Reply on credit check

A motivated opinion has been requested to understand how Reply on Credit Check (hereinafter referred to as "ROCC") can serve the purpose of guaranteeing fundamental rights and freedoms within the Italian legal system.

After providing a summary account of the ways banks and financial intermediaries assess the creditworthiness of individuals and enterprises, it was deemed necessary to analyse how the automatisms of computer systems (and any errors connected thereto), which provide a limited view of creditworthiness, may damage not only an individual's right to reputation and personal identity (unmistakable when transmitting incorrect or incomplete data regarding each individual's credit history) but, most importantly, its right to informational self-determination (understood according to its most accepted meaning of control over one's personal data).

The rights this document refers to are constitutional rights.

Within this scope, ROCC, by enabling users to provide subjective information – that would add to, and not replace, the objectivity of credit data encompassed in the various databases – becomes virtuously capable of completing the information available to credit granting entities, thus guaranteeing the provision of complete data about everyone.

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1. Preliminary remarks

The growing uncertainty of the global economy has called for the introduction of organization and certification forms that represent, however, only partial solutions: on the one hand, some areas of uncertainty may not be mitigated by such tools; on the other, such solutions have failed in the past and still do while being variably manipulatable.

With reference to the credit sector, for example, in an attempt to reduce information asymmetries between borrowers and lenders, banks and financial brokers acquire information based in part on quantitative and controllable elements; however, this information is also based on qualitative evaluations that define (in theory, but with extremely tangible consequences) the risk of default of a specific private or public debtor, classifying it according to a scale certifying its ability to fulfil payment obligations.

These preliminary considerations focus on the subject matter issue, showing how it is increasingly difficult to obtain a loan for a twofold reason: the banking system is still unwilling to grant liquidity (due to the credit crunch introduced in 2011) and the number of bad payers is increasingly growing.

2. Consumer credit and databases

Creditworthiness is key to access the credit market more easily, both for enterprises and individuals.

As for the latter, the most relevant sector is consumer credit, reformed by Directive 2008/48/EC, subsequently implemented in Italy by Legislative Decree no. 141/2010[1], which amended Articles 121 *et seq*. of Legislative Decree no. 385/1998, including the *Testo Unico delle Leggi in materia Bancaria e Creditizia* (Consolidated Act on Banking and Credit)[2].

Consumer credit is an important financing tool used by individuals to purchase durable goods. For various reasons, generally connected to a limited spending capacity due to low income levels, borrowers take out loans from authorised banks or other credit entities to meet their consumption needs[3].

Pursuant to Art. 124-*bis* of the Italian TUB (Consolidated Banking Act), titled "check on creditworthiness", reference is made to the need for preventive verification of the debtor's solvency, i.e. its ability to repay the amount borrowed; this ability must be established based on the debtor's income, executable assets and repayment history, but also on other information provided by individuals (Art. 120-*septies* of the Consolidated Banking Act with specific regard to consumers).

[1] Other two Legislative Decrees followed the above mentioned (no. 218/2010 and no. 169/2012), without substantially changing the existing legal framework, while, for the relevant purpose, not introducing new provisions. Legislative Decree no. 141/2010 was issued to implement the guidelines set forth by Art. 33 of Law no. 88/2009 of 07.07.2009, known as "Provisions for the fulfilment of obligations deriving from Italy's membership of the European Communities - (Community Law 2008)."

[2] With regards to the principles set out by law no. 88 of 07.07.2009, see De Cristofaro, *Verso la riforma della disciplina del credito al consumo*, *I contratti*, 2009, 12, 1151 and ff.

[3] This widespread phenomenon must be traced back to the mass production of industrial economy, which contributed to the transition from a "cash and carry society" to a "credit society", promoting the use of increasingly evolving contractual tools. This expression (cash and carry) and its literal meaning ("pay and carry") dates back to WWII in US. Among other scholars, cf. Caterini, *Controllo del credito, tutela del risparmio e adeguatezza nel finanziamento*, in *La tutela del consumatore nelle posizioni di debito e credito*, by Rizzo, Caterini, Di Nella, Mezzasoma, Naples, 2010, p. 37 and ff.

This type of information is not consistent with the operational procedures of the databases forming the so-called credit information systems (Art. 125 of Consolidated Banking Act). Such systems are in line only apparently with the central role which exhaustive information on the global position of reference of each individual concerned[4] should play; instead, they merely rely on objective data without considering the reasons for which debtors have failed to fulfil their previous obligations.

The regulatory framework (useful to outline the survey), in addition to Article 53, par. I(b) and Article 120-*septies et seq.* of the Consolidated Banking Act, is included in the provisions on banking self-regulation[5].

