



THEMIS ANNUAL JOURNAL 2022

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FOREWORD

MARKUS BRÜCKNER
EJTN SECRETARY GENERAL



It is with great pleasure that I present the 2022 Themis Annual Journal, the fourth issue of a publication that is helping to propel the highly acclaimed EJTN THEMIS competition to new levels and give the opportunity for EU magistrates to present their original approaches to European law.

Themis has a long legacy of success. The event was created, financed and run from 2006 to 2009 by two EJTN member institutions – Portugal’s Centre for Judicial Studies (CEJ) and Romania’s National Institute of Magistracy (NIM). In 2010, the competition became an EJTN activity and steps were then taken to adapt and enlarge its format to the needs of the new generations of magistrates.

EJTN steadfastly believes in the need to keep developing a common European judicial culture and building mutual trust. THEMIS is a veritable treasure in the EJTN training offer for future and early-career judges and prosecutors in order to contribute to these overall goals. This competition answers the need to have a holistic approach to judicial training by cultivating practitioners’ knowledge, skills and attitudes.

After a period that has been a great challenge for all of us, the THEMIS competition semi-finals were held in person after two years of online competition. I hope you all take from this past period this opportunity to learn new skills and discover how you approach uncertain situations. I believe that the EU judges will need to not only master the EU law but also the IT tools and new technologies that are becoming an integral part of the judiciary. I hope you can take the best from these past challenges and make use of them in your future career. Nevertheless, luckily, this year we could offer you the true THEMIS experience that lies in meeting your fellow participants in person.

The THEMIS competition is a platform for debating legal topics, sharing common values, exchanging new experiences, discussing new perspectives and practicing judicial skills. Like every year, the THEMIS competition consists of four semi-final rounds where up to 11 teams, each accompanied by a tutor, compete with each other. The eight best teams are selected from the semi-final rounds, by juries composed of renowned European judges, prosecutors and scholars, and proceed to the competition's Grand Final round. The THEMIS competition enables approximately 200 participants each year to deepen their understanding of EU law topics and to interact with other European judicial trainees.

Each year's THEMIS competition features four semi-final rounds consisting of three stages, with one stage being the preparation of a written paper. Here we come to the essence of this publication. Each participating team must present a written text on any subject related to the topic of the semi-final round in question. Papers should contain new ideas, critical appreciations or proposals regarding European law and professional ethics. This element of the competition produces an array of brilliant, innovative and diverse papers. It shows how different legal cultures and different perspectives on challenges faced by the judiciary are brought together under the construct of European unification.

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The best written papers are selected by the jury members and published in this official EJTN publication, the *THEMIS Annual Journal*, which is issued annually after the completion of each year's semi-final rounds and is presented at the Grand Final.

I am grateful to all the teams for their efforts in participating in THEMIS and to the jurors for their hard work when assessing and selecting the best of the best.

I wish you all a pleasant and engaging reading of this unique publication!



Markus Brückner
Judge, EJTN Secretary General

FOREWORD

**SARA SIPOS &
RASMUS VAN HEDDEGHEM**
THEMIS PROJECT MANAGERS



The highly acclaimed THEMIS competition, open to future EU magistrates undergoing entry-level training presents a forum for debating different domains of EU Law, develop soft-skills and train judicial skills in an atmosphere of mutual assistance, support and interchange of ideas.

In 2022, the topics addressed in four semi-finals and one grand final were the following:

- EU and European Criminal Procedure
- EU and European Family Law
- EU and European Civil Procedure
- Judicial Ethics and Professional Conduct
- Grand Final: Access to Justice

The EJTN THEMIS competition is a unique contest format, open to judicial trainees from across Europe. It is designed to develop the critical thinking and communication skills of future magistrates from different European countries. The competition is a forum of discussion on different European law topics, including international judicial cooperation in criminal and civil matters, judicial deontology and human rights.

An ever-growing enthusiasm exists for the THEMIS competition. In 2022, 35 teams competed in four semi-finals. After having written a paper prior to the event, the participating teams displayed their creativity in making engaging presentations that ranged from short films, staging a play in an authentic Hungarian restaurant, hosting the judicial 'Who Wants to Be a Millionaire' show, to treating the jury with candies. Although one of the jury members stated that the participants would have a bright future as actors or waiters, luckily the high level of contributions showed they have an even brighter future ahead as magistrates. In all award ceremonies, the jury expressed their faith in the next generation of the European judiciary.

During their deliberations, the jury members assessed the overall quality and originality, the critical thinking and the anticipation of future solutions, the references to relevant case law and the communication and debating skills of the teams. We would like to thank them once again for taking on this difficult task. The THEMIS competition prospers thanks to their sharp minds and kind hearts.



Semi-final A at Naples' Castel Capuano



Semi-final B at Hotel Neringa in Vilnius



Semi-final C at the judicial training centre in Balatonszemes



Semi-final D in the judicial school in Barcelona

The word 'Taj' signifies 'crown' in Hindi. It is all the more appropriate that this journal presents the best publications selected by the jury members of the 2022 THEMIS competition. Judicial work is more than expertise, it is a true skill and craft which requires continuous training and fine-tuning. Original approaches and innovative legal solutions are considered of the highest merit in this competition. For many of the participants, this is their first leap in the judicial world. EJTN encourages its members to provide their trainees the THEMIS experience.

We would like to take this opportunity to thank Judge Markus Brückner, EJTN Secretary General, and Carmen Domuta, Head of EJTN Programmes Unit, who supported the idea of the *Themis Annual Journal* over the years. Our thanks go to Arno Vinkovic as well, who edited the first *Themis Annual Journals*, and whose invaluable support and advice helped us to keep the bar for the THEMIS competition at the height were to which he brought it.

Also, we would like to thank all the tutors and the national coordinators, who year by year motivate new teams to take on the challenge and support them during the whole competition. Finally, we would like to thank the participants, who have invested their time and effort in the competition. They took the stage, presented their ideas and crowned the event with a discussion with the jury over the law. We hope everyone followed our jury member David J. Dickson's Shakespearean advice: '*do as adversaries do in law: strive mightily, but eat and drink as friends*'. THEMIS' unique atmosphere offers heated discussion over the law at daytime and more over a couple of drinks in the evening.

We all hope that you will remember and be proud of your contribution to the 2022 THEMIS competition.

SEMI-FINAL A

EU AND EUROPEAN CRIMINAL PROCEDURE

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PARTICIPATING TEAMS

ESTONIA, HUNGARY, POLAND I, POLAND II, THE
NETHERLANDS, MOLDOVA, ITALY, FRANCE, SPAIN, CROATIA

1st place: The Netherlands

2nd place: France

3rd place: Poland II

Selected papers for TAJ

France, Hungary, Italy

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3-6 MAY 2022 NAPLES, ITALY - ITALIAN SCHOOL OF THE JUDICIARY [SSM]

JURY MEMBERS

PETROS ALIKAKOS (GR)

JUDGE, COURT OF GENERAL JURISDICTION OF THESSALONIKI ,
NATIONAL SCHOOL OF THE JUDICIARY

The THEMIS competition is a unique opportunity for the trainees of the European national judicial academies to assess their legal capacity, to share their knowledge and to exchange views with their peers in legal matters. The THEMIS competition is also a unique opportunity for the trainees to make friendships and shape strong connections between them.

The last five years I have participated as juror in different semi-finals (ethics, family law and criminal law). I remember all of them as unique legal experiences. The material derived from the participants' papers helped me many times in my judicial work as a civil and criminal judge.

This year after two years in a row with the online version, we were again together physically with the participants, the tutors, the secretariat of EJTN and the Italian Judicial Academy in the marvellous city of Naples. Ten great teams from different European countries gave their best in different areas of criminal law and they turned this semi-final to a feast of criminal knowledge. As president of the jury committee I can tell that the discussions with the teams gave us the motivation to hold further discussions among us about the topics, which the teams picked to present (the AI in criminal justice, the right of silence of the defendant, the cooperation in criminal matters between the states, restorative justice). I admit that as a juror and as a European judge I am proud of them and their work.

I would also like to take this opportunity to thank publicly Sara Sipos and Rasmus Van Heddeghem from the EJTN secretariat for their continuous help and support before, during and after the semi-final. This time was without Arno Vinkovic, but his spirit was around us. EJTN should keep by all means THEMIS competition. Everybody who has participated in this competition can tell its importance and its significance for the main effort to shape a common judicial European future!

DAVID J. DICKSON [UK]

HEAD OF EXTRADITION, SCOTTISH PROSECUTION SERVICE

Semi final A was hosted by the Italian School of Magistrates at Castel Capuano in Naples, built in the 12th century, which, until recently, housed the Halls of Justice. The building itself was stunning and while the surroundings were imposing, it provided a superb venue for the semi final. There were 10 teams and each of them had undertaken significant research on their chosen topics. Each team showed a depth of knowledge and insight into their chosen topic. Each topic was highly relevant to current issues in the field of criminal justice. As the first 'in person' semi final on criminal justice in the past few years, this dedication and enthusiasm was heartening. Again the twin aims of the event, founded by former General Secretary Luis Perriera, were met; research and learning on a new topic for the participants and learning by participation for the opposing teams. A simple but highly effective approach. The most impressive aspect of the THEMIS competition is the enthusiasm of judges and prosecutors, in the early years of their careers, to take the time, to have the interest, to explore an aspect of practice, procedure and law, with which they are unfamiliar and present a written paper, oral presentation and be questioned on the subject matter. The future is secure in the hands of such dedicated jurists.

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CHRISTINE GÖDL [AT]

JUDGE, FEDERAL MINISTRY OF CONSTITUTIONAL AFFAIRS,
REFORMS, DEREGULATION AND JUSTICE: DEPARTMENT FOR
INTERNATIONAL CRIMINAL LAW

After two years in online format, this year's THEMIS competition took place in Naples, Italy. All teams were well prepared and presented a wide choice of topics, starting from „classical“ ones like the right of silence to new concepts like restorative justice and newest technical developments and their reflection in criminal law. All teams delivered excellent presentations and showed their ability to discuss their themes with an international composed jury coming from very different judicial backgrounds in the most impressive way. The competition not only allowed to prove the high standards of judicial training all participants received in their national systems and the high level of dedication of the tutors but also to get in contact with fellow trainee judges and prosecutors from all over Europe and to spend time together in a professional environment. A competition like THEMIS is the starting point for mutual trust and mutual cooperation which are the cornerstones for efficient and successful work as judges and prosecutors.

ORIANE LE QUINTREC
DIANE LEROY
EUGÉNIE TERNEYRE

TUTOR: HUGO RIALLAND



Team FRANCE

RESTORATIVE JUSTICE, THE LONGED-FOR PROCEDURAL ART OF MENDING TIES BETWEEN OFFENDERS, VICTIMS AND SOCIETY

Although its practice is still limited, interest in restorative justice has blossomed in recent decades in many legal systems, national and international. Indeed, by enabling those directly or indirectly harmed by crime, as well as those responsible for that harm, to actively participate in the resolution of matters arising from the offence, restorative justice carries a visionary aspect of what is expected from judicial systems. Far from being a replacement for traditional penal systems, restorative justice is more a complement to help overburdened court systems and to balance the failure of some repressive policies.

Despite its challenges, mostly because of cultural setbacks, the goal in implementing a unified international concept of restorative justice is to provide a comprehensive and coordinated measure to avoid partial or inconsistent solutions, which may give rise to secondary victimization.

The main purpose of this article is to present restorative justice as a sustainable solution to contemporary issues regarding the increasing importance of victims, the commission of crimes and the prevention of recidivism. It tries to explain how this model can be implemented and guaranteed within various legal systems, mostly through the freedom granted to all parties, the help of an appropriately trained and necessarily impartial third party and the control of judicial authorities. Finally, we try to briefly explore the possibility of making restorative justice a potential part of the right to a fair trial under article 6 of the European Convention on Human Rights.

KEY WORDS

Comprehensive compensation for the victim ▪ Criminal recidivism ▪ Facilitator ▪ Resocialization ▪ Restoring social peace ▪ Secondary victimization

*'Punitive justice is embedded in the heart of our criminal justice system.'*¹ Thus, making restorative justice an essential part of criminal procedure in Europe seems to be a major challenge. Yet this model of justice appears to have many advantages, as highlighted by Desmond Tutu who, in the context of the transitional justice system set up after apartheid in South Africa, insisted on the fact that *'there is another kind of justice - a restorative justice which is concerned not so much with punishment as with correcting imbalances, restoring broken relationships - with healing, harmony and reconciliation.'*

In fact, transitional justice refers to post-conflict justice - established after a war, genocide, war crimes or state crimes - that aims at responding to past crimes and preventing future ones.² Its goals include national reconciliation and peace-making.³ Its four pillars are the search for truth, material or symbolic reparation for the harm suffered by the victim, the non-repetition of crimes, and the right to justice.⁴ This type of justice was recently used in the post-apartheid Truth and Reconciliation Commission in South Africa under the presidency of Nelson Mandela.⁵ It was also implemented by the *Gacaca* courts in Rwanda after the 1994 genocide.⁶

Broadly speaking, restorative justice comprises any process which enables those directly or indirectly harmed by crime, as well as those responsible for that harm, to actively participate in the resolution of matters arising from the offence. For this resolution, all parties must freely consent to take part. The help of an appropriately trained and necessarily impartial third party, known as the facilitator, is required.⁷ While adjudication and arbitration entail the imposition of an agreement by a third party, restorative justice consists of outcomes which the parties have suggested themselves, through a dialogue in which the facilitator only makes limited suggestions.

It encompasses not only restorative justice measures adopted at the time of the judgment and the execution of sentences, but also mediation that can occur at the early stages of criminal proceedings, before any recognition of guilt. Although its practice is still limited, interest in restorative justice has blossomed over recent decades in many legal systems, whether national or international.

On a global scale, the United Nations broadcast a wide range of tools early on to promote restorative justice. First of all, it published the UN Basic Principles on the use of Restorative Justice Programs in Criminal Matters in 2002.⁸

¹ B. Deymié, 'La Justice Restaurative : Repenser la Peine et le Châtiment', Études (2016), at 42.

² P. Morvan, *Criminologie* (3rd ed., 2019), at 390.

³ Ibid.

⁴ Ibid.

⁵ D. Darbon, 'Autopsie du Miracle Sud-Africain, le Cas de la Truth and Reconciliation Commission', *Revue Française de Sciences Politiques* (1998) 6.

⁶ V. Rosoux, 'Réconcilier, Ambition et Piège de la Justice Transitionnelle. Le Cas du Rwanda', 73 *Droit et Société* (2009), at 613-633.

⁷ Recommendation CM/Rec(2018)8 of the Committee of Ministers to Member States concerning Restorative Justice in Criminal Matters, Appendix to Recommendation CM/Rec(2018)8, II, 3.

⁸ ECOSOC Res.2012/12, 24 July 2002.

It then expanded through the UN Office on Drugs and Crimes Handbook and Training Manual on Restorative Justice (2006).⁹ These tools lay the legal foundations for this topic, but it is important to emphasize that restorative justice was originally thought of as a solution regarding juvenile offenders.¹⁰ In order to illustrate this, it is enlightening to look at the 1997 Declaration of Leuven (Belgium), then at the 2009 Lima Declaration on Restorative Juvenile Justice, followed by the 2016 Ibero-American Declaration on Restorative Juvenile Justice.

In Europe, numerous national systems have deployed considerable efforts in the introduction of restorative justice, with varying results. Indeed, the Council of Europe has tried to raise awareness among its Member States regarding restorative justice, firstly in 1999 with mediation in criminal matters,¹¹ then enlarging it in 2018 to restorative justice in criminal matters,¹² and suggesting *'a cultural shift able to transcend the dichotomy between traditional criminal justice and restorative justice'*.¹³

In the European Union, restorative justice is part of a wider reflection on the creation of an area of freedom, security and justice, in which the question of victim support is raised; firstly through the

2001 Council Framework Decision,¹⁴ and above all in the 2012 Directive¹⁵ which constituted the first binding legislation in the European Union on restorative justice.

According to Robert Cario, a French Professor of Law who specialized in the study of restorative justice, the main objective is to provide a new penal response to dissatisfaction or persistent questions that perpetrators or victims might ask, tending to explain the origin and outcome of an offence. Indeed, the care given to offenders and victims may help them regain self-esteem and convince them of their much needed role in society.¹⁶ Restorative justice can thus provide a safe space for dialogue between the different persons involved, through the professionalization of facilitators, surrounded by specific conditions imposed by legislation, and placed under the control of a judicial authority. In this case, the judge does not oversee the content of the measure, but rather verifies that the main conditions and principles of restorative justice are in force.

Nevertheless, despite its visionary aspect and the many advantages offered by restorative justice, many contributors regret the slow speed at which restorative justice is currently developing.

⁹ UNODC Tools and Programs on Restorative Justice, available at: https://www.unodc.org/documents/justice-and-prison-reform/English_book.pdf#page=106.

¹⁰ J. Moyersoen, 'Chronique d'une Justice Restaurative au-delà des Frontières', 59 Les Cahiers Dynamiques (2014), at 96-103.

¹¹ Recommendation No. R (99)19 of the Committee of Ministers to Member States concerning Mediation in Penal Matters.

¹² Recommendation CM/Rec(2018)8 of the Committee of Ministers to Member States concerning Restorative Justice in Criminal Matters.

¹³ I. Marder, 'The New International Restorative Justice Framework : Reviewing Three Years of Progress and Efforts to Promote Access to Services and Cultural Change', *The International Journal of Restorative Justice* (2020).

¹⁴ Council Framework Decision 2001/220/JHA, OJ 2001 L082.

¹⁵ Council and European Parliament Directive 2012/29/EU, OJ 2012 L 315/57.

¹⁶ Robert Cario, interviewed by Pauline Antier, Léonore Fassi, Julie Batani and Virgine Vandesomple, students of the French National School for the Judiciary (2021).

It seems that cultural setbacks, uneven progress from one country to another and even the lack of willpower in many countries and international systems are amongst the causes that lead to the endless adjournment of its establishment within criminal proceedings.¹⁷

How does restorative justice appear to be a sustainable solution to contemporary issues regarding the increasing importance of victims, the commission of

crimes and the prevention of recidivism, and to what extent can it be implemented and guaranteed within various legal systems?

The main purpose of this paper is to outline how restorative justice has been misread. Despite the distrust that it faces, restorative justice introduces a new path to addressing peculiar crimes (1) and leads to its progressive growth in contemporary legal tools (2).



Allegory of Restorative Justice with European Union colours – watercolour by Emma BALLIET, student of the French National School for the Judiciary.

¹⁷ I. Marder, *supra* note 13.

1. THE CALL FOR RESTORATIVE JUSTICE AS A NEW PATH TO ADDRESSING PECULIAR CRIMES

In many countries around the world and in Europe, as a complement to or outside the traditional penal system, restorative justice is developing. Its rise stems from criticism of the criminal justice system, which includes not only the disappointment of victims and the failure of repressive policies and, in particular, of imprisonment, where prisons are mostly seen as schools for criminals, especially for juvenile offenders, but also the length, complexity and excessive cost of judicial procedures and, lastly, the overburdened court system.¹⁸

A. WHY RESTORATIVE JUSTICE? WHY IS IT MORE EFFICIENT THAN THE TRADITIONAL AND RETRIBUTIVE VIEW OF JUSTICE?

1. THE SOCIAL AND ANTHROPOLOGICAL EXPLANATIONS FOR THE RISE OF AND NEED FOR RESTORATIVE JUSTICE

a. The Meaning of Restorative Justice: the Needs of the Parties before the Punishment of the Offender

The term 'restorative justice' is evocative of its purpose. Other terms are frequently used to designate the same concept such as 'reparative justice' (e.g. Canada, Italy, sometimes France), 'transformative justice', 'reconstructive justice', 'comprehensive justice' and 'participatory justice'.¹⁹ The adjective 'restorative' refers to the idea of monetary reparation, which is not the primary goal of restorative justice, whose main objective is to heal.²⁰ Thus, restorative justice goes further than the traditional criminal procedure, and does not seek to punish, but to cure. Indeed, in most legal systems, the offence is considered an act against the state. The justice system focuses exclusively on the responsibility of the offender in order to apply the sentence prescribed by law.²¹ The criminal procedure is thus reduced to a technical matter.²² The philosophy of restorative justice analyses the crime as a damage to people and interpersonal relationships.²³ Therefore, restorative justice aims at meeting the needs of each party, by promoting reparation, active participation, accountability and dialogue. The concrete responsabilization of all leads to the search for consensual solutions, geared towards the future and intended to repair all harm.²⁴

¹⁸ J. Lecomte, 'Les Multiples Effets de la Justice Restauratrice', 334 *Journal du Droit des Jeunes* (2014), at 17-23.

¹⁹ M. Rostaing, 'Etude Comparative de la Justice Restauratrice à travers la Mise en Place des Rencontres Détenus Victimes en France et au Canada' (2019), thesis on file at the *Université Laval and Université 1 Toulouse Capitole*, available at: <https://corpus.ulaval.ca/jspui/bitstream/20.500.11794/38200/1/35726.pdf>.

²⁰ B. Deymié, *supra* note 1.

²¹ R. Cario, 'Justice Restauratrice : Principes et Promesses', *Les Cahiers Dynamiques*, n°59, 2014, at 24-31.

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

Restorative justice seeks to remove the feeling of injustice and impunity in the population: it is thus considered a way of reconnecting with the retributive function of punishment by renewing it.²⁵ Retribution is generally defined as the reward or punishment, material or spiritual, that a person or a community receives for their actions. This concept, transposed to criminal law, means that when an individual commits a crime, he/she causes an injustice to society and to the victim, which must be repaired. Criminologists explain that the retributive function of the sentence is neglected in the traditional criminal trial. Restorative justice is therefore a new form of criminal procedure aimed at restoring the feeling of justice in the heart of the victim, the offender and the community.

b. The Inclusion of the Community: Restorative Justice as a Comprehensive Approach to Justice

Restorative justice was inspired by the ancestral practices, such as sentencing circles, of certain indigenous peoples in Africa, New Zealand (Maoris) and North America (Indians), whereby the whole community dealt with the implementation of justice. Nowadays, restorative justice measures involve not only the offender, the victim and the facilitator, but may also include the victim's or offender's family and community representatives, for instance a religious minister or school principal. The involvement of the community in the pursuit of justice is a first step toward the successful resocialization of the offender. Its role is to

encourage discussion, reintegrate the offender into the community and, more broadly, restore social peace. In this respect, restorative justice must be understood in the light of the reintegrative shaming theory of John Braithwaite.²⁶ According to this theory, the way the community communicates shame about crime is crucial.²⁷ If it is aimed at the offender, it is a stigmatization that will likely lead to recidivism.²⁸ On the contrary, if shame is directed at the act, it encourages the offender to desist.²⁹

c. Restorative Justice as a Way to Overcome the Absence of the Victim in the Criminal Trial

Restorative justice is very much linked to the protection of the victim. It is no coincidence that the 2012 Directive introducing restorative justice in Europe is also the one that gives a definition of the victim. It takes up the definition given at international level by the United Nations General Assembly, which states that '*victims means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within member states, including those laws proscribing criminal abuse of power.*'³⁰

Indeed, restorative justice comes from victimology, which promotes the involvement of the victim in the criminal procedure and proposes solutions to avoid secondary victimization.³¹ Restor-

²⁵ H. Zehr, *Changing Lenses: A New Focus for Crime and Justice* (1990).

²⁶ J. Braithwaite, *Crime, Shame and Reintegration* (1989).

²⁷ J. Braithwaite, *supra* note 26.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ GA Res. 40/34, 11 December 1985.

³¹ G. Lopez, *La Victimologie* (3rd ed., 2019), at 3-5

ative justice seems to be a good way to achieve these goals because it seeks to meet the needs of the victim by providing him/her relief, answering his/her questions, putting him/her in a position to forgive the offender and giving him/her a sense of empowerment. Thus, in France, a study of restorative justice³² found that victims interviewed identified several benefits to restorative justice:

- the feeling of having been listened to, heard and understood;
- fewer feelings of shame, guilt and fear;
- the feeling of becoming actors of their own life again.

In traditional criminal proceedings, the attention given to the victim has also increased. While originally excluded from criminal procedure, the victim has recently acquired many rights. This is evidenced by various national legislative reforms and European jurisprudence. For instance, in a recent case,³³ the European Court of Human Rights held that, given the reasoning in the judgment, the judges failed to protect the victim from secondary victimization.³⁴ In fact, the Court considered the comments regarding the applicant's sexual orientation, his/her relationships and casual sexual relations prior to the events in question unjustified.

d. Restorative Justice Encourages the Offender to Desist by Helping him/her Regain Confidence in himself/herself and the Future

The importance of restorative justice is often emphasized for the benefits it brings to victims of crime. In reality, however, the original goal of restorative justice was to re-socialize offenders, particularly juveniles. Indeed, the first Western restorative justice experiment, carried out in Ontario, Canada in 1975, involved two juvenile offenders of vandalism and their multiple victims.³⁵ A victim/offender mediation process was initiated by a probation officer, Mark Yantzi, who succeeded in convincing the judge, Gordon Mc Connell, who was tired of the inefficiency of justice in preventing recidivism, to allow the minors to benefit from it.³⁶ The two juveniles then met with the victims to work out a reparation plan. This measure was successful, to say the least, since some thirty years later, one of the two young offenders took a mediation course and joined a restorative justice association, where he now works as a community development and public relations assistant.³⁷

The above-mentioned study on restorative justice³⁸ reveals that offenders also benefit from it, because it allows them to:

³² *Institut Français pour la Justice Restaurative, Enquête nationale sur la justice restaurative* (2020), available at: <http://www.justicerestaurative.org/wp-content/uploads/2021/04/EN-2020.pdf>.

