sup>11</sup>

For the purpose of this paper, this section is focused on the kind of crypto-asset that could be used as a means of exchange. Namely, the so-called cryptocurrencies or virtual currencies, that is to say, payment tokens. Stablecoins are a subcategory of them. They are called like that because, often to be used as a means of payment, their value is stabilised. There are many ways of stabilisation. For instance, by linking the stablecoin value to a fiat currency (or a basket of different currencies), or to other assets (either traditional ones such as securities and commodities or crypto-assets), but also, there exist «algorithmic stablecoins» which are backed by users' expectations about the future purchasing power of their holdings.<sup>12</sup> Actually, ECB Crypto-Assets task force classifies them into four

Payments/public-consultation\_en) while the other one is targeted to PSPs ([https://ec.europa.eu/info/consultations/finance-2021-instant-payments-targeted\\_en](https://ec.europa.eu/info/consultations/finance-2021-instant-payments-targeted_en)).

<sup>11</sup> KÖNIG, *The Future of Crypto-Assets within the European Union – An Analysis of the European Commission's Proposal for a Regulation on Markets in Crypto-Assets*, cit., 5-10. STEINER, *Krypto-Assets und das Aufsichtsrecht: Security-, Payment- und Utility-Token und ihre aufsichtsrechtliche Einordnung*, Vienna, 2019, 20-22. HACKER - THOMALE, *Crypto-Securities Regulation: ICOs, Token Sales and*

*Cryptocurrencies under EU Financial Law*, in *European Company and Financial Law Review No. 15*, 2018, 649-650 (with further references). PERNICE, *Criptovalute, tra legislazione vigente e diritto vivente*, in *Ianus. Diritto e Finanza* No. 2, 2020, 44-45. ZETZSCHE - ANNUNZIATA - ARNER - BUCKLEY, *The Markets in Crypto-Assets Regulation (MICA) and the EU Digital Finance Strategy*, *EBI Working Paper Series* No. 77, 2020, 5-6.

<sup>12</sup> EUROPEAN CENTRAL BANK, *Stablecoins - no coins, but are they stable?*, *In Focus*, Issue n. 3, 2019, 2-5.

types, based on their design: (i) tokenised funds; (ii) off-chain collateralised stablecoins; (iii) on-chain collateralised stablecoins; and (iv) algorithmic stablecoins.<sup>13</sup> This section intends a general approach on the legal nature of cryptocurrencies, whereas in section 4 stablecoins as regulated under MiCA Regulation proposal are analysed.<sup>14</sup>

Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, was the first piece of European legislation that gave a concept of virtual currencies. It added a point 18 in article 3 of Directive (UE) 2015/849 that «for the purpose of this Directive» defined virtual currencies as «a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status of currency or money, but is accepted by natural or legal persons as a means of exchange and which can be transferred, stored and traded electronically»<sup>15</sup>. This definition is clearly intended to distinguish a “virtual currency” from the currency issued by a State, hence the former does not possess the legal status of money.<sup>16</sup>

<sup>13</sup> ECB CRYPTO-ASSETS TASK FORCE, *Stablecoins: Implications for monetary policy, financial stability, market infrastructure and payments, and banking supervision in the euro area*, cit., 7.

<sup>14</sup> On an analysis of the nature of stablecoins before MiCA see AVGOULEAS - BLAIR, *The concept of money in the 4<sup>th</sup> Industrial revolution – A legal and economic analysis*, in *Singapore Journal of Legal Studies*, 2020, 23 ss.

<sup>15</sup> Directive (EU) 2018/843 has been transposed to the Italian legal system by Decreto Legislativo 4 ottobre 2019, n. 125, although Decreto Legislativo 25 maggio 2017, n. 90 already established almost the exact same definition: «valuta virtuale: la rappresentazione digitale di valore, non emessa da una banca centrale o da un'autorita' pubblica, non necessariamente collegata a una valuta avente corso legale, utilizzata come mezzo di scambio per l'acquisto di beni e servizi e trasferita, archiviata e negoziata elettronicamente». By the time the Directive should be transposed, there was not a legal definition of virtual currency in Spanish legislation. The Real Decreto-ley 7/2021, de 27 de abril, de transposición de directivas de la Unión Europea en las materias de competencia, prevención del blanqueo de capitales, entidades de crédito, telecomunicaciones, medidas tributarias, prevención y reparación de daños medioambientales, desplazamiento de trabajadores en la prestación de servicios transnacionales y defensa de los consumidores, which is the national law that transposed Directive (EU) 2018/843, was the first law that included a legal concept of virtual currency.

<sup>16</sup> AVGOULEAS - BLAIR, *The concept of money in the 4<sup>th</sup> Industrial revolution – A legal and economic analysis*, in *Singapore Journal of Legal Studies*, 2020, 30. Considering how electronic money tokens are regulated under the MiCA Regulation Proposal, these authors rightly predicted that «the 5MLD definition appears to leave open the possibility that a “stable coin” which is “necessarily attached” to a “legally established currency” should be treated as “money”».

Although this definition has helped to analyse the legal nature of virtual currencies, there is not yet agreement among academics, whose categorisations have ranged from the qualification of cryptocurrencies as securities, through their definition as digital, non-fungible movable property, to finally their consideration as currency or means of payment which, at present, seem to be the most spread one (and actually the one embedded in the Directive).<sup>17</sup> The conception of cryptocurrencies as a means of exchange was firstly introduce with binding force by the Judgment of the CJEU of 22 October 2015, *Skatteverket v David Hedqvist* (Case C-264/14)<sup>18</sup> in which it was conclude that, for VAT purposes, bitcoin is a digital currency and to that extent it constitutes a means of payment, as it can be used in a similar way to legal means of payment.

Despite this first attempt to define virtual currencies based on its function of means of payment, as it is said in Recital 10 of Directive (EU) 2018/843, «they could also be used for other purposes and find broader applications such as means of exchange, investment, store-of-value products or use in online casinos». Actually, it must be stressed that most crypto-assets are hybrids so they have elements from more than one type of token (payment, utility, investment), leaving uncertainty for users, issuers as well as regulators.<sup>19</sup> This fact poses major challenges from a regulatory perspective. Especially considering that one of the main principles that should inspire EU financial legislation is the principle of «same activity, same risk, same rules».<sup>20</sup>

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<sup>17</sup> PASTOR, *La digitalización del dinero y los pagos en la economía de mercado digital pos-COVID*, in *Ekonomiaz* No. 98, 2020, 306.

<sup>18</sup> ECLI:EU:C:2015:718.

<sup>19</sup> KÖNIG, *The Future of Crypto-Assets within the European Union – An Analysis of the European Commission's Proposal for a Regulation on Markets in Crypto-Assets*, cit., 13, 19. HACKER - THOMALE, *Crypto-Securities Regulation: ICOs, Token Sales and Cryptocurrencies under EU Financial Law*, cit., 678 ss. ZETZSCHE - ANNUNZIATA - ARNER - BUCKLEY, *The Markets in Crypto-Assets Regulation (MICA) and the EU Digital Finance Strategy*, *EBI Working Paper Series No. 77*, 2020, 7. AVGOULEAS - BLAIR, *The concept of money in the 4<sup>th</sup> Industrial revolution – A legal and economic analysis*, in *Singapore Journal of Legal Studies*, 2020, 14.

<sup>20</sup> That is to say that EU financial regulations focuses on the economic functions rather than other elements, such as certain technologies (ZETZSCHE - ANNUNZIATA - ARNER - BUCKLEY, *The Markets in Crypto-Assets Regulation (MICA) and the EU Digital Finance Strategy*, *EBI Working Paper Series No. 77*, 2020, 4). When talking about Global Stablecoins, The Financial Stability Board also stressed that authorities should ensure this principle, which implies applying «the relevant regulation, standards and rules for e-money issuers, remittance companies, payments and financial market infrastructures, collective investment schemes, and deposit-taking and securities trading activities. This also includes market integrity, consumer and investor protection arrangements, appropriate safeguards, such as pre- and post-trade

Currently, European markets seem to prefer crypto-assets, including virtual currencies, as a means of investment rather than one of payments. But this could easily change in the middle term, namely due to stablecoins.<sup>21</sup> In any case, approaching cryptocurrencies as a means of payment and naming them as currencies, raises a very important question: are they money somehow? In this section it is explained why cryptocurrencies in general cannot be considered money, both from an economic and legal perspective.

Economically speaking, money has three fundamental functions: it serves as a means of payment, as a unit of account and as a store of value. As a means of payment it facilitates the exchange of goods and services, and to do so it must be widely accepted. As a unit of account, it simplifies the pricing of exchange, facilitating transactions. As a store of value, it implies that the acquisitive power emanating from its ownership (as a recognised and generally accepted means of exchange and unit of account) is relatively stable over time. At the moment, the prevailing view is that cryptocurrencies do not

transparency obligations, rules on conflicts of interest, disclosure requirements, robust systems and controls for platforms where the GSC is traded, and rules that allocate responsibility in the event of unauthorized transactions and fraud, and rules governing the irrevocability of a transfer orders (“settlement finality”))» FINANCIAL STABILITY BOARD. *Addressing the regulatory, supervisory and oversight challenges raised by “global stablecoin” arrangements (consultative document)*, 2020, 27. The MiCA Regulation Proposal is considered to follow this principle, see KÖNIG, *The Future of Crypto-Assets within the European Union – An Analysis of the European Commission’s Proposal for a Regulation on Markets in Crypto-Assets*, cit., 17. CANALEJAS, *Algunas cuestiones en torno a la propuesta de la Comisión europea sobre los mercados de criptoactivos (MiCA) (I)*, in *Revista de Derecho del Mercado de Valores*, nº 27, 2020, 2. DE MIGUEL, *Propuesta de Reglamento sobre los mercados de criptoactivos en la Unión Europea*, in *La Ley Unión Europea No. 85*, 2020, 2.

<sup>21</sup> ECB Crypto-Assets Task Force, *Stablecoins: Implications for monetary policy, financial stability, market infrastructure and payments, and banking supervision in the euro area*, cit., 17. In line with the previous ideas and regarding stablecoins, ECB said that «Stablecoin arrangements should be subject to relevant regulation, oversight, and supervision across all relevant functions. Efforts are underway in the EU to examine the applicability of existing rules and evaluate the need for new legislation as appropriate. These efforts should prioritise substance over form and apply the same rules to all activities that give rise to the same risks, irrespective of the technologies used or the type of service provider/operator. Furthermore, regulation, oversight and supervision should cover all relevant functions comprising a stablecoin ecosystem, including those that are not governed by a stablecoin’s issuer or scheme manager. Finally, given the cross-border nature of stablecoin arrangements, international coordination is crucial to ensure consistency and prevent regulatory arbitrage». ECB Crypto-Assets Task Force, *Stablecoins: Implications for monetary policy, financial stability, market infrastructure and payments, and banking supervision in the euro area*, cit., 10.

fulfil these three functions<sup>22</sup>, even the most widespread ones. Firstly, because their value is so volatile that they are of little use as a unit of account or store of value. Secondly, decentralised issuance means that there is no entity backing the asset, so acceptance is based entirely on holder's trust and is not always generalised, what limits their use as a means of exchange<sup>23</sup>. As a general rule, only fiat money fulfils these three functions, since it is guaranteed by its respective State so the possibility of losing its functionalities is bounded. Nevertheless, the speed of technological innovations calls for caution. The possibility that some crypto-assets may end up being widely adopted and fulfil more of the functions of money should not be categorically ruled out<sup>24</sup>. That is actually the concern with stablecoins and the reason why MiCA Regulation proposal regulates them<sup>25</sup>.

From a legal perspective, not much effort is needed to affirm that cryptocurrencies are not legal tender, therefore they are not money in the legal sense since they have not been declared as such by any Member State in the EU.<sup>26</sup> Any currency which is legal tender has two main characteristics: it is accepted at face value and its acceptance is compulsory so it releases the debtor from its payment obligation. According to the European Banking Authority Report on crypto-assets, although it would be theoretically possible for a virtual currency to be declared legal tender in any country,<sup>27</sup> in the EU this will require to amend the Treaty on the Functioning of the European Union, that establishes the legal tender of the Euro and gives the ECB the exclusive power to authorise the issue of coins and banknotes (article 128)<sup>28</sup>.

Once it is clear that cryptocurrencies are not money from a legal

<sup>22</sup> INGRES, *Going cashless*, in *Finance & Development*, vol. 55, nº 2, 2018, 12. JAMES, *Lucre's allure*, in *Finance & Development*, vol. 55, No 2, 2018, 18. AVGOULEAS - BLAIR, *The concept of money in the 4<sup>th</sup> Industrial revolution – A legal and economic analysis*, in *Singapore Journal of Legal Studies*, 2020, 13.

<sup>23</sup> BOUVERET - HAKSAR, *What are cryptocurrencies?*, *Finance & Development*, vol. 55, No 2, 2018, 27.

<sup>24</sup> HE, *Monetary policy in the digital age*, in *Finance & Development*, vol. 55, no. 2, 2018, 14.

<sup>25</sup> MiCA Regulation proposal's explanatory memorandum, 2, and Recitals 4 and 25.

<sup>26</sup> PASTOR, *La digitalización del dinero y los pagos en la economía de mercado digital pos-COVID*, cit., 313.

<sup>27</sup> e.g. On the 8<sup>th</sup> of June 2022, El Salvador recognised Bitcoin as legal tender (<https://www.asamblea.gob.sv/sites/default/files/documents/dictamenes/27F0BD6F-3CEC-4F52-8287-432FB35AC475.pdf>) On the contrary, China declared all crypto-asset transactions illegal on the 24<sup>th</sup> of September 2022 (<https://www.reuters.com/world/china/china-central-bank-vows-crackdown-cryptocurrency-trading-2021-09-24/>)

<sup>28</sup> EUROPEAN BANKING AUTHORITY, *Report with advice for the European Commission on crypto-assets*, Paris, 2019, 13.

perspective, the remaining issue is whether they can be somehow considered electronic money. According to article 2.2 EMD2 electronic money means «electronically, including magnetically, stored monetary value as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions as defined in point 5 of Article 4 of Directive 2007/64/EC, and which is accepted by a natural or legal person other than the electronic money issuer»<sup>29</sup>. Generally speaking, it has been concluded that cryptocurrencies are not electronic money either, as they usually do not represent a claim on the issuer. However, it should be stressed that there may be cases where all the elements of the legal definition of e-money are met, depending on the specific characteristics of the DLT network where the cryptocurrency is issued and transferred and those of the token itself. In its report, the EBA listed concrete examples provided by some Members States competent authorities where they had considered that a cryptocurrency fell under the EMD2's scope. For instance, a company that wished to create a Blockchain-based payment network, set up as an open network in which both merchants and consumers can participate, where the token, which was intended to be the means of payment in the network, was issued on the receipt of fiat currency at par value, and there was a right to redemption at any time. In this case, the competent authority's analysis concluded that the token was electronically stored, had monetary value, represented a claim on the issuer, was issued on receipt of funds; it was issued for the purpose of making payment transactions and it was accepted by persons other than the issuer. Therefore, this specific token satisfied the definition of electronic money under the EMD2, so its issuance required an authorisation of the issuer as an electronic money institution<sup>30</sup>. That being said, it is to be noted that most of the crypto-assets that qualify as payment tokens will fall outside the scope of EMD2, since it is very narrow.<sup>31</sup>

Referring to cryptocurrencies as a means of payment also pose the question whether PSD2 is applicable or not. Without prejudice to deeper analysis in section 4 regarding stablecoins, it should be noted now that PSD2 does not provide a definition of means of payment. The Directive uses the term in an

<sup>29</sup> Directive 2007/64/EC is the First Directive on Payment Services (PSD1). All PSD1 references in EMD2 shall be construed as references being made to the corresponding provisions of PSD2. In this case, payment transaction is identically defined in article 4.25 PSD2.

<sup>30</sup> EUROPEAN BANKING AUTHORITY, *Report with advice for the European Commission on crypto-assets*, Paris, 2019, 13.

<sup>31</sup> KÖNIG, *The Future of Crypto-Assets within the European Union – An Analysis of the European Commission's Proposal for a Regulation on Markets in Crypto-Assets*, cit., 27.

*ad hoc* and somewhat confusing way, either as analogous to «payment instrument» or to «payment service», and it does so to avoid excessive repetition rather than for substantive reasons. For instance, Recital 6 uses «means of payment» and «payment services» interchangeably when stating «[e]quivalent operating conditions should be guaranteed, to existing and new players on the market, enabling new means of payment to reach a broader market...». On the other hand, article 96.6 uses that term equivalently to «payment instrument»<sup>32</sup> when saying «Member States shall ensure that payment service providers provide, at least on an annual basis, statistical data on fraud relating to different means of payment to their competent authorities». In any case, as cryptocurrencies tend to be compared with currencies which are legal tender, it is vital to know what is the definition of funds. Article 4.25 PSD2 says they are «banknotes and coins, scriptural money or electronic money as defined in point (2) of Article 2 of Directive 2009/110/EC», so more often than not, crypto-currencies are not funds, with the exception of those that qualify as electronic money.

In this respect, Recital 10 of Directive (EU) 2018/843 explicitly states that «[v]irtual currencies should not to be confused with electronic money as defined in point (2) of Article 2 of Directive 2009/110/EC of the European Parliament and of the Council, with the larger concept of ‘funds’ as defined in point (25) of Article 4 of Directive (EU) 2015/2366 of the European Parliament and of the Council, nor with monetary value stored on instruments exempted as specified in points (k) and (l) of Article 3 of Directive (EU) 2015/2366, nor with in-games currencies, that can be used exclusively within a specific game environment...». Cryptocurrencies are not deposits either, hence they do not benefit from protection on deposit guarantee schemes, since Directive 2014/49/EU is not applicable, but neither they are segregation rules under the EMD2 or the PSD2 (unless the specific cryptocurrency is considered electronic money)<sup>33</sup>.

It has also been rightly pointed out that a cryptocurrency DLT network usually works as a payment system, since it is «a value transfer system where the flow of monetary assets is denominated in a private currency»<sup>34</sup>. Payment systems are defined in article 4.7 PSD2 as a «funds transfer system with formal and standardised arrangements and common rules for the processing,

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<sup>32</sup> In line with the definition provided by point 14 of article 4 PSD2.

<sup>33</sup> EUROPEAN BANKING AUTHORITY, *Report with advice for the European Commission on crypto-assets*, Paris, 2019, 28.

<sup>34</sup> CATTELAN - GIMIGLIANO, *Digital currency schemes: more or less sustainable? Limits to growth and electronification of money in Europe*, in *Ianus. Diritto e Finanza*, no. 21, 2020, 34.

clearing and/or settlement of payment transactions». Although the function of a cryptocurrency DLT network is obviously comparable to the function of a traditional payment system, the former cannot be legally considered a payment system in the EU under PSD2, since cryptocurrencies do not meet the definition of funds.

All these points considered it can be concluded that cryptocurrencies do not have a univocal legal nature so far. Each particular case needs to be analysed, since its nature will depend on the specific characteristics of the cryptocurrency, that could be technologically and legally designed in various ways. There is a need to bear in mind that the purpose of the token should be an essential element to determine its legal nature, and therefore, where appropriate, its legal regime. But also it is important to be aware of the fact that the purpose of the token may change throughout its life-cycle, which is exactly what happened to Bitcoin.<sup>35</sup> This pose a major challenge from a legislative perspective and MiCA Regulation proposal is the first attempt to address it.

That being said, section 3 aims to provide an overview of the proposal, so stablecoins (which are a particular kind of cryptocurrencies) covered by MiCA Regulation proposal can be analysed in depth afterwards.

### **3. A first approach to the MiCA Regulation proposal**

#### **3.1. General layout, subject matter and scope.**

The MiCA Regulation proposal starts with 79 recitals that show the complexity of the matter, which is obviously exacerbated by its novelty and by the emerging status of this fast-growing market.<sup>36</sup> The enacting part is divided in nine titles. Title I (articles 1 to 3) sets the subject matter, the scope and the definitions. Title II (articles 4 to 14) regulates the offerings and marketing to the public of crypto-assets other than asset-referenced tokens and e-money tokens. It is not a restricted activity to specific types of entities, but it needs to comply with the requirements set out in this title, essentially,

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<sup>35</sup> KÖNIG, *The Future of Crypto-Assets within the European Union – An Analysis of the European Commission’s Proposal for a Regulation on Markets in Crypto-Assets*, cit., 19. ZETZSCHE - ANNUNZIATA - ARNER - BUCKLEY, *The Markets in Crypto-Assets Regulation (MiCA) and the EU Digital Finance Strategy*, EBI Working Paper Series No. 77, 2020, 8. FINANCIAL STABILITY BOARD. *Addressing the regulatory, supervisory and oversight challenges raised by “global stablecoin” arrangements (consultative document)*, cit. 6.

<sup>36</sup> MARTÍ, *Aproximación a la propuesta de Reglamento UE relativo a los mercados de criptoactivos: Mica*, cit., 10.

regarding to the drafting of a crypto-asset white paper. Title III (articles 15 to 41) concerns asset-referenced tokens and is likewise divided in six chapters. Again, the issuer of asset-referenced tokens does not require to be a specific kind of financial institution but the offer of such tokens to the public need to be authorised by competent authorities. Seeking an admission of such assets to trading on a trading platform for crypto-assets, also has a need for authorisation. The legal regime of this type of crypto-assets is well developed as this title regulates, apart from the issuing: the obligations for the issuers, including, the obligation to have reserve assets, their composition, management, custody, investment and the holders' rights on issuers or on the reserve assets, as well as the prohibition of interest; also, the rules for the acquisition of issuers of asset-referenced tokens; the regime of significant asset-referenced tokens; and some rules on the orderly wind-down of issuers of asset-referenced activities. Title IV (articles 43 to 52) regulates electronic money tokens, which can only be issued by electronic money institutions or credit institutions, and may also be classified as significant. Title V (articles 53 to 75) has four chapters setting out the provisions on authorisation and operating conditions of crypto-asset service providers (hereinafter, CASP). Title VI (articles 76 to 80) puts in place prohibitions and requirements to prevent market abuse involving crypto-assets. Title VII (articles 81 to 120) sets out a complex supervisory regime. Finally, title VIII (article 121) enables European Commission to adopt delegated acts, and Title IX (articles 122 to 126) includes the transitional and final provisions.

In line with the objectives set out in the explanatory memorandum, the proposal aims to regulate the transparency and disclosure requirements for the issuance and admission to trading of crypto-assets; the rules for the authorisation and supervision of crypto-asset service providers and issuers of asset-referenced tokens and electronic money tokens; the operation, organisation and governance of such companies; consumer protection rules and measures to prevent market abuse (article 1 MiCA Regulation proposal).

According to article 2.1 MiCA Regulation proposal, it shall apply to any person that either issues crypto-assets or provides any services related to them in the Union. So first of all, it needs to be determined what a crypto-asset is. It is defined in article 3.1.2 as «a digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology».<sup>37</sup> But the proposal itself distinguishes between different

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<sup>37</sup> Article 3.3.1 MiCA Regulation Proposal defines DLT as «a type of technology that support the distributed recording of encrypted data». This approach was heavily criticized in the consultation process, so it is expected to be revised. For an in-depth explanation please see

types of crypto-assets: asset-referenced tokens, electronic money tokens, and all the crypto-assets other than those two. It is a much more general concept<sup>38</sup> than the established in Directive (EU) 2018/843, in coherence with the actual evolution of the market towards the proliferation of diverse types of crypto-assets with various uses, what dictates the need of a wider regulation. However, it has been pointed out that such a broad definition could lead to diverging interpretations at national level and therefore, it would be preferable to further clarify the scope of application of MiCA Regulation proposal<sup>39</sup>.