It is a rather complex system, which will be examined here only on a general basis while instead focusing on the case of illegitimate reporting. It includes the Central Credit Register of the Bank of Italy[6], where minimum amounts are equal to or higher than €30,000,[7] and the credit information systems managed by private entities, where amounts lower than those entered in the "public" Central Credit Register are filed and based on which obligations between the intermediary and the database controller are set according to contractual arrangements.

3. Central Credit Register, Credit Information Systems (SIC) and Other Databases

[4] These systems are governed by provisions of the Consolidated Banking Act, including Article 51 (on information surveillance).

[5] See resolution of CICR (Inter-ministerial Committee for Credit and Saving) dated 11.07.2012, which replaced the previous resolution dated 29.03.1994 and regulates the credit registration service managed by the Bank of Italy; Bank of Italy's Circular no. 139 of 1991 (in the text updated at April 2011); Legislative Decree no. 196/2003 on Personal Data Protection Code, and specifically art. 7, 11(c), 15, and 117; the Code of Ethics for information systems managed by private entities on consumer credit, reliability and punctuality in payments issued by data Protection Authority's order (no. 8 of 16.11.2004), implementing Article 117 of Legislative Decree no. 196/2003; the Data Protection Authority general provision of 31.07.2002 on private credit registers.

[6] It should also be noted that, according to the instructions for intermediaries set forth by Bank of Italy's Memorandum no. 139 (updated in 2011), "financial intermediaries whose consumer credit activity accounts for more than 50 per cent of their financing activity are exempted from the obligation to participate in the service. Financial intermediaries qualifying as assignees of consumer credit are entitled to be exempted from the obligation to participate to the service should the receivables acquired exceed 50% of the financing activity they carry out. For such purpose, they must send the required application to the Bank of Italy Branch of territorial competence" (Art. 4).

[7] Cf. Bank of Italy's Provision of 2011 including the Instructions for Credit Intermediaries with regards to the Central Credit Register (Chapter II, section I, par. 5). Note: until 31 December 2008, the record limit was €75,000; amounts between €35,000 and €75,000 were recorded in the Central Credit Register for lower amounts (i.e. "*Centralina*" or Lower Amounts Register), established by a resolution of CICR (Inter-ministerial Committee for Credit and Saving) dated 03.05.1999, later repealed. It should also be considered that provisions on consumer credit apply to financing not exceeding €75,000 (see Article 122(a) of the Consolidated Banking Act).

3.1 Central Credit Register of the Bank of Italy

The Central Credit Register of the Bank of Italy (i.e. CCR) is a public information system dedicated to customers' debt towards banks and financing corporations (intermediaries).

Every month, intermediaries transmit to the Bank of Italy the total amount of receivables from their customers equal to or exceeding €30,000.00, in addition to bad debts of any given amount, as long as they refer to loans granted for amounts equal to or exceeding €30,000.00; in turn, the Bank of Italy, provides intermediaries with the aforesaid information on a monthly basis, including the total debt due to the credit system by each customer reported.

Therefore, the Central Credit Register informs the banking system, thus pursuing the public interest, on a specific individual's default for loans of a substantial amount, or when its debt exposure adds up to a considerable amount, despite punctuality of payments.

The purpose of the Central Credit Register is to improve the customer creditworthiness assessment process by enhancing the quality of credits granted by intermediaries, while strengthening the system's financial stability.

In addition to the party concerned, access to the Central Credit Register is reserved exclusively to intermediaries, judicial authorities and criminal police (strictly for law enforcement purposes), as well as other to other Public Authorities within the limits provided for by law.

In turn, intermediaries must report debt exposure of "insolvent clients", i.e. those experiencing persistent equity and financial instability: for the purpose of defining bad debts, the debtor's overall financial position must in fact be considered.

In order for a report to be deleted from the Central Credit Register, intermediaries may monitor the information on a specific individual over a 36-month period. Therefore, a "clean" position requires 3 years from the date of the debt late payment, i.e. 3 years from the partial payment placing the debt below the €30,000.00 limit.

In the latter case, the intermediary will stop reporting the debtor (as the credit is now below the minimum reporting limit), but certain past reports will still be visible to intermediaries for the next 36 months.

3.2 Credit Information Systems (SIC)

In addition to the Central Credit Register at the Bank of Italy, there are other private for-profit corporations (SIC), known as credit information systems, which collect data referring to loans granted exclusively by intermediaries who have subscribed to that system. This applies also when monthly instalments are settled regularly.