³³ ECtHR, *J.L. v. Italy*, Appl. no. 5671/16, Judgment of 27 May 2021, decision available at <https://hudoc.echr.coe.int/fre?i=002-13282>.

³⁴ M. Bouchard, 'La Vittimizzazione Secondaria all'Esame della Corte Europea dei Diritti dell'Uomo', *Diritto Penale e Uomo*, 9 June, 2021.

³⁵ J. Moyersoen, *supra* note 10., at 96-103.

³⁶ J. Lecomte, *supra* note 18, at 17-23.

³⁷ *Ibid.*

³⁸ *Institut français pour la justice restaurative, supra* note 32.

- increase their self-esteem;
- project themselves in the future;
- take responsibility for their actions;
- be aware of the repercussions of their acts in the lives of the victims and their relatives.

Restorative justice needs to be assessed constantly in order to improve the practices. A restorative measure ends with feedback on the experience. Generally, feedback shows great satisfaction on the part of the participants who went through the process to the end. Many declared that they felt recognized and grateful to have the opportunity to express themselves and be truly listened to.

Furthermore, people usually described their experience in court as overly expeditious or too short to express their feelings. The main interest of the assessment resides in the fact that the benefits described are significantly similar for both the perpetrators and the victims.³⁹

2. HOW IS RESTORATIVE JUSTICE A MEANS TO REDUCE THE RATE OF REPEAT OFFENCES?

The prevention of criminal recidivism is one of the main objectives of restorative justice. Almost three-quarters of the studies found a reduction in recidivism compared to the outcomes achieved through traditional criminal justice.⁴⁰

	THE VICTIM	THE OFFENDER	THE COMMUNITY
Main objectives	<ul style="list-style-type: none"> • Avoidance of secondary victimization • Access to justice • Psychological recovery 	<ul style="list-style-type: none"> • Accountability • Reintegration • Desistance 	<ul style="list-style-type: none"> • Reduction of the rate of repeat offences • Restoration of social peace
Expected benefits	<ul style="list-style-type: none"> • Active participation in the process • be heard • have answers • find relief • have access to more information on the offence and the offender 	<ul style="list-style-type: none"> • Creation of empathy through awareness of the victim's suffering • develop new social skills • to be reintegrated in the community • to be useful and re-gain self-confidence 	<ul style="list-style-type: none"> • have a more accessible justice system • criminality prevention

³⁹ Robert Cario, interviewed by Pauline Antier, Léonore Fassi, Julie Batani and Virgnie Vandesomple, students of the French National School for the Judiciary (2021).
⁴⁰ J. Lecomte, *supra* note 18, at 17-23.

B. HOW HAS RESTORATIVE JUSTICE BEEN IMPLEMENTED SO FAR?

1. THE IMPOSSIBLE IMPLEMENTATION WITHIN INTERNATIONAL CRIMINAL JUSTICE

The scope of application of restorative justice principles needs to be restricted to some types of crime. It has indeed been very beneficial in cases of street group violence, where the healing properties of restorative justice are perceivable at the scale of a neighbourhood.⁴¹ However, when it comes to mass violence and mass victimization that is substantial with international criminal law, the very same principles encounter a stumbling block.⁴² In this very specific field, where the trial depends upon the recognition and centralization of victims, one would expect criminal justice to be an ideal candidate to *'embrace restorative practices'*.⁴³ Yet, while restorative justice aims primarily at first-time offenders, low-level crimes and juveniles,⁴⁴ international criminal justice is a *'product of discontinuity, upheaval and political ruptures'*.⁴⁵

Hence, domestic justice and international criminal justice have paradigms whose scales are too different for restorative justice to be evenly applied in both systems.

Firstly, in international criminal justice, victims have very few opportunities to encounter the offender, since they are both represented at court by legal representatives who are in charge of proving or disproving the offender's guilt.

Secondly, as far as the offender's acknowledgment is concerned, in only a few cases have defendants admitted their guilt. Most of the time, the accused tend to challenge the legitimacy of the trial process and they reject offers to demonstrate or declare remorse. When they do, it is only in mitigation in order to receive a more lenient judgment.⁴⁶ At the trial of Biljana Plavsic, indicted for genocide, crimes against humanity and violation of the laws or customs of war by the International Criminal Tribunal for the former Yugoslavia, the defendant accepted her responsibility and expressed her remorse. It is said that this statement helped her receive a lighter sentence.⁴⁷

⁴¹ I. Marder, 'Waves of Healing: Using Restorative Justice for Street Group Violence, Restorative Justice', 2:1, at 103-106 (2014), available at: [10.5235/20504721.2.1.103](https://doi.org/10.5235/20504721.2.1.103).

⁴² A. Cuppini, 'A Restorative Response to Victims in Proceedings before the International Criminal Court: Reality or Chimera?', *International Criminal Law Review* (2021), at 313-341, available at: <https://doi.org/10.1163/15718123-bja10041>.

⁴³ M. Findlay, 'Activating a Victim Constituency in International Criminal Justice', 3 *International Journal of Transnational Justice* (2009) 183-206, at 203.

⁴⁴ A. Cuppini, *supra* note 42, note 67, at 325 ; M. Heikkilä, *International Criminal Tribunals and Victims of Crime: A Study of the Status of Victims before International Criminal Tribunals and of Factors Affecting This Status* (Institute for Human Rights Åbo Akademi University, Turku, 2004), note 18, at 37; K. Clamp and J. Doak, 'More Than Words: Restorative Justice Concepts in Transitional Justice Settings', 12 *International Criminal Law Review* (2012) 339-360, at 346.

⁴⁵ A. Cuppini, *supra* note 42, note 68, at 325 ; D. J. Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law', *Georgetown Law Faculty Working Papers* (2008) 1-26, at 8.

⁴⁶ A. Cuppini, *supra* note 42.

⁴⁷ *Ibid.*

However, years later, the restorative process that could have started at her conviction was jeopardized by the withdrawal of her statement of remorse.⁴⁸

Thirdly, when trying to achieve an agreement between the parties involved in the process, the interests of justice are more likely to be served when there is visible punishment of the perpetrators, instead of employing a collaborative conflict-resolution approach.⁴⁹

Finally, material or symbolic restoration is unable to undo the effects of serious and traumatic events. Meanwhile, attempting to use restorative justice to achieve reconciliation in conflict-affected communities would be inappropriate.⁵⁰

Therefore, the process of international criminal law should remain that of a retributive process, focused on the accountability of the accused. The socio-political context is too sensitive, and primarily seeks peace between communities traumatized by mass atrocity, rather than mediation and meetings between offenders and victims.⁵¹

2. THE FEEBLE DEVELOPMENT IN EUROPEAN COUNTRIES

Even though the European Union has made progress in the development of restorative justice through its directives, its concrete application has met with difficulties. Indeed, it is clearly inefficient to promote such a measure to victims if the service proposed by professionals does not exist in their own countries. While

many countries missed the 2015 deadlines for the implementation of a restorative justice process, others respected it. However, the budget, human resources and training needed to enable agencies to operationalize were not compatible.⁵²

With regards to France, restorative justice was imported rather late compared to other member states. Indeed, even though the victims in criminal proceedings managed to occupy a greater place in the criminal process, restorative justice as such only began to appear in law from 15 August 2014 within the framework of the individualization of sentences and the reinforcement of the effectiveness of criminal sanctions. Following this law, French criminal procedure took restorative justice into consideration and two articles were dedicated to it (Art.10-1 and 707) in the code of criminal procedure. Nevertheless, reading those two articles shows the reluctance of the French legislator to impose restorative justice. This reluctance may be illustrated by several factors, such as the fact that it is described as a fully autonomous measure regarding the traditional criminal response and cannot be taken into account by judges and any national data.

Ultimately, a circular dated 15 March 2017 attempted to restore momentum to the scheme. This text is entitled 'implementation of restorative justice applicable immediately following articles 10-1...' It specifies that all litigation, regardless of its seriousness, may benefit from this complementarity, in particular

⁴⁸ Ibid., note 95, at 300 ; J. Subotić, 'The Cruelty of False Remorse: Biljana Plavšić at the Hague', 36 *Southeastern Europe* (2012) 39–59, at 48.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ A. Cuppini, *supra* note 42.

⁵² I. Marder, *supra* note 13.

road traffic offences, property offences and interpersonal violence. Nonetheless, the text reminds us above all that the proposed measure is 'complementary' and 'autonomous' of criminal procedure, even though it may be initiated by a prosecutor. This circular was partially reinforced by the law of 23 March 2019.

Since 2010, the Poissy penitentiary has experimented with discussion circles and mediation processes linking victims and offenders. The first experiment took place with four offenders and four victims. The key question from victims was 'how does one human kill another?' Following this questioning, Alain Ghiloni, the father of a twenty-year-old teenager who was shot to death on his way home, decided to face the unimaginable and enter into a restorative justice process.⁵³ This initiative emerged more than twenty years after the crime. Indeed, even though the trial and mourning were long over, he realized that some questions had never been answered. Meeting offenders guilty of similar or different crimes helped him to identify the human shape of criminals. The French Institute for Restorative Justice was created in 2013 after this first experimentation by Robert Cario, Benjamin Sayous and several other practitioners.

In Italy, Marco Bouchard, former judge and current president of *Rete Dafne*, the Italian victim support association,⁵⁴ has been interested in restorative justice since 1991. He was a children's judge in

Turin at the time. At this time, restorative justice was only known through criminal mediation. Mr Bouchard learned about it at a congress on the fight against crime in the suburbs organized by the French National School for the Judiciary when initiatives in criminal mediation were being conducted by the courts of Nanterre and Valence. The first criminal mediation offices, exclusively for juvenile offenders, then appeared in the Italian cities of Turin, Milan and Bari before extending to the whole country. Marco Bouchard believes that the first example of restorative justice for adults in Italy dates back to 1999 when the role of Justice of the Peace was created to respond to less serious crimes. He identifies a new step in the implementation of restorative justice in the Italian penal system with the reform of the traffic code in 2010, which created an absolute novelty in Italy in the form of community service sentences. Then, in 2014, the creation of probation was another step toward the implementation of restorative justice. Above all, the implementation of restorative justice in Italy has made considerable progress since Marta Cartabia, a judge, became Minister of Justice. Indeed, she became passionate about restorative justice, in its extra-judicial applications, thanks to the publication of a book⁵⁵ that caused a big stir in Italy, describing meetings between victims of terrorism and former members of the Red Brigade. Italy is preparing to transpose the 2012 Directive through a delegated law of 2021.⁵⁶ In paragraph 18 of the single article of this

⁵³ Alouti, 'A Poissy, Détenus et Victimes Se Rencontrent: "Comment Peut-On Tuer Un Autre Humain?"' *Le Monde* (2017), available at: https://www.lemonde.fr/police-justice/article/2017/09/03/a-la-maison-centrale-de-poissy-l-epreuve-salvatrice-des-rencontres-detenus-victimes_5180287_1653578.html.

⁵⁴ M. Bouchard, personal communication, 18 March 2022.

⁵⁵ A. Ceretti, *Il Libro dell'Incontro. Vittime e Responsabili della Lotta Armata a Confronto* (2015).

⁵⁶ Legge n°134 del 27 settembre 2021 *delega al Governo per l'Efficienza del Processo Penale nonché in Materia di Giustizia Riparativa e Disposizioni per la Celere Definizione dei Procedimenti Giudiziari* (Law of 27 September 2021).

law, the legislator enjoins the government to: *'introduce, in compliance with the provisions of the European Parliament and Council Directive 2012/29 EU of 25 October 2012, and internationally acknowledged principles, an organic restorative justice discipline in terms of notion, main programs, access criteria, safeguards, people eligible to participate, methods of carrying out the programs and evaluating its incomes, in the interest of the victim and the offender.'* It covers restorative justice broadly, encompassing all stages of the criminal process and applicable in all possible cases. It also provides for the definition of the victim in accordance with the 2012 Directive, the modalities of access to restorative justice programs, safeguards, the training path for the mediator, who must obtain accreditation from the government, and the criteria for a successful outcome of the measure. Restorative justice services are expected to be established at regional level. For Marco Bouchard, this reform goes deeper than the French *'Taubira'* Law of 2014, but still points out some deficiencies in the Italian law such as recourse to a mediator and not a facilitator as foreseen by European rules.

C. THE CURRENT SETBACKS TO THE IMPLEMENTATION OF RESTORATIVE JUSTICE

1. THE CRITICIZED AND UNEVEN PROGRESS IN MOST SYSTEMS

Even if restorative justice is an old concept, its real application in most countries is quite recent. The first temptation is to calculate the benefits of such a process through the collection of data. However, is it possible to measure the effectiveness of restorative justice?

One of the dangers is to make quantity prevail over quality.⁵⁷ Some information regarding the number of workshops set up by regions or countries is available but it has to be observed with great caution. In the area of the effectiveness of traditional justice, for example, it is obvious that efficacy cannot be computed through the point of view of the number of convictions.

As for France, many judges and prosecutors who decided to dedicate a part of their time to restorative justice improvements deplore the lack of access to the training of main stakeholders. Indeed, an effective process of criminal mediation requires the coming together of a large number of professionals ranging from penitentiary staff to the facilitator (a third person, outside the conflict) and including prosecutors.

⁵⁷ H. Soletto Munoz, *Directora de Instituto Alonso Martínez de Justicia y Litigación*, personal communication, 18 March 2022

Even if the school in charge of training penitentiary staff (the National School of Penitentiary Administration) offers the opportunity to participate in such classes, it is not mandatory and it does not attract all the students. Despite this, between 2011 and 2018, more than 1,339 people followed training on restorative justice and 309 facilitator certificates were delivered in total (not only in the state school of penitentiary administration).⁵⁸ This training course lasts sixty hours and covers many themes such as codes of practice and basic principles of restorative justice. The lack of publicity or information regarding the benefits of such a course is probably the milestone of its defects. Most of the experiments carried out so far have been conducted by volunteers from the professions, with the help of volunteer organizations. This is why the Council of Europe encourages its member states in the Venice Declaration to *'consider restorative justice as an essential part of the training curricula of legal professionals, including the judiciary, lawyers, prosecutors, social workers, the police as well as of prison and probation staff and to reflect on how to include the principles, methods, practices and safeguards of restorative justice in university curricula and other tertiary level education programs for jurists, while paying attention to the participation of civil society and local and regional authorities in the restorative justice processes.'*⁵⁹

2. CULTURAL OBSTACLES

Restorative justice is more developed in common law countries than in their civil law counterparts. The main explanation for this resides in the cultural customs of conciliation and 'out of court' discussions upwind of the judicial process. Still, justice professionals do not think that culture is a real hindrance to the implementation of a form of restorative justice. The problem sometimes resides more in the semantic aspect than a real cultural rejection.⁶⁰ This may be applied everywhere because culture is fully a part of conflictual solutions in every society even if it is not alluded to. More than culture and sociology, everything depends on the attitude of the parties, their needs and their interests.

2. THE GROWTH OF RESTORATIVE JUSTICE IN CONTEMPORARY LEGAL TOOLS

A. WHAT SAFEGUARDS MUST BE OUTLINED? / WHAT DO ALL LEGAL TOOLS HAVE IN COMMON?

The goal in implementing a unified international conception of restorative justice is to provide a comprehensive and coordinated measure to avoid partial or

⁵⁸ Institut français pour la justice restaurative, *Enquête Nationale des Programmes de Justice Restaurative* (2018), available at: <http://www.justicerestaurative.org/wp-content/uploads/2019/11/Enquête-nationale-JR.pdf>.

⁵⁹ Council of Europe, Declaration of the Ministers of Justice of the Council of Europe 'Crime and Criminal Justice - the Role of Restorative Justice in Europe', 13 and 14 December 2021, 15. iv., available at: <https://rm.coe.int/venice-ministerial-declaration-eng-4-12-2021/1680a4df79>.

⁶⁰ H. Soleto Munoz, *Directora de Instituto Alonso Martínez de Justicia y Litigación*, personal communication, 18 March 2022.

inconsistent solutions which may give rise to secondary victimization.⁶¹ To achieve this, three main points stand out as the most important.

1. INFORMATION AND ACCESS TO RESTORATIVE JUSTICE SERVICES:

The European Union Directive has been criticized for its limited references to restorative justice: a victim has to be informed about the possibility of restorative justice if the services already exist.⁶²

The European Forum for Restorative Justice, which forms a part of the evaluation of the Directive on victim's rights, has also identified this problem. It stresses the importance of this text for the development of restorative justice in Europe and for victims, but also focuses on its limitations. More particularly, the European Forum for Restorative Justice focuses on the fact that *'an equal access to restorative justice services needs to be guaranteed for all victims of crime'*. In the course of the evaluation of the Directive, the Forum conducted a survey, from which emerged the fact that there is a *'1 - lack of awareness of restorative justice of referring bodies and organizations coming into contact with victims (e.g. police, judicial authorities, victim support services)... 2- lack of information provided to victims on available restorative justice services; low quality of information provided to victims on restorative justice.'*⁶³

Consequently, it suggests acknowledging the right to information about available restorative justice services and ensuring that the information is clear and understandable for victims. This could also be carried out by making restorative justice a topic in European Union awareness campaigns on victims' rights.

Many have pointed out the ignorance that victims and offenders face when it comes to restorative justice. The main reason for this ignorance is the initial lack of information in the majority of countries. Ideally, the parties' free consent to the measure should be obtained after having had access to an individualized assessment process, in which an experienced practitioner helps them make an informed decision.⁶⁴

To be accessible and readily used, restorative justice should indeed be publicized by means of media, in a manner which should be clear and understood by all parties, through the use of simple and accessible language.⁶⁵ The information should be accessible at any time and in any case, delivered in all geographical areas of their jurisdictions, with respect to all offences and at all stages of the criminal justice process.⁶⁶ To ensure the respect of these prerogatives, some European texts have mentioned a right to be fully informed,⁶⁷ although specific guidelines to the implementation of such a right have yet to be developed.

⁶¹ Council and European Parliament Directive 2012/29/EU, OJ 2012 L 315/57, at para 46.

⁶² I. Marder, *supra* note 13.

⁶³ European Forum for Restorative Justice, Position Paper on the EFRJ Evaluation of the Restorative Justice Provisions of the Victims' Rights Directive (2021).

⁶⁴ Recommendation CM/Rec(2018)8 of the Committee of Ministers to Member States concerning Restorative Justice in Criminal Matters, (25) and (26).

⁶⁵ Council and European Parliament Directive 2012/29/EU, OJ 2012 L 315/57, at para 21.

⁶⁶ Recommendation CM/Rec(2018)8 of the Committee of Ministers to Member States concerning Restorative Justice in Criminal Matters, (18) and (19).

⁶⁷ Council and European Parliament Directive 2012/29/EU, OJ 2012 L 315/57, at chapter 3, para 12.

2. THE EMPHASIS ON THE FACILITATOR, HIS/HER RECRUITMENT AND TRAINING:

The success of restorative justice relies mainly on a third party, known as the facilitator. The latter is responsible for ensuring that all safeguards are respected throughout the process. He/she also provides the neutrality that is indispensable for the success of the measure and helps the victim feel secure.

The recruitment of said facilitators should be from all sections of society, as long as they have a good understanding of local cultures and communities, as well as the capacity to utilize restorative justice in intercultural settings. They should also be imparted with sound judgment and possess interpersonal skills.⁶⁸ This type of recruitment is highly beneficial to the measure itself, since it offers recruitment from all origins and social classes. In practice, many facilitators seem to have past experience in a specific association, in the judiciary or in a penitentiary. In France, the few measures of restorative justice have indeed mostly been carried out by probation officers, social workers for underaged offenders, or specific associations geographically divided into counties.

Hence, once recruited, the training of facilitators must reflect the important role that is given to them. Both initial and on-going training must be suitable and adequate, a specific psychological training is even encouraged.⁶⁹ This ensures that victims are treated with respect,

sensitivity and in a non-discriminatory way. Moreover, this specific training should ideally be extended to any officials involved in criminal proceedings or likely to come into contact with victims. This includes police services, court staff, lawyers, prosecutors, judges and practitioners who provide victim support or restorative justice services.⁷⁰ The purpose of this wide inclusion of all officials is to fortify the cultural shift that tends to include restorative justice as an evident part of criminal proceedings.

3. THE FREEDOM OF ALL PARTIES AND THE CONFIDENTIALITY OF THE PROCESS:

Since restorative justice is mostly a dialogue between parties, and for the measure to be a success, their respective freedom must be respected, either to enter into or withdraw from the measure.⁷¹

To respect and guarantee the freedom of the parties, the confidentiality of a restorative justice measure is necessary. Given the specificities of restorative justice, confidentiality allows both parties to choose freely and without any reservation to take part in the experience, since they are guaranteed a safe space where the facilitator is the guardian.

The only exceptions that might betray this freedom and the confidentiality that accompanies it are, firstly, the agreement of the parties to unveil the measure and, secondly, an overriding public interest.⁷² The facilitator and parties should indeed still comply with domestic laws. As a re-

⁶⁸ Recommendation CM/Rec(2018)8 of the Committee of Ministers to Member States concerning Restorative Justice in Criminal Matters, at para 40.

⁶⁹ Council and European Parliament Directive 2012/29/EU, OJ 2012 L 315/57, at para 61.

⁷⁰ Ibid.

⁷¹ Ibid, chapter 3.

⁷² Recommendation CM/Rec(2018)8 of the Committee of Ministers to Member States concerning Restorative Justice in Criminal Matters, (49).

sult, the facilitator should disclose any information that appears to be a threat and convey to the appropriate authorities any information about an imminent or a serious crime which may come to light.⁷³

B. ACCESSING RESTORATIVE JUSTICE, AN EMERGING FACET OF THE RIGHT TO A FAIR TRIAL?

1. THE POTENTIAL CREATION OF AN INTERNATIONAL RIGHT TO ACCESS RESTORATIVE JUSTICE AS PART OF THE RIGHT TO A FAIR TRIAL?

While the Council of Europe has stated that restorative justice should be a generally available and inclusive service, which can be denied only under exceptional circumstances,⁷⁴ it did not take the opportunity to erect a binding right to access restorative justice.⁷⁵

Perhaps its attempt to mainstream restorative justice did not intend to give rise to unprecedented actions before the European Court of Human Rights, at a time where its member states did not have sufficient time to implement restorative justice.

Article 6 of the European Convention on Human Rights sets out the different components of a right to a fair trial, in civil and criminal procedures. Concerning the

latter, the Article is applicable throughout the entirety of proceedings for the determination of any criminal charge, including the pretrial stage of proceedings⁷⁶ and the execution of sentences.⁷⁷ With this in mind, one might consider that restorative justice could fall within the scope of that Article, be it at the time of pretrial mediation or the post-trial execution of a sentence, as long as the measure happens within the time of the execution of the sentence.

Indeed, raising restorative justice as part of the right to a fair trial would imply an obligation for member states to provide a unified regime of restorative justice, accompanied by safeguards and minimum standards through specific guidelines.⁷⁸

Those numerous safeguards could include equal access to restorative justice services, specific guidelines and pathways for victims to complain about a restorative justice process, and perhaps financial support for restorative justice services.⁷⁹

Dedicating a new right to restorative justice seems to be a good way to develop it further, although some professionals have sounded the alarm on the risks of too many regulations. Indeed, even if some people from the legal world believe that they can regulate it, it can be risky to regulate too much.

⁷³ Commentary to Recommendation CM/Rec(2018)8 of the Committee of Ministers to Member States concerning Restorative Justice in Criminal Matters, at 11.

⁷⁴ Recommendation CM/Rec(2018)8 of the Committee of Ministers to member States concerning Restorative Justice in Criminal Matters, (18) (19) and (27).

⁷⁵ I. Marder, *supra* note 13.

⁷⁶ ECtHR, *Dvorski v. Croatia*, Appl. no. 25703/11, Judgment of 20 October 2015, available at: <http://hudoc.echr.coe.int/>.

⁷⁷ ECtHR, *Phillips v. The United Kingdom*, Appl. no. 41087/98, Judgment of 12 December 2001, available at <http://hudoc.echr.coe.int/>.

⁷⁸ European Forum for Restorative Justice, 'the EFJR Contributes to the Evaluation of the EU's Victims' Rights Directive', 27 October 2021, available at: <https://www.euforumrj.org/en/node11/efjr-contributes-evaluation-eus-victims-rights-directive>.