As for what the issuance of crypto-assets is<sup>40</sup>, in accordance with the definition of crypto-asset issuer set in article 3.1.6, it is the activity consisting of the offering to the public of any type of crypto-assets or the application for their admission of such crypto-assets to a trading platform. On the other hand, the services related to crypto-assets under the scope of the proposal are the ones established in article 3.9: the custody and administration of crypto-assets on behalf of third parties; the operation of a trading platform for crypto-assets; the exchange of crypto-assets for fiat currency that is legal tender; the exchange of crypto-assets for other crypto-assets; the execution of orders for crypto-assets on behalf of third parties; the placing of crypto-assets; the reception and transmission of orders for crypto-assets on behalf of third parties; and providing advice on crypto-assets. All of these services are defined in article 3, though for present purposes it is not necessary to go over every of them but just to focus on three of them. Firstly, article 3.10 MiCA Regulation proposal defines the custody and administration of crypto-assets on behalf of third parties as the «safekeeping or controlling, on behalf of third parties, crypto-assets or the means of access to such crypto-assets, where applicable in the form of private cryptographic keys; the exchange of crypto-

KÖNIG, *The Future of Crypto-Assets within the European Union – An Analysis of the European Commission’s Proposal for a Regulation on Markets in Crypto-Assets*, cit., 31 ss.

<sup>38</sup> Academics refer to it as a «catch-all definition». KÖNIG, *The Future of Crypto-Assets within the European Union – An Analysis of the European Commission’s Proposal for a Regulation on Markets in Crypto-Assets*, cit., 34. CANALEJAS, *Algunas cuestiones en torno a la propuesta de la Comisión europea sobre los mercados de criptoactivos (MiCA) (I)*, in *Revista de Derecho del Mercado de Valores*, nº 27, 2020, 2. MARTÍ, *Aproximación a la propuesta de Reglamento UE relativo a los mercados de criptoactivos: Mica*, cit., 2.

<sup>39</sup> EUROPEAN CENTRAL BANK, *Opinion of 19 February 2021 on proposal for a regulation on Markets in Crypto-assets, and amending Directive (EU) 2019/1937*, (CON/2021/4), 2.

<sup>40</sup> Both the definition of issuer and the lack of definition of issuance have been criticised by academics, ZETZSCHE - ANNUNZIATA - ARNER - BUCKLEY, *The Markets in Crypto-Assets Regulation (MICA) and the EU Digital Finance Strategy*, EBI Working Paper Series No. 77, 2020, 24 ss. KÖNIG, *The Future of Crypto-Assets within the European Union – An Analysis of the European Commission’s Proposal for a Regulation on Markets in Crypto-Assets*, cit., 40.

assets for fiat currency that is legal tender». Secondly, the concept of the exchange of crypto-assets for fiat currency is established in article 3.12 and means «concluding purchase or sale contracts concerning crypto-assets with third parties against fiat currency that is legal tender by using proprietary capital». The third and last concept of interest is the execution of orders for crypto-assets on behalf of third parties, which according to article 3.14 means «concluding agreements to buy or to sell one or more crypto-assets or to subscribe for one or more crypto-assets on behalf of third parties». We will get back to these notions whenever the connexion between MiCA Regulation proposal and PSD2 is analysed in relation to the services provided in asset-referenced tokens and electronic money tokens. In any case, it should be pointed out that those services shall only be provided by legal persons that have been authorised as CASPs in accordance with articles 53 to 55 MiCA Regulation proposal.

Last but not least, point 3 of article 2 modulates the general demarcation of the proposal's scope set out in point 1 by excluding those crypto-assets that qualify under European legislation as: regulated financial instruments<sup>41</sup>, electronic money (except where they qualify as electronic money tokens); deposits; structures deposits or securitisation. Likewise point 4 establish some subjective exclusions, thus the MiCA Regulation shall not apply, among others, to the European Central Bank or any other central bank of a Member State when acting as a public authority; so, in case any of them finally decide to issue their own Central Bank Digital Currency (CBDC) it would not fall under the scope of this Regulation. Finally, points 5 and 6 of article 3 dispose that credit entities and investment firms authorised under the relevant European legislation shall not be subject to most of the rules about authorisation of crypto-asset service providers.

### **3.2. Regulated crypto-assets and their use as a means of payment**

Once the MiCA Regulation proposal has been introduced, it is time to focus on the specific types of crypto-assets under the proposal that are foreseen to be used as a means of payment.

In theory, any kind of crypto-asset could be used as a medium of exchange,

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<sup>41</sup> Nevertheless, this is precisely one of the aspects that ECB insists on elaborate on, since the distinction between crypto-assets that may be characterised as financial instruments and those which would fall under the scope of the MiCA Regulation proposal does not seem clear enough (EUROPEAN CENTRAL BANK, *Opinion of 19 February 2021 on proposal for a regulation on Markets in Crypto-assets*, cit., 3).

just like any other good or asset/right.<sup>42</sup> Even if it would not make much sense, a baker could accept that a customer pays its bread with movie tickets or gold nuggets. Although that affirmation could arise the legal argument about the nature of that transaction: would it be the payment of a purchase or rather a swap agreement? In any event, among the subcategories of crypto-assets covered by the MiCA Regulation proposal there are two in particular that are intended primarily as a means of payment, to a greater or lesser extent: the asset-referenced tokens and the electronic money tokens.

An asset-referenced token is defined in point 3 of article 3 as «a type of crypto-asset that purports to maintain a stable value by referring to the value of several fiat currencies that are legal tender, one or several commodities or one or several crypto-assets, or a combination of such assets»<sup>43</sup>. This category would apply to stablecoins which are not pegged to a fiat currency and, importantly, which do not qualify as financial instruments.<sup>44</sup> Recital 9 foresees that the purpose of their value stabilisation is often to be used by their holders as a means of payment to buy goods and services and as a store of value. In the event of asset-referenced tokens becoming widely adopted by users to transfer value or as a means of payments they could pose «increased risks in terms of consumer protection and market integrity compared to other crypto-assets»<sup>45</sup>. That is the reason why issuers of such tokens are subject to stricter requirements than other types of crypto-assets issuers, especially regarding the management and investment of reserve assets, which should be invested in secure, low risk assets with minimal market and credit risk. Furthermore, considering the potential use of this tokens as a means of payment, their issuers should bear with the profits or losses resulting from those investments<sup>46</sup>.

On the other hand, an electronic money token (or e-money token) is «a type of crypto-asset the main purpose of which is to be used as a means of exchange and that purports to maintain a stable value by referring to the value of a fiat currency that is legal tender» (point 4 of article 3). The definition itself states

<sup>42</sup> MADRID, *Fichas de dinero electrónico*, in MADRID (ed.) *Guía de criptoactivos MiCA*, Cizur Menor, 2021, 2.

<sup>43</sup> As explained in Recital 26, according to this definition «algorithmic stablecoins» should not be considered as asset-referenced tokens.

<sup>44</sup> TOKEN ALLIANCE, *Legal Landscapes Governing Digital Tokens in the European Union*, 2021, 28 (available at: <https://4actl02jlq5u2o7ouq1ymaad-wpengine.netdna-ssl.com/wp-content/uploads/2021/05/Legal-Landscapes-Governing-Digital-Tokens-in-the-European-Union.pdf>)

<sup>45</sup> Recital 25 MiCA Regulation proposal.

<sup>46</sup> See Recital 39 and article 34.3 MiCA Regulation Proposal.

that an e-money token is designed for the purpose of interchange, so it is a means of payment by nature. Clearly, it has many similarities with electronic money regulated by EMD2, predominantly its function: both «are electronic surrogates for coins and banknotes and are used for making payments»<sup>47</sup>. However, they also have some important differences. The definition provided by article 2.2 EMD2<sup>48</sup> already reveals some important dissimilarities. First, holders of electronic money are always provided with a claim on the electronic money institution, but also, in accordance with article 11 EMD, they have a contractual right to redemption against fiat currency, at any time and at par value. Although, according to article 6.3 EMD, the e-money redeemability does not imply that the funds received in exchange for electronic money should be regarded as deposits. On the contrary, most of the current crypto-assets referred to a single fiat currency which is legal tender do not provide their holders with such a claim on the issuers or, even if they do, it is not at par or the redemption period is limited<sup>49</sup>. Confidence of users could be undermined considering that the vast majority of these crypto-assets fall outside the scope of EMD2.

When assessing the impact of the MiCA proposal it was considered whether it was better to enact a specific regulation for stablecoins, regulate them under the EMD2 or restrict the issuance and the provision of services related to stablecoins within the EU. Obviously, the last option was not consistent with the major objective of promoting innovation and situating the EU at the forefront of digital and modern finances, so it was promptly discarded. It was also concluded that requiring stablecoins' issuers to comply only with existing legislation, namely the EMD2 and the PSD2, could not be the best option as those directives might not mitigate adequately the most significant risks to consumer protection, for example, those raised by wallet providers. However, this second alternative was still valid to some extent so, as there were doubts between enacting a specific regulation or regulating them under existing legislation, the MiCA Regulation proposal has ended up being a combination of both options. On one hand, it is a specific regulation that follows a risk-based approach trying to address vulnerabilities to financial stability posed by stablecoins, as well as the challenges in terms of consumer protection and market integrity specific to crypto-assets, while allowing for the development of different types of stablecoin business model. But also, as it is explained later on this paper, e-money tokens will be subject to EMD2

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<sup>47</sup> Recital 9 MiCA Regulation Proposal.

<sup>48</sup> Transcribed in section 2 of this paper.

<sup>49</sup> Recital 10 MiCA Regulation Proposal.

and might even be subject to PSD2, so hopefully, there will be no regulatory arbitrage between stablecoins and e-money.

Considering the definitions of both sub-categories of crypto-assets and the functions of money «the ECB understands that the terms asset-referenced tokens and e-money tokens are defined in the proposed regulation, in whole or in part, as money substitutes»<sup>50</sup>. In regard to asset-referenced tokens, it seems to the ECB that the store of value function is its main one, since the definition is based primarily on the value stabilisation, whereas the definition of e-money token refers to both the medium of exchange and store of value functions. However, Recital 9 explicitly says that the aim of the asset-referenced tokens value stabilisation is often to be used both as a means of payment and as a store of value; while Recital 41 justify the prohibition of interests to «ensure that asset-referenced tokens are mainly used as a means of exchange and not as a store of value». In any case, as asset-referenced tokens are regulated under MiCA Regulation proposal it is to be seen what is the main use preferred by holders: as a means of payment or as a low risk investment medium.<sup>51</sup> Despite of this doubt, the point is that a broad use of these two kinds of stablecoins could have important implications on the monetary policy transmission.<sup>52</sup>

Articles 36 and 45 MiCA Regulation proposal state that neither issuers nor CASPs shall grant interest or any other benefit related to the length of time the asset-referenced tokens or the e-money tokens are held. In ECB's opinion, this prohibition might affect financial stability and hinder monetary policy transmission, since user's preference for these tokens instead of deposits may depend on the interest rate environment. That could potentially lead to an affection on the stability and cost of credit institutions' deposit funding and

<sup>50</sup> EUROPEAN CENTRAL BANK, *Opinion of 19 February 2021 on proposal for a regulation on Markets in Crypto-assets*, cit., 2. Especially in case some redemption rights are granted. The possibility to easily convert the crypto-assets into banknotes or scriptural money ensures the users' confidence of such instruments as effective and reliable substitutes for banknotes and coins (CANALEJAS, *Algunas cuestiones en torno a la propuesta de la Comisión europea sobre los mercados de criptoactivos (MiCA) (1)*, in *Revista de Derecho del Mercado de Valores*, nº 27, 2020, 10).

<sup>51</sup> AVGOULEAS and BLAIR (2020) rightly pointed out (before MiCA was proposed) that «Money-like instruments created with the aid of new technology have, in some cases, blurred the boundaries between money and investment».

<sup>52</sup> CANALEJAS, *Algunas cuestiones en torno a la propuesta de la Comisión europea sobre los mercados de criptoactivos (MiCA) (1)*, in *Revista de Derecho del Mercado de Valores*, nº 27, 2020, 6.

lending capacity<sup>53</sup>. Despite these macroeconomic challenges that have been pointed out, the ECB does not make any concrete suggestions. Sooner or later, some of these potential effects might be inevitable since financial markets will keep evolving, with or without institutional endorsement. Though in the short term, the specific provisions regarding the classification of asset-referenced and electronic money tokens as significant, which subject them to more stringent requirements than non-significant tokens<sup>54</sup>, might be enough to keep the market transformation under control.

#### **4. The applicability of the existing European payments legislation to stablecoins under MiCA Regulation proposal**

This section aims to analyse in depth whether the MiCA Regulation proposal is coherent with the current European payments legislation for what the interplay between this proposal, the PSD2 and the EMD2 is studied. In the first place, the general applicability of these two Directives is briefly explained. So afterwards the links between them and the asset-referenced and e-money tokens regulation can be easily understood, hence it is possible to evaluate the consistence of the potential legal framework for electronic payments in the EU, as all these rules stand now. Since the PSD2 is about to be reviewed and the MiCA Regulation proposal can be amended until it is finally adopted, any conclusions reached may offer useful ideas for shaping a consistent regime.

##### **4.1. General scope of PSD2 and EMD**

The subject matter of the PSD2 is to regulate which entities can legally be payment services providers (hereinafter, PSP), to set rules concerning transparency and information requirements of payment services, and also the respective rights and obligations of payment service users and PSPs in relation to the provision of these services as a regular occupation or business activity.

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<sup>53</sup> EUROPEAN CENTRAL BANK, *Opinion of 19 February 2021 on proposal for a regulation on Markets in Crypto-assets*, cit., 3.

<sup>54</sup> See articles 39 to 41 for significant asset-referenced tokens, articles 50 to 52 for significant electronic money tokens. For both, ZETZSCHE - ANNUNZIATA - ARNER - BUCKLEY, *The Markets in Crypto-Assets Regulation (MiCA) and the EU Digital Finance Strategy*, EBI Working Paper Series No. 77, 2020, 17. Regarding significant e-money tokens MADRID, *Fichas de dinero electrónico*, cit., 7 ss.

The first point that needs to be addressed is the subjective scope set in article 1.1 PSD2. The entities allowed to provide payment services are: credit institutions, electronic money institutions, post office giro institutions which are entitled under national law to do so, payment institutions, and also the ECB, national central banks and any national, regional or local authorities when not acting in their capacity as public authorities. As it is a closed list, article 37 PSD2 forbids to any other person other than these to offer and provide payment services. But what are the payment services covered by PSD2? There is not a concept *per se* but a list. Article 4.3 PSD2 says that payment service is any business activity set out in Annex I, that lists the following: services enabling cash to be placed on a payment account, those that enable cash withdrawals from a payment account, as well as all the operations required for operating a payment account (points 1 to 3); the execution of payment transactions from or to a payment account, even if the funds are covered by a credit line, what includes the execution of direct debits, the execution of payment transactions through a payment card or a similar device and the execution of credit transfers (points 3 and 4); the issuing of payment instruments and the acquiring of payment transactions (point 5); money remittance (point 6); payment initiation services and account information services (points 7 and 8). All of these services, differing greatly from each other, are defined in article 4 PSD2. Some of them are of particular interest considering the topic of this paper.

A payment transaction is an act of placing, transferring or withdrawing funds that can be initiated either by the payer or the payee and it is independent of any underlying obligations between users (article 4, point 5). Therefore, a payment order is the actual instruction by either of the users (depending on the type of service, e.g. transfer or direct debit) to its payment service provider requesting the execution of a payment transaction (point 13). There is a number of services (all, except payment initiation services and account information services) that one way or another imply the actual transfer of funds. How the payment order is instructed, by who and the transaction's technical procedure is what differentiate each service. Although is not the intent of this paper to deepen in theory of payment services, some hints are useful.

With the exception of the money remittance service (and, of course, those services which do not imply the flow of funds), all the payment services require a payment account as defined in article 4, point 25: an account held in the name of one or more payment service users which is used for the execution of payment transactions, so the provider that maintains that account is called account servicing payment service provider. The nonnecessity of a payment account is what characterise the money remittance service as it is the one

«where funds are received from a payer, without any payment accounts being created in the name of the payer or the payee, for the sole purpose of transferring a corresponding amount to a payee or to another payment service provider acting on behalf of the payee, and/or where such funds are received on behalf of and made available to the payee». On the contrary, according to article 4, point 24, a credit transfer is the service where the payer gives the instruction to its account servicing payment service provider to credit a certain amount to a payee's payment account (which is obviously debited from the payer's payment account).

But some transfers of funds, besides a payment account (two of them, to be precise), imply the use of a payment instrument in the sense of article 4, point 14: «a personalised device(s) and/or set of procedures agreed between the payment service user and the payment service provider and used in order to initiate a payment order». So there is a need of a previous service and contract which is the issuing of payment instruments (point 45) where the PSP supplies a payment instrument to the payer to initiate payment transactions and undertakes to process them. On the other end of the payment chain, in relation with the payee, there needs to be provided another service: the acquiring of payment transactions which, in accordance to article 4, point 44, is the service where the payee's PSP commits to accept and process payment transactions, which results in a transfer of funds to the payee.

To complete this brief overview of the general objective scope, article 3 establishes some explicit exclusions related to cash money (letters a to f); cheques and paper-based drafts, vouchers, traveller's cheques and postal money orders (letter g); payment transactions carried out within a payment or securities settlement system between settlement agents, central counterparties, clearing houses and/or central banks and other participants of the system, and payment service providers (letter h); payment transactions related to securities asset servicing (letter i); payment transactions by a provider of electronic communications networks or services provided in addition to electronic communications services within quantitative limits to the exclusion (letter l); payment transactions carried out between payment service providers, their agents or branches for their own account (letter m); payment transactions and related services between a parent undertaking and its subsidiary or between subsidiaries of the same parent undertaking, without any intermediary intervention by a payment service provider other than an undertaking belonging to the same group (letter n); and very specific cash withdrawal services offered by means of ATM by providers, acting on behalf of one or more card issuers, which are not a party to the framework contract with the customer (letter o). There are two more exclusions, set out in letters j and k,

that could be important to determine whether PSD2 should be applied to some DLT networks. Although this aspect is not deeply examined in this paper, it is interesting to briefly mention them. Letter j excludes the application of PSD2 to technical services which support the provision of payment services, only if the provider does not enter into possession of the funds to be transferred. This includes: the processing and storage of data, trust and privacy protection services, data and entity authentication, the information technology and communication network provision, and finally the provision and maintenance of terminals and devices used for payment services. Letter k excludes services based on specific payment instruments that can be used only in a limited way, as long as they meet one of the conditions set out in letter k, points i. to iii. The most probable one that DLT networks could meet is the one established in number iii, this is known as the limited network exclusion, and refers to instruments that only allow the holder to acquire goods or services within a limited network of service providers under direct commercial agreement with a professional issuer.

Once it is clear what services and what providers are covered by the PSD2, it is time to discuss, even briefly, about the Directive's scope in a strict sense. In point 1 of article 2 it is stated that the PSD2 shall apply to all payment services provided within the Union. However, this general rule is specified in point 2. Provisions about transparency and contract obligations apply to payment transactions in a Member State currency provided both the payee's PSP and the payer's PSP are, or the sole PSP is, located within the Union<sup>55</sup>. According to point 3, most of the transparency and contractual obligation rules are applicable even if the currency of the payment transaction is not from any Member State where there is no PSP outside the Union. As for the cases where only one of the PSPs is located within the Union, irrespective of the currency used, the Directive will only apply to those parts of the payment transaction which are carried out in the Union.

Article 2 poses a vital obstacle: would any kind of crypto-asset under MiCA Regulation be considered currency in the meaning of PSD2? This is not an easy question. Even when the MiCA proposal is enacted, Member States would not have the authority to accept by themselves any crypto-asset as an official currency because that falls within the competence of the European System of Central Banks (ESCB) and ECB according to articles 127 and 282 of Treaty on the Functioning of the European Union. That being said, it is obvious that even if its acceptance is not mandatory, a crypto-asset

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<sup>55</sup> Even though the Directive literally sets as a geographical point of reference the EU, it shall apply to the whole EEA.

voluntarily and commonly accepted as a means of payment would have the same role as a currency that is legal tender without being it. That, actually, was the purpose of the first cryptocurrency ever, Bitcoin, thought it soon became another matter. However, as it will be shown soon, rules set by the MiCA proposal may open the door to some crypto-assets to be considered currency in some way, shape or form. The key is the article 4.25 PSD2, which establishes that only banknotes and coins, scriptural money and electronic money are funds, so all the regulated payment services under PSD2 that imply a transfer of value are defined in relation with this concept of funds.

In regard to EMD2, it lays down the rules for the pursuit of the activity of issuing electronic money, and impose on Member States to only recognise certain categories of issuers, namely, same recognised as PSP under PSD2 but payment institutions (articles 1.1 and 18 EMD2). Connexions between EMD2 and PSD2 are manifest. Points 4 and 3 of article 1 EMD, set the Directive does not apply to services under article 3.k and 1 PSD2. The definition set out in article 2.2 EMD<sup>56</sup> reveals essential e-money characteristics which define its legal nature, that are elaborated a few provisions later.

Firstly, it is a monetary value. Secondly, it is stored electronically, although it does not grant interest or any other similar benefit in accordance to article 12, and also the EMD2 does not apply neither to monetary value stored on specific pre-paid instruments, designed to address precise needs that can be used only in a limited way (recital 5, referred to article 3.k PSD2), nor to monetary value that is used to purchase digital goods or services, where, by virtue of the nature of the good or service, the operator adds intrinsic value to it (recital 6, referred to article 3.1 PSD2). Thirdly, it is issued on receipt of funds and at par value by virtue of article 11.1 EMD. Fourthly, it represents a claim on the issuer, as a consequence, the electronic money holder has a right to redemption which, according to article 11.2 EMD, needs to be at par value and exercisable at any moment. Lastly, its purpose is to be used as means of payment so it needs to be accepted by a person other than the issuer, as it falls within the scope of the PSD2 definition of funds it has the same legal value as cash Euro.

## **4.2. PSD2 and EMD applicability to asset-referenced tokens**

To analyse if asset-referenced tokens are covered under PSD2 it shall be distinguished between its issuance and the operations related to those assets

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<sup>56</sup> Transcribed in section 2 of this paper.

in trying to elucidate if there is an analogy between the crypto-assets services regulated under MiCA Proposal and the payment services set out in PSD2. The analysis takes into consideration the subjective element of PSD2 scope, in regard to the subject who issues or provides any crypto-asset service, and the objective one, regarding the services themselves.

According to article 15 MiCA Regulation proposal the issuing of asset-referenced tokens is not restricted to certain types of business but the offer itself needs to be authorised by the competent authority of the issuer home Member State and the issuer should be a legal entity. To fulfil the subjective requirement on PSD2, the issuer must be one of the entities listed in article 1.1 PSD2, notably, credit institutions, payment institutions or electronic money institutions. It should be noted that in case the issuer of asset-referenced tokens is a credit institution it does not need to seek for authorisation, even though the obligation of drafting a white paper remains, and it must be approved.<sup>57</sup>

From an objective point of view, the marry up between PSD2 and MiCA proposal is not that easy. Notwithstanding the fact that it is well known crypto-assets are not currency, the doubts about their juridical nature pose a blatant defiance. As people understand stablecoins it is obvious that there must be some similarities between currency and asset-referenced tokens. When the latter are meant to be used as means of payment its economic function is quite the same than a banknote's. Actually, trying to draw a parallel between any kind of ‘crypto-asset transfer’ and a transfer covered by PSD2, anyone would probably think of a credit transfer: person A has a payment account in Bank 1 (or a crypto-wallet managed by CASP1) with certain amount of funds, and wants to transfer a part of those funds to person B, who also has a payment account provided by Bank 2 (or a wallet managed by CASP2). Tough this sort of equivalence can only be established whenever it is about a closed DLT network where holders cannot act by themselves, which considering the evolution of the market and the future legislative prospect, seems like the most imminent and probable scenario<sup>58</sup>. If there is no agreement on considering the

<sup>57</sup> As KÖNIG pointed out, there is an incoherence between Recital 28 and the exemption in Article 2.4. The former explicitly mentions the requirement also for credit institutions to produce a white paper, whilst the latter refers to the non-applicability of Title III, Chapter 1 to credit institutions, in which the white paper is regulated. It is probably an editorial mistake that is to be cured in the final version of the Regulation. KÖNIG, *The Future of Crypto-Assets within the European Union – An Analysis of the European Commission’s Proposal for a Regulation on Markets in Crypto-Assets*, cit., 62.