These databases (CRIF is no doubt the most popular, but there is also EXPERIAN controlled by CRIF, CTC, CERVED and others), unlike the Central Credit Register at the Bank of Italy, also include debts ranging from few thousands of euro to € 30,000.00.

SIC's overall activity is governed by the Code of Ethics for Credit Information Systems - no. 300 of 23 December 2004 - issued to implement the "Italian Data Protection Code" (Legislative Decree no. 196/2003). The Code of Ethics was signed by the SIC administrators, by the representatives of financing institutions, by a few consumer associations, and by the Italian Data Protection Authority. Before its enforcement, private credit registers used to keep the names of "bad payers" (i.e., those delaying payments even for just a few days) for more than 5 years; now, they do so for 12 months in case of two late payments, for 24 months in case of more than two late payments, and for 36 months in case of final state of default, starting from the date of loan discharge or from the last update reported by the intermediary to the database.

3.3 Other databases (CAI or Interbank Register of Bad Cheques and Computerised Register of Protests)

The Interbank Register of Bad Cheques (CAI) includes data on credit cards and their possible revocation, as well as information on the issuance of bounced cheques, revocation of the permit to issue new cheques and other types of negative data on this category of financial instruments.

Only intermediaries can access this register which goal is preventing individuals sanctioned for protests, or because of failed payment of purchases made by credit card, to continue enjoying such payment tools throughout the period stated by the sanction (generally six months).

The Computerised Register of Protests (RIP) is instead controlled by the Chamber of Commerce and anyone can access it.

The Computerised Register of Protests includes all information related to protests for unpaid promissory notes, drafts and bank cheques.

Protests must be cancelled from the register 5 after their notification, also when the related payment has never been settled.

Having thus outlined how databases work and the key role they play in determining creditworthiness, it is clear that individuals or companies applying for a loan are completely excluded from the process of rebuilding their financial reliability.

4. Reporting Illegitimacy Profiles in Main Databases of Credit System

A) Motivations for reporting illegitimacy in the Central Credit Register or Credit Information Systems (eg., Crif, Experian, Cerved)

Many are the situations where an error may occur in reporting a person to the Central Credit Register and Credit Information Systems. The most frequent are:

1) **Failed receipt of notice, as provided for by Article 4, par. 7, of Code of Ethics and Article 125, par. 3, of Consolidated Banking Act.**

This first instance occurs when reporting without duly notifying an individual.

This information notice is key as it expresses the fundamental principle of fairness and faithfulness in processing personal data while giving the debtor the chance to act before reporting its state of default or another negative event.

In this respect, Art. 4, par. 7 of the Code of Ethics for Information Systems states that "in case of overdue payments, the participant [in the related information system], informs the individual concerned also by means of reminders or other forms of communication, on the forthcoming filing of its data in one or multiple credit information systems. The data related to the first delay, as set forth by paragraph 6 of the above-mentioned code, will be available to the participants only after at least fifteen days from notice to the individual concerned", under penalty of reporting illegitimacy[8].

2) Incorrect assessment by the Intermediary on the equity-financial position of individuals reported as "bad payer's".

Another very frequent example of illegitimate reporting to the Central Credit Register or Credit Information Systems is represented by incorrect assessment of the reported individual's equity/financial position. As known, filing "bad debts" in the credit information systems requires an in-depth analysis by the intermediary who must assess the customer's overall position before reporting.

More specifically, debts become "bad debts" only in case of "insolvency" (and not necessarily in case of bankruptcy), which however can be defined as a "serious and non-transitional financial difficulty comparable to, if not coinciding with, the state of insolvency[9]."

In this respect, by decision no. 2276/2012 the Court of Florence (acknowledging the illegitimacy of reporting to the Central Credit Register for the case at issue), stated that "[...] the bank has of course the obligation to carry out thorough investigations before filing a report in order to verify - based on objective elements such as the individual's liquidity, its production and/or income capacity, the contingent situation

[8] Cf. among others, ABF Rome decision no. 6087/2015; consistent is also *ABF Collegio di Coordinamento* no. 3089/2012; Court of Florence decisions no. 2304/2016 and no. 241/2016); Court of Pescara Order no. 4687 of 21/11/2014; Court of Milan Order of 29.08.2014.

[9] Italian Supreme Court of Cassation, Civil Division, decision no. 23093/2013, no. 7958/2009 and no. 21428/2007.

of the market of reference, and the total amount of the loan granted by the credit and/or financial system - whether a situation leading to consider the debt "bad" actually exists, i.e. there are considerable difficulties in cashing the outstanding payment [...]."

3) Failure to update the reporting after a settlement or after the court-established reduction of the debt.

The third and final example is represented by an initially-legitimate reporting never updated by the bank after the execution of a settlement agreement between the client and the intermediary.