⁷⁹ *Ibid.*

Elected officials somehow have a theoretical vision of the concept and by regulating, they run the risk of restricting it. Flexibility in the implementation of the justice process is an advantage, as long as it is followed up with human resources and funds.⁸⁰

2. THE CRUCIAL ROLE OF THE JUDICIAL AUTHORITY IN THE DEVELOPMENT OF RESTORATIVE JUSTICE

Although restorative justice might be presented as an alternative to traditional criminal proceedings, it should not deprive judges and prosecutors of their original authority. On the contrary, the participation of judges and prosecutors in the implementation of restorative justice could be the most important lever to its development. The Council of Europe has indeed stated in its recommendation that the conditions, procedures and infrastructures necessary to refer cases to restorative justice must be carried by the judicial authority of the state.⁸¹

Likewise, once an agreement has been reached between parties before conviction or sentencing, the future developments are reserved to the judicial authorities.⁸² Finally, if a restorative justice agreement has been reached and completed, only the judicial authority can decide whether the criminal proceedings against the same person may be discontinued, and it is the intervention of the judicial authority that bestows on the agreement its full legal value.⁸³

Restorative justice should therefore not be viewed as a loophole tending to avoid any contact with the judiciary, but rather as a tool improving the current system and offsetting the stiffness of traditional criminal proceedings.

Nevertheless, it is incumbent upon each state to incorporate into its national criminal procedure the appropriate interconnection between judges and prosecutors and other restorative justice stakeholders. In Belgium, in proceedings for underaged offenders, the prosecutor must examine an attempt at mediation before any other measure. If a mediation agreement or an intention statement has been established, it is submitted for the validation of a judicial authority, which can modify the statement only if such an agreement is a risk to public order.⁸⁴ If the prosecutor chooses to proceed otherwise, he/she must justify this with circumstantial evidence, the lack of which would entail any following act to be declared null and void, resulting in the procedure not being submitted before a judge.⁸⁵

In Spain, prosecutors also have the main role regarding young offenders. Almost 20% of legal proceedings for juvenile delinquents are stopped by the implementation of a restorative justice measure as an alternative. Prosecutors promote it and create the referrals, but it is only intended to be set up for petty crimes (non violent crimes carrying less than three

⁸⁰ H. Soleto Munoz, *Directora de Instituto Alonso Martínez de Justicia y Litigación*, personal communication, 18 March 2022

⁸¹ Recommendation CM/Rec(2018)8 of the Committee of Ministers to Member States concerning Restorative Justice in Criminal Matters, art. 28.

⁸² Ibid, art. 32.

⁸³ Ibid, art. 34.

⁸⁴ Décret du 18 janvier 2018 portant le Code de la Prévention, de l'Aide à la Jeunesse et de la Protection de la Jeunesse, art. 97, §4 (Decree of 18 January 2018).

⁸⁵ Ibid art. 97 at para 7.

years' custody). Teams then work with psychologists, social workers and educators. As far as adults are concerned, the decision to resort to restorative justice before a lawsuit remains with the investigating judges. At the sentencing enforcement stage, it is in the mind of the judges in charge.⁸⁶

The judicial authority is thus entirely intertwined with the process of restorative justice, not only to inform parties of the possibility of restorative justice, but also to actively take part in its process. The cases of Belgium and Spain are two amongst many of the various paths through which judges and prosecutors may be involved in restorative justice and include this procedure within the majority of proceedings.

Therefore, in order for restorative justice principles to be fully enforced and applicable in most judicial systems, its evolving approach must be taken into account by the judicial authorities and all legal practitioners.⁸⁷ For judges and prosecutors, this means grasping its benefits and multiple mechanisms during both their initial and in-service training. At the French School for the Judiciary, such apprenticeship has been included for some years in lectures dedicated to the place of victims within criminal proceedings.⁸⁸ Instilling restorative justice principles in the training program of future judges and prosecutors thus seems

to be the desirable and inevitable path to delve into, so that restorative justice is bound to spread and take its rightful place in any judicial system.

CONCLUSION

During its presidency of the Council of Europe's Committee of Ministers, the Italian Government decided to make restorative justice a priority. After two sessions in December 2021, the forty Ministers of Justice of the member states of the Council of Europe unanimously adopted the Venice Declaration on the Role of Restorative Justice in Criminal Matters. The latter is another significant sign that restorative justice is becoming a central concern in Europe, with the need for many tools for its development, including interagency cooperation nationwide, adequate legislation and appropriate funding. Most importantly, it calls for the consideration by national authorities of a new goal that is the recognition of the right to access appropriate restorative justice services, for all the interested parties, if they consent. Although the clear creation of this right, not to mention its enforcement, is still a thorny subject, one can hope for it to become a forthcoming debate in Europe and, eventually, a success.

*'The truth hurts but silence kills.'*⁸⁹

⁸⁶ H. Soleto Munoz, *Directora de Instituto Alonso Martínez de Justicia y Litigación*, personal communication, 18 March 2022

⁸⁷ K. Schweber, *Student Voice : Integrating Restorative Justice into Judicial Training*, 18 February 2021, available at: <https://www.vermontlaw.edu/blog/restorative-justice/student-voice-judicial-training>

⁸⁸ *Ecole Nationale de la Magistrature*, Conférences sur les Victimes dans le Procès Pénal, 22 september 2017, available at: <https://www.enm.justice.fr/actu-25septembre2017-Conferences-sur-les-victimes-dans-le-proces-penal>.

⁸⁹ D. Tutu at the Truth and Reconciliation Commission in South Africa



‘FOR BORDERLESS CRIME, A BORDERLESS RESPONSE IS NECESSARY.’ A VISION OF A EUROPE-WIDE SEX OFFENDER REGISTRY

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In the present paper we outline the most recent elements of child exploitation, sexual abuse and present an overview of the relevant international and European legal framework. We argue that in order to effectively combat these types of crimes, different national legislators need to adapt their laws to the rapidly changing digital environment, paying particular attention to investigation matters. We highlight a few aspects of jurisdiction and cross-border investigation demonstrating the need for international cooperation. Beyond reviewing the related theoretical aspects and the already elaborated case law, we propose a common European solution by evaluating its advantages and disadvantages. A common EU registry of sex offenders for all Member States could serve not only to keep records of online facilitated sexual crimes, but also to contain the similarly serious traditional offences of child sexual abuse.

KEY WORDS

Child sexual abuse • Cybercrime • International and European cooperation • Sex offender registry • Dark web

1. INTRODUCTORY REMARKS

Historically, child sexual abuse was committed by individuals with direct physical access to victims. Later on, with the invention of photography it gradually expanded, and the images and videos were distributed in hard-copy formats. The arrival of the Internet has dramatically transformed the production, distribution of and access to child sexual abuse material (hereinafter CSAM) and child sexual exploitation material (hereinafter CSEM), *inter alia* because perpetrators may become able to reach materials anonymously.¹ The COVID-19 pandemic gave the phenomenon a twist by moving the world into cyberspace. National governments passed laws ordering people to stay at home, but 'at home and online are not always safe places, and myriad pandemic factors have left some of the most vulnerable children at an increased risk of exploitation and abuse.'² Addressing the problem of child sexual abuse is timely because technological revolution combined with the impact of the pandemic multiplied the threats the vast majority of children using the Internet have to face.

2. THEORETICAL OVERVIEW

Sexual abuse and other forms of sexual offences evolved side by side with the development of civilization. Apart from traditional crimes of a sexual nature, in recent years new kinds of sexual assaults have emerged, due to the explosive technological revolution. Within offences concerning the sexual exploitation of children, we can establish two main categories. The first one is *content-related offences* (i.e. the forms of child pornography), while the second is *offences against the person* (i.e. grooming, cyberstalking and voyeurism).³ The new phenomena have brought along a forceful urge to redefine methods of combatting such crimes. The rapid expansion of digitalization and our increasing reliance on information and communication technology (hereinafter: ICT) renders digital networks as reachable, convenient platforms to commit crimes. Alongside the vital importance of the Internet in various areas of everyday life, the magnitude of harm resulting from the interconnectedness makes it Janus-faced. 'Cybercrime, like crime, consists of engaging in conduct that has been outlawed by a society because it threatens social order',⁴ and differs from other forms of crime primarily in the way it is committed, as perpetrators act mainly in cyberspace. In parallel with the constant proliferation of ways to commit cybercrime, the investigation of such offences also requires a

¹ Leclerc, Cale, Holt and Drew, Child sexual abuse material online: The perspective of online investigators on training and support, *Policing: A Journal of Policy and Practice*, (2022), at 1., available at <https://doi.org/10.1093/police/paac017>

² Haney, *Addressing the Increase of Online Child Sexual Abuse in the Pandemic*, 7 December 2021, available at https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2021/november-december/addressing-increase-online-child-sexual-abuse-pandemic/

³ J. Clough, *Principles of Cybercrime* (2010), at 24.

⁴ S. W. Brenner, *Cybercrime and the Law: Challenges, Issues and Outcomes* (2012), at 6.

continuously renewed approach, giving crucial importance to investigative collaboration within the European Union.

3. SUBSTANTIVE LAW

3.1. INTERNATIONAL AND EUROPEAN LEGAL FRAMEWORK

For the protection of children on a global level, a set of international instruments have been introduced under the auspices of the United Nations. From all UN instruments that cover the protection of children, we highlight those that must be viewed in close connection with online child sexual abuse: initially, the United Nations Convention on the Rights of the Child (hereinafter: CRC) and its Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography (hereinafter: OPSC).

With regard to online-facilitated crimes of a sexual nature against children, the Council of Europe Convention on Cybercrime (hereinafter: the Budapest Convention) uses the term *minor* in Article 9 stating that 'it includes all persons under 18 years of age'.⁵ Article 3(a) of the Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse (hereinafter: Lanzarote Convention) establishes that a *child* is 'any person under the age of 18 years'.⁶ In order to be consistent and in line with the international legal frame-

work, we refer to the term *child* as any person who is under the age of 18 years.

For the purpose of ensuring a common European level of understanding regarding issues like age of consent and the identification of emerging criminal activities in the light of the development of the ICT environment, it became necessary to adopt a common legal framework for combatting the sexual abuse of children. Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combatting the sexual abuse and sexual exploitation of children and child pornography (hereinafter: 2011/93/EU Directive) works in tandem with the aforementioned Lanzarote Convention.

3.2. CATEGORIES OF SEXUAL OFFENCES

Both the concept of CSAM and CSEM discussed above refer to a sexualized image of a child. CSEM is the 'broader category that encompasses both material depicting child sexual abuse and other sexualized content depicting children',⁷ while the abbreviation of CSAM indicates a terminology switch. The latter has been used to replace *child pornography* as it stands for a subset of CSEM 'where there is actual abuse or a concentration on the anal or genital region of the child',⁸ including the 'offences of producing, preparing, consuming, sharing, spreading, disseminating, or possessing such material'.⁹ These two additional concepts encompass materials documenting chil-

⁵ ECPAT International, *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse* (2016) at 5., available at <https://ecpat.org/wp-content/uploads/2021/05/Terminology-guidelines-396922-EN-1.pdf>

⁶ Ibid., at 5.

⁷ Ibid., at 38.

⁸ Ibid., at 39.

⁹ Ibid., at 36.

dren engaging in sexual activities irrespective of whether the material has ICT origins or has been created in person and then shared online, referred in the international outlook as online-facilitated child sexual exploitation (OCSE).¹⁰

Regarding the two main categories of sexual offences against children, we have established the definition of content-related offences by describing the elements of child pornography and CSAM. The category of offences against persons is more complex. A non-exhaustive list includes grooming, generally described as crimes of 'offenders who seek to win the trust of a child as a first step towards the future sexual abuse'.¹¹ Also, cyber-harassment (or cyber-stalking) includes 'keeping the victim under surveillance by repeated and harassing phone calls or other communications'¹² or violence against the victim or someone known to them. Another typical criminal behaviour is cyberflashing, encompassing 'a spectrum of practices, all of which involve the sending of an unsolicited genital image to another, and most commonly involves men sending pictures of their penises to other individuals without their prior agreement or consent'.¹³ This group of offences also encompasses voyeurism meaning 'a person surreptitiously observing, and in some cases recording, another person in what would generally be regarded as a private

place'.¹⁴ Sextortion has a resemblance to blackmail but in some cases offenders force victims to create sex videos or to give them money by threatening to reveal information.¹⁵

3.3. TOWARDS PROCEDURAL REALIZATION

The legal framework of substantive rules regarding such crimes does not seem sufficient by itself to address CSAM, CSEM and their online facilitated versions. The European Court of Human Rights (hereinafter: ECtHR) noted in its judgment of *K.U. v. Finland* that 'the existence of an offence has limited deterrent effects if there is no means to identify the actual offender and to bring him to justice'.¹⁶ In this case the applicant was a 12-year-old child whose personal data (name, phone number, link to his personal webpage with a picture of him, year of birth and physical characteristics) was posted on an online dating site with a message stating that 'he was looking for an intimate relationship with a boy of his age or older to show him the way'.¹⁷ Despite the request of the police, the Helsinki District Court refused to order the service provider of the relevant website to disclose the identity of the user who placed the advertisement, referring to breach of professional secrecy. The District Court argued that based on the relevant Finnish telecommunications and coercive

¹⁰ Ibid., at 23.

¹¹ Clough, *supra* note 3, at 343.

¹² Ibid., at 366.

¹³ Johnson and McGlynn, *Criminalising Cyberflashing: Options for Law Reform*, 85(3) *The Journal of Criminal Law* (2021) 171, at 172.

¹⁴ J. Clough, *supra* note 3, at 388. However, in recent years, voyeurism has expanded and new criminal conducts led to offences like upskirting, broadcasting the picture or video of someone's breasts or up their skirt for example on public transport.

¹⁵ W. Brenner, *supra* note 4, at 84.

¹⁶ ECtHR, *K.U. v. Finland*, Appl. no. 2872/02, Judgment of 2 December 2008. All ECtHR decisions are available at <https://hudoc.echr.coe.int/>

¹⁷ Ibid., at 1.

measures acts, the police had the right to obtain such information concerning certain offences, but not in the instance of ‘malicious misrepresentation’ of the case concerned. The ECtHR held that even though a child was the subject of an advertisement of a sexual nature on an Internet dating site, the identity of the person who put the advertisement on the webpage could not be obtained because of the Finnish legislation that was in effect at the material time. Although the ECtHR underlined the importance of respecting guarantees and due process of crime prevention and investigation, it emphasized that achieving ‘practical and effective protection of the applicant required that effective steps be taken to identify and prosecute the perpetrator.’¹⁸

4. INTERNATIONAL COOPERATION

Identifying the perpetrators of OCSE is only one step towards the conclusion of a successful investigation. These crimes require different approaches and specific expertise in ICT and digital forensics as the traditional police methods may be challenged by some offenders who use encryption technologies, anonymity tools, or alternative payment methods for example pay-as-you-go streaming solutions.¹⁹ Furthermore, law enforcement typically has a national character and it could suffer from shortcomings

concerning international information sharing.²⁰ Expertise, institutional capacity and resources are considerably different across countries, and most national agencies work with limited resources facing the increasing volume of OCSE.²¹ OCSE crimes are typically borderless, and oftentimes the perpetrators may not even be in the same country as their victims. This indicates that perpetrators can benefit from crossing borders as they can move their operations in order to evade investigation, or to find legal contexts that suit their criminal intent. Therefore, the specialization against OCSE is crucial and a more holistic approach should be adopted.

4.1. JURISDICTION

Due to the globalized nature of the Internet, crimes can be committed across numerous jurisdictions. Perpetrators can hide their identities and traces with no apparent effort, and even if they leave any evidence behind, it is difficult to collect it, since the data can be removed, altered or hidden very easily.²² International investigative coordination provides for more efficient operational activities.²³ Police units can join forces to enhance identifying and rescuing more victims as well as arresting more offenders across multiple jurisdictions. Such coordination helps by reducing the duplication of efforts. For example, if the sexual offender is already arrested in a

¹⁸ Ibid., at 14.

¹⁹ ECPAT International, *Summary Paper on Online Child Sexual Exploitation* (2020), at 12., available at <https://ecpat.org/wp-content/uploads/2021/05/ECPAT-Summary-paper-on-Online-Child-Sexual-Exploitation-2020.pdf>

²⁰ Ibid., at 13.

²¹ Ibid., at 12.

²² K. Witting, Transnational by default: Online child sexual abuse respects no borders, *The International Journal of Children's rights* 29, (2021), 731, at 733., available at https://brill.com/view/journals/chil/29/3/article-p731_731.xml?language=en&ebody=pdf-49903

²³ ECPAT International, *Online Child Sexual Exploitation*, *supra* note 19, at 13.

country, the police can notify the other state to cease the investigation with respect to the perpetrator's location.²⁴ Although it sounds very promising, the cooperation across jurisdictions can face several practical challenges due to different legal frameworks, operational procedures, discrepancies in available resources, inconsistent definitions of OCSE, and lack of capacity across law enforcement agencies, not to mention the linguistic and cultural obstacles.²⁵ Therefore, it is necessary that countries take the adequate steps to facilitate cross-jurisdictional investigations.²⁶

Such investigations cover extraterritorial jurisdiction and extradition mechanisms that have played essential roles in combatting sexual exploitation of children for a long time. Despite the worthy progress, these legal frameworks still face practical obstacles that often result in impunity for transnational offenders. For example, there are offenders who intentionally select children in a particular country as their victims due to more lenient laws or legal loopholes in order to avoid prosecution. Others may choose to target children who are not citizens of a specific country, such as irregular migrant children and refugee children assuming that they are less protected by laws.²⁷

'The term jurisdiction generally refers to the power or right of a State to exercise legal authority over a particular individual or matter.'²⁸ In most cases jurisdiction requires a link that connects the offence to the investigating country. The most common connection is the territoriality principle, according to which a state can prosecute crimes committed in its territory. However, this principle might be insufficient when the state where the crime is committed is unwilling or unable to prosecute. Additionally, more and more crimes include a transnational dimension²⁹ where extraterritorial jurisdiction may entail the possibility of prosecuting an offence committed abroad the same way as an offence committed within the given state's borders.³⁰ Therefore, according to the active personality principle a state can prosecute offences of sexual exploitation of children based on the nationality of the offender, or according to the passive personality principle based on the nationality of the victim. Relevant international instruments, such as the Lanzarote Convention and the 2011/93/ EU Directive also include rules that states should prescribe jurisdiction under the principles of active and passive personality. There are offences which are so abhorrent by nature, for instance war crimes or crimes against humanity, that the requirement of a direct link between the state and the offence is not even necessary to justify prosecution (universality

²⁴ ECPAT International, *Online Child Sexual Exploitation*, *supra* note 19, at 13.

²⁵ ECPAT International, *Online Child Sexual Exploitation*, *supra* note 19, at 13.

²⁶ ECPAT International, *Online Child Sexual Exploitation*, *supra* note 19, at 13.

²⁷ ECPAT International, *Extraterritorial Jurisdiction and Extradition Legislation as Tools to Fight the Sexual Exploitation of Children*, (2022), at 2., available at https://ecpat.org/wp-content/uploads/2022/02/IssuePaper_Extraterritoriality_2022FEB.pdf

²⁸ *Ibid.*, at 2.

²⁹ *Ibid.*, at 3.

³⁰ ECPAT International, *Summary Paper on Sexual Exploitation of Children in Travel and Tourism*, (2020), at 16., available at <https://ecpat.org/wp-content/uploads/2021/05/ECPAT-Summary-paper-on-Sexual-Exploitation-of-Children-in-Travel-and-Tourism-2020.pdf>

principle).³¹ Universality principle, however, does not categorize sexual crimes against children as heinous offences that would allow states to prosecute without a direct link.³²

The question arises, how does extraterritorial jurisdiction work in practice? There are practical obstacles, not to mention that the application of extraterritorial jurisdiction is based on many other conditions, such as double criminality. This means that the offence must be considered a crime not only in the state exercising the extraterritorial jurisdiction or in case of extradition in the requesting state, but also in the state where the offence was committed or in case of extradition in the requested state.³³ Double criminality concerning sexual exploitation of children renders extraterritoriality and extradition inapplicable if the offences are not criminalized in both countries, if either the qualification or the age limit based on which the states consider someone a child differs in the relevant countries.³⁴ Compared to this complex and lengthy process, the European Arrest Warrant is considered to be an easier cooperation mechanism, since it does not require double criminality regarding selected serious crimes, including many offences related to sexual exploitation of children.³⁵

4.2. INTERNATIONAL AND EUROPEAN MECHANISMS

Another important element contributing to a successful cross-border investigation apart from the previously discussed jurisdictional rules are international and European cooperations. Being the only global law enforcement agency, Interpol operates the International Child Sexual Exploitation database (ICSE). The ICSE database is an intelligence and investigative tool, which permits competent authorities to share information and data with colleagues across the world in order to identify and locate victims and offenders of OCSE. By using image and video comparing software, law enforcement can make connections and comparison of CSAM/ CSEM. The database is only available to trained and certified law enforcement agents or accredited non-law enforcement analysts. The authorized personnel can organize their submission to the ICSE database by grouping them by series of images or by investigations.³⁶ Interpol also provides an IWOL list (Interpol worst-of list) which enumerates known domains containing very severe CSAM/CSEM to be shared with Internet service providers who may reduce the availability of this kind of material on their platforms.³⁷

³¹ ECPAT International, *Extraterritorial Jurisdiction*, *supra* note 27, at 3.

³² ECPAT International, *Extraterritorial Jurisdiction*, *supra* note 27, at 3.

³³ ECPAT International, *Extraterritorial Jurisdiction*, *supra* note 27, at 6.

³⁴ Griffith and Harris, *Recent Developments in the Law of Extradition*, Melbourne Journal of International Law, (2005) available at: <http://classic.austlii.edu.au/au/journals/MelbJIL/2005/2.html>

³⁵ Council Framework Decision, 13 June 2002, OJ L 190, 18/07/2002 P. 0001 - 0020

³⁶ ECPAT International and INTERPOL, *Towards a global indicator on unidentified victims of child sexual exploitation—Technical Report*, (2018), at 6., available at <https://ecpat.org/wp-content/uploads/2021/05/Technical-Report-TOWARDS-A-GLOBAL-INDICATOR-ON-UNIDENTIFIED-VICTIMS-IN-CHILD-SEXUAL-EXPLOITATION-MATERIAL.pdf>

³⁷ ECPAT International, *Online Child Sexual Exploitation*, *supra* note 19, at 13. The relevant information on how the worst of list functions is available at <https://www.interpol.int/en/Crimes/Crimes-against-children/Blocking-and-categorizing-content>

Within the EU, the investigation of online child abuse cases requires the cooperation of the Member States, primarily carried out by Europol.³⁸ Pursuant to Article 4 of EU Regulation 2016/794 listing Europol's tasks, its broad mandate is what has allowed it to become the centre of combatting cybercrime, including online child sexual abuse.³⁹ Apart from the investigating work conducted alongside the national law enforcement agencies, Europol implements specific campaigns and activities aimed at inhibiting OCSE, such as the Stop Child Abuse - Trace an Object campaign, which provides an opportunity for the public to view objects portrayed in CSAM so that they can give hints about their possible location and origin.⁴⁰

The general mandate to fight cybercrime was further developed with the establishment of the European Cybercrime Centre in January 2013 which is entrusted to act including but not limited to cybercrimes, which cause serious harm to the victim such as online child sexual exploitation. By promoting the cooperation between the Member States, it provides highly specialized technical and digital forensic support capabilities to operations and investigations, important strategic analysis enabling informed decision making, while also producing

thematic threat assessments.⁴¹ Another milestone in the battle against online child sexual exploitation at the European level is Eurojust,⁴² contributing by enhancing prosecution and judicial cooperation activities among EU Member States.

5. SOLUTION: A EUROPE-WIDE SEX OFFENDER REGISTRY?

After discussing the difficulties and the many proliferating ways Member States could cooperate and deal with OCSE, we propose a tool that has the potential to enhance effective interaction, namely a European sex offender registry. Although being a controversial subject, we argue that it is worth looking at the advantages and disadvantages of having such a registry. After discussing the case law of the ECtHR examining the subject in several judgments, we present our view on whether or not the European Union should develop such a registry.

The Parliamentary Assembly of the Council of Europe emphasizes that measures preventing sexual offences must be based on laws that fully respect human

³⁸ Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, OJ L 135, 24.5.2016

³⁹ Directorate General for internal policies, Policy Department C: Citizen's rights and constitutional affairs, Civil liberties, justice and home affairs: Combatting child sexual abuse online, (2015) at 32., available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2015/536481/IPOL_STU\(2015\)536481_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2015/536481/IPOL_STU(2015)536481_EN.pdf)

⁴⁰ Stop child abuse - trace an object, (2021) available at <https://www.europol.europa.eu/stopchildabuse>

⁴¹ Directorate General, *supra* note 39, at 33.

⁴² Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA, OJ L 295, 21.11.2018

rights and fundamental freedoms.⁴³ However, laws governing this subject interfere with many rights protected by the European Convention on Human Rights (hereinafter: ECHR), such as the rights to privacy, to family and home, to freedom of movement and liberty. These rights are not absolute: they can be restricted pursuant to Article 8 of the ECHR on the grounds of 'national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.' The ECtHR has firmly declared that the gravity of the harm that may be caused to the victims of sexual violence places states under an obligation to take measures to protect people from such harm.⁴⁴

The protection of children from sexual abuse is a legitimate public interest that could serve as a basis for invasion of private life. Combatting sexual exploitation by protecting communities from recidivist sex offenders is considered to be an objective that outweighs an individual's human rights.⁴⁵

5.1. AN OVERVIEW OF THE EUROPEAN COURT OF HUMAN RIGHTS CASE LAW

The concept of sex offender registries derives from the United States where highly publicized sex crimes have maintained public focus on sexual crimes and led to milestones in legislations.⁴⁶ In the United States of America the general public has access to personal information of convicted sexual perpetrators. Contrary to the American model - even though it served as an example for the international community⁴⁷ - the immense majority of countries that have created their own sex offender registries do not allow public access to these records.⁴⁸ In Europe, the United Kingdom and France were among the first to establish such registries that shortly posed the question of conformity with the ECHR.