<sup>58</sup> On the issue why cryptocurrencies based on open DLT networks, such as Bitcoin, are probably not going to replace the traditional monetary system, see: CASTILLO, *Distributed*

wallet as a payment account,<sup>59</sup> then it would not be a credit transfer but a money remittance.

However, this hypothesis clearly equates the asset-referenced token to the concept of funds what, given the wording of the articles, is incorrect. Asset-referenced tokens are not included in the definition of funds set out in article 4.25 PSD2, as they are neither banknotes or coins, nor scriptural money, nor electronic money. Although the latter could be argued, there is a general consensus that there is no such identity. Out of the requirements established by EMD2, the most problematic has to be the one set out in article 11.1: «Member States shall ensure that electronic money issuers issue electronic money at par value on the receipt of funds». Beyond that, there is little homogeneity among the different asset-referenced tokens, some of them may grant their holders redemption rights or claims on the reserve assets or on the issuer while others do not offer those rights or restrain them to specific holders or to quantity limits<sup>60</sup>. Hence it can be said that issuers will have a certain margin of discretion for the individual structure of the rights of holders.<sup>61</sup> In any case, it is an obligation for the issuer to provide holders of asset-referenced tokens with clear, fair and not misleading information about the offer of a direct claim or redemption right on the reserve asset, therefore the white paper needs to contain a clear and unambiguous warning in this respect in case those rights are not granted (article 17.1 MiCA Regulation proposal). At any rate, asset-referenced tokens fall outside the scope of EMD which cannot be apply as its subject matter is to set out the rules for the issuance of electronic money.

Since asset-referenced tokens are not funds, the only possible way to make them fall within the standing scope of PSD2 is to consider them as a payment instrument. It would be fair to say that, in view of the definition set out in point 14 of article 4 PSD2, this might well be conceivable: asset-referenced tokens as a set of procedures agreed between the holder and the CASP used in order to initiate a payment order which will be executed through a DLT<sup>62</sup>. However,

*ledger technology en el Mercado de pagos: más allá de las criptomonedas*, in *Revista de Derecho del Mercado de Valores*, nº 27, 2020.

<sup>59</sup> It has been said that a wallet does not really keep the tokens but just the means to access them, such as private cryptographic keys, though the public cryptographic key has been compared to the IBAN. See PASTOR, *Fichas con referencias a activos (Stablecoin)*, in MADRID (ed.) *Guía de criptoactivos MiCA*, Cizur Menor, 2021, 11.

<sup>60</sup> Recital 40.

<sup>61</sup> KÖNIG, *The Future of Crypto-Assets within the European Union – An Analysis of the European Commission's Proposal for a Regulation on Markets in Crypto-Assets*, cit., 36.

<sup>62</sup> Actually, for oversighting purposes digital tokens are deemed payment instruments, as it is explained in the subheading 4.2.

as it has been said before, such an interpretation can be easily called into question since the asset-referenced token is also intended to serve as a unit of account. Just in case this exegesis is accepted could the issuing of asset-referenced tokens be qualified as a regulated payment service under PSD2, namely, the issuing of a payment instrument. Nevertheless, if it is to be achieved a comprehensive regime that subject the issuance of asset-referenced tokens to payments legislation, it would probably be better to amend PSD2 in order to include the issuing of those tokens as a payment service or, even better, to establish specific rules on crypto-assets and their use as a means of payment. In this sense, BCE's opinion on the MiCA Regulation proposal notes that both asset-referenced and e-money tokens would *de facto* equate to payment instruments, and suggests that, if this were to be the case, the only way to avoid the potential regulatory arbitrage between their regimes is to subject both kinds of tokens to similar requirements. Regarding asset-referenced tokens, BCE considers appropriate «at a minimum, to require issuers to grant redemption rights to the holders of asset-referenced tokens either on the issuer or the reserve assets»<sup>63</sup>. Going even further, it is also proposed to create a specific category of «payment tokens» whose regulation would subject asset-referenced tokens to the stricter e-money tokens issuance regime. It remains to be seen whether BCE's suggestions are accepted or not and, in case they are, to what extent.

With regard to the crypto-assets services that could consist in a transfer of value aiming to make a payment, the most suitable one of the stipulated in article 3.9 MiCA Regulation proposal is the execution of orders for crypto-assets on behalf of third parties. Whilst this may be thought as a ‘transfer of asset-referenced tokens’ in the sense exemplified before, that is to say, as a payment denominated not in Euros but in those tokens, the literacy of the service definition set out in article 3.14 does not really fit together with the concept of transfer established in PSD2, neither with the credit transfer service nor the money remittance one. This is because, according to the definition set out in article 3.14 MiCA, that service consists in concluding agreements to buy or sell crypto-assets, what is significantly closer to the definition of the ‘execution of orders on behalf of clients’ established in article 4, point 5 of Directive 2014/65/EU of the European Parliament and of the Council, of 15 May 2014, on markets in financial instruments and amending Directive

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<sup>63</sup> EUROPEAN CENTRAL BANK, *Opinion of 19 February 2021 on proposal for a regulation on Markets in Crypto-assets*, cit., 3.

(hereinafter, MiFID II)<sup>64</sup>. Strictly speaking, if a certain number of asset-referenced tokens, instead of money, is transferred in exchange for any good or service, it is not a payment but a barter.<sup>65</sup> So, it would not be covered neither by MiCA Regulation proposal, nor by PSD2. This may well be the legislator's intention, although it is not really consistent with the insistence about the use of such type of crypto-assets as a means of payment throughout the recitals and, neither is it coherent with the provisions on significant tokens.

A broader interpretation would be to consider that the exchange of goods or services and asset-referenced tokens meets the definition of 'execution of orders for crypto-assets on behalf of third parties', in the sense that those tokens are 'bought' or 'sold' in exchange for a good o service. That would fix the applicability of the MiCA proposal. However, it would not do so in relation to PSD2. There is no way to maintain that this would be a credit transfer or a money remittance, as asset-referenced tokens are not funds. That is because a credit transfer is «a payment service for crediting a payee's payment account with a payment transaction...», and a payment transaction is «an act, initiated by the payer or on his behalf or by the payee, of placing, transferring or withdrawing funds», for its part, money remittance is «a payment service where funds are received from a payer...»<sup>66</sup>. So, it is necessary to get back to the previous hypothesis of asset-referenced tokens as a payment instrument. In this scenario, the argument would be that there is an identity between a payment by card (or any other payment instrument) and a payment by asset-referenced tokens, although it is difficult to follow considering the definition of payment transaction, no matter how, necessarily involves funds.

There is also a considerable inconsistency between MiCA Regulation Proposal and PSD2 regarding the subjective element. Recital 58 of the MiCA

<sup>64</sup> «'Execution of orders on behalf of clients' means acting to conclude agreements to buy or sell one or more financial instruments on behalf of clients and includes the conclusion of agreements to sell financial instruments issued by an investment firm or a credit institution at the moment of their issuance». Actually, the whole list of crypto-asset services is inspired by MiFID II, to say the least. Academics have rightly pointed it out, see KÖNIG, *The Future of Crypto-Assets within the European Union – An Analysis of the European Commission's Proposal for a Regulation on Markets in Crypto-Assets*, cit., 95, 118. AHERN, *Regulatory Lag, Regulatory Friction and Regulatory Transition as FinTech Disenablers: Calibrating an EU Response to the Regulatory Sandbox Phenomenon*, in *European Business Organization Law Review No. 22*, 2021, 402. TAPIA, *Desafíos en la regulación y supervisión de los criptoactivos en la Unión Europea y en España (I)*, in *Revista de Derecho del Mercado de Valores No. 28*, 2021, 8.

<sup>65</sup> In regards to the difference between a means of payment and a means of exchange and how in a barter there is no legal payment see MADRID, *Fichas de dinero electrónico*, cit., 2.

<sup>66</sup> Article 4 PSD2, points 24, 5 and 22, respectively.

Regulation proposal states that CASPs should be authorised as payment institutions to be allowed to make payment transactions in connection with the crypto-asset services they offer. In line with that statement, article 63.4 says as follows: «Crypto-asset service providers may themselves, or through a third party, provide payment services related to the crypto-asset service they offer, provided that the crypto-asset service provider itself, or the third-party, is a payment institution as defined in Article 4, point (4), of Directive (EU) 2015/2366».

First issue is what does it mean to provide payment services related to the crypto-asset service CASPs offer. Is it referring to the transactions denominated in crypto-assets and ordered in exchange for any good or service? Or, instead, is it referring to the payment of the actual crypto-asset services or to the payments ordered to one holder to another resulting from the providing of certain types of crypto-asset services<sup>67</sup>? To my mind, the answer to these questions should be that it is referred to all transactions denominated in crypto-assets. That would be the logical explanation considering that both the memorandum and the recitals insist on the forecast and concerns related to the use of crypto-assets as a means of payment, in particular, asset-referenced tokens and electronic money tokens. And that, irrespectively of what good or service is to be paid<sup>68</sup>. However, as recital 58 explicitly talks about payment transactions, which according to PSD2 imply the placing, transferring or withdrawing of funds, perhaps article 63.4 MiCA should be interpreted in reference to the payment of the crypto-asset services and, particularly, with regard to those payments that will be necessary to implement the agreements concluded in the providing of crypto-asset services. At any rate, this is not the only conundrum. It is also confusing that point 4 further

<sup>67</sup> Namely, either the execution of orders for crypto-assets on behalf of third parties or the reception and transmission of orders for crypto-assets on behalf of third parties. These two are the only crypto-asset services which, in principle, will involve a payment between the holder and another subject different from de CASP. Although, strictly speaking, as far as payment services are concern when providing the service of the reception and transmission of orders for crypto-assets on behalf of third parties, the CASP will only initiate the payment but not actually execute them. Payment initiation services are regulated under PSD2, and defined in article 4.15 as those services that enable to initiate a payment order at the request of the payment service user with respect to a payment account held at another payment service provider. The characteristic feature is that the payment initiation service provider is never in possession of user's funds. Its task is only to transmit the payment order from the user to the account servicing PSP and, once the availability of funds is confirmed, let the payee known that the payment has been initiated and that enough funds are available.

<sup>68</sup> It could be the payment for a crypto-asset service or for the purchase of crypto-assets, but it could also be the payment for a tangible good such as a pizza (as it was the very first transaction with bitcoins) or an off-chain service, for example, a taxi ride.

restricts the entities that can provide payment services in comparison with article 1.1 PSD2. Apparently credit institutions and electronic money institutions are not allowed to provide payment services in relation to the crypto-asset services that these types of financial institutions can actually offer in the market. Besides, Article 63 regulates the safekeeping of clients' crypto-assets and funds, so, apart from PSD2 regulating the safekeeping of client's funds too, it is not easily understandable why the provision set out in point 4 is included in this article.

This complex<sup>69</sup> and quite forced interplay between PSD2 and the rules on asset-referenced tokens does nothing but demonstrate that there is very little consistency between both pieces of legislation.

#### **4.3. PSD2 and EMD applicability to electronic money tokens**

The first point that should be noticed is that electronic money tokens are apparently equated with electronic money. The detailed explanation of the specific provisions of the proposal says that «Article 43 also states that ‘e-money tokens’ are deemed electronic money for the purpose of Directive 2009/110/EC». This quite illustrates the will of the legislative authority which is not entirely clear from the wording of last paragraph of article 43.1. It says as follows: «[f]or the purpose of point (a), an ‘electronic money institution’ as defined in Article 2(1) of Directive 2009/110/EC shall be authorised to issue ‘e-money tokens’ and e-money tokens shall be deemed to be ‘electronic money’ as defined in Article 2(2) of Directive 2009/110/EC». Point (a) requires that the issuer of electronic money tokens «is authorised as a credit institution or as an ‘electronic money institution’ within the meaning of Article 2(1) of Directive 2009/110/EC». To be fair, if that paragraph is literally interpreted it seems like only whenever the e-money tokens have been issued by an electronic money institution are they deemed electronic money, which would make little sense. Since both types of institutions are allowed to issue those tokens, deem them electronic money in one case but not the other would create an inexplicable difference without justification. Besides, this equivalence has deeper consequences.<sup>70</sup> If electronic money tokens are electronic money in the sense of article 2.1 EMD2, they are also funds in the sense of article 4.25 PDS2.

<sup>69</sup> TOKEN ALLIANCE, *Legal Landscapes Governing Digital Tokens in the European Union*, cit., 30.

<sup>70</sup> MADRID is the opinion that e-money tokens are in fact a specific type of electronic money. See MADRID, *Fichas de dinero electrónico*, cit., 3, 9.

As just mentioned above, the issuance of electronic money tokens is an activity restricted to electronic money institutions and credit institutions by virtue of article 43.1.a) MiCA Regulation proposal, which are the same private entities that can issue electronic money according to article 1.1 EMD2. This, added to the fact that this kind of tokens are deemed electronic money determines the undoubtedly application of EMD2 to their issuance, unless a *lex specialis* exists within the MiCA in order to mitigate the specific risks crypto-assets pose to consumer protection and market integrity.<sup>71</sup> The main speciality is that while the general regime for the issuance of e-money relies on the contract between the issuer and the user as the basis for their legal relationship and with effects on possible third parties, the specific regime for e-money tokens envisaged by the MiCA Proposals hinges on the drafting of a white paper, an information document setting out the rights, content and terms of the tokens, on the basis of which the competent authority exercises its supervisory and control functions.<sup>72</sup>

On the other hand, since electronic money tokens are supposed to serve as a means of payment by definition in accordance with article 4.4 MiCA Regulation proposal and Recital 9, it might seem obvious that PSD2 should be applicable in relation to this kind of crypto-asset, but it may not be as straightforward.

Despite the fact that the issuing of electronic money is only possible by entities that also can provide payment services according to article 1.1 PSD2, this activity is not a regulated payment service. Considering it is covered under EMD2 it might not be a major problem, though the challenges in terms of consumer protection and the specialities that could differentiate this kind of crypto-asset from actual electronic money in the market, make desirable that the issuance of e-money tokens would also fall within the PSD2 scope. As for now, the only way to subject this activity to PSD2 is by analogy of article 4.45 which defines the issuing of payment instruments. This could be argued since e-money token are funds, but it could be seen as prepaid electronic money cards where the limits between the issuance of the funds and the issuance of the instrument are blurred. This is because e-money products can be hardware-based or software-based, depending on the technology used to store the monetary value<sup>73</sup>.

<sup>71</sup> KÖNIG, *The Future of Crypto-Assets within the European Union – An Analysis of the European Commission’s Proposal for a Regulation on Markets in Crypto-Assets*, cit., 78, 82.

<sup>72</sup> MADRID, *Fichas de dinero electrónico*, cit., 3.

<sup>73</sup> TOKEN ALLIANCE, *Legal Landscapes Governing Digital Tokens in the European Union*, cit., 9.

Nevertheless, it is foreseeable that the issuing of electronic money would soon be included in Annex I of PSD2 as a regulated payment service. The Retail Payments for the EU Strategy states that the authorisation and supervision regimes set out in PSD2 and EMD2 have ended up converging but remain separate without any apparent justification, considering there is no longer much difference between the services provided by payment institutions and e-money institutions<sup>74</sup>. As a consequence thereof, the inclusion of the issuance of e-money as a payment service in PSD2 is established as a key action<sup>75</sup>. So whenever MiCA Regulation proposal (as long as there are no major changes) and this PSD2 amendment are enacted, there will be no doubt about the issuance of electronic money tokens falling within the scope of PSD2.

At this point, it is time to address the connexions between the crypto-asset services provided in relation to electronic money tokens covered by MiCA Regulation proposal and the payment services under PSD2. Given that electronic money tokens are funds, the objective element does not pose any problem from PSD2 perspective. That is because a transfer of value executed in e-money tokens through a DLT network will meet the definition either of credit transfer or money remittance, depending on whether the wallet where the tokens are kept is considered a payment account or not. Even so, article 63.4 MiCA Regulation proposal should be recalled, as well as the dilemma that its understanding suggests. Based on the interpretation of this article that was accepted, it could be possible that, instead of all PSPs recognised by article 1.1 PSD2, only payment institution would be allowed to provide payment services in electronic money tokens which would make no sense.

Regarding activities under MiCA Regulation proposal and following the idea expressed in the previous section, none of the crypto-asset services set out in article 3.9 MiCA share obvious features with the regulated payment services, though in a broad interpretation, the execution of orders for crypto-assets on behalf of third parties might be analogous to a credit transfer or a money remittance, and the reception and transmission of orders for crypto-assets on behalf of third parties could be understood as a similar service to payment initiation<sup>76</sup>. Supposing this extensive interpretation is not accepted,

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<sup>74</sup> COM/2020/592 final, 19. This amendment is part of the PSD2 review, and is the only one that has been already specified.

<sup>75</sup> COM/2020/592 final, 21.

<sup>76</sup> Payment initiation services are regulated under PSD2, and defined in article 4.15 as those services that enable to initiate a payment order at the request of the payment service user with respect to a payment account held at another payment service provider. The characteristic feature is that the payment initiation service provider is never in possession of user's funds. Its task is only to transmit the payment order from the user to the account servicing PSP and, once

no crypto-asset service would fall within the scope of PSD2. This could lead to a major paradox: a single transaction will, on one side, fall under the scope of PSD2 and, on the other side, will be partly covered by MiCA Regulation proposal, but not completely.

To begin, electronic money tokens are intended as a means of exchange by definition, they are «electronic surrogates for coins and banknotes and are used for making payments»<sup>77</sup>. It is even arguable why should this kind of crypto-asset be admitted to trading on a trading platform as article 43.1 seems to allow, since that could potentially affect their market value, which will differ from their nominal value, and hence their use for making payments, posing a serious risk to financial stability. It would pervert the purpose of those tokens. Furthermore, electronic money tokens are funds, so there should be no doubt that PSD2 covers payment transactions denominated in these tokens what, among other things, implies that those services can only be provided by certain types of entities as established in article 1.1 PSD2.

In the second place, and this is an essential factor, as electronic money tokens only really exist and can be managed in a DLT network (assuming it would be a closed network where holders cannot fully act by themselves), necessarily there need to be professional service providers which can legally and materially act in that network. At the very least, there has to be an entity that custodies and administers the holder's crypto-assets<sup>78</sup>. For that, they are required to be granted an authorisation as CASP in accordance to Article 53 MiCA Regulation proposal. CASP's are defined as «any person whose occupation or business is the provision of one or more crypto-asset services to third parties on a professional basis» being crypto-asset services only the ones set out in Article 3.9 MiCA Regulation proposal.

Moreover, and here comes the core of the paradox, services under PSD2 are not regulated under MiCA Regulation proposal and *vice versa* so there are two options. Either the CASP is also authorised as a PSP or there would need to be two entities involved: a CASP and a PSP. But not any type of PSP, apparently it could only be a payment institution, by virtue of article 63.4 MiCA Regulation proposal. The former option would enable the provision of

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the availability of funds is confirmed, let the payee known that the payment has been initiated and that enough funds are available.

<sup>77</sup> Recital 9

<sup>78</sup> That is to say, the service set out in article 3.9 MiCA Regulation proposal: «the custody and administration of crypto-assets on behalf of third parties», and defined in point 10 as the «safekeeping or controlling, on behalf of third parties, crypto-assets or the means of access to such crypto-assets, where applicable in the form of private cryptographic keys».

crypto-asset services, as well as the provision of payment services by the same entity,<sup>79</sup> but would also require a high effort to comply with multiple regulations (which, to be fair, is quite common on financial markets) and will significantly increase compliance costs, especially at first until the combined regime is clarified. That being said, and leaving aside the incoherence of Article 63, it is foreseeable that many credit institutions would also provide crypto-asset services, without the need to seek authorisation according to Article 2(5) MiCA Regulation Proposal. Likewise, it is probable that many Electronic Money Institutions apply for authorisation as CASPs to seize emerging business opportunities. The latter option, however, could be more challenging. Although it would probably promote a market opening, it is against the recent trend of disintermediation of financial markets and could rise costs for users. Also, specific regulatory gaps in regards to users' protection and providers' liability, especially in case of defective execution, might arise. Furthermore, it will imply the need for interoperability of networks and communications used by CASPs and PSPs<sup>80</sup>.

One way or the other, the complexity of this legal framework is significant.<sup>81</sup> In both cases, from the user/holder perspective, comprehensibility of the contractual relation could be quite complicated. This could pose important challenges, especially to consumer protection, in particular regarding transparency and information requirements, rights and obligations and liability. Moreover, PSD2 provides the possibility for Members States to apply the protective regime designed to ensure consumer protection also to microenterprises<sup>82</sup>, which is not an option under MiCA Regulation proposal.

Finally, and also paradoxically, unless the MiCA Regulation proposal is clarified, the issuance of electronic money tokens will be covered by the PSD2 (whenever it is revised), but the rest of the services related to them will not.

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<sup>79</sup> It has been said that new CASPs could be more efficient PSPs than traditional commercial banks PASTOR, *Fichas con referencias a activos (Stablecoin)*, cit., 3.

<sup>80</sup> With a wider scope, the problem of the interoperability has been pointed out by PASTOR, *La digitalización del dinero y los pagos en la economía de mercado digital pos-COVID*, cit., 320. Also in regards to asset-referenced tokens PASTOR, *Fichas con referencias a activos (Stablecoin)*, cit., 3.

<sup>81</sup> LARA, *Criptomonedas ¿Riesgos o ventajas?*, cit., 10. TOKEN ALLIANCE, *Legal Landscapes Governing Digital Tokens in the European Union*, cit., 30.

<sup>82</sup> As defined in article 4.36 PSD2: «an enterprise, which at the time of conclusion of the payment service contract, is an enterprise as defined in Article 1 and Article 2(1) and (3) of the Annex to Recommendation 2003/361/EC».

Noteworthy is the fact that article 56.2.b MiCA Regulation proposal, in respect of the withdrawal of authorisations, sets out the competent authorities' power to withdraw the CASP authorisation in case it «has lost its authorisation as a payment institution in accordance with Article 13 of Directive (EU) 2015/2366 or its authorisation as an electronic money institution granted in accordance with Title II of Directive 2009/110/EC and that crypto-asset service provider has failed to remedy the situation within 40 calendar days». This provision is quite surprising given that having an authorisation as payment institution or electronic money institution is not a requirement for the providing of any crypto-asset service. It is curious, too, that losing the authorisation as a credit institution does not open up the possibility of withdrawing the CASP's licence. Anyhow, this provision should not be applied automatically, because the affection to the providing of crypto-asset services caused by the losing of a payment institution or electronic money institution authorisation will depend on the business model. And solely in case some crypto-asset services are, at the same time, payment services. That is because no other authorisation but the CASP one is required to provide crypto-asset services. Only in reference to the issuance (which is not a service) of electronic money tokens is it required to be either an electronic money institution or a credit institution. But for issuing crypto-assets, a CASP authorisation is not needed. This could lead to the conclusion that article 56.2.b MiCA Regulation proposal must be read along with article 63.4, despite the obvious incoherence of not including electronic money institution in article 63.4 and credit institutions in either of them. And this suggests that, despite the confusing wording, the spirit of the proposal is that the providing of crypto-asset services and the providing payment services in crypto-assets (either electronic money tokens or asset-referenced tokens) come together.