In this case, the client shall be fully entitled to the amendment/cancellation of the reporting starting from the date of stipulation of the debt repayment plan; the client shall also be entitled to compensation for damage caused by the bank's tardy fulfilment[10]. Similar motivation may also apply when the court establishes that the debt is lower than the one claimed by the intermediary: the intermediary shall then be required to update the reported database, specifying the debt correct amount.

B) Illegitimate reporting to the Interbank Register of Bad Cheques (CAI) for failed receipt of notice as set forth by Article 9-*bis* of Law no. 386/1990

Insofar as concerns the Interbank Register of Bad Cheques (CAI), which prevents intermediaries from issuing new credit cards or chequebooks for the entire reporting period, the most frequent reason of illegitimate reporting, similar to what has been specified for the Central Credit Register and Credit Information Systems, is represented by failure to notify the client about the reporting by registered letter with acknowledgement receipt.

Such requirement is set forth by Article 9-*bis* of Law no. 386/1990.

C) Illegitimate reporting to the Computerized Register of Protests

With regards to illegitimate reporting to the Computerised Register of Protests, it should be noted that a protest notice may be deemed unlawful for procedural flaws or defects of substance.

[10] Cf. ABF Naples decision no. 6484 of 1 September 2015 and no. 6899 of 10 September 2015

In the first case, the individual concerned may apply directly to the Chamber of Commerce to request cancellation of the protest.

If instead the protest is deemed illegitimate for defects of substance, one must apply directly to the Judicial Authority to request ascertainment of the reasons leading to the protest issue.

4.1 Compensation for Damage Caused by Illegitimate Reporting and the Quantification issue

The reasons for the above reflect the general principles of good faith, fairness and adequate professionalism which banks have the obligation to comply with, and the Bank of Italy's Communication of 22 October 2007 which expressly acknowledged the client's right to know the reasons for the bank's refusal[11]. In this respect, as for the client's right to obtain a copy of its credit position file, this represents each user's right, which legislative source is found in the Italian Data Protection Code (Section 7) and, from 25 May 2018, Art. 15 of the GDPR EU Regulation 2016/679, which expressly provides for the sensitive data holder's right to access all documents concerning him/her.

Once established the liability for illegitimate reporting in credit databases, the majority of law cases[12] show that the damage is not *in re ipsa* (i.e. coinciding with the event) (save, as explained below, for damage to reputation), but that the damage suffered must be proved, with additional rise in costs and times. The damage caused by illegitimate reporting may thus be interpreted as both a pecuniary and non-pecuniary damage.

Pecuniary damage is represented mostly by a reduced investment capacity and more limited access to credit. It will also cause greater damage when the individual concerned is an entrepreneur.

As for non-pecuniary damage, this may concern, for example, damage to one's personal and professional reputation, and the identity of the unjustly reported individual, which refers to the category of personality rights constitutionally protected under Article 2 of the Italian Constitution[13].

[11] cf. *Collegio Coordinamento ABF* no. 6182/2013; Italian Supreme Court of Cassation Civil Division decision no. 349/2013

[12] cf. Italian Supreme Court of Cassation Civil Division, decision no. 1931/2017

[13] Italian Supreme Court of Cassation Civil Division decision no. 15609/2014, no. 22396/2013, no. 29185/208 and no. 12929/2007.

5. Informational Self-determination, Complete Information and Reputation. Damaged Legal Assets.

5.1 Informational Self-determination and Complete Information.

The right to privacy which leads, as a sign of the times, to the right to protection and control of personal data, was established in the United States[14] at the end of the XIX century. Conversely, our legal system refers the first, non-exhaustive, theories on this subject to authors such as A. Ravà[15] and F. Carnelutti[16], who based their analysis on analogical and systematic approaches starting from art. 10 of the Civil Code of 1942, art. 96 and 97 of Copyright Law no. 633 of 22 April 1941 and, in the criminal segment, art. 616 to 623 of the Criminal Code, and finally stating that the above were based on the same rationale of protecting an individual and its image. This theory, however, was not initially supported by case law: when the Italian Supreme Court of Cassation was required, for the first time ever, to rule on a case regarding a movie - "*Leggenda di una voce*" (Legend of a voice), dedicated to tenor Enrico Caruso's life - it stated that "no legal provision authorizes to ratify, the absolute respect for one's private intimacy as a general rule nor as a limit to free artistic expression, except when an individual offends another's honour or dignity or reputation through its actions, thus falling within the general framework of torts. The legislator did not consider the mere desire for privacy as an interest deserving protection except when a personality right is expressly acknowledged." (decision no. 4487 of 22 December 1956). Only by decision no. 2129 of 27 May 1975, in line with Constitutional Court ruling no. 38 of 12 April 1973, did the Civil Division of the Italian Supreme Court of Cassation finally confirm the existence of an independent right to privacy on a twofold ground: the implicit ground is represented by "the set of ordinary and constitutional provisions that, by protecting aspects peculiar to individuals, under substantive law, cannot