The United Kingdom first adopted sex offender legislation in 1997.⁴⁹ Eight years later, the French legislative body followed its counterpart and established its sex offender registry in 2005. Both acts require the perpetrators to notify the relevant authority if their circumstances changed, and in both cases, the period

⁴³ K. Newburn (ed.), *The prospects of an international sex offender registry: Why an international system modeled after United States Sex Offender Laws is not an effective solution to stop child sexual abuse?*, (2011) at 574.

⁴⁴ ECtHR, *Stubbings and Others v. The United Kingdom*, Appl. no. 22083/93; 22095/93 Judgment of 22 October 1996

⁴⁵ Orecchio and A. Tebbett, *Sex Offender Registration: Community Safety or Invasion of Privacy?*, 13 *Journal of Civil Rights and Economic Development*, (1999) 675, at 676.

⁴⁶ Dugan, *Megan's Law or Sarah's Law? A Comparative Analysis of Public Notification Statutes in the United States and England*, 23 *Loyola of Los Angeles International and Comparative Law Review*, (2001) 617, at 633.

⁴⁷ Thomas, *European Developments in Sex Offender Registration and Monitoring*, 18 *European Journal of Crime, Criminal Law and Criminal Justice* (2010) 403, at 404.

⁴⁸ Hynes, *The Cost of Fear: An Analysis of Sex Offender Registration, Community Notification, and Civil Commitment Laws in the United States and the United Kingdom*, 2 *Penn State Journal of Law & International Affairs*, (2013) 351, at 352.

⁴⁹ Newburn, *supra* note 43, at 560.

during which the perpetrators' data had to be stored was in line with the gravity of the committed felony or misdemeanour.⁵⁰

5.1.1. UNITED KINGDOM

The following judgments have been delivered by the ECtHR in connection with the system of the United Kingdom. In the case of *Adamson v. the United Kingdom*,⁵¹ Adamson had committed a single offence of indecent assault and was sentenced to five years imprisonment. In the case of *Ibbotson v. United Kingdom*,⁵² Ibbotson was convicted on six charges of possession of obscene and indecent material. In the context of both applicants, the Sex Offenders Act - as soon as it entered into force - required them to register with the police for an indefinite period of time following their release from prison.

Both applicants complained about the breach of Article 7 of the ECHR, claiming that the provisions of the Act constituted a heavier penalty than the sanction applicable at the time the criminal offence was committed. Moreover, Adamson invoked Article 8, stating that the requirement to register constituted an unjustified interference with his private life. He also complained under Article 3 that the registration requirement stigmatized him as a sex offender for life.

Although the ECtHR accepted that the applicants in both cases may have perceived the requirements of the Sex Offenders Act as 'punitive', in the view of the ECtHR these kind of requirements were

rather considered preventive. According to the ECtHR, the fact that a person could be registered by the police due to certain sexual crimes specified by the legislator could dissuade the potential perpetrator from committing further offences.

The ECtHR considered that the requirement to provide certain information to the police interfered with the applicant's private life, however, it was found that the disputed measures pursued legitimate aims. Such aims are for instance prevention of crime and the protection of rights and freedoms of others. Since the ECtHR stated that the measures were rather preventive than an additional penalty under Article 7, the controversial criteria did not meet the minimum level of severity required for a breach of Article 3.

5.1.2. FRANCE

Regarding the French registry, the ECtHR delivered judgments in the case of *M.B. v. France*,⁵³ *Gardel v. France*,⁵⁴ and *B.B. v. France*.⁵⁵ All three applicants were sentenced to terms of imprisonment for rape of 15-year-old children committed as persons in a position of authority. On 9 March 2004, Law No. 2004-204 created a national judicial database of sex offenders, and all three applicants were included in the database.

They complained that their inclusion in the registry breached their rights under Articles 7 and 8. The applicants complained against their placement on the Sex Offenders Register which imposed

⁵⁰ Thomas, *supra* note 47, at 405-408.

⁵¹ ECtHR, *Adamson v. The United Kingdom*, Appl. no. 42293/98, Judgment of 26 January 1999.

⁵² ECtHR, *Ibbotson v. The United Kingdom*, Appl. no. 40146/98, Judgment of 21 October 1998

⁵³ ECtHR, *M.B. v. France*, Appl. no. 22115/06, Judgment of 17 December 2009

⁵⁴ ECtHR, *Gardel v. France*, Appl. no. 16428/05, Judgment of 17 December 2009

⁵⁵ ECtHR, *B.B. v. France*, Appl. no. 5335/06, Judgment of 17 December 2009

more stringent obligations on them than those existing at the time of their conviction.

The ECtHR observed that the national judicial database constituted a public-order measure rather than a sanction and it was designed to prevent convicted persons from reoffending and to guarantee that they could be identified and traced. In that aspect, the ECtHR accepted the argument that a convicted perpetrator's address known by the police and the judicial authorities based on their inclusion in the Sex Offenders Register has a deterrent effect.

Considering the potential breach of Article 8, the ECtHR had to choose between two competing interests - private and public - and decide whether or not the state overstepped the acceptable margin of appreciation in connection with the storage of the sexual perpetrators' data. Sexual abuse is unquestionably an abhorrent type of wrongdoing, with long-term harmful psychological effects on its victims. Children and other vulnerable individuals are entitled to the protection of the state, which justifies such data storage. For storing the information, maximum periods were determined depending on the seriousness of the relevant crime. In conclusion, the ECtHR stated that the system of inclusion in the database of sex offenders had struck a fair balance between the competing private and public interests at stake, and therefore there was no violation of Article 8.

5.2. HUNGARIAN REGULATORY FRAMEWORK

As it was presented above, the ECtHR established that the registries of the United Kingdom or France that have been enacted in order to identify and trace sexual offenders - with respect to the essential substance of the relevant fundamental rights - conform to the ECHR. In Europe - besides the United Kingdom and France - Austria, Germany, Ireland, Malta, Poland, Portugal, Spain and most recently Hungary have adopted laws governing sex offender registration. In the following we outline the relevant provisions of the newly adopted Hungarian Act⁵⁶ establishing a database of sex offenders that entered into force on 1 February 2022. The database is available on a platform operated by the Ministry of Interior and contains data of convicted offenders of sexual crimes against children. Data retrieval from the registry requires a statement from the user regarding the purpose of the query. Any user, in order to reach information on the offenders, has an obligation to indicate that they need the information as a relative of a child, or because they are taking care of a child. After reading a mandatory warning about the obligation of respecting personal data, the user needs to specify their motivation for searching someone's criminal background. The list of intents contains options like gaining information on a particular person is - according to the opinion of the user - 'presumably necessary' for the protection of children or checking if someone in the child's environment endangers their safety. Once the ground for retrieving data is established, searching for a specific name, the platform discloses the portrait, the loca-

⁵⁶ See Act XLVII of 2009

tion, year of birth of the perpetrator and basic information about the committed crime.

5.3. LET'S NOT WASTE MORE TIME!

These new kind of measures to protect children from sexual offenders are becoming more and more common. The 2011/93 EU Directive also declared that the Member States may consider adopting additional administrative measures, such as the inclusion of perpetrators in national sex offender registries. These circumstances resulted in the rapid spread of such databases in the European Union, and it also brings along the question if a Europe-wide sex offender registry should be introduced by the European legislators.

Every two minutes a sex crime is reported in the EU. Europol emphasized the fact that women and children suffer the most at the hands of these kinds of violent criminal acts.⁵⁷

In 2007 the Parliamentary Assembly of the Council of Europe (hereinafter: the Assembly) passed a Resolution calling for a Europe-wide sex offender's registry.⁵⁸ The matter was referred for a more detailed investigation which resulted in a report (hereinafter: the Report) on the basis of

which the Assembly did not support a Europe-wide sex offender registry.⁵⁹

In 2016, the European Commission (hereinafter: the Commission) had to deliberate on the registration of pedophiles in Europe initiated by Petition No. 2147/2014.⁶⁰ However, the Commission highlighted that it shared the general concerns about convicted sex offenders potentially becoming recidivists, but it did not intend to table proposals in order to set up registries on child sexual abusers neither at national nor at EU level. Most recently, a motion for a resolution has been submitted to the European Parliament on an EU-wide registry of convicted sex offenders.⁶¹

'By the time you've finished reading this, at least one violent sex offence will most likely have already been reported somewhere in the EU. Let's not waste more time!' stated Europol in its article.⁶² We reiterate that after multiple scandalous child abduction cases such as the Madeleine McCann (2007) case were reported, the subject of sex offenders' registry has appeared from time to time on the agenda of the Council of Europe and the Commission. This results in deliberations on the requirement of the Europe-wide registry, particularly regarding employment screening for childcare workers since they are internationally mobile.⁶³

⁵⁷ Some of Europe's most dangerous sex offenders in the spotlight (2020) available at <https://www.europol.europa.eu/media-press/newsroom/news/some-of-europe%E2%80%99s-most-dangerous-sex-offenders-in-spotlight>

⁵⁸ Parliamentary Assembly, Committee on Legal Affairs and Human Rights, For a Europe-wide sex offenders register, Introductory Memorandum (2008), at 1., available at http://assembly.coe.int/CommitteeDocs/2010/20081104_ajdoc51.pdf

⁵⁹ Ibid., at 1.

⁶⁰ Notice to Members available at https://www.europarl.europa.eu/doceo/document/PETI-CM-576744_EN.pdf?redirect

⁶¹ Motion for a Resolution available at https://www.europarl.europa.eu/doceo/document/B-9-2021-0301_EN.html

⁶² *supra* note 57.

⁶³ Thomas, *supra* note 47, at 414.

5.4. BALANCING THE COMPETING ARGUMENTS

It is a common false assumption that all sexual offenders are pedophiles. 'Pedophilia is a mental defect where an individual seeks sexual gratification from children. In itself it does not give rise to criminal liability, only acting on it does.'⁶⁴ Labelling the perpetrators of sexual offences as pedophiles is not accurate, it would only increase the stigmatizing effect an offender has to face. Hereby we would like to emphasize that since not all sexual offenders are considered pedophiles, the registry we envision would only be limited to convicted sexual perpetrators. Even though the registry would include all sexual offenders not just child abusers, we will highlight the arguments concerning perpetrators who committed crimes against children.

Taking a closer look at the relationship between victims and offenders, sexual abuse between intimate partners and family members seems to be quite frequent. Statistics⁶⁵ show that 64% of children were abused by someone known to them, 11% were abused by someone in their nuclear family and 16% by someone in their extended family. Some critics say that registry laws discourage victims to report their relatives as abusers, since they might not want the 'permanent stigmatization'.⁶⁶

Our position is that a Europe-wide registry could work as a deterrent factor for the potential perpetrators since the inclusion on the registry would render their reintegration into society significantly more difficult. Therefore, the establishment of such a registry could not only pursue general but also special prevention aims.

As it was presented above, some countries run national sex offender registries, while others have no such arrangements. Consequently, the already existing national systems can stand as an example with all their advantages and failures. As a matter of fact, the practical issues of organizing a Europe-wide registry have always constituted a barrier. Firstly, the differences in terminology make it difficult to compare legislations of the Member States. Some Member States give specific definitions of the term 'sex offender', while others have specific sections on offences involving sexual assault on children, even where such acts lack violence or threats.⁶⁷ Secondly, the rules not only differ concerning the age limit under which a person is considered as a child, but also the age of consent regarding sexual activities vary greatly among the Member States. This renders the establishment of a coherent Europe-wide registry rather complex because it requires the harmonization of the laws of all Member States.

⁶⁴ Cornell Law School, Legal Information Institute available at <https://www.law.cornell.edu/wex/pedophilia?fbclid=IwAR3gWhEKQokalaLv2T52NaKl9QhJ8ycYDQz89yKAqVNihyeOmZ8ozrleja0>

⁶⁵ ECPAT International and INTERPOL, Technical report, *supra* note 36, at 22.

⁶⁶ Why the sex offender registry isn't the right way to punish rapists (2016) available at <https://www.vox.com/2016/7/5/11883784/sex-offender-registry>

⁶⁷ *supra* note 58, at 2.

However, it should not deter the European legislator from introducing such a registry, because harmonization has so far proven to be successful in countless areas of legislation, for instance crimes of terror or drug trafficking.⁶⁸ "Harmonization" does not mean a single European system or identical national rules, but rather "compatibility" for the purposes of practical cooperation between authorities.⁶⁹ We believe that for instance a comprehensive term unification could contribute to reducing differences between the legislations of the Member States.

Another argument against such a registry is the aforementioned stigmatizing effect overshadowing the prevention aims, however the ECtHR already established in its case law that national registries are rather considered to be preventive measures and not additional punishments. Our position is that we can draw a comparison between these national registries and their potential European counterparts. Concerning the punitive or preventive nature of the registry an additional argument could be the breach of the principle of *nulla poena sine lege*. The principle means that 'no heavier penalty is imposed than the one available under the written or unwritten law applicable at the time the crime was committed'.⁷⁰ Based on the decision of the ECtHR, the registry is considered to be a preventive measure and not a sanction. If the perpetrators were convicted before the establishment of a sex

offender registry, but later on their personal data would be included in the registry, the breach of the principle of *nulla poena sine lege* could be ruled out on the basis that the inclusion is not an additional punishment.

The opponents also criticize that using such registries can result in harassment against the listed perpetrators.⁷¹ Inclusion in such a registry definitely has certain repercussions on sex offenders' privacy and reintegration into society. However, it can be avoided if the data concerning the sexual offenders are accessible only to the relevant European authority responsible for the update and supervision of the registry. Henceforth, the introduction of the Europe-wide sex offenders registry would comply with the principle of proportionality.⁷² Hereby we highlight that the Europe-wide sex offender registry that we envisioned can be considered tremendous progress compared to the American model due to the fact that by limiting access for the relevant authorities and requiring a specified purpose for the query, the misuse of data could be avoided.

The reliability of such a registry requires regular updates to ensure that it contains accurate information.⁷³ By keeping more precise data it would assist police investigations should there be any further offences in a certain area.⁷⁴ In our view, even though it would place an administrative burden on national authori-

⁶⁸ Rosmus, Topa, Walczak, Harmonisation of criminal law in the EU legislation- the current status and the impact of the Treaty of Lisbon available at <https://www.ejtn.eu/Documents/Themis/THEMIS%20written%20paper%20-%20Poland%201.pdf>

⁶⁹ *supra* note 58, at 10.

⁷⁰ Kreß, Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Oxford University Press, (2010), at 8., available at <https://www.legal-tools.org/doc/f9b453/pdf/>

⁷¹ *supra* note 66.

⁷² *supra* note 58, at 2.

⁷³ *supra* note 58, at 2.

⁷⁴ Thomas, *supra* note 47, at 403.

ties, updating the European registry with the information provided by the Member States would be optimal.

Effectiveness of the registry is a key factor. It does not only encompass the easier cooperation mechanism, but also underlines the importance of time efficiency. The latter could be enhanced by establishing a supplementary 'alert system' creating the opportunity for authorities to take measures as quickly as possible when children go missing.⁷⁵

The Report also laid down that by travelling across jurisdictions in order to avoid conviction underlines the need for an increased cooperation between European countries. The Report mentioned Interpol's international sex offender database into which all countries could deposit and retrieve information of known perpetrators, and emphasized that countries should make better use of it. So far 'states seemed reluctant to share information on sex offenders'.⁷⁶ This means that if the database operated by Interpol cannot take on the role as the main channel of communication, then better direct exchanges of information on sex offenders between European countries have to be encouraged.⁷⁷

The main reason for introducing a Europe-wide sex offender registry would be to provide the public with greater protection against sexual assaults with regard to the issue of the travelling sex

offenders who appear to be able to cross borders and to reoffend. It was reported by the Child Exploitation and Online Protection Centre that the vast majority of missing sex offenders are believed to be abroad.⁷⁸

In Hungary, in the case of sexual offences committed against children, banning the perpetrator from exercising any profession involving the responsibility for providing education, care, custody or medical treatment to children is a compulsory measure. Although the prohibition is permanent, which might seem to be a severe sanction, after a period of ten years the possibility of revision becomes available.⁷⁹

Once the perpetrator under prohibition enters a foreign country, what are the guarantees that the imposed provisions shall be respected? What if the criminal record of the sexual offender is inaccessible for an employer, for instance in the case of a school headmaster.

We illustrate this issue by presenting the case of Michel Fourniret, a French citizen. Fourniret was an employee in a Belgian school despite having served a custodial sentence for offences against children in France. He continued to commit offences at his workplace,⁸⁰ standing as a suitable example when a sex perpetrator is only seeking certain employment possibilities to gain access to children.⁸¹

⁷⁵ *supra* note 58, at 9.

⁷⁶ Parliamentary Assembly, Report, Reinforcing measures against sex offenders, (2010), at 13., available at <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12426&lang=en>

⁷⁷ Thomas, *supra* note 47, at 413-414.

⁷⁸ *supra* note 76, at 9.

⁷⁹ Article 53 of Act C of 2012 (Hungarian Penal Code)

⁸⁰ How Fourniret slipped through the net, (2004), available at <http://news.bbc.co.uk/2/hi/europe/3875987.stm>

⁸¹ Thomas, *supra* note 47, at 412.

The 2011/93/EU Directive stated that the Member States shall take the necessary measures to ensure that employers recruiting a person for professions involving direct and regular contacts with children are entitled to request information on the existence of criminal convictions or on the existence of any disqualification concerning sexual offences against children. We also greet the endeavour that Member States have to take the necessary measures in order to make information circulation more effective⁸² concerning convictions and disqualifications for such abhorrent crimes against minors. Our position is that by introducing a Europe-wide sex offender registry information sharing between the Member States can be more efficient. As we stated above, only relevant authorities could have access to such a registry. Moreover, we underline that it is crucial to limit the possibility of data requests to employers running child-care and education institutions and even elderly care institutions.

When it comes to travelling sex offenders, we are aware of the practical difficulties concerning the requirement of notifying the police and the difficulties in seeking surrender to states where the offender has been placed on the register and breaches the order. The problems derive from the fact that Member States of the EU have established different legislation governing the subject. For instance, in the UK in case of an existing Sexual Harm Prevention Order (SHPO) and Sexual Risk Orders (SRO) the court may impose positive requirements (e.g. take part in a behaviour programme, provide

personal information, report the change of personal data) and obligations such as prohibit foreign travel. Breach of the notification requirements in the UK is a criminal offence punishable by up to five years' imprisonment. However, the punishability of breaching the order is not coherent within the Member States of the EU. For example neither the Hungarian nor the Italian penal code contains a similar offence, and there are Member States where breaching the order only constitutes an administrative breach.

We reiterate that the concept of a cross-border registry is not a new phenomenon, since Interpol already operates one, however, it serves different aims compared to what we envisage. Our view is that a European registry would be more useful, since the Member States share similar cultural and legal backgrounds.

6. CONCLUSION

In the European Union protecting children is a highly prioritized interest therefore it is particularly important to step up against the various forms of child abuse. The COVID-19 pandemic shed light on the relevance of the already established legal framework promoting collective action, however, it also pointed out the necessity of further development of the cooperation amongst Member States. We argue that combatting child abuse and its online facilitated versions require international and European cooperation in order to conduct successful investigations and keep the frequency of sexual

⁸² DIRECTIVE (EU) 2019/884 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 April 2019 amending Council Framework Decision 2009/315/JHA, as regards the exchange of information on third-country nationals and as regards the European Criminal Records Information System (ECRIS), and replacing Council Decision 2009/316/JHA

offences against children as low as possible. Based on our assessments a Europe-wide sex offender registry would promote transnational crime prevention. In this sphere we examined the ECtHR case law. From the relevant European legal practice, we deduced that a registry of sexual offenders would be an effective tool not only in national legislations, but also on a European level. After elaborating all the arguments for and against the European-wide sex offender registry we concluded that the advantages significantly outweigh the reasonable doubts and difficulties concerning the data protection and administrative burden.

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THE RIGHT TO SILENCE WITHIN THE EUROPEAN UNION: ONE RIGHT, SO MANY CHALLENGES

This paper addresses the most recent challenges to the right to silence in the EU legal system. The first part is devoted to the definition of the meaning of the right and its most relevant sources. As the right enjoys a multi-level protection, we focus not only on EU law, but also on the law of the ECHR, that belongs to the general principles of EU law and whose standard of protection of the rights is integrated into the CFREU. The second part deals with the scope of application of the right – namely, whether and to what extent it should be recognized in administrative proceedings and to legal persons – that has been recently debated in the case law of the Court of Justice of the EU. The last part examines the negative consequences that the choice to remain silent might have in two specific ‘sub-proceedings’ of the criminal proceeding: the proceeding for compensation for illegal detention and the proceeding for the execution of the penalty. In order to assess the impact of the right to silence as defined in EU law on all these practical issues, the Italian legal system is used as a benchmark.

KEY WORDS

Right to silence • [no] Self-incrimination • EU Directive 2016/343 • Articles 5 and 6 ECHR • Nature of the proceeding • Legal persons

1. INTRODUCTORY REMARKS

Defined as the ‘chameleon of criminal procedure’,¹ the right to silence has recently been given new and increasing attention by the academic community and by judges all across Europe thanks to a recent landmark judgment of the Court of Justice of the European Union (*DB v Consob*) and to the entry into force of Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial. Despite the fact that almost all modern legal systems recognize to some extent the right to silence of those accused of a criminal offence, there is still controversy over its rationale, its nature, its implications and its scope of application.

This paper aims at analysing the right to silence in European Union law and in the law of the European Convention on Human Rights (ECHR) and at discussing its practical implications with special regard to the impact of the case-law of the Court of Justice of the European Union (CJEU) and of the European Court of Human Rights (ECtHR) on the Italian legal system.

Firstly, it is important to note that the expressions ‘right to silence’ and ‘privilege against self-incrimination’, despite frequently being used as synonyms, do not describe the same guarantee but rather represent two only partly overlapping circles.² On one hand, the right to silence

entails that individuals suspected with a criminal offence must be accorded the right to remain completely passive when asked questions about their involvement in the offence concerned. On the other hand, the privilege against self-incrimination has a much broader meaning, since it implies that the accused should in no way be forced to contribute to its incrimination, e.g. by being obliged to hand over documents. In the present paper we will cover both issues, as they frequently overlap.

Scholars worldwide are far from unanimous in pointing out the rationale of the privilege, which is of fundamental importance in assessing its scope of application and precise nature. Whereas it is impractical to discuss all the various theories that have been elaborated in this regard, we focus on those arguments that have gained the greatest attention (and that have also been ‘used’ in various judgments by the European Court of Human Rights).³ Despite the widespread opinion that the right to silence lies at the heart of the notion of a fair trial and that it is essential to ensure that the suspect can effectively build his defence strategy, others stress that the right to silence is essential to avoid that the suspect is forced to lie, and thus ultimately to diminish the risk of miscarriages of justice. According to another theory the right to silence is a direct corollary of the presumption of innocence, since the burden of proving the guilt of the accused only relies on the State and in no way should the accused be treated as guilty - and therefore obliged to give its

¹ For both this definition and an overview of the topic see Lamberigts, ‘The Privilege against Self-Incrimination: A Chameleon of Criminal Procedure’, 7 *New Journal of European Criminal Law* 2016, 418.

² In this respect see S. Trechsel, *Human Rights in Criminal Proceedings* (2005), at 343.

³ See Jackson, ‘Re-Conceptualizing the Right of Silence as an Effective Fair Trial Standard’, 58 *The International and Comparative Law Quarterly* (2009) 835.

contribution - before the State has successfully proven its case. This approach should be given special consideration, as the European legislator seems to have adopted this exact line of reasoning when it addressed the right to silence in a Directive devoted to the strengthening of the presumption of innocence. Third, a lot of commentators think that the right to silence is crucial in order to respect the will of the accused; this opinion relies on the prohibition of torture, the need to respect for private life or 'the privacy of the mind'.

All these theories show that the right to silence is intertwined with the core principles of criminal law. Furthermore, as the latest case-law of the European Courts seems to suggest, the right should be recognized even beyond criminal law, as an essential safeguard of the individual against the punitive power. However, as it is shown in the paper, the weaker the connection with a criminal proceeding, the lesser absolute the protection of the right and, in the day-to-day implementation, each of the underlying rationales of the right should be balanced with the countervailing interests.

2. THE RIGHT TO SILENCE IN THE LEGAL FRAMEWORK OF THE EUROPEAN UNION AND OF THE ECHR

The first step in this attempt is looking for the legal basis of the right to silence, both in the context of the European Union and in the context of the ECHR, thus taking into account the case law of the CJEU and of the ECtHR.