#### **4.4. Asset-referenced and e-money token arrangements as tantamount to that of a «payment system»**

As it has been previously noted, academics have already drawn a parallel between the functioning of a cryptocurrency DLT network and payment systems<sup>83</sup>. The ECB has also drawn attention to the fact that «asset-referenced and e-money token arrangements may qualify as tantamount to that of a

<sup>83</sup> CATTELAN - GIMIGLIANO, *Digital currency schemes: more or less sustainable? Limits to growth and electronification of money in Europe*, cit., 34. DIDENKO - ZETZSCHE - ARNER - BUCKLEY, *after libra, digital yuan and covid-19: central bank digital currencies and the new world of money and payment systems*, EBI Working Paper Series No. 65, 2020, 49

‘payment system’ where they have all the typical elements of a payment system»<sup>84</sup> but, for now, only for the purposes of Eurosystem oversight.<sup>85</sup>

Roughly speaking, payment systems are formal arrangements between several participants that establish rules and standards for the execution of value transfers between them<sup>86</sup>. Some of them, known as Systematically Important Payment Systems (SISP), are regulated by Directive 98/26/EC of the European Parliament and of the Council, of 19 May 1998, on settlement finality in payment and securities settlement systems. However, not every payment system from an economic perspective is a SISP, hence not all of them are subject to Directive 98/26/CE, as it establishes strict requirements for qualifying payment systems. Besides, a SISP activity is supposed to be the clearing and settling euro-denominated payments, so that regulation might not apply to stablecoin arrangements that handle payments denominated in another unit of account.<sup>87</sup> Anyhow, the ECB arguments its opinion based on Article 2(i) of this Directive, which establishes that «any instruction which results in the assumption or discharge of a payment obligation as defined by the rules of the system» qualifies as a «transfer order». So, despite the definition of payments system set out in article 4.7 PSD2 which uses the term

<sup>84</sup> EUROPEAN CENTRAL BANK, *Opinion of 19 February 2021 on proposal for a regulation on Markets in Crypto-assets*, cit., 5. Those elements are the following: «(a) a formal arrangement; (b) at least three direct participants (not counting possible settlement banks, central counterparties, clearing houses or indirect participants); (c) processes and procedures, under the system rules, common for all categories of participants; (d) the execution of transfer orders takes place within the system and includes initiating settlement and/or discharging an obligation (e.g. netting) and the execution of transfer orders, therefore, has a legal effect on the participants' obligations; and (e) transfer orders are executed between the participants». Also, ECB CRYPTO-ASSETS TASK FORCE, *Stablecoins: Implications for monetary policy, financial stability, market infrastructure and payments, and banking supervision in the euro area*, cit. 9.

<sup>85</sup> The Statute of the ESCB provide for the Eurosystem to conduct oversight of clearing and payment systems as part of its mandate.

<sup>86</sup> This is not a legal definition as could be the ones set out in article 4.7 PSD2; article 2.1(a) Directive 98/26/EC, or article 2.1) of Regulation (EU) No 795/2014 of the European Central Bank of 3 July 2014 on oversight requirements for systemically important payment systems (ECB/2014/28). These definitions are specifically designed for the application of such rules. The one set out in PSD2 is the most general, whereas the other two refer specifically to designated payment systems and systemically important payment systems, respectively.

<sup>87</sup> ECB CRYPTO-ASSETS TASK FORCE, *Stablecoins: Implications for monetary policy, financial stability, market infrastructure and payments, and banking supervision in the euro area*, cit. 25. Nevertheless, the Financial Stability board is the opinion that stablecoin arrangements can actually perform systemically important payment system functions or other financial market infrastructure (FMI) functions that are systemically important. FINANCIAL STABILITY BOARD. *Addressing the regulatory, supervisory and oversight challenges raised by “global stablecoin” arrangements (consultative document)*, cit., 17.

«transfer of funds», the ECB is of the opinion that, for overseeing purposes, «to the extent that asset-referenced and e-money token arrangements qualify as ‘payment systems’, the Eurosystem payment system oversight framework [...] would apply to them».<sup>88</sup>

Accordingly, the Eurosystem oversight framework for electronic payment instruments, schemes and arrangements (PISA framework) deem digital payment tokens as payment instruments<sup>89</sup>, which are included within the overseeing scope. Under that framework, payment instruments are defined as personalised devices «and/or set of procedures agreed between the payment service user and the payment service provider used to initiate a transfer of value»<sup>90</sup>. «Transfer of value» is likewise a broader concept than «transfer of funds». The former is defined as «[t]he act, initiated by the payer or on the payer’s behalf or by the payee, of transferring funds or digital payment tokens, or placing or withdrawing cash on/from a user account, irrespective of any underlying obligations between the payer and the payee. The transfer can involve a single or multiple payment service providers»<sup>91</sup>. Similarly, ECB states that «asset-referenced and e-money token arrangements that set standardised and common rules for the execution of payment transactions between end users could qualify as a ‘payment scheme’»<sup>92</sup>, what might also

<sup>88</sup> EUROPEAN CENTRAL BANK, *Opinion of 19 February 2021 on proposal for a regulation on Markets in Crypto-assets*, cit., 6. The ECB CRYPTO-ASSETS TASK FORCE is of the same opinion: «the Eurosystem oversight policy framework is not limited to systems that clear and settle euro-denominated payments. The Eurosystem would still be in a position to apply the PFMI, or a subset thereof, to a non-euro-denominated system that is located in the euro area even though the system is not subject to the SIPS regulation» ECB CRYPTO-ASSETS TASK FORCE, *Stablecoins: Implications for monetary policy, financial stability, market infrastructure and payments, and banking supervision in the euro area*, cit. 25.

<sup>89</sup> EUROPEAN CENTRAL BANK, *Eurosystem oversight framework for electronic payment instruments, schemes and arrangements*, 3. Available at: <https://www.ecb.europa.eu/paym/pol/html/index.en.html> «A digital payment token is a digital representation of value backed by claims or assets recorded elsewhere and enabling the transfer of value between end users. Depending on the underlying design, digital payment tokens can foresee a transfer of value without necessarily involving a central third party and/or using payment accounts» (cit.,13).

<sup>90</sup> EUROPEAN CENTRAL BANK, *Eurosystem oversight framework for electronic payment instruments, schemes and arrangements*, 14.

<sup>91</sup> EUROPEAN CENTRAL BANK, *Eurosystem oversight framework for electronic payment instruments, schemes and arrangements*, 14. There are concerns about stablecoin arrangements that are not properly managed can be a source of large-scale disruption and even systemic risk (ECB CRYPTO-ASSETS TASK FORCE, *Stablecoins: Implications for monetary policy, financial stability, market infrastructure and payments, and banking supervision in the euro area*, cit. 23.)

<sup>92</sup> EUROPEAN CENTRAL BANK, *Opinion of 19 February 2021 on proposal for a regulation on Markets in Crypto-assets*, cit., 6. ECB CRYPTO-ASSETS TASK FORCE said that although

imply the applicability of the PISA framework to the CASP responsible for the scheme.

So irrespectively of asset-referenced and electronic money tokens falling in or outside PSD2 scope, according to ECB's opinion on the MiCA Regulation Proposal, they should subject to the Eurosystem oversight.

Notwithstanding the above, the incoherence between payment services legislation and payment systems rules should be sorted out, since it could potentially be a major source of legal uncertainty. At least, it would be desirable to align their definitions, though it might be worth it to deeply review payment systems legislation<sup>93</sup>, which is outdated and rather limited, considering how technological innovation is affecting not only payment services, but also payment systems. Be that as it may, this section only intends to bring the connexion between payment systems and stablecoins under the MiCA Regulation proposal to the table, yet it need to be object of further research.

## **5. Concluding remarks**

Overall, the MiCA Regulation proposal is an ambitious and wide regulation that aims to provide a legal framework for a subject-matter which is too broad and still emerging. It is indeed very difficult to predict how many crypto-asset applications and uses are about to arise. However, in its current terms, this Regulation would probably fall short, even to what is already known.

It makes little sense to regulate specific kinds of crypto-assets foreseeing that they are meant to be used as a means of payment, but then do not ensure the coherence of their complete framework. The spirit of the proposal is much closer to MiFID II than to PSD2 and, even though it is absolutely necessary to provide a legal framework for the investments on crypto-assets, it is likewise important to establish a modern, coherent and comprehensive electronic payments regime. Despite the fact that connexions between the

stablecoin arrangements as payment schemes «do not give rise to systemic risk concerns, their orderly functioning facilitates secure and effective payment instruments that meet users' needs and are critical for maintaining public trust in the euro» ECB CRYPTO-ASSETS TASK FORCE, *Stablecoins: Implications for monetary policy, financial stability, market infrastructure and payments, and banking supervision in the euro area*, cit., 23.

<sup>93</sup> This is meant in a broad sense, beyond the particular revision of Directive 98/26/EC, that actually begun in February 2021, with a public consultation that closed in early May ([https://ec.europa.eu/info/consultations/finance-2021-settlement-finality-review\\_en](https://ec.europa.eu/info/consultations/finance-2021-settlement-finality-review_en)).

MiCA Regulation proposal and the existing payments European regulation seem glaring, there is a noticeable lack of coherence between the proposal, as it stands now, and the PSD2. The ECB has pointed out that need for clarification on the interplay between these two pieces of legislation, which would also be desirable to refer explicitly in the text<sup>94</sup>. Consistence with the EMD2 is acceptable, yet some aspects would benefit from further clarification, namely the wording of article 43 MiCA Regulation proposal.

Regarding the issuance of asset-referenced tokens and electronic money tokens the inconsistence might not be that serious, as it is a very specific activity that hence require special rules that are properly established in the MiCA Regulation proposal. Nevertheless, when considering to include the issuance of electronic money as a payment service in the reviewing process of PSD2, it might be a good idea to contemplate the inclusion of the issuance of this kind of tokens too.

It may also be appropriate to clarify what is exactly a trading platform for crypto-assets and, as the case may be, to reassess the possibility or the conditions in which electronic money tokens and asset-referenced tokens could be traded in a trading platform, so it is somehow guaranteed that their nominal value and their market value do not differ (at least, for e-money tokens). Otherwise, they would not be able to serve as a means of payment any better than any other good or right.

On the other hand, the most urgent need regards to crypto-asset services and their subjective element. It is necessary to align or coordinate the services regulated under MiCA Regulation proposal (which are just MiFID II equivalents for crypto-assets) with those set in PSD2. Considering the PSD2 review is in progress at a very early stage, the opportunity to harmonize both regimes must be seized. A straightforward option could be to include as a payment service the provision of services consisting of value transfers denominated in asset-referenced and e-money tokens in exchange for good and services, and/or to allow CASPs to provide payment services denominated in these tokens. Even so, taking into account some of the ECB's suggestions regarding the creation of a sub-category of «payment tokens», the MiCA framework for stablecoins might still be considerably modified. Therefore, beyond any specific suggestion, the crucial thing is that the MiCA Regulation and the PSD3 (or any other payments law that could be adopted) are designed as supplementary laws.

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<sup>94</sup> EUROPEAN CENTRAL BANK, *Opinion of 19 February 2021 on proposal for a regulation on Markets in Crypto-assets*, cit., 6.

Furthermore, and even more importantly, it is essential to clarify the subjective interplay between the rules set out in the MiCA Regulation proposal and the regime under PSD2. Mainly but not solely the meaning of articles 56.2.b and 63.4 MiCA Regulation. In this respect, the ECB has also drawn attention to the extensive casuistry of the potential interplay between these two regulations<sup>95</sup> and its potential effects, that should be determined. This becomes of more significance in business-to-consumer contractual relations, when ensuring consumer protection.

Finally, it cannot be lost from sight the clear relation among DLT networks where crypto-assets are issued and transferred as a means of payment and the traditional payment systems. Further definition of this connexion would be advisable.

In conclusion, if it is to be achieved a comprehensive, coherent and univocal legal framework for payments in the EU, in the pursuit of competitive and innovative payments market, the MiCA Regulation proposal needs to elaborate on its interplay with all the existing payments legislation. Namely with the PSD2, that should also be modernised to foresee the new payment solutions that are breaking into the market while ensuring consumer protection, market integrity and financial stability.

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<sup>95</sup> The ECB gives an example that perfectly illustrates the inconsistence between MiCA Regulation proposal and PSD2: «[a]n example of the potential interplay between the proposed regulation and the PSD2 would be where a service provider is contracting with a payee to accept crypto-assets other than e-money tokens. In such a case it would need to be clarified whether such providers would need to meet the same requirements on consumer protection, security and operational resilience as regulated payment service providers. Ultimately, it would need to be clarified whether such activities can be tantamount to the ‘acquiring of payment transactions’, as defined under PSD2». EUROPEAN CENTRAL BANK, *Opinion of 19 February 2021 on proposal for a regulation on Markets in Crypto-assets*, cit., 6.

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## **ALTRI SAGGI**



**TRACCE EVOLUTIVE DEL «*RIGHT TO BE FORGOTTEN*»  
TRA ESIGENZE DI ANONIMATO E RICHIESTE DI  
DEINDICIZZAZIONE<sup>°</sup>**

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*Il saggio analizza la genesi e l'evoluzione del diritto all'oblio in Italia. L'esame della normativa italo-europea e della casistica mette in evidenza la modularità dei rimedi applicativi (anonimizzazione, deindicizzazione, contestualizzazione) e la difficoltà delle Corti nell'effettuare il bilanciamento tra l'interesse generale all'informazione e il diritto individuale ad essere dimenticati.*

*The essay analyzes the genesis and the evolution of the right to be forgotten in Italy. The examination of Italian-European legislation and case studies highlights the modularity of application remedies (delisting, anonymization, contextualization) and the difficulty of the Courts in balancing the general interest of information and the individual right to be forgotten.*

**Sommario:**

1. L'«implacabile memoria collettiva» e la richiesta di oblio
2. Genesi del *right to be forgotten*
3. Dalla carta stampata ad Internet
4. Pluralità di fonti e *multilevel protection*
5. Il quadro normativo italo-europeo
6. L'evoluzione del «diritto ad essere dimenticati» nel dialogo fra Corte di giustizia e Corte europea dei diritti umani
7. Analisi casistica alla luce dell'art. 17 GDPR. Il «diritto alla cancellazione» nel pluralismo dei rimedi
8. La deindicizzazione e il c.d. blocco geografico
9. Oblio digitale e «algoritmo sovrano». La persistenza della memoria

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<sup>°</sup> Saggio sottoposto a *double-blind peer review*.

## 1. L'«implacabile memoria collettiva» e la richiesta di oblio

«Che cosa diviene la vita nel tempo in cui “Google ricorda sempre”?». Con questo interrogativo un noto giurista introduceva la sua riflessione sui nuovi ed inediti pericoli legati alla rete: questo immenso non-luogo aperto a raccogliere l'«implacabile memoria collettiva», ove facile è restare «prigionieri di un passato destinato a non passare mai»<sup>1</sup>.

In tale vasto circuito interconnesso si assiste al continuo e inarrestabile flusso di informazioni personali<sup>2</sup>: ogni traccia della vita umana è raccolta e cristallizzata<sup>3</sup>, ogni notizia è sedimentata e dispersa *online* o, meglio, custodita nell'eterna dimensione di «inconscio digitale»<sup>4</sup>. Tanto che la vera *damnatio* sembra essere rappresentata dalla conservazione della memoria e non dalla sua eliminazione, come avveniva in un lontano passato<sup>5</sup>; memoria che non è più intesa quale accumulo di esperienze o saggezze, ma come peso insostenibile dal quale liberarsi<sup>6</sup>.

Nasce così il desiderio<sup>7</sup> non tanto di sottrarsi dallo sguardo indesiderato (in una cornice di riserbo), quanto di ritirarsi “dietro le quinte”, in una c.d. zona

<sup>1</sup> Così, S. RODOTÀ, *Il mondo nella rete. Quali i diritti. Quali i vincoli*, Roma-Bari, 2014, rispettivamente, 41 e 43.

<sup>2</sup> Sulla circolazione dei dati personali v. S. RODOTÀ, *Persona, riservatezza, identità. Prime note sistematiche sulla protezione dei dati personali*, in *Riv. crit. dir. priv.*, 1997, 586 ss.; MESSINETTI, *Circolazione dei dati personali e dispositivi di regolazione dei poteri individuali*, ivi, 1999, 339 ss.; PARDOLESI (a cura di), *Diritto alla riservatezza e circolazione dei dati personali*, Milano, 2003; TORREGIANI, *La circolazione dei dati secondo l'ordinamento giuridico europeo. Il rischio dell'ipertrofia normativa*, in *Riv. it. inf. dir.*, 2021, 49 ss.

<sup>3</sup> Sottolinea come «il Web favorisca una sorta di cristallizzazione che inchioda la totalità e la complessità di una persona a un singolo fatto, a una notizia, a un'informazione, talora semplicemente a un sospetto o a un'ipotesi», ZANICHELLI, *Il diritto all'oblio tra privacy e identità digitale*, in *Inf. dir.*, 2016, 24.

<sup>4</sup> RUSHKOFF, *Presente continuo. Quando tutto accade ora*, Torino, 2014, p. 86. Discorre del «mare di Internet in cui si naviga» raffigurandolo quale «oceano di memoria»: FINOCCHIARO, *La memoria della rete e il diritto all'oblio*, in *Dir. inf.*, 2010, 392.

<sup>5</sup> La *damnatio memoriae* era una condanna decretata, nella Roma antica, in casi gravissimi, per effetto della quale veniva cancellato/distrutto ogni ricordo (ritratti, raffigurazioni, iscrizioni o statue) dei personaggi colpiti da tale decreto.

<sup>6</sup> Sul punto, CUFFARO, *Cancellare i dati personali. Dalla damnatio memoriae al diritto all'oblio*, in ZORZI GALGANO (a cura di), *Persona e mercato dei dati*, Milano, 2019, 219 ss.; BIANCA, *Memoria ed oblio: due reali antagonisti*, in EAD. (a cura di), *Memoria versus oblio*, Torino, 2019, 153 ss.

<sup>7</sup> Sul legame tra «desiderio» e «interesse» quale ragione giuridica per agire cfr., più ampiamente, FEMIA, *Interessi e conflitti culturali nell'autonomia privata e nella responsabilità civile*, Napoli, 1996, 269 ss.

d’ombra<sup>8</sup> nella quale si viene “cancellati”. Affiora, in altri termini, la richiesta di oblio<sup>9</sup>: una pretesa individuale ad essere dimenticati<sup>10</sup> avvertita, con maggior preponderanza, con l’incremento dell’uso di Internet<sup>11</sup> e delle nuove tecnologie<sup>12</sup>.

## 2. Genesi del *right to be forgotten*

Forgiato dalla giurisprudenza a cavallo degli anni ’80 e ’90 del secolo scorso, il diritto all’oblio viene delineato quale situazione giuridica oscillante tra il diritto al rispetto «dell’identità della persona e il diritto alla riservatezza»<sup>13</sup> ovvero - secondo altra definizione - come quella situazione soggettiva avente «il *corpus* del diritto all’identità personale, ma [...] l’anima della *privacy*»<sup>14</sup>.

<sup>8</sup> O – come a taluni piace definirla – nella «folla solitaria» delle metropoli: v., RIESMAN, *La folla solitaria*, (1948), trad. it. di G. Santi, Bologna, 1999.

<sup>9</sup> Discorre di pretesa a «liberarsi dell’oppressione dei ricordi, da un passato che continua a ipotecare pesantemente il presente» S. RODOTÀ, *Il diritto di avere diritti*, Roma-Bari, 2012, 406, il quale mette in luce come tale passato non può trasformarsi «in una condanna che esclude ogni riscatto».

<sup>10</sup> ERRIGO, *Il diritto all’oblio e gli strumenti di tutela tra tradizione e nuovi contesti digitali, in dirittifondamentali.it*, 30 aprile 2021, 642 ss.; ALÙ, *Esiste il diritto all’oblio su internet? La complessa evoluzione di tale figura tra giurisprudenza e legge*, in *Dir. fam. pers.*, 2020, 313 ss.

<sup>11</sup> Cfr. FEMIA, *Una finestra sul cortile. Internet e il diritto all’esperienza metastrutturale*, in C. PERLINGIERI e RUGGERI (a cura di), *Internet e diritto civile*, Napoli, 2015, 15-76; FROSINI, *Liberté Egalité Internet*, Napoli, 2015, 90 ss.; D’AMBROSIO, *Confidentiality and the (Un)Sustainable Development of the Internet*, in *Italian Law J.*, 2016, 253 ss. Si fa presente che nel gennaio 2021 il numero di utenti di Internet nel mondo ha superato 4,6 miliardi (un incremento del 7,3% rispetto al 2020); nel 1997 se ne contavano circa 120 milioni. Nel 2020 i dispositivi collegati a Internet sono circa 50 miliardi; nel 2014 – senza andare troppo indietro nel tempo –, erano 10 miliardi. E, in tutto questo, volendo segnalare un aspetto (forse l’unico) positivo della pandemia da Covid-19, di sicuro il 2020 sarà ricordato come l’anno nel quale l’umanità ha compiuto un grande balzo in avanti circa l’uso delle tecnologie digitali.

<sup>12</sup> S. RODOTÀ, *Tecnologie e diritto*, Bologna, 1995, 19 ss.

<sup>13</sup> Così, PIZZETTI, *Il prisma del diritto all’oblio*, in ID. (a cura di), *Il caso del diritto all’oblio*, Torino, 2013, 30, il quale sottolinea altresì che si tratta di una «categoria giuridica complessa, multiforme, polisensa e poliedrica, la cui natura è di volta in volta segnata dalle caratteristiche dei fenomeni ai quali è applicata».

<sup>14</sup> In questi termini, MEZZANOTTE, *Il diritto all’oblio. Contributo allo studio della privacy storica*, Napoli, 2009, 81. Riconosce che il diritto all’oblio sia «nato dalle costole del diritto all’identità personale e del diritto alla riservatezza», NAPOLITANO, *Il diritto all’oblio: la centralità dell’identità personale*, in *Danno resp.*, 2020, 746. Cfr., inoltre, DAGA, *Diritto all’oblio: tra diritto alla riservatezza e diritto all’identità personale*, ivi, 2014, 271 ss.

La sua autonoma configurazione si ebbe grazie a quel percorso espansivo dei c.dd. diritti della personalità che impose di considerare sotto una nuova luce interpretativa l'art. 2 cost.: “clausola aperta” volta a tutelare ogni forma di esplicazione della personalità umana e, dunque, anche i diritti non ancora normativamente ‘tipizzati’<sup>15</sup>.

Per meglio comprendere tale passaggio occorre ricordare come, inizialmente, parte della dottrina riteneva che la Costituzione italiana avesse soltanto un mero valore programmatico: sì che, le sole situazioni esistenziali tutelate erano quelle espressamente disciplinate dalla normativa ordinaria (quali, ad esempio: il diritto al nome, art. 6 c.c.; il diritto all’immagine, art. 10 c.c.; ecc.). Contrapposta a questa teoria (c.d. atomistica), una diversa corrente di pensiero (c.d. monistica) iniziò a prospettare l’esistenza di un unico diritto della personalità, dal contenuto vago ed indistinto, volto a riassumere tutti gli altri senza identificarsi con la loro somma<sup>16</sup> o, meglio, sulla base dell’assiologia ordinamentale, a riconoscere l’esistenza di un unitario valore della persona umana<sup>17</sup> emergente sotto una molteplicità di profili esistenziali<sup>18</sup>, oggetto di tutela a prescindere dall’esistenza di specifiche previsioni legislative<sup>19</sup>.