[14] E. Shills, *Privacy: its constitution and Vicissitudes,* Law & contemporary problems, 31, 1966, 289. The first essay about privacy in the legal field dates back to 1881 and it was written by S.D. Warren, L.D., Brandeis *The right to privacy,* Harvard law Review, Cambridge, MA, 1890, 4.
[15] A. Ravà. *Istituzioni di diritto privato*, Cedam, Padua, 1938, 174-175
[16] F. Carnelutti, *Diritto alla vita privata*, in *Rivista trimestrale di diritto pubblico*, Giuffré, Milan, 1955, 3 and ff.

but refer to their private sphere." The explicit ground is represented by all those provisions, set out more specifically by special laws, which expressly refer to one's private life or even privacy.

The right to privacy, however, becomes progressively a sort of power to control one's own personal data, which must faithfully reflect the identity of the individual concerned (i.e. informational self-determination), especially in a system, such as the current one, strongly digitalised.

While in the United States electronic communications between citizens are still protected by a law dating back to 1986, the European legislation on protection of computer-based data admirably struggles to keep the pace with the unpredictable technological progress and by the challenging Internet.

The forerunner of any domestic legislation is Art. 8, par. 1 of the ECHR. Along the years, this provision has enabled the European Court of Human Rights to establish and extend the meaning given to the concepts of "private life" and "consistency", laying the foundations to establish the right to exercise the conscious and voluntary control over any form of disclosure of one's personal data[17]. In assessing the overall position of the individual in society, the European Court of Human Rights stated that full respect for privacy is a condition required for equality and enjoyment of fundamental rights.

Still within the European Council, Convention no. 108 of 1981 (i.e. the Strasbourg Convention)[18] provides an exhaustive list of principles to which domestic legislations should comply, so as to ensure respect of the individual's right to privacy in automated processing of data concerning identified or identifiable subjects[19].

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[17] Cf. ECHR, Gaskin *v.* United Kingdom, application no. 10454/83 (1989); ECHR, Z. *v.* Finland, application no. 22009/9325 (1997); ECHR, Sidabras *v.* Lithuania, application no. 59330/00 (2004), by which the European Court of Human Rights gave a very extensive interpretation of the right to privacy under Art. 8 of the European Convention on Human Rights.

[18] In 1973, the Minister Committee of the European Council adopted a resolution "on the protection of individuals' privacy with regards to electronic databases of the private sector" and, in 1974, a similar resolution referring to databases of the public sector was adopted as well. Both resolutions set minimum standards for the protection of one's privacy with regards to information filed in electronic databases. These were mere, non-binding recommendations for national governments.

[19] The preliminary remarks mentioned the right to respect one's privacy as one of human rights, and the free movement of information among peoples as one of the fundamental freedoms, subject to derogation only when considered as a measure deemed necessary in a democratic society. Enforced on 1 October 1985. Italy ratified the Convention through Law no. 98 of 1989. However, the lack of adequate legislation on such matter has prevented its full enforcement for a very long time.

After the Strasbourg Convention, the privacy protection as a means to safeguard personal data was also confirmed by two Community provisions: Directive 95/46/EC[20] (on the protection of individuals with regards to personal data processing and free movement of such data, regardless of the technical means used) and Directive 97/66/EC (concerning personal data processing and privacy protection in the telecommunication sector, freely accessible on dedicated networks)[21].

These provisions confirm the existence of a "right to protection of personal data", a distinct right independent from the right to privacy.

In Italy, Directive 95/46/EC entails the adoption of Law no. 675 of 31 December 1996[22].

For the very first time, law starts considering the possibility to access one's own personal data to control its proper acquisition, to correct errors and to monitor its use over time.