A. THE EUROPEAN UNION

The first legal framework to be taken into consideration is that of the European Union. According to most scholars, the right to silence has three different legal sources within this context: Article 6 para. 3 of the Treaty of the European Union (TEU), Articles 47-48 of the Charter of Fundamental Rights of the European Union (CFREU) and Articles 7 and 10 of Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial (hereinafter 'Directive 2016/343').⁴

It must be noted, however, that Article 6 TEU and Articles 47-48 CFREU contain no mention of the right to silence. On the one hand, Article 6 para. 3 TEU 'simply' states that 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'. On the other hand,

⁴ For a more in-depth analysis see Caianiello, 'Right To Remain Silent and Not to Incriminate Oneself in the European Union System', available at SSRN: <https://ssrn.com/abstract=3743329> or <http://dx.doi.org/10.2139/ssrn.3743329> (2020).

Articles 47 and 48 CFREU respectively guarantee the right to a fair trial and the presumption of innocence (and the rights of the defence). Despite the absence of any explicit mention in the above-mentioned provisions, those norms do provide - in fact - a 'constitutional basis' to the right to silence within the context of the EU. Indeed, Article 6 para. 3 TEU, in recalling the ECHR and the constitutional traditions of the Member States, implicitly gives the right to silence the status of a general principle of the Union law, since the right to silence has always been treated by the ECtHR as a fundamental component of the right to a fair trial recognized by Article 6 of the ECHR and as a direct corollary of the presumption of innocence.

This inextricable link between the right to silence, the right to a fair trial and the presumption of innocence, in turn, allows us to find another 'constitutional' basis for the right in Articles 47 and 48 CFREU (the Charter having the same value of the Treaties) that recognize and protect - at the EU level - the right to a fair trial and the presumption of innocence. This conclusion is undisputed also in light of the so called 'equivalence clause' embedded in Article 52 para. 3 CFREU. The double reference to the ECHR contained in Articles 6 TEU and 47-48-52 CFREU allows us to conclude that the level of protection that the ECHR (as interpreted by the Strasbourg Court) grants to the right to silence is to be considered a part of the Union Law; since the jurisprudence of the ECtHR, in this respect, is far more rich and detailed than the one of the CJEU, we will devote a special attention to the former in the next paragraph.

Below the constitutional level,⁵ the first provisions that explicitly recognize the right to silence are Articles 7 and 10 of Directive 2016/343. The self-declared goal of the Directive, expressed in its title, leads us to believe that the European legislator regards the right to silence as a necessary consequence of the presumption of innocence. As we will see in the second part of this paper, however, some of the implications of the right to silence that can be drawn from the text of the Directive are quite incoherent with such a premise. Turning to the specific provisions of the Directive, only two of them are devoted to the right to silence (while a little bit more attention is dedicated to the right in Recitals 24-32). Article 7 recognizes to the suspect and the defendant both the right to remain silent and the privilege against self-incrimination (paras. 1 and 2); the third paragraph recalls almost *verbatim* the case law of the ECtHR when it states that 'The exercise of the right not to incriminate oneself shall not prevent the competent authorities from gathering evidence which may be lawfully obtained through the use of legal powers of compulsion and which has an existence independent of the will of the suspects or accused persons'; the fourth and the fifth paragraph concern the consequences of the suspect's behaviour: on the one side, his cooperative attitude may be considered in the sentencing phase; on the other side, his silence shall never be used against him or as incriminating evidence; the sixth paragraph leaves room for exceptions in relation to minor offences.

⁵ In this paper we are specifically focusing on the right to silence in the criminal realm; however, we must point out that art. 9 para. 2 of the OLAF regulation (Regulation (EU, Euratom) No. 883/2013) also recognizes such right during a peculiar administrative proceeding, the one conducted by OLAF.

Article 10, on its part, is devoted to the consequences of the violation of the right to silence and – once again almost quoting the ECtHR – states that ‘Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of the right to remain silent or the right not to incriminate oneself, the rights of the defence and the fairness of the proceedings are respected.’

A significant role in shaping the right to silence within the EU has also been played by the CJEU. Indeed, it was the Court itself that drew the right from the already existing principles and provisions when Directive 2016/343 had not yet been drafted. In this respect, two of the most relevant judgments are *Orkem v. Commission* and *DB v. Consob* which will be analyzed in part. 3.

B. THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

As one can easily see by reading the ECHR, there is no explicit mention of the right to silence in any provision of the Convention. This factor, however, did not prevent the ECtHR from deriving this right – and, more generally, the privilege against self-incrimination – from other provisions of the Convention (and from elaborating the most significant international jurisprudence on the issue).⁶ The main provisions to which the Court has made reference in building its case

law are Article 3 (for the prohibition of torture and degrading treatment) and Article 6 (for the right to a fair trial and the presumption of innocence). It would be impossible, in this paper, to recall each and every significant judgment; for this reason, we will only make reference to the most relevant ones and highlight the general conclusions that can be drawn from them.

Preliminarily, we need to stress that it took the Court quite some time to come to a definitive conclusion as to the rationale of the right to silence and the privilege against self-incrimination. Initially, the Strasbourg judges had been quite laconic, in that they simply stated that anyone charged with a criminal offence within the meaning of Article 6 had the right to remain silent and not to incriminate himself;⁷ they did not, however, explain how such right was derived from the right to a fair trial embedded in Article 6 ECHR. Subsequently, the Court clarified that the right to remain silent lies at the heart of the notion of a fair procedure and that protecting the accused against improper compulsion avoids miscarriages of justice.⁸ Later on, the judges have reached a more detailed conclusion on the rationale of the right, that can be summarized as follows:

‘The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the

⁶ For a more detailed analysis of the ECtHR’s S. Trechsel, *Human Rights in Criminal Proceedings* (2005), chapter 13.

⁷ ECtHR, *Funk v. France*, Appl. no. 10828/84, Judgment of 25 February 1993; all ECtHR decisions are available at <http://hudoc.echr.coe.int/>.

⁸ ECtHR, *Murray v. UK*, Appl. no. 18731/91, Judgment of 8 February 1996.

right is closely linked to the presumption of innocence contained in Article 6 para. 2 of the Convention. The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent.⁹

Accordingly, the most recent jurisprudence of the ECtHR could be read in the sense that the right to silence is mainly aimed at respecting the will of the accused, and that improper compulsion of the defendant would result in a violation of the presumption of innocence.

The issue of who enjoys the right to silence will be addressed in the following paragraph; here we simply point out that the ECtHR has repeatedly stressed that the concept of someone having been ‘charged’ with a criminal offence is an autonomous one, and that it is sufficient – for defence rights to be ‘triggered’ – that the authorities have sufficient elements to suspect that someone is involved in the commission of a criminal offence.¹⁰

To ensure that the right to silence is effective, the Court demands that national authorities warn the defendant that he enjoys such right, before any question is put to him. Indeed, as clarified in *Ibrahim and others v. UK*, the Court believes that ‘it is inherent in the privilege against self-incrimination, the right to silence and the right to legal assistance that a person ‘charged with a criminal offence’ for the purposes of Article 6 has the right to be notified of these rights... in principle there can be no justification for a failure to notify a suspect of these rights.

Where a suspect has not, however, been so notified, the Court must examine whether, notwithstanding this failure, the proceedings as a whole were fair... where access to a lawyer is delayed, the need for the investigative authorities to notify the suspect of his right to a lawyer and his right to silence and privilege against self-incrimination takes on a particular importance.’

Accordingly, even in situations in which the suspect has not been warned of his rights, the Court will still proceed to verify whether such failure has rendered the proceeding ‘as a whole’ unfair, considering all the specific circumstances of the case.

As we have previously stressed, the Court believes that the right to silence is primarily concerned with the respecting of the will of the accused and avoiding that excessive pressure could be put on him by police and judicial authorities. As such, the Strasbourg judges have had to clarify what constitutes excessive pressure, in order to verify which practices are admissible under art. 6 ECHR. In this respect, ‘the Court will have regard, in particular, to the following elements: the nature and degree of the compulsion, the existence of any relevant safeguards in the procedures and the use to which any material so obtained is put’. This entails that different types of pressure might lead the Court to reach different conclusions; for example, it has considered the obligation imposed upon the owners of cars to disclose the identity of the driver to be admissible,¹¹ whereas it has found a violation in the case of a

⁹ ECtHR, *Saunders v. UK*, Appl. no. 19187/91, Judgment of 17 December 1996.

¹⁰ See the position of the fourth applicant in ECtHR, *Ibrahim and others v. UK*, Appl. nos. 50541/08, 50571/08, 50573/08, 40351/09, Judgment of 13 September 2016.

¹¹ ECtHR, *O’Halloran and Francis v. UK*, Appl. nos. 15809/02, 25624/02, Judgment of 29 June 2007.

suspect who was forcibly administered emetics in order to expel drugs that he had ingested¹² and in several cases of individuals obliged to hand over potentially incriminating documents concerning tax evasion and custom violations.¹³

Another issue that was addressed by the Court multiple times is that of the material scope of application of the privilege against self-incrimination: does it also cover real evidence? Not surprisingly, the natural consequence of the above-mentioned inextricable link between the right to silence and the need to respect the will of the accused, entails that the right to silence 'does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing'.¹⁴

Lastly, the Court had to examine the topic of adverse inferences being drawn from the defendant's exercise of his right to silence. The leading case, in this respect, is *Murray v. UK*. As the issue will be analysed more in depth in the fourth section of this paper, we will simply point out that in this specific instance the Court found no violation of Article 6 and stated that 'On the one hand, it is self-evident that it is incompatible with the immunities under consideration to base a conviction solely or mainly on the

accused's silence or on a refusal to answer questions or to give evidence himself. On the other hand, the Court deems it equally obvious that these immunities cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution. Wherever the line between these two extremes is to be drawn, it follows from this understanding of 'the right to silence' that the question whether the right is absolute must be answered in the negative.'

C MISCELLANEOUS

Another particularly relevant provision, that has been quoted in various cases by the ECtHR itself, is Article 14 (3)(g) of the International Covenant on Civil and Political Rights. Indeed, after having proclaimed the right to a fair trial and the presumption of innocence, the above-mentioned provision states that 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... Not to be compelled to testify against himself or to confess guilt.'

Last, since the legal background of the authors of the present paper is Italian, we shall devote a few words to the Italian legislation. The Italian Constitution does not contain any specific provision devoted to the right to silence. However, multiple norms of the Constitution can be invoked as a legal basis for the right

¹² ECtHR, *Jalloh v. Germany*, Appl. no. 54810/00, Judgment of 11 July 2006.

¹³ ECtHR, *Funke v. France*, Appl. no. 10828/84, Judgment of 25 February 1993, *J.B. v Switzerland*, Appl. no. 31827/96, Judgment of 3 May 2001, and *Chambaz v. Switzerland*, Appl. no. 11663/04, Judgment of 5 April 2012.

¹⁴ ECtHR, *Saunders v. UK*, Appl. no. 19187/91, Judgment of 17 December 1996, *Jalloh v. Germany*, Appl. no. 54810/00, Judgment of 11 July 2006.

to silence. First, Article 24(2) of the Constitution states that 'The right of defence is inviolable at every stage and level of the proceedings'. Second, in Article 27 (2) of the Constitution is embedded the 'Italian version' of the presumption of innocence: 'The defendant is not considered guilty until the final judgment is passed'. Third, the right to 'a fair trial regulated by the law' is enshrined in art. 111 (1) of the Constitution. Last, Articles 2 and 13 of the Constitution can be read in the sense that the need to respect the human dignity and the personal freedom of the defendant imply that any choice to speak during the criminal trial must be voluntary.

Finally, we must stress that Article 64(3) of the Italian Code of Criminal Procedure devotes a very detailed discipline to the right to silence of the defendant. Indeed, the above-mentioned provision states that before the questioning begins, the defendant must be warned that: a) his statements might always be used against him; b) he has the right not to answer to any of the questions, but the proceeding will follow its course; c) should he make any statement on facts that involve the responsibility of other people, he might become a witness in that respect. Last, Article 64(3-*bis*) affirms that if the defendant is not given the warnings proscribed in the previous paragraphs a) and b), his statements cannot be used.

3. WHOSE SILENCE IS THIS? THE SCOPE OF APPLICATION OF THE RIGHT TO SILENCE

A. THE ACCUSED PERSON IN CRIMINAL PROCEEDINGS

A recent debate in both EU and ECHR law has concerned the possibility to recognize the right to silence not only to the accused in the criminal proceedings, but also to the defendant in administrative proceedings.

This issue mainly concerns administrative proceedings that can be considered criminal in substance, according to the autonomous notion of criminal charge, upheld by both the CJEU and the ECtHR. Recently, it has also been debated whether the right to silence should be recognized in administrative proceedings that are strictly connected to criminal proceedings deterring and sanctioning the same unlawful conducts, in order to impose limits on the investigative powers of administrative authorities when the evidence collected through the investigation is likely to be used in the criminal proceeding.

While Directive 2016/343 seems restrictive on this regard, the Court of Justice has recently adopted a more protective approach, in line with the case-law of the ECtHR.

Article 2 of the Directive explicitly limits its scope of application to ‘criminal proceedings’ and Recital 11 rules out civil or administrative proceedings, ‘including where the latter can lead to sanctions, such as proceedings related to competition, trade, financial services, road traffic, tax or tax surcharges, and investigations by administrative authorities in relation to such proceedings’.

Nevertheless, Recital 11 refers to the notion of criminal proceedings as interpreted by the CJEU and the ECtHR. This means that the right to silence, enshrined in Article 7 of the Directive, should be recognized in administrative proceedings which lead to the imposition of sanctions of criminal nature according to those criteria firstly set out by the ECtHR in the *Engel* case¹⁵ and most recently adopted by the Court of Justice too:¹⁶ the legal classification under national law; the intrinsic nature of the offence; the purpose and the degree of severity of the penalty.

Although these criteria might seem affected by some uncertainties (for example how to fix the threshold of severity that makes a financial penalty *criminal*) and the outcome of their application may vary depending on a case-by-case assessment, the case-law of the CJEU and of the ECtHR generally regards administrative proceedings concerning the protection of the market and taxation as

criminal in nature because of the punitive purpose and the high degree of severity of the sanction.¹⁷

Indeed, such an assessment has been recently carried out by the CJEU for the benefit of the application of the right to silence in the *DB* judgment with regards to the sanctions imposed by the Italian National Companies and Stock Exchange Commission (Consob).¹⁸

Answering to the reference for a preliminary ruling of the Italian Constitutional Court concerning the interpretation and the validity of Article 14(3) of Directive 2003/6/EC on insider dealing and market manipulation and Article 30(1)(b) of Regulation (EU) 596/2014 on market abuse, the Court stated that such provisions, interpreted in light of Articles 47 and 48 of the CFREU, do not compel Member States to penalize natural persons who, in an investigation carried out in respect of them by the competent authority, refuse to cooperate and provide information that may contribute to establish their criminal liability or to impose administrative sanctions of criminal nature, such as those inflicted by the Italian Commission for insider dealing.

Relying upon those provisions of the Treaties (Article 6 TEU) and of the Charter (Articles 52-53) that require an interpretation of fundamental rights consistent with the minimum standard of protection provided by the ECHR and with the

¹⁵ ECtHR, *Engel and Others v. the Netherlands*, Appl. no. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, Judgment of 8 June 1976, at para. 81.

¹⁶ C489/10, *Bonda* (EU:C:2012:319), at para. 37 and C-617/10, *Åkerberg Fransson* (EU:C:2013:105), at para. 35.

¹⁷ Joined Cases C-596/16 and C-597/16, *Di Puma and Zecca* (EU:C:2018:192) para. 38, and C-537/16, *Garlsson Real Estate and Others* (EU:C:2018:193), at para. 34 and 35. ECtHR, *Grande Stevens and Others v. Italy*, Appl. no. 18640/10, Judgment of 4 March 2014, at para. 101.

¹⁸ C-481/19, *DB v. Consob* (EU:C:2021:84), at para. 43.

principles enshrined in Member States' Constitutions, the Court of Justice derives the right to silence from the right to a fair trial and the presumption of innocence. Then, the Court extends the very core of the right to silence – the right of the individual not to be penalized for his refusal to cooperate to the investigation – to an administrative proceeding that imposes punitive sanctions: evidence against the accused person can never be gathered through coercion, to the detriment of the liberty and defence rights of the individual in front of the public authority. And this is true with regards not only to information directly incriminating the person, but also to questions of fact that may be used in support of the prosecution (para. 40).

Such a distinction, that had been drawn by the CJEU in its case-law concerning the application of the right to silence to undertakings in the investigations for anticompetitive conducts,¹⁹ does not apply to natural persons in light of the judgments of the ECtHR.²⁰

B. THE DEFENDANT IN ADMINISTRATIVE PROCEEDINGS CONNECTED TO CRIMINAL PROCEEDINGS

In light of the *DB* judgment of the CJEU, we may also ask whether the right to silence should be recognized to the defendant in administrative proceedings when the investigative outcomes of such proceedings can be potentially used to establish his criminal liability: the Court underlines the fact that the need for the recognition of the right to silence arises

also when, 'in accordance with national legislation, the evidence obtained in those proceedings may be used in criminal proceedings against that person in order to establish that a criminal offence was committed' (para. 44).

This issue is relevant considering the possibility that an administrative proceeding is followed by a criminal proceeding, or that both proceedings are opened in parallel to ascertain and sanction the same facts, and that both the CJEU and the ECtHR seem to encourage the circulation of evidence between administrative and criminal proceeding.

Such an interaction, however, might have a negative impact on the right to silence: considering that criminal safeguards apply since the person is suspected of having committed a criminal offence, following a formal decision of the prosecuting authority that may remain unknown to the person,²¹ if the criminal liability of the individual is based on the evidence collected during the administrative investigations – then, when criminal safeguards are not still in place – the effective protection of the right is undermined.

Of course, the recognition of the right to silence in administrative proceedings connected to criminal proceedings would affect the rapidity and effectiveness of the former to the detriment of the protection of the underlying public interest.

A balance could be achieved by recognizing the right to silence in administra-

¹⁹ 374/87, *Orkem v Commission* (EU:C:1989:387), at para. 34; C-301/04 P, *Commission v SGL Carbon* (EU:C:2006:432), at para. 41; C-407/04 P, *Dalmine v Commission* (EU:C:2007:53), at para. 34.

²⁰ In this respect see part 2 of the present paper.

²¹ In Italy, for example, the act envisaged by Article 335 of the Code of Criminal Procedure.

tive proceedings only when elements that a criminal offence has been committed come out. Indeed, this is the solution adopted by Article 220 of the implementation provisions of the Italian Code of Criminal Procedure that requires authorities in charge of conducting enquiries to collect evidence according to the procedural safeguards of the Code, the right to silence in its full extension included, otherwise the evidence obtained cannot be used in the criminal proceeding.²²

The effectiveness of this provision could be nevertheless undermined as it may often be difficult to establish the exact moment when there are elements that a criminal offence has been committed.

In this respect, the *DB* judgment of the CJEU seems to set a higher standard of protection of the right to silence: although Article 2 of the Directive clearly states that ‘it applies at all stages of the criminal proceedings, from the moment when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence’, the Court stated that the criminal liability of the individual can never be established on grounds of evidence that has been collected by the public authority under the threat of imposing a penalty on the individual, in administrative proceedings too.

This approach seems in line with the judgment *Chambaz v. Switzerland* of the European Court of Human Rights,²³ in that case the accused person had been fined during an administrative proceeding because he had refused to provide documents concerning his revenues that

could have been used for the purpose of establishing his criminal liability for tax evasion. The Court recognized a violation of the privilege against self-incrimination under Article 6 (1) ECHR as the criminal and the administrative proceedings were strictly related and the former was subsequent to the latter.

C. CAN LEGAL PERSONS INVOKE THEIR RIGHT TO REMAIN SILENT?

Another issue affecting the scope of application of the right to remain silent concerns its application in the proceedings involving legal persons, such as corporations.

In this respect, EU legislation seems restrictive: Article 2 of the Directive 2016/343 only refers to natural persons and Recital 14 underlines that ‘At the current stage of development of national law and of case-law at national and Union level, it is premature to legislate at Union level on the presumption of innocence with regard to legal persons. This Directive should not, therefore, apply to legal persons’. This restraint is due to the awareness of the EU legislator that natural and legal persons differ in their needs and levels of protection as regards the presumption of innocence (Recital 13).

Nonetheless, it must be considered that the Directive only establishes a minimum standard of protection of the presumption of innocence and considers the possibility that the European Court of Human Rights and the Court of Justice recognize its application to legal persons too (Recital 14).

²² Italian Court of Cassation, Section 2, judgment n. 8604 of the 5 November 2020; judgment of 24 November 2020 n. 11794; judgment of the 6 November 2020, n. 3726.

²³ ECtHR, *Chambaz v. Switzerland*, Appl. no. 11663/04, Judgment of 5 April 2012.

Indeed, as regards the case-law of the Court of Justice, since *Orkem*, a limited protection of the right to silence has been recognized to undertakings too.²⁴ The company *Orkem* had challenged the decision of the Commission in the field of competition law claiming that it was in breach of his rights of defence as such decision compelled the company to give information that constituted evidence against itself.

In that case the Court, relying on general principles of EU law, on the one hand, affirmed that the protection of the right to silence was reserved to natural persons in criminal proceedings; on the other hand, it found that a decision that compels undertakings to provide answers that might involve the admission of a competition law infringement on its part violated the right of defence.

Thus, the protection of the right to silence of undertakings is quite limited: they cannot be forced to admit that they have committed an infringement, but they are not exempted from answering factual questions and providing documents even though the latter could be used to establish their liability.

Orkem was later incorporated into Recital 23 of Regulation 1/2003²⁵ and was not overruled by the following judgments.²⁶

The *DB* judgment of the CJEU did not open up the possibility of extending the right to silence in its full extent to legal entities neither called into question the blurred distinction between factual questions, that are allowed, and questions which might involve the admission of the existence of the infringement, forbidden as contrary to the very essence of the right to silence (paras. 46-47).

The European Court of Human Rights seems not to have directly addressed the issue of the application of the right to silence to legal persons. The ECtHR considered the right to a fair trial in its criminal limb, enshrined in Article 6 (1) ECHR, applicable to administrative proceedings against corporations, such as those imposing sanctions for anti-competitive conducts, provided that the sanctions can be regarded as criminal in substance according to the *Engel* criteria;²⁷ it is still uncertain, however, whether legal persons could fully rely on the right to silence as acknowledged by the ECtHR with regard to natural persons.

This is also true because the right to silence is not regarded by the ECtHR as absolute: the right can be limited in order to ensure the protection of the public interests involved in the proceeding, provided that its very essence is not undermined according to the ECtHR assessment.

²⁴ 374/87, *Orkem v Commission* (EU:C:1989:387).

²⁵ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

²⁶ C-238/99 P, *Limburgse Vinyl Maatschappij et al. v Commission* (ECLI:EU:C:2002:582); C-301/04 P, *Commission v SGL Carbon* (EU:C:2006:432); C-407/04 P, *Dalmine v Commission* (EU:C:2007:53); C-466/19 P, *Qualcomm and Qualcomm Europe v. Commission* (ECLI:EU:C:2021:76).

²⁷ ECtHR, *Menarini Diagnostics s.r.l. v. Italy*, Appl. no. 43509/08, Judgment of 27 September 2011.

The issue of the recognition of the right to silence to legal persons is going to become more and more relevant considering the extension of a criminal or quasi-criminal liability of legal persons in EU Member States for the crimes committed by their directors or employees (predicate offences).²⁸

In the absence of a case law on this subject, it seems that the outcome could vary depending on the definition of the main rationale of the right: on the one hand, if we agree that the rationale of the right is to defend the individual from coercion or oppression and protect human dignity and autonomy, the recognition of the right to remain silent to legal persons does not seem obvious. On the other hand, if we consider essential the need for securing effective defence rights to the accused, the adoption of a different standard of protection between natural and legal persons could seem unjustified. But yet, it could be argued that, while the protection of human dignity and autonomy does not admit derogations, the right of defence can be limited to a certain extent, especially when the liberty of the individual is not at stake.

As regards the concrete implications of the recognition of the right to remain silent to legal persons, it is crucial to define the natural person who should be entitled to exercise this right on behalf of the legal person. It seems necessary to refer to the person through which the legal

person participates in the proceeding and *can speak* according to procedural rules.

In Italy, for example, the legal person participates in the proceeding through its legal representative, unless the latter is the person accused of the predicate offence (Article 39 Legislative Decree no. 231/2001 on the administrative liability of legal persons for crimes). However, the legal representative cannot invoke the right to remain silent on behalf of the legal person in every situation. Article 35 extends the safeguards of the Code of Criminal Procedure concerning the accused person to the legal person – the right to remain silent and not to incriminate oneself included – if deemed compatible. Article 44 excludes the legal representative from the obligation to testify only if he held this position when the crime was committed: as it seems likely the involvement in the commission of the infringement of the legal representative at the time of the infringement in a personal capacity, the Italian legislator decided to avoid any risks of self-incrimination.

Such a provision *a contrario* seems to impose the obligation to testify on the legal representative that participates in the proceeding on behalf of the legal person but that had not this qualification at the time of the infringement. This means denying the right of the legal person, acting in the proceeding through its representative, to remain silent.

²⁸ For example, in Italy *Decreto Legislativo 8 giugno 2001 n. 231 Disciplina della responsabilità amministrativa delle persone giuridiche, delle società e delle associazioni anche prive di personalità giuridica* (Legislative Decree of 8 June 2001, no. 231 that regulates the administrative liability of legal persons, whose substantial nature is still under debate). In France, Article 121-2 of the French Criminal Code affirms la '*responsabilité pénale des personnes morales*' (the criminal liability of legal persons).