Superato, dunque, il precedente indirizzo interpretativo fondato sulla generale negazione di qualsivoglia situazione giuridica soggettiva priva di un esplicito fondamento normativo<sup>20</sup>, la giurisprudenza di legittimità inizia a riconoscere, dapprima, il «diritto alla riservatezza» quale situazione diretta a

<sup>15</sup> ALPA, *Diritti della personalità emergenti, diritto all’identità personale*, in *Giur. merito*, 1989, 464 ss.; BASILICA, *Il difficile percorso della formalizzazione giuridica dei diritti della personalità c.d. atipici*, in *Riv. dir. civ.*, 2005, II, 694 ss.

<sup>16</sup> Sì che, ogni manifestazione dell’uomo e ogni sua legittima aspirazione allo svolgimento della propria personalità sono tutelate e assecondate nella loro realizzazione secondo modalità non preventivamente determinate, né modellabili nel tempo. Cfr., al riguardo, RESTA, *Autonomia privata e diritti della personalità*, Napoli, 2005. In argomento, anche, Id., *Diritti della personalità: problemi e prospettive*, in *Dir. inf.*, 2007, 1043 ss.

<sup>17</sup> Sul punto v. P. PERLINGIERI, *La personalità umana*, Napoli-Camerino, 1972, 7 ss.; ID., *La persona e i suoi diritti. Problemi del diritto civile*, Napoli, 2005, 3 ss.

<sup>18</sup> Cfr. MESSINETTI, *Personalità (diritti della)*, in *Enc. dir.*, XXXIII, Milano, 1983, 376 ss.; P. RESCIGNO, *Personalità (diritti della)*, in *Enc. giur.* Treccani, XIII, Roma, 1990, spec. 5 ss.; SCALISI, *Il valore della persona nel sistema e i nuovi diritti della personalità*, Milano, 1990, 3 ss.; ID., *Il diritto alla riservatezza. Il diritto all’immagine, il diritto al segreto, la tutela dei dati personali, il diritto alle vicende della vita privata, gli strumenti di tutela*, Milano, 2002.

<sup>19</sup> LONARDO, *Diritti della personalità*, in AA.VV., *Temi e problemi della civilistica contemporanea. Venticinque anni della Rassegna di diritto civile*, Napoli, 2005, 175 ss.; v., più ampiamente, P. PERLINGIERI, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti*, II, *Fonti e interpretazione*, Napoli, 2020, 159 ss.;

<sup>20</sup> Cfr. Cass., 7 dicembre 1960, n. 3199, in *Foro it.*, 1961, I, c. 43 ss.

tutelare «vicende strettamente personali e familiari, le quali, anche se verificatesi fuori del domicilio domestico, non hanno per i terzi un interesse socialmente apprezzabile, contro le ingerenze che, sia pure compiute con mezzi leciti, non siano giustificate da interessi pubblici preminenti»<sup>21</sup>. Di poi, essa formula una tutela esplicita per il «diritto all'identità personale» inteso come «l'interesse a non vedere travisato o alterato all'esterno il proprio patrimonio intellettuale, politico, sociale, religioso, ideologico, professionale»<sup>22</sup>. Le due situazioni esistenziali così riconosciute si palesano con caratteri di differenziazione: mentre il diritto alla «riservatezza» attiene alla pretesa di non vedere rappresentati all'esterno profili della propria vita privata, quello dell'«identità personale» ha riguardo a profili della propria personalità che qualora fossero legittimamente rappresentati all'esterno dovrebbero esserlo nel rispetto della verità, evitando false prospettazioni.

Sulla base di tale diversificazione si pone - in forma embrionale e autonoma - il diritto all'«oblio»<sup>23</sup>, delineato dalla giurisprudenza di merito come quella figura che «pur rientrando nel generale ambito di tutela riservata alla vita privata (*privacy*), che trova fondamento nell'art. 2 cost., assume spiccata peculiarità rispetto al diritto alla riservatezza», giacché «a differenza di questo, non è volto ad impedire la divulgazione di notizie e fatti appartenenti alla sfera intima dell'individuo e tenuti fino ad allora riservati, ma ad impedire che fatti già resi di pubblico dominio (e quindi sottratti al riserbo) possano essere rievocati - nonostante il tempo trascorso e il venir meno del requisito dell'attualità - per richiamare su di essi [...] "ora per allora" l'attenzione del pubblico [...] proiettando l'individuo [...] verso una nuova notorietà indesiderata»<sup>24</sup>.

<sup>21</sup> Cass., 27 maggio 1975, n. 2129, in *Dir. aut.*, 1975, p. 351. Cfr. AULETTA, *Diritto alla riservatezza e "droit à l'oubli"*, in ALPA, BESSONE, BONESCHI e CAIAZZA (a cura di), *L'informazione e i diritti della persona*, Napoli, 1983, 127 ss.; COSTANZA, *Riservatezza o non riservatezza*, in AA.Vv., *Studi in onore di Pietro Rescigno*, II, *Diritto privato*, 1, *Persone, famiglia, successioni e proprietà*, Milano, 1998, 221 ss.

<sup>22</sup> Cass., 22 giugno 1985, n. 3769, in *Foro it.*, 1985, I, c. 2211 ss. Per un'approfondita disamina sull'«atmosfera culturale che ha preparato il terreno all'emergere di questo nuovo diritto» e sul percorso giurisprudenziale che ne ha definito i confini ed i contesti applicativi v. PINO, *Il diritto all'identità personale. Interpretazione costituzionale e creatività giurisprudenziale*, Bologna, 2003, 9 ss.

<sup>23</sup> Se ne discute, in uno dei primi convegni sul tema, ad Urbino: v., GABRIELLI (a cura di), *Il diritto all'oblio. Atti del Convegno di Studi del 17 maggio 1997*, Napoli, 1999, 42 ss.

<sup>24</sup> Così, Trib. Roma, ord., 20 novembre 1996, in *Dir. inf.*, 1997, 336 ss.: ciò – si precisa – «indipendentemente dal contenuto positivo o negativo che – in relazione alla natura dei fatti narrati – può assumere la considerazione sociale».

Riconoscimento che - di lì a breve - è fatto proprio dalla Suprema Corte che qualifica l'oblio come l'«interesse di ogni persona a non restare indeterminatamente esposta ai danni ulteriori che arreca al suo onore e alla sua reputazione la reiterata pubblicazione di una notizia in passato legittimamente pubblicata»<sup>25</sup>. Sì che, mentre la riservatezza ha ad oggetto fatti tenuti riservati, dei quali si vuole vietare la divulgazione, l'oblio ha riguardo a fatti che sono già di pubblico dominio, dei quali però si vuole impedirne la rievocazione.

In tale contesto storico il diritto all'oblio si pone in stretta connessione con il «diritto di cronaca»: individuabile nella pretesa volta ad impedire la ripubblicazione di notizie trascorso un significativo lasso di tempo, quando la nuova divulgazione sia priva di interesse attuale per la collettività. Nel bilanciamento tra i due diritti (cronaca e oblio)<sup>26</sup> si riconosce, dunque, la prevalenza del primo là dove la notizia pubblicata risulti attuale, utile, frutto di un serio lavoro di ricerca, descritta mediante un'esposizione civile non eccedente lo scopo informativo<sup>27</sup>; in questi casi, il diritto all'informazione inteso nella sua complessità - come diritto ad informare e ad essere informati (e, pertanto, anche diritto di cronaca) - prevale sul diritto individuale all'oblio. Viceversa, decorso un adeguato lasso di tempo dalla prima pubblicazione della notizia, qualora non si riattualizzi l'interesse pubblico all'informazione, deve ritenersi prevalente il diritto ad essere dimenticati<sup>28</sup> o - come detto con una formula più evocativa - ad «essere lasciati in pace»<sup>29</sup>.

Il diritto all'oblio è così apparso quale «prodotto giuridico» della c.d. società dell'informazione. Un diritto emerso, per l'appunto, quando, sul finire

<sup>25</sup> Cass., 9 aprile 1998, n. 3679, in *Danno resp.*, 1998, p. 882 ss., con nota di LO SURDO, *Diritto all'oblio come strumento di protezione di un interesse sottostante*, chiosata da LAGHEZZA, *Il diritto all'oblio esiste (e si vede)*, in *Foro it.*, 1998, I, c. 1835 ss.

<sup>26</sup> Cfr., RICCIO, *Il difficile equilibrio tra diritto all'oblio e diritto di cronaca*, in *Nuova giur. civ. comm.*, 2017, I, 549 ss.; SIROTTI GAUDENZI, *Diritto all'oblio e diritto all'informazione: un difficile equilibrio*, in *Corr. giur.*, 2018, 1107 ss.; FINOCCHIARO, *Diritto all'oblio e diritto di cronaca: una nuova luce su un problema antico*, in *giustiziacivile.com*, 15 gennaio 2019; PARDOLESI e SASSANI, *Bilanciamento tra diritto all'oblio e diritto di cronaca: il mestiere del giudice*, in *Foro it.*, 2019, I, c. 235 ss.; BACHELET, *Oblio e cronaca: del delicato rapporto tra due diritti "egualmente fondamentali"*, in GRANELLI (a cura di), *I nuovi orientamenti della Cassazione civile*, Milano, 2019, 19 ss.

<sup>27</sup> Cass., 18 ottobre 1984, n. 5259, in *Foro it.*, 1984, I, c. 2711 ss. (c.d. sentenza decalogo).

<sup>28</sup> Sul punto v. Cass. pen., 22 settembre 2016, n. 39452, in *Foro it.*, 2016, II, c. 621 ss.; Cass., 24 giugno 2016, n. 13161, *ivi*, I, c. 2729.

<sup>29</sup> DI MARZIO, *Il diritto all'oblio*, in *Pers. danno*, 6 luglio 2006. Sulle «nuove frontiere» emergenti in merito ai c.dd. diritti della personalità v. ALPA e RESTA, *Le persone e la famiglia*, I, *Le persone fisiche e i diritti della personalità*, in *Tratt. dir. civ.* Sacco, Torino, 2019, 365 ss.

di un secolo che ha visto l'affermazione prima dei giornali a stampa, poi della radio, poi della televisione, e infine di Internet, l'uomo ha iniziato a scoprire come anche una notizia vera e diffusa in maniera corretta, possa, nel tempo, arrecare disagio all'interessato<sup>30</sup>.

In tali casi - salvo talune eccezioni<sup>31</sup> - opportuna e lecita si rivela la richiesta che accadimenti relativi alla propria vita passata, non più di interesse pubblico, siano dimenticati<sup>32</sup>.

### 3. Dalla carta stampata ad Internet

Con l'avvento delle nuove tecnologie il diritto all'oblio ha iniziato a manifestare un'ulteriore declinazione applicativa nel contesto digitale. Si osserva, infatti, come la indefettibilità della memoria virtuale incida sul rapporto tra memoria ed oblio, ridefinendo le condizioni di bilanciamento

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<sup>30</sup> VIGEVANI, *Identità, oblio, informazioni e memoria in viaggio da Strasburgo a Lussemburgo, passando per Milano*, in *Danno resp.*, 2014, p. 731 ss.; F. PIZZETTI (a cura di), *Il caso del diritto all'oblio*, cit., 3 ss.; DI CIOMMO e PARDOLESI, *Dal diritto all'oblio in internet alla tutela della identità dinamica. È la Rete, bellezza!*, in *Danno resp.*, 2012, 701 ss.

<sup>31</sup> Vi sono fatti talmente gravi che l'interesse pubblico alla loro riemersione da parte dei *mass media* non viene mai meno: si pensi, ad es., ai crimini contro l'umanità, ma anche ad altri accadimenti riproposti perché hanno inciso significativamente sul corso della storia ovvero hanno riguardato persone particolarmente esposte sul piano sociale. Sul punto v., DI CIOMMO, *Quello che il diritto non dice. Internet e oblio*, in *Danno resp.*, 2014, 1102.

<sup>32</sup> Anche la Corte costituzionale si occupa del diritto all'oblio, individuandone un fondamento nella funzione rieducativa della pena, *ex art.* 27, comma 3, cost., costituente «un principio [...] da tempo diventato patrimonio della cultura giuridica europea» (Corte cost., 2 luglio 1990, n. 313, in *Foro it.*, 1990, I, c. 2385 ss.). Principio dal quale discenderebbe la necessità di evitare la riesumazione di notizie datate, in mancanza di un interesse sociale che ne impedirebbero, ad esempio, ad un soggetto – resosi responsabile nel passato di infrazioni alla legge – l'effettivo reinserimento nella società, a meno che la condotta criminosa sia di particolare allarme sociale da «comportare una “resistenza all'oblio” nella coscienza comune più che proporzionale all'energia della risposta sanzionatoria» (Corte cost., 28 maggio 2014, n. 143, in *Giur. cost.*, 2014, 2369 ss.). Cfr., MORELLI, *Fondamento costituzionale e tecniche di tutela dei diritti della personalità di nuova emersione (a proposito del cd “diritto all'oblio”)*, in *Giust. civ.*, 1997, 515 ss. e, più ampiamente, ID., *Oblio (diritto all')*, in *Enc. dir.*, Agg., VI, Milano, 2002, 851 ss.; NISTICÒ e PASSAGLIA (a cura di), *Internet e Costituzione*, Torino 2014, 7 ss. Osserva che la memoria ha «come la luna, doppia faccia»; RUGGERI, *Appunti per uno studio su memoria e Costituzione*, in *Consulta online*, 2019/II, 355: «l'una illuminata, l'altra nascosta, o meglio, dalla prospettiva del diritto, sull'una c'è l'obbligo di fare luce, sull'altra quella di lasciarla in ombra. A seconda dell'angolo di visuale adottato, essa è perciò ora valore, ed ora disvalore».

tra l'interesse generale all'informazione<sup>33</sup> e l'interesse individuale ad essere dimenticato. Si distinguono, pertanto, due fasi nell'evoluzione del diritto all'oblio, legate l'una alla stampa cartacea, l'altra agli archivi *online*.

Nella prima fase, il diritto all'oblio è inteso quale pretesa di un soggetto a non vedere pubblicate alcune notizie relative a vicende, già legittimamente divulgata, dopo che sia trascorso un notevole lasso di tempo rispetto all'accadimento<sup>34</sup>. In tale contesto, si osserva come il "ciclo di vita dell'informazione cartacea" sia destinato sempre ad esaurirsi, dopo la fase propagandistica a mezzo stampa. Una volta, dunque, cessato l'effetto mediatico derivante dalla circolazione della notizia, il processo "fisiologico" di cancellazione dei ricordi passati opera come «antidoto necessario contro gli eccessi della memoria»<sup>35</sup>, favorendo la «riappacificazione sociale e l'evoluzione della personalità individuale»<sup>36</sup>.

Nella seconda fase, invece, lo scenario muta<sup>37</sup>; si potrebbe dire, anzi, che esso è sconvolto dall'avvento e dalla rapidissima espansione di Internet. Nata, sul finire del secolo scorso, come rete di connessione tra apparecchi informatici, Internet è divenuta, infatti, una realtà talmente pervasiva da aver rivoluzionato il modo nel quale l'uomo del terzo millennio si relaziona con gli altri. In questo scenario «dimenticare è diventato l'eccezione e ricordare la norma»<sup>38</sup>: l'inesauribile flusso di informazioni accessibili *online* ha determinato una sorta di «immortalità dei dati digitali»<sup>39</sup> i quali giungono a sopprimere i benefici positivi della dimenticanza. Non è mancato, infatti, chi ha osservato: l'«oblio è morto, viva l'oblio!»<sup>40</sup>. Si passa, dunque, al diritto a contestualizzare e aggiornare fatti permanenti sulla rete e appiattiti dalla rete anche se legittimamente pubblicati. Qui l'oblio è inteso quale pretesa alla corretta e aggiornata contestualizzazione dell'informazione pubblicata

<sup>33</sup> Informazione quale strumento di conoscenza per PUGLIATTI, *Conoscenza*, in *Enc. dir.*, IX, Milano, 1961, 45 ss., spec. 113 ss.; sottolinea che «conoscere è potere» e «l'informare e l'essere informati rappresentano una necessità strutturale dell'intero sistema» P. PERLINGIERI, *L'informazione come bene*, in *Rass. dir. civ.*, 1990, 327.

<sup>34</sup> Cass., 9 aprile 1998, n. 3679, cit., 882 ss.

<sup>35</sup> OLIVERIO, *Memoria e oblio*, Soveria Mannelli, 2003, 9. Sul punto v., inoltre, P. PERLINGIERI, *Informazione, libertà di stampa e dignità della persona*, in *Rass. dir. civ.*, 1986, 624 ss.

<sup>36</sup> ALÙ, *Esiste il diritto all'oblio su internet?*, cit., 319.

<sup>37</sup> Cfr., PALMIERI e PARDOLESI, *Polarità estreme: oblio e archivi digitali*, in *Foro it.*, 2020, I, c. 1570 ss.

<sup>38</sup> MAYER-SCHÖNBERGER, *Delete. Il diritto all'oblio nell'era digitale*, Milano, 2010, 2.

<sup>39</sup> ZICCARDI, *Il libro digitale dei morti. Memoria, lutto, eternità e oblio nell'era dei social network*, Torino, 2017, 181.

<sup>40</sup> DI CIOMMO, *o.u.c.*, 1105.

dall'editore del sito sorgente; come necessità dell'*aggiornamento* e della *contestualizzazione*<sup>41</sup> delle informazioni (notizie nel *web* che, per il trascorrere del tempo risultino ormai dimenticate o ignote alla generalità dei consociati implicano l'irrilevanza, o meglio la ‘non interferenza’ dell’interesse pubblico all’informazione a tutela dell’identità sociale attuale del soggetto leso)<sup>42</sup>.

#### 4. Pluralità di fonti e *multilevel protection*

Accade, dunque, che lo schermo sul quale la persona proietta la sua vita viene enormemente dilatato: non è più soltanto quello del suo *personal computer*; dietro quello schermo si cela l’intero spazio della rete. Ma, l’entrata in questo spazio, può essere accompagnata da una perdita di diritti? Il cambiamento è stato colto allorquando ci si è resi conto che la tradizionale nozione di *privacy*<sup>43</sup>, come «diritto a essere lasciato solo», non era più in grado di competere in una dimensione così profondamente mutata. La sua costruzione originaria, infatti, riproduceva lo schema della proprietà privata: gli altri sono esclusi e, all’interno della mia *privacy*, nessuno può legittimamente penetrare. Ma la rivoluzione elettronica e tecnologica ha trasformato la nozione stessa di “sfera privata” divenuta sempre più intensamente luogo di scambi, di condivisione di dati personali, di informazioni. Si è passati, così, dall’originale nozione di «riservatezza» a quella di «protezione dei dati», elaborata in ambito europeo.

L’attenzione si sposta, dunque, agli spazi sconfinati e mobili della rete per i quali emerge l’esigenza di una disciplina uniforme. Qui un insieme di principi-valori-diritti umani vengono a concorrere dinanzi a un pluralismo di fonti e ad una molteplicità di giurisdizioni con enormi difficoltà di risoluzione delle controversie e di bilanciamento tra *privacy*, dignità, identità personale,

<sup>41</sup> Discorre di «*Contextual Identity*» NISSENBAUM, *Privacy in Context Technology, Policy, and the Integrity of Social Life*, Stanford, 2009.

<sup>42</sup> Cass., 5 aprile 2012, n. 5525, in *Nuova giur. civ. comm.*, 2012, I, 836 ss. con note di: MANTELERO, «Right to be forgotten» e archivi storici dei giornali. *La Cassazione travisa il diritto all’oblio*, *ivi*; DI MAJO, *Il tempo siamo noi ...*, in *Corr. giur.*, 2012, 764 ss.; CITARELLA, *Aggiornamento degli archivi on line, tra diritto all’oblio e rettifica “atipica”*, in *Resp. civ. prev.*, 2012, 1147; EUSEBI, *Anonimato, identità personale e diritto di cronaca nel mondo telematico. La sentenza della Corte di Cassazione n. 5525/2012*, in *Ciberspazio dir.*, 2013, 183 ss.

<sup>43</sup> Cfr., COSTANZA, *o.c.*, spec., p. 225 s.; M. FRANZONI, *Privacy e diritti dell’interessato*, in *Resp. civ. prev.*, 1998, 885 ss.

reputazione, onore, immagine ecc., da un lato, e libertà di informazione ed espressione, diritto di cronaca, accesso, conoscenza, ricerca storico-scientifica ecc., dall'altro. Tutto questo in assenza di una preferenza gerarchica, predefinita e rigida, giacché i diritti in rete «non sono gerarchizzabili, perché è la rete stessa che rifiuta le gerarchie»<sup>44</sup>.

In tale quadro, il diritto all'oblio compare quale «diritto a governare la propria memoria, per restituire a ciascuno la possibilità di reinventarsi, di costruire personalità e identità affrancandosi dalla tirannia di gabbie nelle quali una memoria onnipresente e totale vuole rinchiudere tutti»<sup>45</sup>.

Ma, come diritto, necessita di tutele e di una regolamentazione. Ma... può avere regole il mondo del web? Benvenuti o no che siano - per usare le parole della *Dichiarazione d'indipendenza del ciberspazio*<sup>46</sup> - gli Stati impongono la loro presenza, esercitano i loro poteri. È indispensabile far sì che una pluralità di attori, ai livelli più diversi, possano dialogare con regole comuni secondo un modello definito «*multilevel*»: soggetti diversi, a livelli diversi, con strumenti diversi, negoziano e si legano con impegni reciproci per individuare e rendere effettivo un patrimonio comune di diritti. Nel corso di questo processo si potrà provare a giungere a risultati parziali, all'integrazione tra codici di autoregolamentazione o ad altre forme di disciplina, ovvero a normative comuni per singole aree del mondo, come dimostra l'Unione europea, la “regione” del pianeta dove più intensa è la tutela di questi diritti.

Le obiezioni tradizionali sono sempre le stesse: chi è il Legislatore? Quale Giudice renderà applicabili i diritti proclamati? Domande che, in parte, appartengono al passato; ignare della valanga di nuovi diritti umani nascenti.

<sup>44</sup> S. RODOTÀ, *Il diritto di avere diritti*, cit., 394. Sul punto cfr., inoltre, FEMIA, *Decisori non gerarchizzabili, riserve testuali, guerra tra Corti. Con un (lungo) intermezzo spagnolo*, in MEZZASOMA, RIZZO e RUGGIERI (a cura di), *Il controllo di legittimità costituzionale e comunitaria come tecnica di difesa*, Napoli, 2010, 106 ss.

<sup>45</sup> In questi termini, S. RODOTÀ, *o.u.c.*, 406.

<sup>46</sup> Dichiarazione che esordisce: «Governi del Mondo Industriale, stanchi giganti di carne e acciaio, io vengo dal Ciberspazio, la nuova sede della Mente. Per il bene del futuro, chiedo a voi del passato di lasciarci in pace. Non siete i benvenuti tra noi. Non avete sovranità là dove ci siamo riuniti». In merito a tale affermazione cfr., S. RODOTÀ, *Una Costituzione per Internet?*, in AMORETTI (a cura di), *Diritti e sfera pubblica nell'era digitale*, in *Pol. dir.*, 2010, 338, il quale ha evidenziato come questa «affermazione orgogliosa rifletta il sentire di un mondo, di una sterminata platea in continua crescita [...], che si identifica con una invincibile natura di Internet, libertaria fino all'anarchia, coerente con il progetto di dar vita ad una rete di comunicazione che nessuno potesse bloccare o controllare. Ma è pure un'affermazione che ha dovuto subire le dure repliche da una storia in continua accelerazione, da una cronaca che consuma».