[20]Specifically, directive 95/46 was the first provision to introduce in the Member States of the European Union, specific and accurate rules on personal data processing, in an attempt to regulate the increasingly frequent relationships between subjective juridical positions and the development of new technologies. The provision was intended to be very clear in explaining to Member States the key concept which they should comply with through their national laws: data processing systems should serve humans; regardless of their nationality or place of residence, all individuals must respect one another's freedom and fundamental rights, more specifically their private lives, and must contribute to economic and social progress, as well as trade development and individuals' wellbeing. According to Article 6, personal data shall be adequate, relevant and not excessive in relation to the purposes for which it is collected and/or subsequently processed, whereas Article 7 obligates Member States to provide for personal data processing to be carried out only when strictly necessary to perform a task of public interest or connected to the execution of public officer powers entrusted to the data controller; Article 8 provides for Member States to prohibit personal data processing when the data concerns personal health, but this provision shall not apply when processing is carried out, with appropriate guarantees, by foundations, associations or other non-profit organisations with no political, philosophical, religious or trade-union aim, in the course of its legitimate activities and only when the processing relates to its members or to individuals having regular contacts with the foundation, association or organisation, in connection with its purposes and without disclosing such data to third parties without consent by the individuals concerned. These rules have been transcribed in an almost identical way into Regulation (EC) no. 45/2001 of the European Parliament and Council of 18 December 2000 on the protection of individuals with regards to personal data processing by EC institutions and bodies.

[21] With regards to the applicability of this Directive to the Internet, it must be noted that the European Group of Data Protection Authorities has identified specific Internet subjects to which the above Directive is applicable. For such purpose, let's consider (1) telecommunication providers - i.e. those providing connection to the Internet or other Internet-related services or router and data traffic network providers - (2) web space (hosting services) providers, see CASSANO G., *Diritto dell'internet. Il sistema di tutela della persona. Cit. p. 12-13*

[22] Law no. 675 of 31 December 1996, *Tutela delle persone e di altri soggetti rispetto al trattamento dei dati personali* (*Protection of persons and other subjects with regards to personal data processing*), published on the *Gazzetta Ufficiale* (Italian Official Journal), Issue no. 5 of 8 January 1997, Ordinary Supplement no. 3. Adoption of Law no. 675/1996 was mandatory: to enjoy the benefits of the Schengen Agreement, the Member State would have to make its domestic legislation on data processing comply with the European law.

Another directive was later adopted at European level (Directive 2002/58/EC) to fulfil the requirements deriving from technological development and related to the personal data processing and to privacy protection in the electronic communications sector[23].

Such directive was implemented in Italy by Title X of Legislative Decree no. 196/2003, i.e. the Data Protection Code[24] and then by the new General Data Protection Regulation, aimed at introducing a sole privacy law for all 28 Member States of the European Union to replace domestic legislation. This reform is comprised of two provisions: a directive covering the use of personal data for security, police and jurisdictional operations, and EU Regulation, 2016/679, made effective on 25 May 2018.

Privacy is by now considered a multi-functional right, falling within the category of fundamental rights and freedoms, closely connected to the individual's dignity and established to offer some sort of global protection.

Hence this has led to a regulatory structure where, having acknowledged the importance of data processing, its protection, purpose, requirements, filing times and methods[25] are regulated, for correct determination of the ways the individual's private sphere is constructed as a whole and to offer full protection of the information regarding each individual. Privacy is no longer a negative freedom, as the right to confidentiality, but is instead assigned a positive connotation, expressed by the power to control personal data that must faithfully reflect the current identity of the person concerned.

The changes experienced over time can be summarised as follows: we have moved from a world where personal data was controlled exclusively by the individuals concerned to a world of information shared with a variety of people; from a world where information transfer was generally a consequence of interpersonal relationships to a world where information is collected through abstract transactions; and

[23] Other directives were subsequently adopted, namely, Directive 2009/136/EC, i.e. "e-privacy directive"; Directive 2009/140/EC, and Directive 2006/24/EC.
[24] Legislative Decree no. 196 of 30 June 2003, "*Codice in materia di protezione dei dati personali*" (Personal Data Protection Code), published on the *Gazzetta Ufficiale* (Italian Official Journal) no. 174 of 29 July 2003, Ordinary Supplement no. 123. It was enforced on 1 January 2004.
[25] F. Pizzetti, *Il prisma del diritto all'oblio, cit.* 30

from a world where the only issue was controlling the information flow from the inside to the outside of one's private sphere to a world where control of incoming information is becoming more and more important.

5.2 Reputation and Personal Identity

The issues connected to creditworthiness and the transmission of data used by banks and financial intermediaries no doubt affect two other juridical assets of constitutional relevance: an individual's personal identity and its reputation.

The former is basically a concise formula to define an "individual from a global standpoint through its specific characteristics and expressions [...] and to express its material and actual personality developed along one's relational life[26]." Acknowledgement of the right to personal identity is the result firstly of the

[26] Italian Supreme Court of Cassation 1st Civil Division decision no. 3769 of 22 June 1985.

work of judges (trial courts[27] and courts of cassation[28], and then by the Constitutional Court[29]) and, only later, of the intervention of the legislator[30].