4. MAY THE SILENCE SPEAK?

A. RIGHT TO SILENCE AND UNJUST DETENTION

The right to silence has assumed, both in domestic law and in the interpretation of national courts, the role of a double-edged sword. It is the case of the right to compensation for illegal detention on remand where the silence is a fundamental right and yet an impediment to the compensation.

In the European context, reparation for unlawful detention is provided by Article 5 ECHR which is dedicated to the protection of the right of everyone to freedom and security. Article 5(5) ECHR provides that ‘everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation’.

The same provision is contained in Article 9(5) of International Covenant on Civil and Political Rights, 1966, according to which ‘anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation’.

Although European legislation does not specifically address this subject, Directive (EU) 2016/343 seems to have an impact on the present issue, in that it stresses that ‘the exercise of the right to remain silent or the right not to incriminate oneself should not be used against a suspect or accused person’ (see Recital no. 28).

Focusing on the extent of Article 5(5) ECHR, it grants the right to compensation for the time spent in pre-trial detention to anyone who has been unlawfully deprived of personal liberty, regardless of the outcome of the trial: acquittal does not entail the automatic recognition of the right nor does it impose its exclusion. In accordance with the law, compensation requires a confirmed violation of Article 5(1)(2)(3)(4) by a national authority and also that the effective enjoyment of the right guaranteed in Article 5(5) of the Convention is ensured with a sufficient degree of certainty.²⁹

However, the case law of Italian Courts has shown some conflicts between the national system and the ECHR’s provisions, as interpreted by the ECtHR. More specifically, domestic courts have often denied compensation where, without prejudice to the miscarriage of justice, the applicant has somehow caused or concurred to cause the wrongful detention with his behaviour, such is the case of his decision to remain silent during the trial.

In this context, the right to silence becomes a ‘two-faced Janus’: at the same time, it can be both a defensive choice which cannot on its own be used as conclusive evidence of guilt in criminal proceedings and an obstacle to the claim for compensation for wrongful detention on remand.

In Italy, the law provides that the right to compensation can be denied where the applicant has by some action of his own caused pre-trial detention either

²⁹ ECtHR, *Ciulla v. Italia*, appl. no. 11152/84, Judgment of 22 February 1989, para. 44; *Sakık and Others v. Turkey*, appl. no. 23878/94, 23879/94, 23880/94, 23881/94, 23882/94, 23883/94 (joined), Judgment of 26 November 1997, para. 60; *Stanev v. Bulgaria*, appl. no. 36760/06, Judgment of 17 January 2012, para. 182.

deliberately or through gross neglect.³⁰ More specifically, although the fact that the person concerned has invoked his right to remain silent is insufficient to refuse his request for compensation, silence may have negative consequences when the suspect had made no attempt to prove his innocence or had concealed facts – ignored by investigators – or failed to provide explanations that could have prevented detention on remand.³¹ In this perspective, remaining silence may turn into a violation of a prudential rule.

The Italian *Corte di Cassazione* has long considered the domestic provisions about compensation for unlawful detention to be compatible with the ECHR and has also argued that the negative consequences of remaining silent could be explained, to certain extent, through the solidarity principle: to prevent society from paying for the judicial error that the applicant himself has contributed to cause with his reluctant behaviour, the right to the compensation demands an objective infringement of personal freedom.

Nonetheless, Strasbourg judges seem to think otherwise. In fact, in a recent ruling – *Fernandes Pedroso c. Portugal* case – the ECtHR condemned the narrow interpretation of domestic courts concerning compensation for wrongful imprisonment, arguing that a person who suffered for unlawful detention must have a full access to the compen-

sation: this right cannot be affected by any limitations.³² That is the response of the ECtHR to the domestic courts that, in this case, assuming that the compensation depends on '*si la détention provisoire était fondée sur une erreur grossière, notoire, c'est-à-dire impardonnable*,'³³ had deemed that such an irregularity had not been obvious, blatant, or manifest.

Applying this decision to the relationship between the right silence and the judgment on reparation for illegal detention, national courts should not evaluate the lawful, legitimate decision to remain silent (which is an expression of the right to defend oneself) as an impediment to claim the compensation.

Additionally, judicial decisions had to deal with the Directive (EU) 2016/343, which had a direct impact on the right to compensation for illegal detention on remand.

In this regard, in countries such as Italy, where, as already emphasized, silence has always been an instance of seriously reckless and/or negligent conduct that interfered with the the establishment of the facts, judges had to modify their own interpretive approaches. In fact, recently, the Supreme Court has ruled that, albeit it is necessary to ascertain if the applicant contributed to cause the error, the willingness of the European Union to strengthen the procedural rights of defendants (and especially the presump-

³⁰ Art. 314, Code of Criminal Procedure (Italy): '1. Anyone who has been acquitted with an irrevocable sentence because the fact does not exist, for not having committed the fact, because the fact does not constitute a crime or is not provided for by law as a crime, has the right to equitable reparation for the pre-trial detention suffered if he has not given or contributed to giving cause through willful misconduct or gross negligence.'

³¹ Italian Court of Cassation, Section 4, judgment n. 24439 of 27 April 2018.

³² ECtHR, *Pedroso v. Portugal*, appl. no. 59133/11, Judgment of 12 June 2018: according to para. 132), compensation at the domestic level depends on a 'manifestement illégale ou fondée sur une erreur grossière detention, within the meaning of Article 225 of code de procédure pénale'.

³³ Ibid., para. 62.

tion of innocence) must be taken into account.³⁴

Furthermore, following the Directive, the Legislator had to adapt its domestic legislation to European requirements concerning the presumption of innocence, also considering the European objective of issuing common rules on the protection of the procedural rights of suspects and defendants (Directive (EU) 2016/343, paras. 10, 24).

In particular, the Code of Criminal Procedure has been modified in order to clarify that the exercise by the accused of the right to remain silent does not affect the right to reparation.³⁵

B. BENEFITS FOR THOSE WHO COOPERATE

The choice to remain silent or to speak also affects the powers which may be exercised by the court during the execution of a conviction. It is what happens in the Italian legislation where the possibility for certain types of convicts of being granted alternative measures depends on a choice between two options which lead to different paths.

More specifically, art. 4 bis of the Prison Administration Act (*ordinamento penitenziario*, hereinafter 'o.p.') states that those who have been convicted for a list of serious offences – mainly mafia organizations and terrorism related offences – cannot access alternative measures

unless they cooperate with the authorities.³⁶ In other words, the access to some benefits – such as the possibility to execution of penalty out of the prison – demands that the convict helps concretely the judicial authorities in the collection of decisive elements for the ascertainment of the facts and for the detection/capture of the other perpetrators.³⁷ This provision implies an irrebuttable presumption of persistent dangerousness of the non-cooperative convict, despite a potential improvement in his personality due to the time spent in prison.

However, the ECtHR has obliged the domestic courts to reconsider the legitimacy of this provision and the importance of a cooperation.

The leading case - *Viola v. Italy*³⁸ - focused on the inability of a person with a sentence of life imprisonment to access to release on parole if he/she has decided not to cooperate with the authorities after having been found guilty of specific offences (*ergastolo ostativo*). The case is about Mr Marcello Viola (the applicant) convicted to be a membership of a Mafia-type criminal organization (1995) and with a life prison sentence for separate offences linked to Mafia-type criminal activities and other serious offences.

In 2015 Mr Viola applied for release on parole, which was dismissed by the Court since such measure was conditional on cooperation with the judicial authorities and the permanent severing

³⁴ Italian Court of Cassation, Section 4, judgment n. 8616 of the 8 February 2022.

³⁵ Art. 314(1) Code of Criminal Procedure (Italy) as modified by *Decreto Legislativo* (Legislative Decree) of the 8 November 2021, no. 188.

³⁶ Alternative measures, however, can still be granted if cooperation is neither possible nor useful, and provided that there are no connections anymore between the convict and organized crime.

³⁷ Art. 58 ter Prison Administration Act (Italy) according to which it is up to the surveillance tribunal to verify whether such conditions are met.

³⁸ ECtHR, *Marcello Viola v. Italy*, appl. no. 77633/16, Judgment of 13 June 2019.

of ties between the convicted person and Mafia circles. The ECtHR concluded that the life sentence imposed on Mr Viola under section 4 bis *o.p.* restricted his prospects for release and the possibility of review of his sentence to an excessive degree, without considering the path taken by the applicant through a positive changing in his personality. Doing so, the Court concluded that the requirements of Article 3 ECHR – which prohibited in absolute terms inhuman or degrading treatment – had not been satisfied. In fact, deciding not to cooperate with the authorities, as the ECtHR has pointed out, is not always felt like a free choice by the person, whose decision can be affected by the fear of endangering his own life or that of his family members and, moreover, it does not necessarily reflect continuing adherence to criminal values or ongoing links with the criminal – or mafia type – organization.³⁹

Following the ECtHR, the Italian Constitutional Court⁴⁰ declared Article 4-bis *o.p.* to be partially contrary to the Italian Constitution as it does not permit a person found guilty of mafia related crimes to be admitted to the short release when he decided not to cooperate with the authorities.

The Court stressed out the importance of a case-by-case evaluation arguing that what is relevant to that extent is the existence of elements which allow to exclude both any persistent link with the criminal organization and the danger of its restoration. In this perspective, the mere cooperation with the authorities becomes a rebuttable presumption: the decision not to cooperate may lead to a persistent link between the convicted person and the criminal association but it can also be denied by other circumstances existing in the specific case.

Recently, the Italian Constitutional Court, called to decide on the lawfulness of the *ergastolo ostativo* that prevents those who did not cooperate with the authorities from the early release even when their amendment is clear, decided to postpone its decision on the matter to give time to the Parliament to rule about it.⁴¹

Indeed, ruling on Article 4 bis *o.p.* is a delicate matter concerning the State's commitment against organized crime and it also means striking a balance of two different aspects equally important: the right of the community to security and the right to personal dignity – regardless the membership to a criminal organization – which implies the right to silence due to specific and intimate motivations that everyone can find insuperable compared to the choice to collaborate.⁴²

³⁹ Ibid., para. 118.

⁴⁰ Italian Constitutional Court, judgment n. 253 of the 23 October 2019.

⁴¹ Italian Constitutional Court, judgment n. 97 of the 15 April 2021.

⁴² The legislative proposal (A.C. 3160) is currently submitted to the Senate.

5. CONCLUSIONS AND PROPOSALS

The analysis has shown that, even if the right to silence is recognized as a fundamental right of the individual in EU and ECHR law, there are still some uncertainties concerning its scope of application and meaning.

A. Firstly, it is not clear whether and to what extent, after the *DB* judgment, the right to silence should be recognized in administrative proceedings. This issue is related to the general topic of the expansion of criminal guarantees beyond the borders of criminal law aimed at creating a common standard of safeguards for punitive sanctions. Although the outcome would be positive as regards the enhancement of procedural rights, the protection of the public interests that are the objectives of the administrative proceedings would be undermined, as the defendant would be entitled to invoke the right to silence in every situation and to refuse to cooperate with the public authority.

We express some concerns about the simple transferring of the criminal guarantees in the administrative proceedings: an adaptation would be necessary, considering the different interests at stake and the possibility of limiting such guarantees when the outcome of the proceeding is not the restriction of the liberty of the individual. The core of the right to silence that cannot be derogated from, in light of EU and ECHR law, seems the following: criminal liability cannot be established through information obtained by the coercion of the will of the accused. When criminal liability is not at stake, the protection of the right is more

limited, as well as when the material to be obtained has an existence independent from the will of the accused so his dignity and autonomy are not endangered.

Indeed, the *DB* judgment itself does not require a full implementation of the right to silence in the administrative proceedings. Not only the Court underlines that ‘the right to silence cannot justify every failure to cooperate with the competent authorities, such as a refusal to appear at a hearing planned by those authorities or delaying tactics designed to postpone it’, but it recognizes a precise and specific right to the defendant in his relation with the investigative authority: the right of the individual not to be penalized for his refusal to provide that authority with information that may be used to establish its criminal liability or the application of an administrative sanction of criminal nature.

As such, our first proposal can be summarized as follows: the right to silence should not be recognized in administrative proceedings, unless the administrative sanction that could be imposed is criminal in its nature pursuant to the case law of the CJEU and the ECtHR. However, the evidence that is collected during the administrative proceeding and that would violate the right to silence should not be used in parallel criminal proceedings.

B. Secondly, there are still some uncertainties concerning the recognition of the right to silence to legal persons. As it has been shown, legal persons are entitled to a very limited protection by the CJEU and the ECtHR has not yet dealt with such an issue.

With regards to EU law, as there is not uniformity in the Member States as regards the nature of the liability of legal persons, it is understandable why Directive 2016/343 does not extend the presumption of innocence and the right to silence to legal persons.

Furthermore, such a gap in the protection does not seem to affect the core of the right to silence: human dignity and autonomy are not undermined. Although it is true that the legal person acts through a natural person (e.g. the legal representative), the latter cannot be considered as the accused per se as it only acts on behalf of the legal person.

It seems, then, that Member States have discretion in deciding whether to recognize the right to silence to legal persons and to what extent.

Finally, it is interesting to underline that, even in those national legal systems that recognize the liability of the legal person as criminal or quasi-criminal – such is the case of Italy – the specificities of the legal persons and of their liability may justify a different standard of protection in the proceeding. Let's consider Article 6 of the Italian Legislative Decree no. 231/2001 that, by putting on the legal person the burden of demonstrating that it had adopted all the precautionary measures necessary to avoid any risks of commission of the offence, establishes a presumption that can be rebutted only by the collaboration of the defendant.

As such, our second proposal can be summarized as follows: legal entities should not fully enjoy the right to silence, and their legal representatives have a duty to answer truthfully when questioned by authorities. It goes without saying that methods contrary to art. 3 ECHR shall never be used to compel legal representatives to answer. Following the line of reasoning of our first proposals, the answers that legal representatives are obliged to give shall never be used against them – as natural persons – in criminal proceedings.

C. With regard to the reward measures envisaged by Italian law for the person convicted of mafia-related crimes who decides to cooperate, we point out that they do not violate the right to silence.

Cooperation, provided that it is not impossible, is necessary to obtain some benefits during the execution of the penalty, after the criminal liability of the individual has been established. Remaining silent, then, does not have consequences on the establishment of the criminal liability of the individual, but on the adaptation of the penalty that has already been inflicted. This does not seem unreasonable as the enjoyment of reward measures depends on positive indicators of the personality of the convicted whereas silence is just a neutral element.

Furthermore, in its latest decisions, the Italian Constitutional Court has recognized that silence, as a personal expression of the inner will of the convicted, cannot have per se any negative effects, during the execution of the penalty either. While silence is not sufficient to entitle the convicted to those benefits, it cannot be an absolute obstacle to their enjoyment: as suggested by the ECtHR, it is for the judge to ascertain whether any persistent links with the criminal organization, as well as the danger of their reintegration, can be excluded so as to consider that the convicted person deserves such reward measures.

As such, our third proposal can be summarized as follows: it is admissible to deny benefits to those that have been convicted of mafia-type crimes and have refused to cooperate with the authorities, as long as: a) there is not proof of valid reasons for their refusal to cooperate (e.g. they have no useful information or they fear reprisals for themselves or family members); b) the authorities have evidence that there is still an ongoing connection between the convict and the criminal organization.

SEMI-FINAL B

EU AND EUROPEAN FAMILY LAW

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PARTICIPATING TEAMS

GERMANY, PORTUGAL I, PORTUGAL II, CZECHIA,
SERBIA, FRANCE

1st place: France
2nd place: Czechia
3rd place: Germany

Selected papers for TAJ:
Czechia, France

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25-27 MAY 2022, VILNIUS, LITHUANIA - NATIONAL COURTS
ADMINISTRATION

JURY MEMBERS

ILSE COUWENBERG (BE)

JUDGE AT THE SUPREME COURT OF BELGIUM

After two years of Covid-induced virtual meetings, it was very nice to be able to hold the THEMIS competition in Vilnius, age-old and beautiful as ever before. Of course magistrates have learned how to make the best of working virtually, but nothing can replace real-person exchanges, especially for an event like this.

Of the many things that struck me during the competition, three come to mind instantly:

- The overall level of the teams. Of course, some teams were better than others, and the best team won, but all of them were at least very good. All wrote a high-level paper, on a not always obvious topic, presented it in a creative way and were able to respond to the – not always easy – questions of the jurors. In my personal experience, many of the lawyers I encounter in my court are not as well prepared.
- The dedication of the teams. Most participants are judges in training, and are thus already confronted with a heavy workload. Nevertheless, all the participants found the time to engage fully in this competition, on top of their daily activities, possible deadlines for exams,... The THEMIS competition can indeed only function if young magistrates are prepared to make this effort and are given the opportunity to do so by their Magistrates schools.
- The readiness of everybody to listen and learn from each other. From a personal perspective, I found the many exchanges with my fellow jurors to be very enriching, as these often made clear, in real-time, how different jurors with various backgrounds assess the same input in alternative ways. I am convinced that the same applied to the participants, who learned from other teams how a topic can be approached differently. Learning how 'assessing in diversity' can be enriching, is definitely one of the important elements of the THEMIS competition.

As the success of such an event depends largely upon its organization, many thanks to the EJTN and the Lithuanian National Courts Administration for the smooth organization, striking a good balance between 'work' and 'leisure' (the nice city walk, the excellent diner, ...), activities that are equally important to achieve one of the goals of the EJTN, which is the building a genuine network of European judges. The organizers should be proud of what they achieved and I am sure that all participants are grateful for all this work on their behalf.

To end, one final word to all the young judges I had the privilege to meet: you and you alone are the first European judges, the judges that will have to apply and uphold European law. This is not always an easy task. European legislation is expanding at a rapid pace, Regulations remain sometimes unknown and they are not always carefully drafted, thus leaving room for interpretation and discussion. But the competition in Vilnius once again confirmed: the future of Europe is in excellent hands!

INESA FAUSCH (CH)

LEGAL ADVISER, CENTRAL AND EASTERN EUROPEAN
JURISDICTIONS AT SWISS INSTITUTE FOR COMPARATIVE LAW

It was an honour and a privilege to be a Jury Member of this year THEMIS Semi-Final B on the EU and European Family Law in Vilnius. I would like to thank the EJTN for the opportunity it gave me. It was both: pleasure and responsibility to evaluate papers and performances of this year participants. I was very pleased with the results as the teams showed great enthusiasm and professional excellence during the whole three days of the competition.

At the Swiss Institute of Comparative Law, I deal with comparative law on complex and various legal topics. When I prepare a legal opinion for a court on a family law topic, I need not only to understand the legal system of the country but also to take into consideration cultural, historical, and socio-economic context. Therefore, I was very pleased that in their papers, competing teams used comparative analysis, in which they found inspiration. In my opinion, THEMIS is a great opportunity to show future judges the importance of comparative law in their argumentation and their future decision-making.

I also get a chance to learn about various issues in the EU and Family Law field. In their papers, the teams examined the legal topics related to mothers, newborns and Coronavirus barriers (Team Portugal II), Age Assessment (Team Czech Republic), Freedom of Movement and Personal Status of Rainbow Families in the EU (Team Germany), Taking Children's Voices into Consideration in European Family Law Proceedings (Team France), Suroguate Motherhood (team Serbia) as well as the problems faced by children whose fathers are incarcerated (Team Portugal I). The participants conducted great legal analysis and presented their findings in a lively and creative way. Moreover, I was pleased to see how future judges showed not only their comprehensive knowledge of law, language skills, natural curiosity but also resistance to stressful situations as they were confronted with a number of challenging questions.

THEMIS is a great opportunity to learn from each other and move beyond national legal systems. It is also a way to build a strong professional network. I believe that each year more and more teams will take the opportunity to have this unique experience.

BORIANA MUSSEVA (BG)

ASSOCIATE PROFESSOR OF PRIVATE INTERNATIONAL LAW AT
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CHAIR OF THE BULGARIAN ATTORNEY'S TRAINING CENTER

It was my greatest pleasure to attend again this year's THEMIS competition in EU and European Family Law semi-final B as a member of the jury. I shared this honour and responsibility with my wonderful colleagues Ilse Couwenberg, a judge at the Supreme Court of Belgium, and Inese Fausch, a legal advisor for Central and Eastern European Jurisdictions at the Swiss Institute for Comparative Law. We all were extremely happy that the competition this year took place face-to face in the beautiful Vilnius, Lithuania. I would like to express my deep gratitude to the EJTN for the excellent organization and for trusting me again.

The highlight of this year's THEMIS competition in my view was the possibility to enjoy the live presentations and discussions. The teams had chosen very original questions, which touched upon different fields of law (mothers, newborn, and coronavirus; age assessment; the recognition of the parenthood of same sex mothers; children's rights of imprisoned fathers; the hearing of the child and surrogate motherhood in the context of the war in Ukraine). The topics were presented through in-depth analysis, with reference to various legal instruments and case law. The practical and theoretical challenges were confronted critically with anticipation of possible solutions. The teams employed different technics: a play, a discussion among judges, an internal meeting of lawyers, a sociological survey. We did not only stay in a court room, but were also taken to a hospital, a prison, and a playground. The quick chess part engaged the audience in active hearing. The questions posed showed awareness and enriched the performance of the teams. The competition was very tense, emotional and on a high intellectual level. All teams wanted to win, but even more they wanted to outdo themselves in the pursuit of success. It is wonderful to experience such a quest for perfection and knowledge!

However, the most moving moment was to see how the boys and girls from Serbia meet their counterparts from Portugal, France, Germany, and the Czech Republic, how they keep on talking, how they congratulate each other, how they laugh and plan to welcome the sunrise together.

EJTN should be proud to put into practice the motto of the EU - united in diversity. The THEMIS competition in EU and European Family Law makes it possible to gather young professionals from different countries, with different traditions and cultural background, that share the same values and have similar dreams – to become highly competent and fair judges contributing to peace and prosperity in their countries and in Europe. It is great to be part of this wonderful experience!

LUISA BLAHOVÁ
JANA KAPOUNOVÁ
JAN ŠEBA



TUTOR: JOSEF STRAKA

Team CZECHIA

AGE ASSESSMENT: RIGHTS OF THE CHILDREN, METHODS, AND CHALLENGES

Legal systems are facing new challenges in connection with migration. One of these is the issue of distinguishing between children and adults. This paper analyses the current legislation and practice in the Common European Asylum System regarding the age assessment process. The focus is primarily on the rights and procedural safeguards provided for minors while determining their age. The pros and cons of the most used non-medical and medical methods of age assessment are further discussed. Particularly highlighted are the major challenges of the age assessment process and possible solutions that would ensure the equal, transparent, and dignified treatment of all asylum seekers in the EU. In conclusion the authors propose an 'ideal' approach for application in all Member States.

KEY WORDS

Age assessment ▪ Unaccompanied minor ▪ Procedural safeguards ▪
International protection ▪ Directive 2013/32/EU ▪ Common European asylum
system

1. INTRODUCTION

After the Taliban takeover of Afghanistan in August 2021, Ahmad fled to Romania where he applied for international protection. His family could not afford to travel and therefore remained in their homeland. Using the services of smugglers, Ahmad tried to get to Germany in the trailer of a truck, but he was intercepted by a Foreign Police patrol in the Czech Republic. During the check, he repeatedly claimed that he was born on 1 January 2005 and is a minor,¹ but he could not present any identity card, travel document or residence permit. However, Ahmad appeared rather physically and mentally mature to the Foreign Police officers. Due to serious doubts concerning Ahmad's minority, he was detained in a refugee facility in order to undergo an age assessment process.

According to Eurostat statistics, 472 395 people applied for asylum in the EU in 2020, 13 550 of them being unaccompanied minors.² The migration influx varies from one Member State to another, and Member States also differ in their preparedness for child migration.

Legal systems are facing new challenges in connection with migration, one of which is the issue of distinguishing between children and adults.

Unaccompanied minors find themselves in a situation of 'double vulnerability';³ due to their status as migrants and children. This particular vulnerability of unaccompanied minors demands specific measures to be taken in response to their status. The age of applicants thus has a major effect on how they will be treated when they come into contact with public authorities on their migration journey. Adults may face detention in a refugee facility. Unaccompanied minors, on the other hand, need to be provided with alternative care given the lack of parental care. Minor applicants, whether accompanied by an adult or not, enjoy special rights and privileges.⁴ Applicants around the age of majority may thus have high motivation to conceal their actual age. However, some minors may pretend to be adults based on the false conviction that they will avoid these protective measures and therefore will be able to continue their journey to the targeted Member State.

¹ The terms 'minor' and 'child' will be used interchangeably both for those who have been proven to be minors and those who claim to be minors. The terms will be used for any person below 18 years of age. See Article 1 of the United Nations Convention on the Rights of the Child (CRC), Article 2(l) of the Directive 2013/32/EU of 26 June 2013, OJ 2013 L 180/60 (APD), Article 2(k) of the Directive 2011/95/EU of 13 December 2011, OJ 2011 L 337 (QD), and Article 2(d) of the Directive 2013/33/EU of 26 June 2013, OJ 2013 L 180 (RCD).