## 5. Il quadro normativo italo-europeo

Per rispondere a tali quesiti occorre dapprima illustrare il quadro normativo presente e la sua evoluzione negli ultimi decenni limitando l'analisi - per una maggiore comprensione del fenomeno - all'Italia ed all'Europa.

Sul tema della tutela dei diritti l'Unione europea ha da sempre mostrato una 'pulsante' attenzione. Il «diritto alla protezione dei dati di carattere personale» (art. 8) viene riconosciuto nella Carta dei diritti fondamentali dell'Unione europea, come autonomo e distinto da quello «al rispetto della propria vita privata e familiare» (art. 7). Distinzione che non è soltanto di facciata: nel diritto al rispetto della vita privata e familiare si manifesta, soprattutto, il momento individualistico; il potere si inserisce sostanzialmente nell'escludere interferenze altrui: la tutela è statica, negativa. Diversamente, la protezione dei dati si concretizza in un potere di intervento: la tutela è, in altri termini, dinamica<sup>47</sup>. I poteri di controllo e di intervento, inoltre, non sono attribuiti soltanto ai diretti interessati, ma vengono affidati anche a un'Autorità indipendente. Carta dei diritti - anche nota come Carta di Nizza (sottoscritta il 7 dicembre 2000 e, di poi, adattata il 12 dicembre del 2007 a Strasburgo) - che ha assunto, con l'entrata in vigore del Trattato di Lisbona, il medesimo valore giuridico dei Trattati (*ex art. 6 TUE*) e, quindi, diviene pienamente vincolante per le istituzioni europee e gli Stati membri.

Lo stesso può dirsi con riguardo alla Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali (Cedu) i cui diritti fondamentali ivi garantiti - in specie, per quel che qui interessa, gli artt. 8 (diritto al rispetto della vita privata e familiare)<sup>48</sup> e 10 (libertà di espressione) - «fanno parte del diritto dell'Unione in quanto principi generali».

Passando alle fonti c.dd. secondarie, va ricordato che, al fine di garantire un'omogenea protezione dei dati delle persone, il legislatore europeo aveva dapprima emanato la dir. 95/46/CE (relativa alla *Tutela delle persone fisiche con riguardo al trattamento dei dati personali, nonché alla libera circolazione di tali dati*), con lo scopo di armonizzare le normative nazionali in materia già esistenti in molti Stati europei. Tale direttiva - che ha rappresentato la pietra miliare della storia della protezione dei dati - è stata recepita in Italia con l. 31

<sup>47</sup> Il passaggio da una concezione statica di riservatezza (risalente a WARREN e BRANDEIS, *The Rigth to Privacy*, in *Harvard L. Rev.*, 1890, 193 ss.) a una visione dinamica sono ripercorse da S. RODOTÀ, *La vita e le regole. Tra diritto e non diritto*, Milano, 2009, 100 s.

<sup>48</sup> Il legame tra l'art. 8 Cedu e il diritto all'oblio è evidenziato da BARTOLINI e SIRY, *The right to be forgotten in the light of the consent of the data subject*, in *Computer L. Sec. Rev.*, 2016, 220 ss.

dicembre 1996, n. 675 (intitolata Tutela delle persone e di altri soggetti rispetto al trattamento dei dati personali); in seguito sostituita dal d.lgs. 30 giugno 2003, n. 196, c.d. *Codice in materia di protezione dei dati personali*, volto a raccogliere le indicazioni e le direttive europee intervenute nel lasso di tempo intercorso dal 1996 al 2003. Il legislatore italiano, pertanto, adeguandosi alle istanze di armonizzazione espresse a livello europeo, ha predisposto un sistema basato sul prioritario rispetto dei diritti e delle libertà fondamentali e della dignità della persona, segnando il passaggio da una concezione statica a una concezione dinamica della tutela della riservatezza, finalizzata al controllo dell'utilizzo dei dati personali<sup>49</sup>.

Infine, nel gennaio 2012, la Commissione europea ha presentato ufficialmente il c.d. pacchetto protezione dati con lo scopo di garantire un quadro giuridico coerente ed un sistema complessivamente armonizzato in materia di protezione dati nell'Unione europea. Nel maggio 2016 è entrato ufficialmente in vigore il Regolamento UE definitivamente applicabile in via diretta in tutti gli Stati membri a partire dal 25 maggio 2018: due anni di tempo necessari per consentire alle imprese ed al settore pubblico di organizzarsi per allineare i trattamenti dei dati ai nuovi standard. Normativa che è dichiaratamente volta a far sì che il trattamento dei dati personali si svolga nel rispetto dei diritti, delle libertà fondamentali e della dignità dell'interessato<sup>50</sup>.

## **6. L'evoluzione del «diritto ad essere dimenticati» nel dialogo fra Corte di giustizia e Corte europea dei diritti umani**

Se tale è la normativa europea volta a uniformare il trattamento e la tutela dei dati personali, instabile e incerto è apparso, invece, il dialogo tra le Corti, nel quale è emerso un disallineamento tra le giurisprudenze transnazionali, in specie tra la Corte di giustizia e la Corte europea dei diritti umani<sup>51</sup>.

<sup>49</sup> V., per tutti, S. RODOTÀ, *Tra diritti fondamentali ed elasticità della normativa: il nuovo codice sulla privacy*, in *Eur. dir. priv.*, 2004, 4 ss.

<sup>50</sup> FUSCO, *Dalla sentenza “Google Spain” al Regolamento 2016/679, passando per la Carta dei diritti fondamentali di Internet: l’itinerario del diritto all’oblio lungo i sentieri del Web*, in *Ratio iuris*, 1 settembre 2016; SENIGAGLIA, *Reg. UE 2016/679 e diritto all’oblio nella comunicazione telematica. Identità, informazione e trasparenza nell’ordine della dignità personale*, in *Nuove leggi civ. comm.*, 2017, 1023 ss.; LUCCHINI GUASTALLA, *Il nuovo regolamento europeo sul trattamento dei dati personali: i principi ispiratori*, in *Contr. impr.*, 2018, 106 ss. e, con specifico riferimento al diritto all’oblio, 118 ss.

<sup>51</sup> D’AMBROSIO, *La protezione dei dati personali alla luce della giurisprudenza CEDU e CGUE: aspetti generali e profili di criticità*, in *Dir. prat. trib. int.*, 2019, 970 ss.

Notevole interesse ha sollevato, nel 2014, la decisione della Corte di giustizia in merito al noto caso *Google Spain*<sup>52</sup>: un cittadino spagnolo, esercitante il proprio diritto ad essere dimenticato, chiedeva la rimozione, prima al gestore del sito e poi a Google, di alcuni dati personali pubblicati in poche righe del giornale “*La Vanguardia Editiones SL*” e da lui ritenuti non più attuali. La problematica riguardava, in altri termini, la possibilità per un soggetto di chiedere ai motori di ricerca di non indirizzare gli utenti su una determinata risorsa contenente una certa notizia; ossia, non aiutare i cibernetici a rintracciare una determinata informazione sgradita.

La Corte, con tale sentenza, è pervenuta a soluzioni talmente innovative da scatenare un dibattito mondiale sul diritto all’oblio in Internet<sup>53</sup> e sul ruolo dei motori di ricerca (in particolare di Google). Tre sono stati i temi di maggior interesse.

Il primo ha avuto riguardo al trattamento dei dati personali. La convenuta in giudizio Google sosteneva che indicizzando in modo automatico i *link* pubblicati sul *web*, essa non veniva a compiere alcuna attività che potesse essere qualificata di «trattamento», ma soltanto una «indicizzazione automatica» con memorizzazione dei dati e messa a disposizione del pubblico. Inoltre, anche ipotizzando che «tale attività d[ovesse] essere qualificata come

<sup>52</sup> Corte giust., 13 maggio 2014, c. 131/12, Google Spain SL e Google Inc. c. Agencia Española de Protección de Datos e Mario Costeja González, in *Foro it.*, 2014, IV, c. 295 ss., con note di: PALMIERI e PARDOLESI, *Diritto all’oblio: il futuro dietro le spalle*, ivi; GIANNONE CODIGLIONE, *Motori di ricerca, trattamento di dati personali e obbligo di rimozione: diritto all’oblio o all’autodeterminazione informativa?*, in *Nuova giur. civ. comm.*, 2014, I, 1054 ss.; SCORZA, *Corte di Giustizia e diritto all’oblio: una sentenza che non convince*, in *Corr. giur.*, 2014, 1741 ss.; PERON, *Il diritto all’oblio nell’era dell’informazione on line*, in *Resp. civ. prev.*, 2014, 1159 ss.; POLLICINO, *Diritto all’oblio e conservazione dei dati. La Corte di Giustizia a piedi uniti: verso un digital right to privacy*, in *Giur. cost.*, 2014, 2499 ss.; PIZZETTI, *La decisione della Corte di Giustizia sul caso Google Spain: più problemi che soluzioni*, in *federalismi.it*, 10 giugno 2014; VIGLIANISI FERRARO, *La sentenza Google Spain e il diritto all’oblio nello spazio giuridico europeo*, in *Contr. impr./Eur.*, 2015, 159 ss.; MINUSSI, *Il “diritto all’oblio”: i paradossi del caso Google Spain*, in *Riv. it. dir. pubbl. com.*, 2015, 209 ss. Con riguardo alle numerose implicazioni – non solo giuridiche – della decisione cfr., RESTA e ZENO-ZENCOVICH (a cura di), *Il diritto all’oblio su Internet dopo la sentenza Google Spain*, Roma, 2015, 3 ss.

<sup>53</sup> Cfr., PALMIERI e PARDOLESI, *Dal diritto all’oblio all’occultamento in rete: traversie dell’informazione ai tempi di Google*, in *Nuovi Quad. Foro it.*, 2014, 5 ss.; SARTOR e VIOLA DE AZEVEDO CUNHA, *Il caso Google e i rapporti regolatori USA/EU*, in RESTA e ZENO-ZENCOVICH (a cura di), *o.c.*, 117 ss.; FLOR, *Dalla ‘data retention’ al diritto all’oblio. Dalle paure orwelliane alla recente giurisprudenza della Corte di Giustizia. Quali effetti per il sistema di giustizia penale e quali prospettive de jure condendo*, ivi, 243 ss.; MELIS, *Il diritto all’oblio e i motori di ricerca nel diritto europeo*, in *Gior. dir. amm.*, 2015, 171 ss.; BUGIOLACCHI, *Quale responsabilità per il motore di ricerca in caso di mancata deindividuazione su legittima richiesta dell’interessato?*, in *Resp. civ. prev.*, 2016, 571 ss.

“trattamento di dati”», si riteneva che «il gestore di un motore di ricerca non p[otesse] essere considerato come “responsabile” di tale trattamento, dal momento che egli non [poteva avere] conoscenza dei dati in questione e non esercita[va] alcun controllo su di essi»<sup>54</sup>. La Corte, invece, ha ritenuto il gestore di detto motore di ricerca «responsabile» del trattamento.

Secondo aspetto: applicazione della normativa spagnola (ed europea) a un’azienda con sede legale negli USA. La Corte ha riconosciuto che «qualora il gestore di un motore di ricerca» venga ad aprire «in uno Stato una succursale o una filiale destinata alla promozione e alla vendita degli spazi pubblicitari proposti da tale motore di ricerca e l’attività della stessa si dirig[a] agli abitanti di detto Stato membro»<sup>55</sup>, debba trovare applicazione la normativa a tutela del trattamento di dati personali prevista nel territorio statale, ossia la legge nazionale del Paese nel quale il motore di ricerca opera.

Terzo e ultimo profilo d’interesse ha avuto riguardo all’obbligo di intervenire a tutela del diritto all’oblio. La Corte ha riconosciuto all’utente che abbia ragione il diritto di chiedere che un certo contenuto diretto a pregiudicarlo non fosse reso più fruibile *online*<sup>56</sup>. Sì che all’interessato è stato riconosciuto il diritto di chiedere al motore di ricerca - ritenuto «responsabile» - la “rimozione dell’indicizzazione” perché i diritti fondamentali di cui agli artt. 7 e 8 della Carta europea dei diritti fondamentali (rispetto della vita privata e della vita familiare; protezione dei dati di carattere personale) prevalgono in linea di principio - ed anche a prescindere da un ‘pregiudizio dell’interessato’ - sia sull’interesse economico del gestore del motore di ricerca (*ex art. 16*), sia sull’interesse del pubblico all’informazione (*ex art. 11*)<sup>57</sup>.

<sup>54</sup> Corte giust., 13 maggio 2014, c. 131/12, Google Spain, cit., punto 22.

<sup>55</sup> Corte giust., 13 maggio 2014, c. 131/12, Google Spain, cit., punto 60.

<sup>56</sup> Il «gestore di un motore di ricerca è obbligato a sopprimere, dall’elenco di risultati che appare a seguito di una ricerca effettuata a partire dal nome di una persona, dei *link* verso pagine *web* pubblicate da terzi e contenenti informazioni relative a questa persona, anche nel caso in cui tale nome o tali informazioni non vengano previamente o simultaneamente cancellati dalle pagine *web* di cui trattasi, e ciò eventualmente anche quando la loro pubblicazione su tali pagine *web* sia di per sé lecita»: così, Corte giust., 13 maggio 2014, c. 131/12, Google Spain, cit., punto 88.

<sup>57</sup> V. Corte giust., 13 maggio 2014, c. 131/12, Google Spain, cit., punto 99, la quale, ad ogni modo, puntualizza: «così non sarebbe qualora risultasse» – ad es., per ragioni particolari, come il ruolo ricoperto da tale persona nella vita pubblica – «che l’ingerenza nei suoi diritti fondamentali è giustificata dall’interesse preponderante del pubblico suddetto ad avere accesso, in virtù dell’inclusione summenzionata, all’informazione di cui trattasi». Al riguardo non è mancato chi ha sottolineato come la sentenza «offr[a] una visione profondamente restrittiva dell’art. 11 della Carta dei diritti fondamentali [...] rispetto al diritto a vedere protetta la propria riservatezza nell’ambito delle ricerche in rete», al punto tale da «cogliere un indizio piuttosto serio di un bilanciamento tra diritti contrastanti che non può non nascere asimmetrico, del tutto

Viene, così, a configurarsi un diritto non più (o non soltanto) alla dimenticanza di sé (*to be forgotten*), quando una sorta di diritto a non essere facilmente trovati (*to not be found*) o diritto non essere facilmente visti (*to not be seen*)<sup>58</sup>. Si evidenzia, in realtà, come parlare di diritto all’oblio, o diritto ad essere dimenticati, sia fuorviante dal momento che quella del dimenticare è un’attività che non può essere imposta: insomma, non si dimentica a comando. Pertanto, più opportuno sarebbe discorrere di un diritto ad essere cancellati o di un diritto ad essere deindicizzati<sup>59</sup>.

Sul tema è intervenuta anche la Corte europea dei diritti umani<sup>60</sup>, trattando una questione in termini, tutto sommato, simili a quelli esaminati dalla Corte di giustizia. La sentenza risulta particolarmente significativa giacché, da un lato, disconosce - ossia, non consente - all’interessato il diritto ad ottenere la rimozione dell’informazione pubblicata *online*; dall’altro, individua il punto di equilibrio tra la conservazione della notizia (pur non corretta) nel patrimonio informativo dei giornali in rete e la pretesa della persona coinvolta alla conservazione dell’identità personale nell’obbligo di pubblicare una nota aggiuntiva ad una fonte disponibile in un archivio Internet, la quale vada a specificare la circostanza che tale informazione sia stata reputata diffamatoria dall’autorità giudiziaria.

In altre parole, i giudici di Strasburgo hanno avallano la soluzione volta ad assicurare la piena libertà di espressione (garantita dall’art. 10 Cedu) dalla quale discende la legittima permanenza delle informazioni pubblicate anche

sbilanciato, già in partenza, a favore delle ragioni di tutela della privacy digitale»: così, O. POLLICINO, *Un digital right to privacy preso (troppo) sul serio dai giudici di Lussemburgo? Il ruolo degli artt. 7 e 8 della Carta di Nizza nel reasoning di Google Spain, in RESTA e ZENO-ZENCOVICH (a cura di), Il diritto all’oblio su Internet, cit.*, 314 s.

<sup>58</sup> Sembra configurarsi un diritto «al ridimensionamento della propria visibilità telematica» per SICA e D’ANTONIO, *La procedura di de-indicizzazione*, in SICA, D’ANTONIO e RICCIO (a cura di), *La nuova disciplina europea della privacy*, Milanofiori Assago, 2016, 154.

<sup>59</sup> In seguito a tale decisione, l’avv. Mario González ha vinto la sua battaglia contro Google: chi scrive il suo nome su *google.es* non visualizza più l’articolo del quotidiano spagnolo e, pertanto, non può scoprire che «nel 1998 il ministero del lavoro iberico aveva sequestrato e messo all’asta la sua abitazione». Tuttavia, l’articolo in questione è facilmente rinvenibile *online* utilizzando *google.com* e cioè la pagina americana del motore di ricerca, o tanto per fare un esempio, *google.sm* (cioè la versione sanmarinese che agli italiani non crea neanche problemi di lingua). Osserva DI CIOMMO, *Quello che il diritto non dice*, cit. p. 1112: «Il diritto non lo dice [e la sentenza tace sul punto], ma l’assenza di confini geografici nazionali in Internet, così come la globalità e la ubiquità della Rete, rendono facilmente aggirabili sul piano tecnico le disposizioni (tanto legislative, quanto pretorie) delle autorità nazionali».

<sup>60</sup> Corte edu, 16 luglio 2013, n. 33846/2007, Węgrzybowski e Smolczewski c. Polonia, in *Giorn. dir. amm.*, 2013, p. 1211 ss.; ma v., anche, Corte edu, 19 ottobre 2017, n. 71233/13, Fuchsmann c. Repubblica Federale di Germania, in *Danno resp.*, 2018, 149 ss.

su Internet a tutela del diritto della collettività di accedere alle notizie, anche del passato. Libertà di espressione costituente presupposto fondamentale di una società democratica, con il conseguente restringimento dell'ambito di operatività del diritto all'oblio. Sì che, il rimedio della rimozione integrale di un articolo giornalistico diffamatorio, finalizzato alla tutela della reputazione degli individui (*ex art. 8 della Carta*) è stato ritenuto «sproporzionato»: il punto di incontro tra le esigenze poste dai due articoli ora richiamati (8 e 10 Cedu) va individuato nell'obbligo, a carico dell'*editor*, di pubblicare aggiunte o precisazioni all'articolo in questione le quali consentano al pubblico un'immediata contestualizzazione dello stesso alla luce degli avvenimenti storici successivi alla pubblicazione.

Nel bilanciamento tra il diritto al rispetto della vita familiare e la libertà di espressione è stata, dunque, data prevalenza a quest'ultima, ponendo “in ombra” il diritto all'oblio. E la dottrina non ha mancato di commentare la vicenda con un titolo evocativo della ‘dimenticanza’ del diritto ad essere dimenticati<sup>61</sup>.

## **7. Analisi casistica alla luce dell'art. 17 GDPR. Il «diritto alla cancellazione» nel pluralismo dei rimedi**

In questo scenario, entra in vigore in Europa il *Regolamento generale sulla protezione dei dati* n. 2016/679 (anche noto come GDPR, *General Data Protection Regulation*) il quale espressamente, all'art. 17, riconosce all'interessato «il diritto di ottenere dal titolare del trattamento la cancellazione dei dati personali che lo riguardano senza ingiustificato ritardo», mentre il titolare del trattamento ha l'*obbligo* di cancellare, senza ingiustificato ritardo, i dati personali in presenza di determinati motivi<sup>62</sup>.

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<sup>61</sup> In tal senso, BONAVITA e PARDOLESI, *La Corte Edu contro il diritto all'oblio?*, in *Danno resp.*, 2018, 149 ss., i quali sottolineano, a chiusura del contributo: «le criticità del *right to be forgotten* restano impregiudicate» (p. 155). Sul punto v., inoltre, DI CIOMMO, *Privacy in Europe after Regulation (EU) No 2016/679: What Will Remain of the Right to Be Forgotten?*, in *Italian Law. J.*, 2017, 24 ss.

<sup>62</sup> Cfr., SUMAN, *Il diritto alla cancellazione*, in PANETTA (a cura di), *Circolazione e protezione dei dati personali, tra libertà e regole del mercato. Commentario al Regolamento UE n. 679/2016 e al d.lgs. n. 101/2018*, Milano, 2019, 199 ss.; THIENE, *Segretezza e riappropriazione di informazioni di carattere personale: riserbo e oblio nel nuovo regolamento europeo*, in *Nuove leggi civ. comm.*, 2017, 410 ss.; PIRAINO, *Il Regolamento generale sulla protezione dei dati personali e i diritti dell'interessato*, ivi, 369 ss.; SENIGAGLIA, *Reg. UE 2016/679 e diritto all'oblio nella comunicazione telematica*, cit., 1023 ss.

Nonostante nel formale titolo della rubrica si discorra di «diritto alla cancellazione» (con l'ulteriore inciso virgolettato «diritto all'oblio»), si osserva che la disposizione non ne individua i tratti specifici, discorrendo esclusivamente di «diritto alla cancellazione»<sup>63</sup>; inoltre, in essa non viene recepito il *dictum* della sentenza *Google Spain* in ordine al diritto alla deindicizzazione (c.d. *delisting*), ossia non si differenzia tra l'eliminazione dell'informazione personale dal sito fonte/sorgente e la rimozione del contenuto dall'elenco dei risultati indicizzati sul *web*. Sono, invece, indicati i presupposti - cumulabili o alternativi - per il riconoscimento e l'azionabilità del diritto, ossia: *a*) i dati personali non siano più necessari rispetto alle finalità per le quali sono stati raccolti/trattati; *b*) l'interessato revochi il consenso (e non esista altro fondamento giuridico per il trattamento); *c*) l'interessato si opponga al trattamento per la sua particolare situazione; *d*) i dati personali siano stati trattati illecitamente; *e*) i dati personali debbano essere cancellati per adempire un obbligo legale previsto dal diritto dell'Unione o dal diritto dello Stato membro cui è soggetto il titolare del trattamento.

Il trattamento dei dati sarebbe, invece, ammesso e ritenuto necessario a seguito del bilanciamento: *a*) per l'esercizio del diritto alla libertà di espressione e di informazione; *b*) per l'adempimento di un obbligo legale o per l'esecuzione di un compito svolto nel pubblico interesse o nell'esercizio di pubblici poteri; *c*) per motivi di interesse pubblico sanitario; *d*) a fini di archiviazione nel pubblico interesse, di ricerca scientifica o storica o a fini statistici [...]; *e*) per l'accertamento, l'esercizio o la difesa di un diritto in sede giudiziaria.

Molte le criticità segnalate dalla dottrina: l'assenza di una precisa definizione<sup>64</sup>; la discrezionalità nel bilanciamento giudiziale affidato alle Corti

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<sup>63</sup> Rileva DI CIOMMO, *Il diritto all'oblio (oblio) nel regolamento Ue 2016/697 sul trattamento dei dati personali*, in *Foro it.*, 2017, V, c. 306, come durante i lavori preparatori il regolamento riportasse l'espressione «right to be forgotten or right to erase», di poi modificata in quanto suscettibile di generare confusione e ampliare di troppo la portata della disposizione, andando oltre alla mera cancellazione del dato. Per considerazioni al riguardo, formulate alcuni anni prima, v., FINOCCHIARO, *Il diritto all'oblio nel quadro dei diritti della personalità*, in *Dir. inf.*, 2014, 591 ss., la quale metteva in evidenza come la cancellazione sia «un'operazione sui dati che esclude ogni ulteriore conservazione degli stessi, mentre l'oblio sembra piuttosto essere una finalità, che si può raggiungere con la cancellazione, ma anche con il blocco».