Insofar as concerns reputation[31], its content under civil law was deduced from the criminal provisions aiming at punishing crimes such as abuse (now decriminalized) and libel. From this perspective, reputation puts the individual ideally at the centre of interpersonal relationships, generally based on moral, professional and intellectual assessments and judgements: by identifying the representation of an individual's personality representation within a group of associates, it assumes an objective connotation, that may however vary when referred to its group and status. Reputation may thus be defined as

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[27] The first rulings leading to acknowledgement of a right to personal identity are those by the Magistrate's Court of Rome of 6 May 1974, in *Il foro italiano,* 1974, 1805-1806 and of 7 May 1974 in *Il foro italiano,* 1974, 1810-181. In both, the Roman judge rules that if art. 10 of the civil code acknowledges protection for unlawful use of image, it is also necessary to go beyond and protect also the damaged plaintiff's interests from connecting their opinions, completely divergent, to the political purposes of the manifest. In literature, already with the work by N. Stolfi, *I segni di distinzione personali*, Officina tipografica salernitana, Salerno, 1905 *(*although dedicated to distinctive elements such as last name, first name, nickname, pseudonym, titles of nobility, heraldic symbols), the concept of personal identity starts to be outlined ad identification and uniqueness of the individual. Its however with A. De Cupis, *Il diritto all'identità personale,* Giuffrè, Milan, 1949 that the need for protection forms, not only for single distinctive marks, but rather for a more extensive right with its autonomous characteristics directly connected to protection of the individual in its globality. See also E.C. Raffiotta*, Appunti in materia di diritto all'identità personale*, in http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/paper/0173_raffiotta.pdf, 2010, 1.

[28] Very interesting in the same sense are the decisions ruling the so-called "Veronesi case" at every level of jurisdiction. Among these, the most relevant decision is the ruling of the Italian Supreme Court of Cassation of 22 June 1985 (no. 3769) which confirmed the trial courts' conclusions, thus changing the position adopted so far (cf., among others, Italian Supreme Court of Cassation 1st Civil Division, decision no. 2242 of 13 July 1971), according to which the right to personal identity was acknowledged and protected only when coinciding with a kind of protection expressly provided for by law, and identifying an independent legal basis for this right, falling for the first time within the scope of Article 2 of the Italian Constitution. The following was stated: "while the distinctive signs (name, pseudonym, etc.), identify under in the current legal system, an individual in terms of material existence and civil and legal status, and the image evokes its mere physical appearance, identity represents a summarising method to define the individual from a global standpoint with its specific characteristics and expressions (moral, social, political, intellectual, professional, etc.), i.e., expressing the material and actual individual personality that he/she has developed, or appeared to be developing, on the ground of unequivocal circumstances, in its relational life."

[29] Constitutional Court, decision no. 13 of 3 February 1994. As a matter of fact, the Court of Florence - voluntary jurisdiction division - with reference to Art. 2 of the Italian Constitution, raised a doubt on the constitutional legitimacy of Art. 165 *et seq.* of the Ordinamento dello Stato Civile (Civil Status Regulation - Royal Decree no. 1238 of 9 July 1939. In line with decision no. 13 of 1994, decision no. 297 of 23 July 1996 also declared the illegitimacy, due to violation of the very fundamental right to one's personal identity, of Section 262 of the Italian Civil Code, in so far as it failed to provide for the right of a natural child who had taken the surname of the parent who had first recognized him or her, to keep the surname originally attributed to him or her if this was to be considered as a distinctive sign of its personal identity. A few years later, the Constitutional Court, by decision no. 120 of 11 May 2001, used again the parameter of the right to personal identity under Article 2 of the Constitution to declare the constitutional illegitimacy of the second paragraph of Section 299 of the Italian Civil Code, in so far as it provided that the adopted child who was a natural child not recognised by its parents should only take the surname of the adoptive parent, losing the surname originally imposed by the registrar.

[30] The legislation on the protection of personal data, in identifying the protection of privacy and personal identity as *the rationale* of positive law, regards these rights as falling within the fundamental freedoms (cf. Art. 1 of Law no. 675/1996, and now Art. 2, par. 1, of the Personal Data Protection Code, as well as the provisions set out in the European General Data Protection Regulation, ref. no. 679/2016).