² Eurostat, *Asylum and first time asylum applicants - annual aggregated data (rounded)*, 7 April 2022, available at <https://ec.europa.eu/eurostat/databrowser/view/tps00191/default/table?lang=en>. Eurostat, *Asylum applicants considered to be unaccompanied minors - annual data*, 31 March 2022, available at <https://ec.europa.eu/eurostat/databrowser/view/tps00194/default/table?lang=en>.

³ Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, at 2.

⁴ See the summary of the most relevant international and EU provisions concerning migrant children in European Asylum Support Office (EASO), *Practical Guide on age assessment* (2nd ed., 2018), at 78-80.

Others may claim to be adults in order to be able to work or get married, or may just follow instructions they received from smugglers seeking to deprive the children of protection from exploitation.⁵

The age of the most unaccompanied minors arriving in the EU is accepted without further examination by the competent authorities, however, in a considerable number of age disputed cases, the applicant's claim of being a minor and the reasonable doubts of competent authorities, need to be scrutinized.⁶ Age assessment methods vary in their intrusiveness, reliability, and validity. Their common denominator is that none of them is universally used in all Member States.⁷ A precise legal framework that would comprehensively harmonize the age assessment process at the EU level is absent. Minimal guarantees of medical examinations to determine the age of unaccompanied minors are enshrined only in Article 25(5) of the Asylum Procedures Directive recast (APD).⁸

In this paper, an analysis is made of the current legislation and practice in the Common European Asylum System (CEAS) concerning the age assessment process. The primary focus will be on children's rights and procedural safeguards provided for minors while determining their age mainly in asylum cases.

However, our findings may be of relevance also in family or criminal law cases. Further the pros and cons of the most commonly used methods will be examined. After evaluating the findings of the European Union Agency for Asylum (EUAA)⁹, Council of Europe (CoE) and European Migration Network (EMN),¹⁰ an 'ideal' approach for application in all Member States is proposed. Finally, the major challenges of the age assessment process will be presented along with possible recommendations to ensure equal, transparent and dignified treatment of all asylum seekers in the EU.

2. GENERAL PRINCIPLES AND RIGHTS OF THE CHILDREN IN RELATION TO THE AGE ASSESSMENT

A. EUROPEAN UNION LAW

The need to verify the age of a minor can arise in all Member States through which the minor transits to the destination Member State. It therefore seems appropriate to treat minors uniformly throughout the CEAS.

⁵ EASO, *supra* note 4, at 17.

⁶ Official statistics of age disputed cases in the EU are not available. For the UK see Refugee Council, *Information: Children in the Asylum System* (2021), at 1-2.

⁷ European Economic and Social Committee Opinion SOC/634 of 18 September 2020, at 2.8. and 4.6., and United Nations High Commissioner for Refugees, *Recommendations for the European Commission's Proposed Pact on Migration and Asylum* (2020), at 9.

⁸ Directive 2013/32/EU of 26 June 2013, OJ 2013 L 180/60 (APD).

⁹ From 19 January 2022 replacing the European Asylum Support Office (EASO).

¹⁰ Initiated in 2021 by the EMN National Contact Point for the Czech Republic, see *AD HOC QUERY ON 2021.10 Unaccompanied minors - age assessment methods used by Member States* (2021), available at https://ec.europa.eu/home-affairs/system/files/2021-05/202110_unaccompanied_minors_age_assessment_methods_used_by_member_states.pdf.

At the level of EU primary law, the issue falls within the scope of Article 6 (the right to liberty and security) and Article 24 (the rights of the child) of the Charter of Fundamental Rights of the European Union (Charter). At the level of EU secondary law, the rules of age assessment are explicitly stated in Article 25 APD.

Age assessment is usually performed when deciding on detention alternatives. In this context, it may be noted that under EU law, a minor may be detained under the Return Directive (RD),¹¹ which applies to third country nationals staying illegally on the territory of the EU. As well as the Reception Conditions Directive recast (RCD),¹² which applies to applicants for international protection.¹³ The asylum procedure itself is regulated by the APD. The minimum standards for qualification for international protection and the scope of protection is regulated by the Qualification Directive recast (QD).¹⁴ Age assessment is covered, rather haphazardly, only in the context of international protection in Article 25 of the APD. Consequently, minors from third countries staying illegally on the territory of Member States do not enjoy explicit guarantees of correct age assessment. The Return Handbook¹⁵ states that it is 'recommended' to apply the rules of age assessment under the APD even for the minors who are subject to the RD.

The regulation of age assessment in Article 25 APD concerns specifically the unaccompanied minors. The APD refers to the definition of an unaccompanied minor formulated in Article 2(l) of the QD,¹⁶ which provides that the unaccompanied minor is '*a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States.*' However, it should be noted that the need to verify age may also apply to minors who come accompanied by their family or different adults, although this hypothesis is not specifically regulated in these EU instruments.

Article 25(5) of the APD formulates the basic rules for age assessment of unaccompanied minors. The rules may be summarized in the following principles:

- i. medical examination as a means of last resort: age assessment should be based primarily on general statements and other relevant indications. Only if after such examination, reasonable doubts concerning the applicant's age remain, a medical examination should be performed;

¹¹ Directive 2008/115/EC of 16 December 2008, OJ 2008 L 339 (RD).

¹² Directive 2013/33/EU of 26 June 2013, OJ 2013 L 180 (RCD).

¹³ The detention of applicants for international protection for the purpose of transport to the Member State responsible for examination of the application for international protection is specifically regulated under the Article 28 of the Regulation 604/2013 of 26 June 2013, OJ 2013 L 180 (Dublin III Regulation), although the RCD remains applicable. See Article 8(1)(f) RCD and the Recital 11 Dublin III Regulation.

¹⁴ Directive 2011/95/EU of 13 December 2011, OJ 2011 L 337 (QD).

¹⁵ The European Commission's official non-binding explanatory manual to the RD, established by Commission Recommendation 2017/2338 of 16 November 2017, OJ 2017 L 339/83.

¹⁶ Article 2(m) APD.

- ii. presumption of minority: if the medical examination does not clear doubts concerning age, the applicant should be assumed to be a minor;
- iii. proportionality: the least invasive form of medical examination should be chosen, and the examination should be performed with respect for human dignity;
- iv. reliability: medical examination should be performed by qualified medical professionals, so that a reliable result is guaranteed;
- v. informed consent: the minors and/or their representative have the right to refuse the medical examination, having been informed about the method and consequences of the examination and its refusal in a language they understand. Although the refusal of a medical examination does not prevent the competent authorities from deciding on the application for international protection, the decision shall not be based solely on that refusal.

The legislation on age assessment in the APD is thus brief, focusing on medical methods of age assessment only in general and it does not address non-medical methods at all. However, recital 10 of the APD refers to the EUAA guidelines which Member States '*should take into account*' when implementing this directive. The EUAA has paid significant attention to the issue and has developed comprehensive material with many recommendations, considering not only EU law but also international human rights treaties such as the United Nations Con-

vention on the Rights of the Child (CRC) and the European Convention on Human Rights (ECHR).¹⁷

Important to note is that the issue of the age assessment of unaccompanied minors has not been yet been addressed by the Court of Justice of the European Union (CJEU).

B. UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

The CRC has been ratified by all EU Member States, however, the EU is not a party. Nevertheless, the CJEU pointed out that the CRC is one of the international instruments for the protection of human rights of which it takes account in applying the general principles of EU law.¹⁸

In the process of age assessment, as in any other activity concerning children, the best interests of the child shall be a paramount consideration, as stated in Article 3(1) of the CRC. Among competing public interests, the interests of the child should always take precedence. This simple rule is reflected in many ways with regard to age assessment, such as by the general prohibition of the use of invasive assessment methods, even at a cost of deterioration of the evidential situation. The same negative impact may be caused by the need to proceed with haste, which arises from the fact, that the age assessment is usually performed in the situation of deprivation of liberty, from which the children are protected under Article 37 CRC. In case of doubt, the presumption of minority must be granted, even if the minority status may

¹⁷ See EASO, *supra* note 4.

¹⁸ CJEU, C-540/03, *European Parliament v Council of the European Union* (ECLI:EU:C:2006:429), at para. 37.

facilitate the minor's illegal stay on the territory of Member States.

Two of the UN Committees, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child clearly and concisely present the basic guarantees of a correct age assessment in their joint comment as follows:

*'To make an informed estimate of age, States should undertake a comprehensive assessment of the child's physical and psychological development, conducted by specialist paediatricians or other professionals who are skilled in combining different aspects of development. Such assessments should be carried out in a prompt, child-friendly, gender sensitive and culturally appropriate manner, including interviews of children and, as appropriate, accompanying adults, in a language the child understands. Documents that are available should be considered genuine unless there is proof to the contrary, and statements by children and their parents or relatives must be considered. The benefit of the doubt should be given to the individual being assessed. States should refrain from using medical methods based on, inter alia, bone and dental exam analysis, which may be inaccurate, with wide margins of error, and can also be traumatic and lead to unnecessary legal processes. States should ensure that their determinations can be reviewed or appealed to a suitable independent body.'*¹⁹

Although the comment is a non-binding instrument, it has a significant weight during the interpretation and application of the CRC, resulting from both the authority of the issuing institution and the force of arguments.

Allowing the children to be heard during the age assessment process is a necessary precondition for the primary consideration of their best interests. Indeed, the right to be heard, as guaranteed under Article 12 of the CRC, enables children to comment on what is in their best interests and to raise objections to the procedures they are subject to. In order to enable the children to exercise their right to be heard additional procedural safeguards for the children need to be guaranteed, bearing in mind their double vulnerability arising from their status as minors and migrants. For this reason, minors, whether unaccompanied or not, need to be provided with an interpreter and a legal representative. In addition to the legal representative and interpreter, unaccompanied minors should be provided with a guardian.²⁰

C. EUROPEAN CONVENTION ON HUMAN RIGHTS

Matters of age assessment process may fall within the scope of the Article 3 ECHR (prohibition of torture and degrading treatment), Article 5 ECHR (right to liberty and security), Article 8 ECHR (right to respect for private and family life) and Article 13 ECHR (right to an effective

¹⁹ Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, at 14.

²⁰ Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, at 9.

remedy). Some aspects of the age assessment process have been already addressed in the case law of the European Court of Human Rights (ECtHR). It is important to mention the following cases.

1. ABDULLAHI ELMI AND AWEYS ABUBAKAR V. MALTA²¹

Two Somalis were detained in Malta after their irregular arrival in the country by boat. Both claimed to be children and both were subject to the age assessment process. They were both informed orally of the results of the examination after the examination had taken place, and they were told it had been confirmed they were minors and they were going to be released from detention. Having spent eight months in the detention centre, they did not receive the written decision with the results of the age assessment nor were they released from the detention.

Both applicants were placed in an adult detention facility in unsatisfactory conditions, which the ECtHR considered as degrading treatment in the sense of the Article 3 ECHR. A violation of Article 5(1) ECHR was also found due to the fact that delivery of the outcome of the age assessment took eight months, notwithstanding the double vulnerability of the applicants who were both minors and asylum seekers. Detention of such length was deemed to have been arbitrary and not carried out in good faith. The ECtHR also held that Article 5(4) ECHR had been violated as the minors did not have an effective and speedy remedy to challenge the lawfulness of the detention.

2. DARBOE AND CAMARA V. ITALY²²

Two asylum seekers, a Gambian national Mr Darboe and a Guinean national Mr Camara, were placed in an adult detention facility in Italy on the basis of a bone examination with a result which indicated they were both 18 years old. They complained about the age assessment process and argued that in breach of national law, no margin of error was reported in the bone test results. The examination was based solely on a radiological examination, although national law required a multidisciplinary approach, including examination by a paediatrician and a psychologist. The Greulich-Pyle bone age assessment method was carried out with a radiological examination, which is a method based on data from the Euro-American population, while the applicants come from Africa and the African population has a different body constitution than that of Euro-Americans. Moreover, the result of the age assessment was not communicated to the applicants, who were not considered as minors before the end of the age assessment process.

On 14 February 2017 the ECtHR indicated an interim measure to transfer Mr Darboe from an overcrowded and unsatisfactory reception centre to a facility for unaccompanied minors.

The ECtHR held unanimously that Italian authorities failed to apply the principle of presumption of minority and violated Article 8 ECHR, as Mr Darboe was for more than four months placed in an adult reception centre, which affected his 'right to personal development and

²¹ ECtHR, *Abdullahi Elmi and Aweys Abubakar v. Malta*, Appl. nos. 25794/13 and 28151/13, Judgment of 22 November 2016 (ECLI:CE:ECHR:2016:1122JUD002579413).

²² ECtHR, *Darboe and Camara v. Italy*, Appl. no. 5797/17. Judgment of 21 July 2022 (ECLI:CE:ECHR:2022:0721JUD000579717).

to establish and develop relationships with others.’ This could have been avoided if he had been immediately placed in a specialized centre for unaccompanied minors. The ECtHR considered that Italy had to deal with the escalating migration crisis and significantly increased number of unaccompanied minors. However, this fact did not exonerate States from their obligations under Article 3 ECHR, which was also breached by Mr Darboe’s placement in the understaffed adult reception centre without appropriate access to medical care and humanitarian assistance for vulnerable asylum-seekers. Finally, there had also been a violation of Article 13 ECHR (in conjunction with Articles 3 and 8 ECHR) because Mr Darboe had not had an effective remedy under Italian law by which he could have complained about his reception conditions. Although even in this case, the ECtHR did not deal in more detail with the reliability or invasiveness of the medical methods used during the age assessment process (see 3.B), it did at least point out that ‘the relevant medical report, which failed to indicate any margin of error,’ should have been served on Mr Darboe.

The ECtHR struck out the part of the application that Mr Camara lodged because the applicant did not intend to pursue his application.

D. SECONDARY LEGAL SOURCES

The above-mentioned legal sources can be considered the most relevant for the issue of age assessment in the context of migration. However, this list is not exhaustive. Since the legal regulation of age assessment is overall brief, it may be helpful for the practitioners to seek further information in a number of secondary legal sources covering the issue. Numerous studies and recommendations have been issued by international human rights organizations, such as the CoE, UN Refugee Agency, United Nations Children’s Fund (UNICEF) and European Union Agency for Fundamental Rights (FRA).

3. AGE ASSESSMENT METHODS

A human being has two distinct ‘ages’: a chronological one and a biological one. The former refers to the objective and irreversible amount of time that has passed from the moment the person was born, while the latter indicates the relative physiological state of an individual and depends on several factors such as genetics (more specifically DNA methylation), lifestyle and nutritional intake. Moreover, age may be defined from a psychological and social perspective considering the behavioural capacities and interpersonal skills of an individual.²³ Although these concepts correlate with each other, it should be emphasized that no person has precisely the same chronological, biological, psychological and social age, especially around the time of late puberty.

²³ EASO, *supra* note 4, at 65.

However, it is only the chronological age of 18 years that is decisive for the legal definition of a child.²⁴

Age assessment is generally a complex process by which public authorities seek to estimate the chronological age of a person when reasonable doubts are present. In cases where the applicant is obviously a child or where the applicant's physical appearance and demeanour very strongly suggest they are significantly over 18 years of age (e.g. 30 years of age or over in absence of any contradicting evidence), further age assessment may not be performed.²⁵ In the context of the asylum procedure, it is not necessary to determine the exact age of an applicant but to confirm or refute the claimed minority.²⁶ Unless it is proven beyond reasonable doubt that the person is an adult, presumption of minority should prevail.²⁷

Chronological age is normally proven by documentary evidence, e.g. birth certificate, identity card or passport. While almost all children in the EU are officially registered immediately after birth, a large number of minors in African and Asian countries are not given any document that would reliably prove their date of birth.

In Afghanistan, for example, only around 40% of the population is provided with legal documentation to claim identity.²⁸ Local children do not often obtain a birth certificate even if they were born at a health facility because the parents traditionally choose a baby's name afterwards in a ceremony attended by relatives.²⁹ Moreover, many cultures do not give birthdays the same importance as in Europe and children are treated as adults as soon as they become physically mature. Therefore, a significant percentage of Afghan applicants for international protection declare a date of birth on January 1 of the Gregorian calendar as it is easy to remember.³⁰

These are just some of the many aspects that make age assessment in the absence of reliable documentation complicated. Ignoring these cultural, demographic, or biological differences (e.g. the mere fact that members of some ethnic groups look older than others), which may not be obvious to the decision-makers at first glance, increases the final margin of error of the age assessment. The whole process should thereby involve qualified and impartial professionals with appropriate training in communicating with children with different cultural backgrounds.³¹

²⁴ Article 1 CRC and Article 2(l) APD.

²⁵ EASO, *supra* note 4, at 17, and Home Office, *Assessing age* (5th ed., 2018), at 12.

²⁶ See judgments of the Regional Court in Prague (Czech Republic) on 21 December 2021, rf 53 A 3/2021 - 13, at para. 47, and on 22 December 2021, rf 50 A 23/2021 - 17, at para. 28 (available at <https://vyhledavac.nssoud.cz/>).

²⁷ Article 25(5) APD.

²⁸ UNICEF, *Status of civil registration and vital statistics in South Asia countries* (2019), at 28.

²⁹ *Ibid.*

³⁰ Sieff Kevin, *In Afghanistan, Jan. 1 is everyone's birthday* (2013), available at https://www.washingtonpost.com/world/in-afghanistan-its-everyones-birthday/2013/12/31/81c18700-7224-11e3-bc6b-712d770c3715_story.html. It should be noted that this date has no relevance in the local Solar Hijri calendar.

³¹ Article 24(4) RCD, see judgment of the Supreme Administrative Court (Czech Republic) on 26 September 2019, rf 7 Azs 87/2019 - 22 (ECLI:CZ:NSS:2019:7.Azs.87.2019.22), at para. 19.

Examples of good practice in this field include France and Sweden, where training for social workers or officers dealing with unaccompanied minors is institutionally organized.³²

The EU asylum *acquis* does not set forth which specific age assessment method should be performed. Priority should generally be given to the least intrusive methods with full respect for the individual's dignity.³³ In other words, the methods ought to be used successively so that unnecessary or repetitive examinations are avoided. All evidence must be naturally gathered in a way that is consistent with 'relevant EU law provisions, and in particular with the fundamental rights guaranteed by the Charter, such as the right to respect for human dignity, enshrined in Article 1 of the Charter, and the right to respect for private and family life, guaranteed by Article 7 thereof.'³⁴ However, there is currently no single method, neither non-medical, nor medical, to estimate age with determinative accuracy and every approach is subject to discussions or even disagreements concerning its reliability and/or invasiveness.³⁵ As a result, the use of different methods or combinations of

methods varies considerably from one Member State to another.³⁶ The most commonly used methods can be summarized as follows.

A. NON-MEDICAL METHODS

Non-medical methods include all procedures not involving the participation of a physician, particularly the use of documents (including those that do not explicitly state the applicant's age, e.g. school and medical records, or photos), age assessment interviews conducted by an official, psychosocial assessments conducted by a specialist and general estimations based on physical appearance and demeanour. As none of these is regulated in the APD, their use is left solely to the Member States. All Member States perform at least one of these methods in combination with a medical method. The only exception is Ireland, which claims³⁷ to use exclusively non-medical methods.

The obvious advantage of non-medical methods is that they are not physically invasive. Nevertheless, the competent authorities must be mindful of the applicant's potential vulnerability and utilize

³² CoE, *Age assessment: Council of Europe member states' policies, procedures and practices respectful of children's rights in the context of migration* (2017), at 34.

³³ Article 25(5) APD.

³⁴ CJEU, C-473/16, *F v Bevándorlási és Állampolgársági Hivatal* (ECLI:EU:C:2018:36), at para. 35. This case did not specifically concern the age assessment, but the credibility assessment of the applicant's sexual orientation in the context of circumstances laid down in Article 4 of the QD.

³⁵ CoE, *Age assessment for children in migration: a human rights-based approach* (2019), at 13.

³⁶ For details see EASO, *Age assessment practice in Europe* (2014), at 23, 88 and 89, EASO, *supra* note 4, at 106, and EMN, *supra* note 10.

³⁷ EASO, *Age assessment practices in EU+ countries: updated findings* (2021), at 9. Differently Malekmian Shamim, *The State Has No Guidelines for Judging If Asylum Seekers Are Children, but It Does So Anyway* (2021), available at <https://www.dublininquirer.com/2021/11/10/the-state-has-no-guidelines-for-judging-if-asylum-seekers-are-children-but-it-does-so-anyway>, and Buczkowska Teresa, *Ireland: Issues in the age assessment of unaccompanied child asylum seekers* (2021), available at https://ec.europa.eu/migrant-integration/news/ireland-issues-age-assessment-unaccompanied-child-asylum-seekers_en.

non-medical methods with adequate sensitivity.³⁸ It should be also noted that all of these methods have a wide margin of error and, especially in the case of interviews, largely depend on a subjective evaluation as their result cannot be verified with exactitude.³⁹ Possibly misleading conduct on the part of the applicant, such as lying about the chronological sequence of their life or simulating childish behaviour, can occur and must also be taken into account.

In terms of the non-medical methods, the practice in Malta may serve as a model. In this Member State age assessment interviews are conducted by a multidisciplinary panel of trained social workers, asylum officials and psychologists.⁴⁰ Only if the in-depth interview about the applicant's personal history does not lead to an undoubted conclusion, can a medical examination be performed.⁴¹ A similar approach is followed in Germany and the Netherlands.⁴² Further inspiration can also be found in practice in the United Kingdom based on the *Merton judgement and further case law setting out guidance and minimum standards*

*that must be applied by social workers, such as the obligation to offer the applicant the opportunity to explain any inconsistencies in its statement that would be likely to result in an adverse credibility finding.*⁴³

B. MEDICAL METHODS

Medical methods are based on research into what are known as age biomarkers, being physiological aspects *'that run through phases that are distinguishable from each other and where each phase is linked to a specific period of chronological age.'*⁴⁴ Their observation can simply be made visually (dental examination, physical development and sexual maturity inspection) or by medical imaging techniques such as X-rays (radiography), magnetic resonance imaging (MRI) or ultrasonography.⁴⁵ The most relevant biomarkers are the development of the wrist and hand bones (or more precisely degree of epiphyseal ossification), collar bone (fusion of the medial clavicle), third molars ('wisdom teeth'), hip (iliac crest) and knee joint.⁴⁶ In addition to anatomical tests, forensic scientists

³⁸ Under Article 4(3) APD Member States shall ensure that the personnel of the determining authority are properly trained and that the persons interviewing applicants shall also have acquired general knowledge of problems which could adversely affect the applicants' ability to be interviewed, such as indications that the applicant may have been tortured in the past. Under Article 15(3) APD sets standards for interviews such as ensuring that the person who conducts the interview is competent to take account of the personal and general circumstances surrounding the application, including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability. Under Article 25(3)(a) APD if the interview of an unaccompanied minor is conducted by a person who has the necessary knowledge of the special needs of minors.

³⁹ EASO, *supra* note 4, at 47-51.

⁴⁰ CoE, *supra* note 32, at 24.

⁴¹ Questionable may be however the actual length of the age assessment procedure conducted by the Maltese authorities, see above ECtHR, *Abdullahi Elmi and Aweys Abubakar v. Malta*, *supra* note 21.

⁴² EMN, *supra* note 10, at 13 and 22.

⁴³ Judgment of the High Court of Justice (United Kingdom) on 14 July 2003, *B v. London Borough of Merton* (2003) EWHC 1689 (admin), at para. 55 (available at <https://www.judiciary.uk>). For details see Home Office, *supra* note 25, at 29 *et seq.*

⁴⁴ Joint Research Centre, *Medical Age Assessment of Juvenile Migrants* (2018), at 11.

⁴⁵ EASO, *supra* note 4, at 52-59.

⁴⁶ Joint Research Centre, *supra* note 44, at 13-19, and EASO, *supra* note 36, at 29-41.

have attempted to determine age by 'epigenetic clocks' using DNA samples from buccal cells and blood.⁴⁷ However, all of these methods have a certain margin of error because they are based merely on mapping an individual to a particular statistical sample of a population in a relevant age range, which is necessarily approximate.⁴⁸

As for medical examinations Article 25 APD provides minimal requirements on the consent of applicants and/or their representatives, the level of intrusiveness of the medical examination, qualifications of the examiner and the probability of a reliable result (see 2.A). Taking into account the EUAA guidelines,⁴⁹ Member States may thus set additional requirements in the form of binding legislation or soft law instruments such as recommendations of the ministries or research institutions.⁵⁰

An applicant's consent to undergo a certain medical examination must be informed and voluntary, whereby the presence of an interpreter should be ensured not only before the examination itself but also during it.⁵¹ In this context, it must be emphasized that in

some Member States (Austria, Portugal and Slovakia) the consent of the legal representative is exclusively required, but the applicant's is not.⁵² In contrast, in other Member States the medical examination may proceed only with consent of the applicant (France, Italy, Spain) or of both the applicant and the legal representative (Finland, Germany and Sweden). Although the refusal of a medical examination does not prevent the competent authorities from deciding on an application for international protection, the decision cannot be based solely on that refusal.⁵³

The main disadvantage of medical methods is their necessary physical invasiveness, which manifests itself especially in the sexual maturity observation or examination. As methods requiring nudity significantly conflict with the applicant's right to privacy and dignity, they have been banned in some Member States (France, Luxembourg).⁵⁴ The EUAA also considers that '*no method implying nudity or the examination of genitalia as a sexual maturity observation should be used under any circumstance*'.⁵⁵ However, despite their intrusiveness and unreliability these methods continue to be used in

⁴⁷ Abbot, 'DNA clock may aid refugee age check', 561 *Nature* (2018), at 15.