<sup>64</sup> Il risultato ottenuto sarebbe «deludente» per NAPOLITANO, *Il diritto all'oblio*, cit., 750: da un lato, mancherebbe una definizione «specificamente definit[a]» e, dall'altro, «le nuove disposizioni normative possono essere interpretate in modo tale da svuotarne il contenuto. Infatti, se il diritto in questione venisse ritenuto mera espressione del diritto alla cancellazione dei dati, esso perderebbe la maggior parte della sua connotazione tipica, attorno alla quale, grazie all'attività svolta dai giudici, si sono riconosciuti anche il diritto alla deindicizzazione,

e alle *Authorities* nazionali; la modularità dei provvedimenti. Tanto che la «cancellazione» appare essere soltanto ‘uno’ dei rimedi per realizzare l’oblio: sintesi verbale di molteplici possibili interessi giuridicamente rilevanti. Si sottolinea, infatti, la presenza di diverse declinazioni del diritto all’oblio: il diritto alla «deindicizzazione» dai motori di ricerca di Internet dei contenuti considerati illeciti; il diritto alla «anonimizzazione» del dato<sup>65</sup>, il quale, in tal modo, perde la qualifica personale; il diritto alla esatta «contestualizzazione» del dato non più attuale che sia messo a disposizione del pubblico.

Dopo le due rilevanti decisioni europee sopra richiamate, e dopo l’entrata in vigore dell’art. 17 GDPR, la giurisprudenza italiana si è occupata di due complesse questioni inerenti il «right to be forgotten».

A) Il primo caso ha riguardo ad un noto personaggio del mondo dello spettacolo<sup>66</sup>; uno dei più importanti cantautori italiani, il quale veniva, nel 2000, ripreso mentre rifiutava in maniera secca e perentoria un’intervista<sup>67</sup>. Tali immagini venivano messe in onda e commentate in maniera sgradevole. Successivamente, a distanza di cinque anni, le immagini venivano trasmesse nuovamente all’intero di una “classifica dei personaggi più scorbutici e antipatici del mondo dello spettacolo”, accompagnate da commenti poco rispettosi. Il noto cantautore citava, allora, in giudizio l’emittente televisiva (RAI) chiedendo il risarcimento dei danni subiti per effetto della messa in onda di tale mancata intervista. Il Tribunale e la Corte d’Appello (giudici di

alla anonimizzazione del dato e all’esatta contestualizzazione dell’informazione non più attuale». Normativa che «delude» anche THIENE, *Segretezza e riappropriazione di informazioni di carattere personale*, cit., 411, la quale sottolinea come «nell’accogliere la sfida di coniugare i diritti delle persone con le esigenze di mercato, [la disciplina in esame] pare avvalorare un’accezione sempre più spersonalizzata di dati personali con un approccio lontano dalla sensibilità di chi sottolinea il valore giuridico della persona». Cfr., inoltre, BARBIERATO, *Osservazioni sul diritto all’oblio e la (mancata) novità del Regolamento 2016/679 sulla protezione dei dati personali*, in *Resp. civ. prev.*, 2017, 2100 ss.

<sup>65</sup> Cfr., FOGLIA, *Il dilemma (ancora aperto) dell’anonimizzazione e il ruolo della pseudonimizzazione nel GDPR*, in R. PANETTA (a cura di), *Circolazione e protezione dei dati personali, tra libertà e regole del mercato*, cit., 309 ss.

<sup>66</sup> Cass., 20 marzo 2018, n. 6919, in *Giur. it.*, 2019, p. 1047 ss. (caso Antonello Venditti) ove la Suprema Corte traccia le “linee direttive” per il complesso esercizio di bilanciamento tra diritto di cronaca e diritto all’oblio. Sul punto v. le osservazioni di: MARTINELLI, *Il diritto all’oblio nel bilanciamento tra riservatezza e libertà di espressione: quali limiti per i personaggi dello spettacolo?*, ivi, 1049 ss.; PARDOLESI e BONAVITA, *Diritto all’oblio e buio a mezzogiorno*, in *Foro it.*, 2018, I, c. 1145 ss.; GIANNONE CODIGLIONE, *I limiti al diritto di satira e la reputazione del cantante celebre “caduta” nell’oblio*, in *Nuova giur. civ. comm.*, 2018, I, 1317 ss.

<sup>67</sup> NOCERA, *Il criterio del pubblico interesse e l’intervista televisiva nel conflitto tra riservatezza e diritto di cronaca*, in *Corr. giur.*, 2013, 625 ss.

primo e secondo grado) disattendevano la richiesta ritenendo non necessario il consenso per la pubblicazione dell’immagine (sottolineando la notorietà del personaggio) e non sussistente il diritto all’oblio (sulla base dell’esimente del diritto di satira).

La Suprema Corte cassa la sentenza impugnata (con rinvio alla Corte d’appello di Roma) e traccia le “linee direttive” per il complesso bilanciamento tra il diritto di cronaca (o diritto alla storia tramite archivi) e il diritto all’oblio, prevedendo che quest’ultimo possa subire una compressione soltanto in presenza di specifici e determinati presupposti, ossia: 1) la diffusione dell’immagine o della notizia apporti un contributo ad un dibattito di interesse pubblico; 2) sussista un interesse effettivo e attuale alla diffusione dell’immagine o della notizia (per ragioni di giustizia, di polizia o di tutela dei diritti e delle libertà altrui, ovvero per scopi scientifici, didattici o culturali); 3) sussista un elevato grado di notorietà del soggetto rappresentato, per la peculiare posizione rivestita nella vita pubblica o nella realtà economica o politica del Paese; 4) l’informazione sia veritiera, diffusa con modalità non eccedenti lo scopo informativo, nell’interesse del pubblico, e scevra da insinuazioni o considerazioni personali, sì da evidenziare un esclusivo interesse oggettivo alla nuova diffusione; 5) sussista la preventiva informazione circa la pubblicazione o la trasmissione della notizia o dell’immagine a distanza di tempo, in modo da consentire all’interessato il diritto di replica prima della sua divulgazione al grande pubblico. In assenza di tali presupposti, dunque, la pubblicazione di un’informazione concernente una persona determinata (nel caso specifico un artista che è soggetto noto, ma non figura pubblica), a distanza di tempo dai fatti ed avvenimenti che la riguardano, rappresenta violazione del fondamentale diritto all’oblio.

B) Il secondo caso attiene ad un uxoricidio<sup>68</sup>. La vicenda si inserisce all’interno di un consolidato *case law* nazionale diretto ad analizzare i limiti dell’informazione con riguardo a circostanze giudiziarie legittimamente pubblicate da una testata giornalistica e riferibili ad un soggetto non noto, né di rilievo pubblico. Nella fattispecie, un uomo aveva ucciso la moglie ed era stato condannato per il reato a dodici anni di reclusione; dopo aver scontato la pena era ritornato in libertà iniziando una “nuova vita” nell’anonimato, resa possibile dalla dimenticanza dell’evento e dal conseguente reinserimento del reo nel contesto sociale. Un giornale locale, a distanza di ventisette anni dall’accaduto, decide, tuttavia, di ripubblicare i fatti all’interno di una rubrica di «cronaca nera locale», compromettendo, in questo modo, la dignità tanto

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<sup>68</sup> Cass., 5 novembre 2018, n. 28084, in *Foro it.*, 2019, I, c. 3082 ss.

faticosamente riacquisita dall'individuo. La ripubblicazione di questi fatti espone l'autore del reato ad una “gogna mediatica”: sì che l'uxoricida ricorre in giudizio lamentando la lesione del suo diritto all'oblio e chiedendo il risarcimento dei danni, patrimoniali e non, correlati essenzialmente al grave malessere emotivo generato dalla nuova sottoposizione della vicenda all'attenzione dell'opinione pubblica. Di contro, si sosteneva che la rievocazione di questi fatti fosse legittima in quanto inserita nella rubrica settimanale dedicata a fatti storici di maggior rilievo che avevano particolarmente colpito e turbato la collettività: rientrava, dunque, nel diritto costituzionale di cronaca, di libertà di stampa e di espressione.

L'*iter processuale*, dopo un giudizio di merito conclusosi, sia in primo sia in secondo grado, a favore del riconoscimento della prevalenza del diritto di cronaca, giunge in Cassazione. E qui, la Suprema Corte, per la questione ritenuta «di particolare importanza», decide di trasmettere gli atti alle Sezioni unite.

Le Sezioni unite nel 2019<sup>69</sup> si pronunciano con una sentenza storica e identificano tre differenti declinazioni del diritto all'oblio: come pretesa a impedire la ripubblicazione di notizie quando sia decorso un significativo lasso di tempo dalla prima divulgazione legittimamente resa in passato<sup>70</sup> (in questo modo si evita di vedere nuovamente ripubblicate notizie del passato);

<sup>69</sup> Cass., Sez. un., 22 luglio 2019, n. 19681, in *Giur. cost.*, 2020, 349 ss., con nota di MEZZANOTTE, *Il diritto all'oblio secondo le Sezioni unite: cerbero o chimera?*, il quale delinea il diritto all'oblio quale «situazione giuridica soggettiva ancillare, che si adatta, di volta in volta, al diritto della personalità al quale fa riferimento [diritto alla riservatezza, diritto all'identità personale, diritto alla protezione dei dati personali]». Una sorta di essere a tre teste, come il cane della mitologia greca, Cerbero, privo quindi di una struttura unitaria e di una riferibilità certa, multiforme, e, soprattutto, di difficile definizione». V., anche, le osservazioni di: DI CIOMMO, *Oblio e cronaca: rimessa alle Sezioni unite la definizione dei criteri di bilanciamento*, in *Corr. giur.*, 2019, 5 ss.; CUFFARO, *Una decisione assennata sul diritto all'oblio*, *ivi*, 1195 ss.; MUSCILLO, *Oblio e divieto di lettera scarlatta*, in *Danno resp.*, 2019, 611 ss.; POLETTI e CASAROSSA, *Il diritto all'oblio (anzi, i diritti all'oblio) secondo le Sezioni Unite*, in *Dir. internet*, 2019, 725 ss.; CITARELLA, *Diritto all'oblio: un passo avanti, tre di lato*, in *Resp. civ. prev.*, 2019, 1560 ss.; RIZZA, *Lucciole per lanterne. La n. 19681 del 2019 e la terra promessa del diritto all'oblio*, in *giustiziacivile.com*, 24 marzo 2020. Cfr., inoltre, Cass., 5 novembre 2018, n. 28084, in *Foro it.*, 2019, I, c. 235 ss., con note di PARDOLESI e SASSANI, *Bilanciamento tra diritto all'oblio e diritto di cronaca: il mestiere del giudice*.

<sup>70</sup> Al riguardo cfr. PARDOLESI, *The right to be forgotten come of age*, in *L&B Lab*, 2020, 6 ss., il quale nel commentare la sentenza della Cass., 19 maggio 2020, n. 9147, sottolinea che l'eterna esposizione non è più determinata dal riemergere della notizia, bensì dalla costante accessibilità dei dati inseriti in archivio digitale accessibile *online*. Sul punto v., anche, SPANGARO, *Notizie sul web e oblio: il conflitto tra cronaca, reputazione, riservatezza*, in *Giur. it.*, 2021, 1332 ss.

come pretesa alla *corretta e aggiornata contestualizzazione dell'informazione* anche se già legittimamente pubblicata<sup>71</sup> (connessa all'uso della rete Internet e alla reperibilità di notizie provenienti dal passato e alla necessità di collocare l'informazione nel contesto attuale); infine, come pretesa alla *deindicizzazione dei dati personali* visibili nell'elenco dei risultati di ricerca disponibili online<sup>72</sup> con specifico riferimento alle implicazioni "digitali" (riguardante la cancellazione dei dati personali)<sup>73</sup>.

Sì che, il giornalista che rievoca fatti storici non esercita il «diritto di cronaca», ma il «diritto alla rievocazione storica o storiografica di fatti»<sup>74</sup>. La storia, quindi, non può essere considerata cronaca: in essa i fatti narrati - a meno che non si tratti di persone che hanno rivestito o rivestono un ruolo pubblico - devono essere rievocati «in forma anonima». In sostanza, la conoscenza si limita al ricordo del fatto e non deve riguardare anche l'identità; pertanto, qualora il decorso del tempo faccia venire meno l'interesse attuale alla conoscenza di una notizia già legittimamente pubblicata in passato anche per fatti gravi non è ammessa l'ulteriore reiterata diffusione dei dati personali del protagonista della vicenda<sup>75</sup>.

<sup>71</sup> Cass., 5 aprile 2012, n. 5525, cit., p. 836 ss.

<sup>72</sup> Corte giust., 13 maggio 2014, c. 131/12, Google Spain, cit., c. 295 ss.

<sup>73</sup> Cfr., più ampiamente, ALÙ, *Esiste il diritto all'oblio su internet?*, cit., p. 318. Sul «variegato affresco» del diritto all'oblio e sulla necessità di dettarne «un'adeguata configurazione [...] delle relative traiettorie rimediali» discorrono PALMIERI e PARDOLESI, *Polarità estreme: oblio e archivi digitali*, cit., c. 1571. Rileva CREA, *Droit à l'oubli e memoria storica tra antiche e nuove criticità*, in *Rass. dir. civ.*, 2020, 954, che il «ragionamento delle sezioni unite desta non poche perplessità, soprattutto sul piano dell'argomentazione. Oltre a dubitarsi della classificazione tra le varie ipotesi di diritto all'oblio, ciò che maggiormente alimenta dubbi è proprio la creazione di un ulteriore concetto (diritto alla rievocazione storica) che dovrebbe consentire all'interprete di creare un nuovo punto di equilibrio tra riservatezza dell'individuo e diritto di informare ed essere informati della collettività».

<sup>74</sup> Per un commento alla decisione ivi illustrata v., inoltre, PARDOLESI, *Oblio e anonimato storiografico: "usque tandem...?"*, in *Foro it.*, 2019, I, c. 3071 ss.; v., inoltre, SCARPELLINO, *Contorsionismi del diritto all'oblio e criticità degli archivi on line*, in *Danno resp.*, 2020, p. 405 ss.

<sup>75</sup> Sì che, «l'interesse alla conoscenza di un fatto [...] non necessariamente implica la sussistenza di un analogo interesse alla conoscenza dell'identità della singola persona che quel fatto ha compiuto» (a meno che – si torna a precisare – non si tratti di un soggetto che rivesta un ruolo pubblico): così, Cass., Sez. un., 22 luglio 2019, n. 19681, cit. Criticamente CREA, *o.c.*, 956, osserva: l'«anonimato [...] non è necessariamente il rimedio più efficace per realizzare il punto di equilibrio nel bilanciamento tra oblio-riservatezza e informazione dell'opinione pubblica nella prospettiva anche della memoria storica. Né è esclusivo, ben potendosi nel caso concreto cumulare con altri rimedi (*i.e.*: aggiornamento e integrazione, o anche deindicizzazione o cancellazione, a seconda dei casi) più giusti, ragionevoli e proporzionati rispetto agli interessi in conflitto meritevoli di tutela». Al riguardo, v. G.

## 8. La deindicizzazione e il c.d. blocco geografico

Nel settembre 2019 torna all'attenzione della Corte di giustizia il tema del diritto alla protezione dei dati personali nel noto caso *Google*<sup>76</sup>. Tale decisione si colloca successivamente all'entrata in vigore del reg. UE 679/2016 e, quindi, la questione è esaminata alla luce della portata applicativa dell'art. 17 GDPR. I giudici di Lussemburgo intervengono non soltanto in merito all'ammissibilità dell'esercizio del diritto alla deindicizzazione (quale *species* del diritto all'oblio in Internet), ma anche con riguardo alla possibile estensione territoriale dello stesso.

La Corte di giustizia è investita del seguente quesito: se il gestore di un motore di ricerca, nel dare seguito a una richiesta di deindicizzazione, sia tenuto ad eseguirla su tutti i nomi di dominio del suo motore, cioè anche al di fuori dell'àmbito di applicazione territoriale della normativa europea. Due sono le questioni rilevanti: la prima attiene al rapporto tra diritto alla protezione dei dati personali e diritto all'informazione dell'utente di Internet; la seconda riguarda la portata territoriale del diritto all'oblio.

Con riguardo alla prima questione si afferma che in Internet i dati personali vengono curati e aggiornati dai c.dd. siti sorgente e, di poi, indicizzati e memorizzati dai motori di ricerca, i quali li trattano per le proprie finalità. Secondo l'art. 17 GDPR, il diritto alla cancellazione<sup>77</sup> sorge qualora sussistano determinate condizioni (es. la non necessarietà dei dati per le finalità per le quali erano stati originariamente raccolti, il venir meno del consenso, l'illiceità del trattamento ecc.) alla presenza delle quali l'interessato può pretendere dal titolare del trattamento la cancellazione dei dati che lo riguardano. In merito al diritto all'informazione si fa presente che non esiste solo un diritto a essere informati, ma anche un diritto ad informare; ciò vuol significare che

PERLINGIERI, *Profili applicativi della ragionevolezza nel diritto civile*, Napoli, 2015, 7 ss., nonché ID., *Reasonableness and Balancing in Recent Interpretation by the Italian Constitutional Court*, in *Italian Law J.*, 2018, 386 ss.

<sup>76</sup> Corte giust., 24 settembre 2019, c. 507/17, Google LCC e Google Italia c. Commission Nationale de l'information et des libertés (CNIL), in *Danno resp.*, 2020, p. 209 ss., con note di: SCARPELLINO, *Un oblio tutto europeo*, ivi; PACINI, *Diritti di informazione e diritto alla riservatezza nell'era di internet*, in *Giorn. dir. amm.*, 2010, 60 ss.

<sup>77</sup> V., più dettagliatamente, LIVI, *Diritto alla cancellazione (diritto all'oblio)*, in BARBA e PAGLIANTINI (a cura di), *Delle Persone. Leggi collegate*, II, in Comm. c.c. Gabrielli, Torino, 2019, 267 ss., spec. p. 292 ss.

l'attenzione va rivolta non soltanto a chi fornisce un'informazione (giornali, media e piattaforme digitali, *social network*, motori di ricerca)<sup>78</sup>, ma anche a chi tale informazione la riceve. Informazione, dunque, che va tutelata e garantita in tutte le sue articolazioni, sia per assicurare il pluralismo informativo, sia per promuovere e sostenere il diritto di ciascun utente ad essere informato. Ed è qui che si colloca la questione della portata applicativa del diritto alla deindicizzazione inteso come diritto alla rimozione dei *link* alle pagine *web* contenenti notizie non più attuali<sup>79</sup>. La posizione della Corte di giustizia appare rilevante non soltanto per le implicazioni connesse all'individuazione dei limiti del diritto alla cancellazione, ma, soprattutto, per aver affermato che l'attività di indicizzazione e memorizzazione automatica delle informazioni messe a disposizione del pubblico di Internet costituisce «trattamento di dati personali», di cui il gestore del motore di ricerca è responsabile, con evidenti ricadute sul piano delle conseguenze giuridiche.

Con riguardo alla seconda questione, si prende in esame la portata territoriale del diritto all'oblio. Al riguardo si stabilisce che il gestore di un motore di ricerca è tenuto ad effettuare tale deindicizzazione non in tutte le versioni del suo motore di ricerca (ossia a livello mondiale), ma soltanto nelle versioni di tale motore corrispondenti a tutti gli Stati membri dell'Unione europea, con ciò limitando l'adempimento dell'obbligo in tali confini spaziali<sup>80</sup>.

La portata del rimedio della deindicizzazione<sup>81</sup>, dunque, si restringe notevolmente: ciò in quanto in molti Stati terzi il diritto alla protezione

<sup>78</sup> Cfr., DE FRANCESCHI e LEHMANN, *Data as tradeable Commodity and new Measures for their Protection*, in *Italian Law J.*, 2015, 22 ss.; C. PERLINGIERI, *Gli accordi tra i siti di "social networks" e gli utenti*, in *Rass. dir. civ.*, 2015, 104 ss.; nonché EAD., *Social networks and private law*, Napoli, 2017, 64 ss.; DE GREGORIO, *Social network, contitolarità del trattamento e stabilimento: la dimensione costituzionale della tutela dei dati personali tra prospettive passate e future*, in *Dir. inf.*, 2018, 462 ss.

<sup>79</sup> BONAVITA, *Deindicizzazione: tecnologie abilitanti ed evoluzione del rapporto tra tecnologia e diritto*, in *Danno resp.*, 2019, 122 ss. Cfr., più ampiamente, il Rapporto curato da Assonime, *Diritto all'oblio e deindicizzazione dai motori di ricerca: la giurisprudenza della Corte di giustizia*, in *Note e studi*, n. 1/2020.

<sup>80</sup> ASTONE, *Il diritto all'oblio on line alla prova dei limiti territoriali*, in *Eur. dir. priv.*, 2020, 223 ss.; ALÙ, *o.c.*, spec. p. 323.

<sup>81</sup> Cfr., sul punto, Cass., 27 marzo 2020, n. 7559, in *Danno resp.*, 2020, 732 ss., con note di NAPOLITANO, *Il diritto all'oblio*, cit., 746 ss., e SCIARRINO, *Il web e la tutela della memoria collettiva storica: un tentativo, poco riuscito, di protezione dell'oblio digitale*, in *Corr. giur.*, 2021, 354 ss.; Trib. Milano, 24 gennaio 2020, in *Nuova giur. civ. comm.*, I,

dei dati personali non è conosciuto o non è regolato, ed il sistema ordinamentale europeo non prevede strumenti o meccanismi di cooperazione diretti a estendere tale cancellazione al di fuori di tali confini territoriali. Ne consegue l'amara conclusione che il motore di ricerca è tenuto ad effettuare - mediante la tecnica del c.d. blocco geografico - la deindicizzazione soltanto sulle versioni nazionali corrispondenti agli Stati facenti parte dell'Unione europea<sup>82</sup>.

## **9. Oblio digitale e «algoritmo sovrano». La persistenza della memoria**

È possibile affermare, in conclusione, che sebbene la rete sia il più grande spazio pubblico che l'umanità abbia mai conosciuto<sup>83</sup>, la stessa non è sottoponibile ad un sistema normativo privo di limitazioni spaziali. Ne consegue che non è delineabile una tutela dell'oblio su scala globale: questa figura, pur essendo «una delle più moderne espressioni del tentativo dell'individuo di essere pieno artefice della propria identità»<sup>84</sup>, risulta particolarmente problematica nella fase applicativa (almeno nella sua accezione digitale), essendo arduo configurare delle condizioni di effettiva tutela applicabile all'intero spazio virtuale della rete.

La tutela dell'oblio resta costellata da incertezze disciplinari legate, da un lato, all'inadeguatezza del diritto a stare al passo con i rapidi cambiamenti<sup>85</sup> tecnologici e, dall'altro, dalla oggettiva difficoltà di bilanciare la dignità della persona con la libertà di manifestazione del pensiero in un ambito sconfinato qual è la rete. Il dibattito resta aperto e l'unica ancora presente è individuata nella figura dell'interprete al quale si richiede uno sforzo ermeneutico costante nella consapevolezza dell'impossibilità di poter adottare soluzioni

1235 ss., con nota di CIRILLO, *La deindicizzazione dai motori di ricerca tra diritto all'oblio e identità personale*.

<sup>82</sup> SCARPELLINO, *Un oblio tutto europeo*, cit., 218 ss.