[31] V. Zeno-Zencovich, *Onore e reputazione nel sistema del diritto civile*, Jovene, Naples, 1985, 343. Cf. also V. Zeno-Zencovich, *Onore, reputazione e identità personale,* in G. Alpa, M. Bessone (by), *La responsabilità civile,* Giappichelli, Turin, 1987; G. Santini, *Onore* (*diritto civile*), in *Novissimo Digesto italiano,* Turin, 1965, XI, 685.

the temporal stabilization of the expectations of a plurality of agents, related to certain (positive or negative) qualities of specific individuals, groups, and institutions. From this perspective, case law[32] maintains that there is a true right to personal reputation, to be outlined within the system of constitutional protection of the human person, legally grounded on Article 2 of the Italian Constitution (see decision of the Constitutional Court no. 479 of 10 December 1987[33]).

As the issue concerning the preceptive and not programmatic function of such provision has been superseded and the constitutional importance of an individual in all its aspects has been affirmed, this article enables law interpreters to establish all subjective positions suitable to protect, on a positive law system basis, every expression of the human person within social life.

With regard to the above, it is quite clear how these two rights may be damaged by improper or incomplete management of data concerning an individual's creditworthiness: an illegitimate report may affect a corporation's business or an individual's capacity to access credit and thereby damaging its reputation and identity suggesting poor creditworthiness and identifying previous loans as risky[34], with the inevitable upset of relationships.

6. The role of ROCC within this context

Conclusions.

The picture outlined above, where a negative credit rating strongly affects access to credit, shows how the system developed by Reply On Credit Check (the possibility for every user to download its creditworthiness assessment based on the various databases, and upload the documentation, making it

[32] Italian Court of Cassation, Civil Division, decision no. 6597/2001.

[33] According to which "Art. 2 of the Italian Constitution acknowledges the absolute value of the human person."

[34] Italian Supreme Court of Cassation Civil Division, 12626/2010; see also Italian Supreme Court of Cassation Civil Division, decision no. 20120/2009; Italian Supreme Court of Cassation Civil Division, decision no. 18316/2007 Italian Supreme Court of Cassation Civil Division, 6507/2001 Italian Supreme Court of Cassation Civil Division 9233/2007; Italian Supreme Court of Cassation Civil Division decision. no. 14977/2006; Italian Supreme Court of Cassation Civil Division decision. no. 11103/1998.

available to financing institutions, and considered suitable to prove its incorrectness or, at least, incompleteness) increases the information available to banks and financial intermediaries through data provided by the individuals concerned, thus truly protecting the fundamental rights described above:

- Privacy, as a fundamental right to informational self-determination, i.e. the right to determine how one's private sphere is "construed" in its entirety through comprehensive protection of the information concerning the individual: of course, thanks to ROCC, individuals may become aware of their credit history, as it is outlined through data provided by and to databases. The subjects concerned may then provide additional information to their history including details which, for the very singularity of each experience, may influence (and explain) the reasons for non-fulfilling their obligations.
- Reputation, which by assuming an ideal collocation of an individual at the centre of interpersonal relations, generally based on moral, professional and intellectual assessments and judgements, identifies the individual's personality as something reflected in a group of associates with an objective character, although variable when related to the group of reference and the individual's status. The possibility for users to know (in a simpler and more intuitive fashion) the information available to databases and to integrate subjectively its range, may enable to anticipate the protection of the fundamental right to reputation, correcting errors, providing missing data and thus preventing damage to this juridical asset, with a deflationary effect on judicial disputes or other cases.
- Personal identity, as a summarising tool to define an "individual from a global standpoint, through its specific characteristics and expressions [...] and to express the tangible and actual individual personality developed [...] along one's relational life." The definition of creditworthiness of every person has a strong impact when building one's personal identity and on the way an individual is perceived in the relational context to which it belongs. To fully rebuild and express one's personal identity, creditworthiness cannot be established exclusively on economic data.

This document clearly describes how ROCC may play a key role in the credit granting system, it must also be pointed out that, by integrating database operations (which cannot be replaced by ROCC, as these are provided for by law), it fully complies with applicable legislation.

Article 120-*septies* of the Consolidated Banking Act (with specific reference to consumer credit), provides for a fundamental principle which is actually enhanced by ROCC: "Within the activities regulated by this article, the lender and the credit intermediary: a) shall act with diligence, fairness and transparency, taking into account consumers' rights and interests; b) shall base their activities on relevant information concerning the consumer's situation, on any specific need he has expressed, and on reasonable assumptions with regards to the risks to which the consumer's situation is exposed throughout the duration of the loan agreement."

The system conceived through ROCC, thus meeting the requirements of both those applying for credit and those granting it (who, moreover, would be more and more in line with the principles of ethical finance), focuses on information, reduces asymmetry between lenders and borrowers and, without affecting data objectivity, by virtue of the diligence and fairness required, completes such data thanks to the contribution of those involved directly in this procedure.

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Francesca Paruzzo, Lawyer