<sup>83</sup> S. RODATÀ, *Il diritto di avere diritti*, cit., 378.

<sup>84</sup> D'ANTONIO, *Oblio e cancellazione dei dati nel diritto europeo*, in SICA, D'ANTONIO e RICCIO (a cura di), *La nuova disciplina europea della privacy*, cit., 197 ss.

<sup>85</sup> Si ricordano, al riguardo, le parole di GROSSI, *Crisi del diritto, oggi?*, in ID., *Introduzione al Novecento giuridico*, Roma-Bari, 2012, 75: «La fattualità dei nostri giorni si connota per rapidità, mutevolezza, complessità. È un tessuto indocile, recalcitrante a ogni irretimento, tanto più a una gabbia legislativa, che è per sua natura tarda e lenta a formarsi, che si sottrae a ogni variazione o che assorbe con difficoltà ogni variazione, che è vocata a permanere nel tempo».

tendenzialmente universali<sup>86</sup> in grado di decidere di quel «futuro che è già presente, ma tutto ancora da comprendere»<sup>87</sup>, sorretto dal c.d. «algoritmo sovrano»<sup>88</sup>.

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<sup>86</sup> Osserva SPANGARO, *Notizie sul web e oblio*, cit., 1340: «l’oblio stenta a qualificarsi quale autonomo diritto della personalità, difettando delle caratteristiche di autonomia», facendosi «strumento multifunzionale di altri diritti. Ciò non significa affatto derubricare l’oblio, sminuirne la portata, ma, al contrario, rilevarne la polifunzionalità e la concreta operatività, a fronte di affermazioni di diritti, quali quelli della personalità, che – a dispetto del loro rilievo – risultano a volte evanescenti, poco tangibili o comunque difficilmente perimetrabili».

<sup>87</sup> CREA, *Droit à l’oubli e memoria storica*, cit., 958.

<sup>88</sup> CURCIO, *L’algoritmo sovrano. Metamorfosi identitaria e rischi totalitari nella società artificiale*, Roma, 2018; per un approfondimento generale ANTINUCCI, *L’algoritmo al potere. Vita quotidiana ai tempi di Google*, Roma-Bari, 2011, 3 ss. Individua nell’algoritmo lo strumento mediante il quale i grandi motori di ricerca esercitano il loro potere raccogliendo, selezionando e stabilendo «gerarchie tra le informazioni alle quali un numero sempre crescente di persone attingono le loro conoscenze» S. RODOTÀ, *o.u.c.*, 402. Sul tema v., inoltre, le considerazioni di P. PERLINGIERI, *Sul trattamento algoritmico dei dati*, in *Tecn. dir.*, 2020, 181 ss.



# APPUNTI SULLA SICUREZZA NEL TRATTAMENTO DEI DATI E *DATA BREACH*<sup>°</sup>

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*Il saggio si propone di esaminare se le norme del Reg. UE 679/16 in materia di sicurezza del trattamento dei dati personali appaiono adeguate nel caso di data breach e se il bilanciamento degli interessi presi in considerazione dal Regolamento (tutela della libertà e dignità delle persone da un lato e sviluppo dell'economia digitale dall'altro) sia assicurato anche mediante i meccanismi di individuazione della responsabilità in caso di mancato trattamento sicuro dei dati e di individuazione dei criteri risarcitorii.*

*The purpose of this essay is to examine whether the rules of EU Reg. 679/16 on the security of personal data processing appear adequate in the event of a data breach and whether the balance of interests taken into account by the Regulation (protection of the freedom and dignity of individuals on the one hand and development of the digital economy on the other) is also ensured through the mechanisms for identifying liability in the event of failure to process data securely and for identifying the criteria for compensation.*

## Sommario:

1. Indicazione delle norme del GDPR sulla sicurezza nel trattamento dei dati
2. L'approccio basato sulla preventiva valutazione del rischio
3. Il documento informatico, come contenitore di dati
4. Specificazione dell'*accountability* per la sicurezza dei dati
5. Il *data breach* e le conseguenze risarcitorie

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<sup>°</sup> Double blind peer-reviewed paper.

## 1. Indicazione delle norme del GDPR sulla sicurezza nel trattamento dei dati

Gli artt. 32, 33 e 34 del GDPR contengono le norme relative all'obbligo del titolare del trattamento di garantire la sicurezza del trattamento dei dati e di svolgere una serie di attività nel caso in cui si verifichi la violazione dei dati.

Queste norme fissano il principio per cui gli adempimenti (misure tecniche ed organizzative) messi in atto dal titolare del trattamento devono garantire un livello di sicurezza adeguato al rischio inerente lo specifico trattamento dei dati.

Oltre all'adozione di specifiche attività – come l'uso di pseudonimi o la cifratura dei dati; la capacità di assicurare *su base permanente* la riservatezza, l'integrità, la disponibilità e la resilienza dei sistemi e dei servizi di trattamento; la capacità di ripristino e la messa a punto di procedure per testare, verificare e valutare regolarmente l'efficacia delle misure tecniche adottate al fine di garantire la sicurezza del trattamento – oltre a tutti questi adempimenti, dicevamo, appare fondamentale la valutazione preliminare e generale del rischio presentato dal trattamento.

Questi principi fissati dall'art. 32 devono poi essere letti in combinato con gli adempimenti previsti dagli artt. 33 e 34 nel caso in cui avvenga una violazione dei dati personali perché in questo caso scattano dei precisi obblighi informativi che hanno lo scopo da un lato di mettere in condizioni l'autorità di controllo di verificare (a posteriori) l'adeguatezza delle misure messe in atto per evitare la violazione (c.d. *data breach*) e dall'altro di consentire all'interessato (proprietario dei dati) di valutare eventuali danni a suo carico.

La dottrina ha correttamente messo in risalto che il GDPR ha attribuito alla sicurezza il valore di principio fondamentale informatore del trattamenti dei dati personali, privilegiandone il carattere funzionale ed assegnandone un valore elastico (art. 5, lett. f GDPR)<sup>1</sup>.

## 2. L'approccio basato sulla preventiva valutazione del rischio

Questa impostazione sottolinea la rilevanza che il GDPR attribuisce al c.d. *risk-based approach* ed alla responsabilizzazione o *accountability* del titolare del trattamento<sup>2</sup>.

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<sup>1</sup> RENNA, *Sicurezza dei dati personali*, in BARBA e PAGLIANTINI (a cura di) *Comm. del cod. civ.*, vol. II, Torino, 2019, 627.

<sup>2</sup> BATTELLI, *La valutazione d'impatto introdotta dal GDPR: un approccio basato sul rischio*, in BARBA e PAGLIANTINI (a cura di) *Comm. del cod. civ.*, vol. II, Torino, 2019, 663.

La necessità di questo approccio deriva dal prendere atto che «*la rapidità dell’evoluzione tecnologica e la globalizzazione comportano nuove sfide per la protezione dei dati personali. La portata della condivisione e della raccolta dei dati personali è aumentata in modo significativo. La tecnologia attuale consente tanto alle imprese private quanto alle autorità pubbliche di utilizzare dati personali, come mai in precedenza, nello svolgimento delle loro attività.*

*Sempre più spesso le persone fisiche rendono disponibili al pubblico su scala mondiale informazioni personali che ci riguardano. La tecnologia ha trasformato l’economia e le relazioni sociali e dovrebbe facilitare ancora di più la libera circolazione dei dati personali all’interno dell’Unione e il loro trasferimento verso paesi terzi e organizzazioni internazionali, garantendo al tempo stesso un elevato livello di protezione dei dati personali»* (Cons. n. 6 GDPR). «*Tale evoluzione richiede un quadro più solido e coerente in materia di protezione dei dati nell’Unione affiancato ad efficaci misure di attuazione, data l’importanza di creare il clima di fiducia che consentirà lo sviluppo dell’economia digitale in tutto il mercato interno. È opportuno che le persone fisiche abbiano il controllo dei dati personali che li riguardano e che la certezza giuridica e operativa sia rafforzata tanto per le persone fisiche quanto per gli operatori economici e le autorità pubbliche»* (Cons. n. 7 GDPR).

### **3. Il documento informatico, come contenitore di dati**

L’elemento che caratterizza questa impostazione è il dato personale in tanto in quanto contenuto in un documento informatico<sup>3</sup>, perché è quest’ultimo che ha la peculiare caratteristica di essere trattato con i

<sup>3</sup> Il d.lgs. 7 marzo 2005 n. 82 (Codice dell’Amministrazione Digitale) all’art. 1 lett. p) definisce il documento informatico: il documento elettronico che contiene la rappresentazione informatica di atti, fatti o dati giuridicamente rilevanti; in contrapposizione al documento analogico (lett. p-bis) definito come la rappresentazione non informatica di atti, fatti o dati giuridicamente rilevanti.

Già nel 1972, RODOTÀ, *Elaboratori elettronici e controllo sociale*, Bologna, aveva “profeticamente” individuato questa caratteristica. Sul punto la letteratura è amplissima, v. per tutti: ALPA, *A proposito della ristampa anastatica di “Elaboratori elettronici e controllo sociale”*, in *Riv. crit. dir. priv.*, 2019, 137.

V. anche: PESCE, *Sul rapporto tra atto del privato inserito sulla piattaforma tecnologica “sicura ed irretrattabile” (blockchain) e atto pubblico. Riflessi sul procedimento e sul processo*, in [www.Judicium.it](http://www.Judicium.it), 7 settembre 2021.

sistemi informatici e dunque di essere messo in circolazione e condiviso in ambiti anche lontani dalla sfera personale del titolare del dato.

Questa radicale trasformazione dei dati è stata già da tempo oggetto di attenzione sia da parte del legislatore comunitario<sup>4</sup> che del legislatore nazionale in ambiti determinanti della vita sociale ed economica<sup>5</sup>.

Le problematiche da ciò derivanti sono state evidenziate sotto moltissimi profili<sup>6</sup>, ma la prospettiva assunta dal GDPR prende atto del fatto che la libera circolazione dei dati possa costituire un fattore di sviluppo economico.

Ciò che va dunque indagato è se il sistema normativo contenuto negli artt. 32, 33 e 34 del GDPR consente di realizzare un bilanciamento tra la necessità di tutela della libertà e dignità personale<sup>7</sup> e le esigenze di sviluppo dell'economia digitale fondata sullo scambio delle informazioni.

L'eccezionale attitudine delle reti informatiche a far circolare e condividere i documenti informatici, combinata con l'attitudine di questi ultimi di essere trattati per l'acquisizione delle più diverse informazioni che contengono, ha determinato dei profondissimi mutamenti praticamente in tutti i settori economici, come è stato correttamente rilevato da attenta dottrina (anche solo con riferimento alle email)<sup>8</sup> ed incide anche sulla tutela dei dati personali la cui protezione appare ancora più determinante<sup>9</sup>.

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<sup>4</sup> A partire dalla Convenzione del Consiglio d'Europa n. 108 del 28 gennaio 1981 c.d. Convenzione di Strasburgo sulla protezione delle persone rispetto al trattamento automatizzato di dati di carattere personale (ratificata dall'Italia con L. 21 dicembre 1989 n. 98), e dalla Carta dei Diritti fondamentali dell'Unione Europea c.d. CEDU del 7 dicembre 2000.

<sup>5</sup> CONTALDO e GORGA, *Le regole tecniche del nuovo casellario giudiziale telematico*, in *Diritto dell'Internet*, n. 4/2008, 411; LISI e CONFANTE, *La conservazione digitale dei documenti contabili e fiscali alla luce della Circolare 3C/E dell'Agenzia delle Entrate*, in *Diritto dell'Internet*, 4/2007, 407; MACRÌ, *Gli strumenti per il dialogo dell'amministrazione digitale*, in *Azienditalia*, 5/2011, 856.

<sup>6</sup> Uno per tutti: MEZZANOTTE, *La memoria conservata in Internet ed il diritto all'oblio telematico: storia di uno scontro annunciato*, in *Diritto dell'Internet*, 4/2007, 398.

<sup>7</sup> LIBERATI BUCCANTI, *Disposizioni Generali*, in BARBA e PAGLIANTINI (a cura di) *Comm. del cod. civ.*, vol. II, Torino, 2019, 21.

<sup>8</sup> CERDONIO CHIAROMONTE, *Il valore dell'email nel quadro della disciplina dei documenti informatici*, in *Riv. dir. civ.*, 3/2021, 427.

<sup>9</sup> FINOCCHIARO, *Intelligenza Artificiale e protezione dei dati personali*, in *Giur. It.*, luglio 2019, 1670.

#### 4. Specificazione dell'*accountability* per la sicurezza dei dati

Dunque, l'obbligo di garantire la sicurezza nel trattamento dei dati è delineato dal GDPR in modo “elastico” quale declinazione concreta del principio di *accountability*, che può essere tradotto con responsabilità e insieme prova della responsabilità, con un particolare accento posto sulla dimostrazione di come viene esercitata la responsabilità e sulla sua verificabilità.

Com’è oramai noto, l’*accountability* poggia su due principi: l’adozione di misure tecniche ed organizzative adeguate a garantire il livello di sicurezza in relazione allo specifico rischio derivante dal quel trattamento dei dati e la possibilità di dimostrare in qualsiasi momento di avere adottato tali misure.

Il Parere n. 3/2010 del Gruppo di Lavoro articolo 29 ha messo in luce la circostanza che la flessibilità di tale principio possa non essere sufficiente a garantire la certezza del diritto<sup>10</sup> ed in effetti il rilevo non è di carattere secondario.

Tuttavia, la necessità di stabilire un criterio generale adottabile a tutte le circostanze ha portato il legislatore europeo a recepire il principio dell’*accountability*, non senza introdurre l’indicazione di alcune misure minime (art. 32 lett da a a d), nonché alcune misure ulteriori come l’adesione a codici di condotta (art. 40) o a meccanismi di certificazione (art. 42).

L’importanza della “posta in gioco” e la delicatezza della materia relativa al trattamento dei dati personali hanno dunque portato a delineare un dovere di sicurezza che non si esaurisce nella predeterminazione di misure minime o di una determinata soglia di conformità e che, di contro, prevede una verifica sempre aggiornata dei profili di rischio.

In aggiunta a ciò, l’art. 25 del GDPR prescrive che il titolare del trattamento possa mettere in atto misure tecniche e organizzative adeguate già dal momento in cui deve determinare i mezzi del trattamento, sempre nell’ambito della dovuta contestualizzazione dell’attività posta o da porre in essere e cioè facendo in modo che gli strumenti tecnologici adoperati per il trattamento siano concepiti per pseudonomizzare e per raccogliere il numero minimo indispensabile di dati per la finalità indicata: si tratta del c.d. approccio *privacy by design*<sup>11</sup>.

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<sup>10</sup> Parere n. 3/2010 Gruppo di Lavoro Articolo 29 in [www.garanteprivacy.it/documents/10160/10704\\_14](http://www.garanteprivacy.it/documents/10160/10704_14).

<sup>11</sup> CAVOUKIAN, *Privacy by Design, the 7 Foundational Principles*, in [www.privacysecurityacademy.com/wp-content/uploads/2020/08/PbD-Principles-and-Mapping.pdf](http://www.privacysecurityacademy.com/wp-content/uploads/2020/08/PbD-Principles-and-Mapping.pdf); MONTANARI, *Le misure tecniche ed organizzative come criterio concreto di comportamento*

Inoltre, l'art. 25 del GDPR prevede che il titolare del trattamento debba effettuare una valutazione d'impatto dei rischi previsti sulla protezione dei dati personali, quando un tipo di trattamento preveda l'uso di nuove tecnologie, sempre nell'ambito di una precisa valutazione del contesto in cui opera. La valutazione d'impatto (o DPIA) è svolta con la consultazione del responsabile della protezione dei dati, se nominato.

È stato osservato che la DPIA non è soggetta a pubblicazione o comunicazione, non essendo un documento pubblico<sup>12</sup>.

Nondimeno appare evidente che tale attività costituisca un momento cruciale nella *accountability* di un determinato trattamento dei dati. La capacità del titolare del trattamento di valutare *ex ante* i rischi di quel trattamento, di mettere in atto le misure adeguate, informandone il DPO costituiscono elementi di valutazione del suo adempimento all'obbligo di garantire la sicurezza<sup>13</sup>.

Completano il quadro delle misure di *accountability* l'adesione ai codici di condotta e la certificazione.

Senza eccedere i limiti di questi appunti, si può sinteticamente ricordare che i codici di condotta previsti dall'art. 40 del GDPR costituiscono un peculiare ed innovativo sistema autoregolamentare che, a differenza degli schemi autodisciplinari adottati nei diversi ambiti socio-economici frutto di autonomia negoziale, postula in vario modo un'ingerenza dei poteri pubblici<sup>14</sup>, mentre la certificazione prevista dall'art. 42 rientra in quei modelli di comportamento volti a certificare la conformità di un servizio (o di un bene) a predeterminati parametri stabiliti<sup>15</sup>.

Questo è ciò che si intende per "adeguatezza" ai sensi dell'art. 32, esprimendo quindi un principio che lungi dall'apparire generico o vago, si riempie della sostanza concreta delle azioni ed adempimenti che ciascun titolare del trattamento avrà valutato opportune in quel determinato momento

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nella *privacy by design*, in BARBA e PAGLIANTINI (a cura di) *Comm. del cod. civ.*, vol. II, Torino, 2019, 530;

<sup>12</sup> D'IPPOLITO, *La valutazione d'impatto introdotta dal GDPR: un approccio basato sul rischio*, in BARBA e PAGLIANTINI (a cura di) *Comm. del cod. civ.*, vol. II, Torino, 2019, 671.

<sup>13</sup> Con particolare riferimento alle nuove tecnologie come l'intelligenza artificiale, il *machine learning*, l'*Internet of Things* e il *cloud computing* la DPIA diventa un momento cruciale nel bilanciamento fra protezione dei dati personali e iniziativa economica e incentivo all'innovazione e al progresso tecnologico: BATELLI, *DPIA e le nuove tecnologie*, in *Comm. del cod. civ.*, vol. II, cit., 678.

<sup>14</sup> D'ORAZIO, *Codici di condotta*, in *Comm. del cod. civ.*, cit., 807.

<sup>15</sup> Mi sia consentito rinviare a BIANCA, *Art. 42 Lo scopo della norma*, in BARBA e PAGLIANTINI (a cura di) *Comm. del cod. civ.*, vol. II, Torino, 2019, 837.

per fronteggiare i rischi di *data breach* e svolgere le proprie attività in sicurezza<sup>16</sup>.

## 5. Il *data breach* e le conseguenze risarcitorie

Nonostante le misure previste per garantire la sicurezza nel trattamento dei dati, gli episodi di indebita diffusione di dati e in senso più lato di *data breach* si verificano comunque.

Ciò significa che – a dispetto delle misure attuate in conformità al principio di *accountability* – la protezione dei dati non è stata garantita.

Di fronte a questa evidenza si rende necessario cominciare ad indagare le prospettive concrete di valutazione della responsabilità del titolare del trattamento e di quantificazione del pregiudizio arrecato ai titolari dei dati.

Il tema appare vieppiù complesso con riferimento agli episodi di *data breach* compiuti dai *cyber criminali*, i quali riescono ad entrare nei *data center* per prelevare i dati ivi contenuti, oppure per bloccare l'accesso al *data center* da parte del titolare del trattamento per costringere quest'ultimo a pagare un riscatto per rientrare nella disponibilità dei dati.

In realtà, nessuno ci dice che l'*hacker* – una volta inserito il *ransomware* – non estratta anche una copia dei dati (o una parte di essi) in aggiunta alla richiesta di riscatto, per poi rivenderli.

Certo è che una volta violato il *data center* di un titolare del trattamento è molto difficile capire dove vadano a finire i dati abusivamente prelevati e chi traggia profitto da ciò.

In questo contesto è plausibile ritenere che sia difficile individuare il fatto-danno e dargli una quantificazione.

La giurisprudenza che fino ad ora ha avuto occasione di esaminare fatti-specie di indebito trattamento dei dati (situazione per la verità in parte diversa dal *data breach* frutto di *cyber crime*) ha necessariamente dovuto applicare le norme della responsabilità aquiliana, con esiti per la verità non proprio soddisfacenti<sup>17</sup>.

In un caso, addirittura, la diffusione illecita sul *web* del dato personale (una fotografia) è stata degradata da illecito ex art. 82 GDPR ad “inconveniente” e l'esistenza di un “serio pregiudizio” è stata esclusa in ragione della supposta

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<sup>16</sup> GAMBINI, *Algoritmi e sicurezza*, in *Giur. It.*, 2019, 1726.

<sup>17</sup> Cass. Civ. Sez. I, ord. 10.06.2021 n. 16402; Cass. Civ., Sez. III, ord. 23/10/2020, n. 23390; Cass. Civ., Sez. VI-1, ord. 20/08/2020 n. 17383; Cass. Civ., Sez. I, ord., 19/02/2021 n. 4475; Trib. Torino 18/01/2020 in [www.onelegale.it](http://www.onelegale.it).

brevità della permanenza del dato in questione sul sito *web* del titolare del trattamento (una testata giornalistica)<sup>18</sup>.

Il caso appare interessante sotto due profili: da un lato il mancato riconoscimento della violazione dell'art. 82 GDPR in favore della responsabilità aquiliana dell'art. 2043 c.c. con le arcinote conseguenze in ordine al regime di prova del danno e della colpa dell'autore dell'illecito trattamento del dato personale; dall'altro il mancato riconoscimento della serietà del pregiudizio.

Specialmente quest'ultimo aspetto merita di essere oggetto di riflessione, dal momento che non sembra sia stato adeguatamente preso in considerazione il fatto che la rimozione di un dato personale da una pagina *web* non assicuri affatto l'eliminazione totale del dato dalla rete<sup>19</sup> e quindi la rapidità della rimozione del dato personale dalla pagine *web* non diminuisce la gravità dell'illecito.

Ci si domanda se nei confronti di fattispecie del genere non sia più adeguata una risposta come quella prospettata da autorevole dottrina<sup>20</sup>, la quale ha ipotizzato l'introduzione di un criterio risarcitorio non più basato sull'errore e sulla colpa, ma piuttosto sull'allocazione del rischio.

In altre parole, si ipotizza di prevedere dei meccanismi di allocazione del costo del danno cagionato su quei soggetti che astrattamente potrebbero essere responsabili mediante, ad esempio, la costituzione di un fondo al quale attingere, a prescindere dalle modalità dell'incidente o dell'errore.

Va precisato che questa dottrina fa riferimento alle ipotesi di responsabilità nel caso di applicazioni di intelligenza artificiale, ma forse anche per le fattispecie dannose relative agli episodi di *data breach* si potrebbe ipotizzare una soluzione del genere, se si pensa al fatto che entrambi i fenomeni (*A.I.* e *data breach*) partono dal presupposto comune di una realtà sociale ed economica sempre digitalmente interconnessa dove i dati e le informazioni sono destinate sin dall'origine ad una circolazione globale.

Potrebbe non essere azzardato ipotizzare che il Reg. UE 679/16, pur non essendo stato concepito per le applicazioni di intelligenza artificiale e per i *Big Data*, possa tuttavia contenere gli strumenti adeguati per un nuovo modello culturale e giuridico di riferimento che contemperi l'esigenza di tutelare la dignità della persona e non compromettere la creazione di un clima di fiducia che consenta lo sviluppo dell'economia digitale (Cons. n. 7).

<sup>18</sup> Trib. Torino, 18/01/2020, cit.

<sup>19</sup> C.G.U.E. sent. Causa C-507/17 del 24.09.2019

<sup>20</sup> FINOCCHIARO, *Intelligenza Artificiale e protezione dei dati personali*, in *Giur. it.*, luglio 2019, 1675





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