⁴⁸ Salamánek and Weisssová, 'Zajištění nezletilého cizince bez doprovodu, zjišťování jeho věku v případech pochybností a související otázky soudního přezkumu', 54 *Správní právo* (2021) 221, at 226.

⁴⁹ Recital 10 APD.

⁵⁰ E.g., guidelines of the French Ministry of Solidarity and Health (*Ministère des Solidarités et de la Santé*, see *Guide de bonnes pratiques en matière d'évaluation de la minorité et de l'isolement*, available at https://solidarites-sante.gouv.fr/IMG/pdf/guide-de-bonnes-pratiques-en-matiere-d-evaluation-de-la_minorite-et-de-l-isolement.pdf) or German Working group for forensic age diagnostics (*Arbeitsgemeinschaft für Forensische Altersdiagnostik*, see *Empfehlungen für die Altersdiagnostik bei Jugendlichen und jungen Erwachsenen außerhalb des Strafverfahrens*, available at <https://www.dgrm.de/forensische-altersdiagnostik/empfehlungen>).

⁵¹ See decision of the Constitutional Council (France) on 21 March 2019, no. 2018-768 QPC (ECLI:FR:CC:2019:2018.768.QPC), at para 10, and judgment of the Constitutional Court (Czech Republic) on 7 July 2021, rf II. ÚS 482/21 (ECLI:CZ:US:2021:2.US.482.21.1), at para 62 and 64.

⁵² FRA, *Age assessment and fingerprinting of children in asylum procedures* (2018), at 9-11.

⁵³ Article 25(5)(c) APD.

⁵⁴ EMN, *supra* note 10, at 12, and EASO, *supra* note 37, at 8.

⁵⁵ EASO, *supra* note 4, at 55.

some Member States (Austria, Germany, Hungary, Italy, Romania).⁵⁶ As some methods, especially those involving radiation, may have potential health implications⁵⁷, radiation-free methods such as MRI should generally be given priority. From an ethical point of view, it is further appropriate that the results of medical examinations should not be used only to determine age, but also for their original purpose, which is to care for the patient's health. For example, in Finland, dental radiographs are subsequently used for dental care.⁵⁸

All medical methods should be undertaken by impartial professionals who are specifically qualified for the purpose of age assessment. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)⁵⁹ and the Helsinki Committee⁶⁰ have thereby criticized practice in Hungary, where examinations were recently carried out by military doctors without special training in transit zones insufficiently equipped for this task. However, according to the Hungarian Ministry of the Interior, examinations are currently performed only by 'medical experts with many years of experience'.⁶¹

In contrast, inspiration for best practices in terms of qualification can be found in Finland and Sweden, where the 'four eyes principle' is applied, i.e. that two or more doctors are involved in the evaluation of examination results.⁶²

The main criticism on the use of medical methods is their lack of reliability or rather their margin of potential error. Particularly controversial are bone maturity tests, which might be highly affected by genetic, nutritional and socioeconomic factors.⁶³ Several international, EU and professional bodies (such as the Committee on the Rights of the Child,⁶⁴ the European Economic and Social Committee⁶⁵ and the European Academy of Paediatrics⁶⁶) have therefore called on states to refrain from using them. Moreover, the reliability of some evaluation methods (e.g. the Greulich-Pyle method for wrist and hand bone X-ray) have been successfully challenged before national higher courts for having a wide margin of error, especially once the applicant has reached the age of 16.⁶⁷ For that reason Sweden has opted for a combination of MRI imaging of the knee joint and dental X-ray of third molars instead of carpal examination.⁶⁸ As the different

⁵⁶ Ibid., at 106.

⁵⁷ Joint Research Centre, *supra* note 44, at 22-23.

⁵⁸ EMN, *supra* note 10, at 12, and EASO, *supra* note 37, at 10.

⁵⁹ CPT, *Report to the Hungarian Government on the visit to Hungary* (2018), at 5.

⁶⁰ Hungarian Helsinki Committee, *Input by civil society to the EASO Annual Report 2019* (2020), at 9.

⁶¹ EMN, *supra* note 10, at 15.

⁶² Ibid., and Rättsmedicinalverket, *Medical age assessment* (2020), available at <https://www.rmv.se/medical-age-assessment/>

⁶³ EASO, *supra* note 36, at 35, and Joint Research Centre, *supra* note 44, at 19-20.

⁶⁴ Joint general comment No. 4 (2017) *supra* note 19, and No. 23 (2017) *supra* note 19, at 4.

⁶⁵ European Economic and Social Committee Opinion SOC/634 of 18 September 2020, at 1.12. and 4.10.

⁶⁶ Sauer, Nicholson and Neubauer, 'Age determination in asylum seekers: physicians should not be implicated', 175 *European Journal of Pediatrics* (*Eur J Pediatr*) (2016) 299, at 302.

⁶⁷ Decision of the Federal Administrative Court (Switzerland) on 4 March 2019, rf E-7333/2018, at para 2.3. (available at <https://www.bvger.ch/>), and judgment of the Supreme Administrative Court (Czech Republic) on 25 June 2020, rf 5 Azs 107/2020 - 46 (ECLI:CZ:NSS:2020:5.Azs.107.2020.46), at para 42-44.

⁶⁸ EASO, *supra* note 37, at 8.

methods cover different age ranges,⁶⁹ the usage of multiple age biomarkers and approaches to their evaluation should be the general rule. In addition, any doubts concerning the outcome of the medical examination must always be resolved in favour of the applicant.⁷⁰

4. CHALLENGES AND RECOMMENDATIONS

A. CORNERSTONES OF AN 'IDEAL' AGE ASSESSMENT PROCESS

National courts have acknowledged that there is not one universal method that would assess the age of a person with a guarantee of complete accuracy. For that reason, a multidisciplinary and holistic approach based on a combination of methods should be conducted by two or more professionals who have special expertise in child development.⁷¹ First of all a non-medical assessment should be performed, using any available documents (school and medical records or photos), an age assessment interview or a psychosocial assessment. If their result is not conclusive, a medical examination could take place. If the competent authorities are still in doubt about the applicant's age, they should presume that

the applicant is a child.⁷² The age assessment process should generally consider psychological, developmental, environmental, and cultural factors.⁷³

A model multidisciplinary and holistic approach can be found, for example, in Sweden where methods are conducted in the following order: written evidence from the applicant, interview, medical examination (X-ray of wisdom teeth and MRI of knee joint).⁷⁴ France also applies a multidisciplinary and holistic approach where age assessment is based on interview and social assessment. A complementary medical examination is performed only with the consent of the applicant and when approved by the judicial authorities, the margin of error must hereby be specifically indicated, and examination of pubertal development has been abandoned.⁷⁵ French authorities also have published a multidisciplinary guide on best practices for age assessment to harmonize the evaluation process.⁷⁶

As already stated, the age assessment process should be guided by the general principle that until evidence proves otherwise the applicant is to be treated as a minor. Therefore, the applicant will have the procedural guarantees of an unaccompanied minor such as the right to a representative,⁷⁷ the right to be

⁶⁹ For details see 19 anonymized examples from practice in Joint Research Centre, *supra* note 44, at 37-55.

⁷⁰ Constitutional Council (France) *supra* note 51, at para 11.

⁷¹ Constitutional Court (Czech Republic) rf II. ÚS 482/21, *supra* note 51, and judgment of the Higher Regional Court Bremen (Germany) on 4 June 2018, rf OVG 1 B 82/18 (available at <https://www.oberverwaltungsgericht.bremen.de/>).

⁷² EASO, *supra* note 4, at 38-39.

⁷³ *Ibid.*, and CoE, *supra* note 32, at 25.

⁷⁴ EMN, *supra* note 10, at 28.

⁷⁵ *Ibid.*, at 12-13.

⁷⁶ EMN, *supra* note 10, at 12-13. Guidelines of the French Ministry of Solidarity and Health, *supra* note 50.

⁷⁷ Article 25(1) APD, Article 2(1) and 24(1) RCD.

heard,⁷⁸ the right to be informed and the right to communicate in a language he or she understands or is reasonably supposed to understand.⁷⁹ The child's legal representative and/or guardian as well, if necessary, an interpreter should be present during all stages of the age assessment, including the psychosocial interview or medical examination.⁸⁰ The age assessment process should be performed in a timely manner.⁸¹ The applicant should be able to appeal the age assessment decisions or decisions of which the age assessment is an integral part (such as a decision on detention or a decision on international protection).⁸²

The subsequent movement of the applicant within the CEAS is determined by the age assessment outcome. It would be therefore appropriate that all Member States recognize age assessment conducted by other Member States (but there is currently no legal basis for this). Mutual trust is necessary to prevent the minor from multiple age assessments. It also reduces costs and resources loads for Member States.⁸³

It should be also emphasized that unaccompanied minors represent a particularly vulnerable group of applicants.

In addition, minors may also be vulnerable due to other factors beyond their age and status as asylum seekers. They may be fleeing their country of origin because of a war, may have been victims of human trafficking, sexualized behaviour or abuse or may have witnessed a high level of violence.⁸⁴ Because of such traumatic events a minor may suffer from a mental disorder that is recognized as a particular vulnerability factor.⁸⁵ A child's development may be influenced by factors such as lack of care and education, inappropriate diet and living conditions.⁸⁶ A young person who is 18 years old or slightly older may have similar psychological maturity as a child due to these factors.⁸⁷ Undoubtedly, how long a child has attended school must also affect the psychosocial development of the applicant. It is therefore necessary to assess the maturity of applicants in the context of their life experience. The maturity of such applicants will logically differ from the average individual growing up in the EU.⁸⁸

Basic guarantees declared in the joint comments of the UN Committees⁸⁹ have summarized the leading cornerstones of age assessment.

⁷⁸ Article 12(2) CRC.

⁷⁹ Article 12(1) APD, see also Constitutional Court (Czech Republic), rf II. ÚS 482/21, *supra* note 51, at para 46 and 48, stated that the applicant must have an effective option to comment on the alleged contradiction of evidence.

⁸⁰ Constitutional Court (Czech Republic), rf II. ÚS 482/21, *supra* note 51.

⁸¹ CoE, *supra* note 32, at 34.

⁸² *Ibid.*, at 36.

⁸³ *Ibid.*, at 39.

⁸⁴ CoE, *supra* note 32, at 18, and UNICEF, *A Deadly Journey for Children: The Central Mediterranean Migration Route* (2017).

⁸⁵ Article 21 RCD, Article 20(3) QD, recital 29 APD.

⁸⁶ CoE, *supra* note 32, at 29.

⁸⁷ *Ibid.*, at 17-18, and United Nations High Commissioner for Refugees, *Guidelines on Child Asylum Claims* (2009), par. 7 at 5.

⁸⁸ Judgment of the Regional Court in Prague (Czech Republic) rf 50 A 23/2021 - 17, *supra* note 26, at para 27, and Constitutional Court (Czech Republic), rf II. ÚS 482/21, *supra* note 51, at para 46 and 48.

⁸⁹ Joint general comments No. 4 (2017) and No. 23 (2017) *supra* note 19.

B. IS THE CURRENT LEGISLATION SUFFICIENT?

As discussed above, the age assessment process is not homogenous across Member States and various combinations of distinct, unevenly invasive methods are used. The main principles as described above (presumption of minority, proportionality, reliability, informed consent and right to refuse medical examination) are legally binding only when conducting a medical examination.⁹⁰ There are no procedural guarantees for other age assessment methods. Recital 10 of the APD recommends using relevant EUAA guidelines when implementing the Directive. Although implementing national guidance based on the EUAA recommendations could also contribute to harmonizing the age assessment practice in the CEAS, in 2021 only 16 Member States adopted some national guidance.⁹¹

The age assessment process could be related to decisions on detention that are restricted by short time limits.⁹² In some Member States judges are not specialized and do not frequently encounter the issue of age assessment. It can be a challenge to autonomously assess the reliability of various methods of age assessment within a defined time limit because it is a conclusion based on professional medical and/or psycho-social evaluation. In addition, there is not enough relevant case law from the CJEU and the ECtHR, and international guidance is neither legally binding nor

adapted to national legislation. If it is based only on one expert opinion without declaring the margin of error, and no time to perform a revision evaluation, the judge cannot properly review the legality of the age assessment process, which only increases uncertainty about the applicant's chronological age.

It follows that trying to regulate the age assessment process in a comprehensive and for all Member States binding way, is not achievable. Efforts to find a single best age assessment method is unrealistic because none exists. Each Member State possesses different personnel capacities and financial means. Non-medical methods require enough professionally trained staff, such as psychologists and social workers to ensure that the age assessment is conducted in a timely manner. Medical methods also require highly trained staff and expensive medical equipment. As a regulation of the age assessment process at the EU level or attempts at harmonization of practices of Member States is not realistic, one should focus on the harmonization of procedural guarantees as they are more essential.

In this respect the APD can be extended slightly to guarantee procedural rights regardless of the chosen methods. Some non-medical methods (such as psycho-social interviews) may be more invasive for minors suffering from abuse or traumatic memories than undergoing an X-ray. Therefore, it is necessary to establish procedural safeguards to ensure that

⁹⁰ Article 25(5) APD.

⁹¹ EASO, *supra* note 37, at 6.

⁹² For example, in the Czech Republic, judges have to decide within 7 working days from the date of delivery of the administrative file to the court, which must be delivered within 5 days from the date of delivery of the action against decision on detention or against decision to extend the duration of the detention or against decision not to release from detention, see section 172 para 4 and 5 Act on the Residence of Foreigners [1993] No. 326/1999 Coll.

5. CONCLUSION

the minor was given all the necessary information to be able to give voluntary consent. The minor must be accompanied by a guardian, a legal representative, and if necessary, an interpreter at all stages of the age assessment process. The APD should oblige Member States to use a combination of methods that are chosen by their competent authorities on a case-by-case basis. Granting autonomy to choose and combine methods respects the varying capacities of each Member State. The most invasive methods that violate human dignity (especially those implying nudity or the examination of genitalia) would be explicitly excluded. A demonstrative enumeration of viable methods should be transparent and available in advance. Age assessment must be conducted by two or more experts working independently regardless of the chosen method to increase the level of objectivity. Medical reports would note the methodology used, clearly explain its possible margin of error, and specify the minimum and maximum value of the estimated age range. Description of the methodology would be transparently published to enable critique by other experts.⁹³ These standards increase the level of the assessment's objectivity, provide judges and other professionals better knowledge to consider the relevance of the age assessment evidence,⁹⁴ and enable higher mutual trust of age assessment conducted in other Member States within the CEAS.

Age assessment is essential for determining what standards of the asylum procedure the state is obliged to apply. If the applicants are evaluated as minors, they will be entitled to special protection in accordance with the principle of the best interests of the child, which is reflected in many ways during the age assessment process and should always take precedence. Analysis of relevant EU law and other international obligations shows that there is no sufficient legislative basis to ensure a uniform level of procedural guarantees during the age assessment process in all Member States. The APD briefly regulates basic rules for age assessment of unaccompanied minors but only in the context of medical examinations. Even if rules derived from the child's right to be heard under Article 12 of the CRC should be guaranteed, it is not specifically determined for the age assessment process. The discussion of ECtHR cases has shown how age assessment can encroach on an applicant's fundamental rights.

Applicants from African and Asian countries often do not obtain a birth certificate or any other documentary evidence proving their chronological age. Therefore, their age must be determined or, more precisely, estimated by non-medical or medical methods.

⁹³ EASO, *supra* note 4, at 35.

⁹⁴ *Ibid.*

Although there are various age assessment methods available, none of them can determine the exact age with absolute accuracy. As a result, the use of different methods or their combination varies considerably from one Member State to another. This fact leads to a dismal situation, when applicants for international protection, who are in a fundamentally similar position are treated differently within the CEAS.

A multidisciplinary and holistic approach that enables to proceed on a case-by-case basis and combine available age assessment methods, should therefore be considered as a key to the age assessment process. Without further necessary guidance the current legislation is not sufficient.

Judges and other decision-makers face great challenges to evaluate the evidence on age assessment. Because there is no ideal method of age assessment, trying to comprehensively regulate the age assessment process is not feasible. In order to ensure the same standard of treatment of applicants when assessing their age, wider and binding procedural guarantees should be adopted regardless of the chosen method. In general, it should be borne in mind that during the age assessment process other factors (such as disability, having been subjected to torture, human trafficking, sexualized behaviour, or abuse) can be identified for which minors or young adults may be considered as vulnerable persons.

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TAKING CHILDREN'S VOICES INTO CONSIDERATION IN EUROPEAN FAMILY LAW PROCEEDINGS

This paper advocates for a better consideration of children's voices in European family law proceedings. While each Member State strongly values children's rights, they protect them to varying degrees. At national level, improvements are required. In addition, ten years after raising children's rights to the top of the EU Agenda, the European Union must consider accelerating the process at European level by planning an approximation of laws, notably to ease cross-border proceedings.

KEY WORDS

European family law ▪ Children ▪ Hearing ▪ Information ▪ Access to justice ▪
Cross-border proceedings ▪ Common standards

INTRODUCTION

'Children must be given a chance to voice their opinion and participate in the making of decisions that affect them'. These are the exact words the European Commission chose to emphasize in 2011 when fixing the European Union Agenda for the Rights of the Child. In family law proceedings, these words have striking resonance. Parental responsibility, custody, access rights, placement of the child, educational measures or child abduction are all extremely sensitive cases when it comes to children. Around 2.5 million children are involved in judicial proceedings across the European Union every year.¹ Ensuring they may easily take the floor and play an effective part in the judicial decision-making process is therefore paramount.

Children's rights are reflected in various forms of legislation, not only at national level but also at European and International levels. The evolution of European and International legislation tends to acknowledge that children have the same

rights as adults and must be recognized as full-rights holders. However, children are entitled to additional rights due to their special needs and vulnerability to exploitation and abuse, especially when they are involved in judicial proceedings. Promoting children's rights is the result of the United Nations Convention on the Rights of the Child;² which is obviously worth mentioning and guides decision-making in many states. In Europe, the Council of Europe also fully plays its role through the European Convention on Human Rights, the European Convention on the Exercise of Children's Rights³ and non-binding guidelines issued by the Committee of Ministers towards *'child-friendly justice'*.⁴ Likewise, the European Union has not remained silent, as the Charter of Fundamental Rights of the European Union attaches great value to children's rights, as do regulations whose aim is to ease cross-border proceedings in family law matters within the European Union.⁵ The European Commission has also committed itself to better promote children's rights.⁶

¹ European Union Agency for Fundamental Rights (hereinafter the 'FRA'), *'Child-friendly justice - Perspectives and experiences of children involved in judicial proceedings as victims, witnesses or parties in nine EU Member States'*, February 2017.

² United Nations Convention on the Rights of the Child adopted by General Assembly Resolution 44/25 of 20 November 1989 (hereinafter the 'CRC').

³ European Convention on the Exercise of Children's Rights, opened for signature in Strasbourg on 25 January 1996, and entered into force on 1 July 2000 (hereinafter the 'ECECR').

⁴ Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum (hereinafter the 'Guidelines of the Council of Europe').

⁵ Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and matters of parental responsibility, and on international child abduction (hereinafter 'Regulation Brussels II-ter') (OJ 2019, L 178/1). This Regulation is about to enter into force in August 2022 and recasts Council Regulation (EC) n° 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility (hereinafter 'Regulation Brussels II-bis') (OJ 2003, L 338/1). As Regulation Brussels II-ter will only be applied to proceedings started after August 2022, both Regulations Brussels II-bis and Brussels II-ter will be analysed.

⁶ See Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region, *'Ensuring justice in the EU – a European judicial training strategy for 2021-2024'*, COM(2020) 713 final, December 2020. Available at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/rights-child/child-friendly-justice_en [last access April 2022].

Despite common values, strong disparities are however to be noted in the practice of Member States. Children are not heard in the same way, or at the same age. Some do not receive the same information while others are not even able to take direct legal action. After consultation with European judges involved in family law proceedings, to whom our team sent a survey,⁷ disparities became apparent, leaving open the question of the place of the child in family law proceedings and the weight of the child's opinion in the decision-making process.

In this regard, this paper advocates for a better consideration of children's voices in European family law proceedings. While each Member State strongly values children's rights, they protect them to varying degrees. At national level, improvements are required (1). In addition, ten years after raising children's rights to the top of the EU Agenda, the European Union must consider accelerating the process at European level by planning an approximation of laws, notably to ease cross-border proceedings (2).

1. THE NEED FOR BETTER CONSIDERATION OF CHILDREN'S VOICES IN EUROPE

A child's fundamental right to participate and express his or her views in civil proceedings cannot be exercised effectively, whether directly or indirectly, if

the child involved does not receive adequate information and support. To make the justice systems across Europe more child-friendly, the Council of Europe and the European Commission have collected and analyzed data showing that different standards among Member States lead to unequal access to information (A) and justice (C). Besides, procedures to hear a child differ between European countries (B). These disparities are even more apparent at the decision-making stage, as the principle of the best interest of the child is widely open to interpretation.

A. DISPARITIES IN A CHILD'S RIGHT TO INFORMATION

The right to receive adequate information is a fundamental right of a child involved in civil proceedings, as stated in Articles 12 and 13 of the CRC, as well as Articles 3, 6 and 10 of the ECECR. Article 13 of the CRC states that *'the child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice'*. Article 3 of the ECECR asserts: *'A child considered by internal law as having sufficient understanding, in the case of proceedings before a judicial authority affecting him or her, shall be granted, and shall be entitled to request, the following rights: (a) to receive all relevant information; (b) to be consulted and express his or her views; (c) to be informed of the possible consequences of compliance with these views and the possible consequences of any decision'*.

⁷ Judges from Belgium, Bulgaria, England and Wales, France, Germany, Hungary, Ireland, and Poland answered the survey. A copy of the latter is annexed to this paper.

To underline the importance of the information that must be given to children, the ECECR has defined the term '*relevant information*' as information which is appropriate to the age and understanding of the child, and which will be given to enable the child to fully exercise his or her rights, unless sharing the information is contrary to the welfare of the child.⁸

Moreover, the concern given to a child's right to information also emerges from its efficiency, which is guaranteed by Article 6 of the ECECR dealing with the decision-making process which specifies that '*in proceedings affecting a child, the judicial authority, before taking a decision, shall, in a case where the child is considered by internal law as having sufficient understanding, ensure that the child has received all relevant information*'.

These principles ensure child-friendly justice, especially the right to information, which is the first step in any child's involvement in judicial proceedings. Child-friendly justice and effective involvement of children in proceedings depends clearly on the information that is given to them. Likewise, the principle of the child's best interests, inspiring the Brussels II-bis and Brussels II-ter Regulations, implies that children should be given adequate preparation before their involvement in judicial proceedings.

For the same purpose, the Guidelines of the Council of Europe recommend that both children and their parents or legal representatives should promptly and directly receive the information, considering that sharing the information with the parents should not be an alterna-

tive to sharing that information with the child. This means that children can fulfil their rights only if they receive reliable, comprehensive and understandable information before, during, and after the proceedings. This condition is critical to ensure that children have a correct understanding of any judicial proceedings in which they are involved.

However, while sharing the information is essential to promote and implement the procedural rights of the child, it is not necessarily true that all information has to be shared with children. Some may be harmful to the child's welfare, and it may not be in the child's best interest to receive it.

Therefore, a fundamental aspect of providing adequate information is that both information and advice should be provided to children in a manner adapted to their age and maturity, in a language they can understand, and sensitive to culture and gender. In this way, every child involved in civil proceedings will be informed of his or her rights. Most of all, expressing their views must remain a choice and not an obligation. To that end, they should receive information about the stages, scope and purpose of the proceedings, the possibility of legal representation, what to expect from the hearings and the availability of protective measures.

Furthermore, providing information about the potential impact of the procedure is essential. It must be explained to children how their views will be considered, on what matters, and what weight will be given to them. This includes information about the notion of best interest

⁸ See Article 2 of the ECECR.

of the child as a primary consideration in any judicial proceedings and the fact that children's views may not necessarily determine the final decision. Unfortunately, a FRA study shows that sixty-two per cent of interviewed children felt that they did not receive sufficient information.⁹

To improve a child's right to information, it is essential to have a better understanding of national legislation. To this extent, the European Commission conducted a study to collect data on children's involvement in criminal, civil and administrative judicial proceedings in its 28 Member States. This study revealed some disparities between Member States with regards the child's right to information: some children benefit from a statutory right to receive information on the judicial system and proceedings, while in some Member States, these rights do not exist.¹⁰

To have a precise idea of the different professional practices within the European Union, a survey was sent to several European judges, the findings of which are set out below. In French family law, family judges ensure that children have been informed of their right to be heard and to be assisted by a lawyer. The information is provided by their legal guardian or guardians or, in some cases, by the person or body to whom they have been entrusted.¹¹ The same obligations are also applicable in non-judicial consensual divorces by means of a template form.¹² Regarding French procedure in

educational measures, Judge Emmanuelle Lajus-Thizon, Juvenile Judge in Bordeaux, also explains that '*children with sufficient understanding – or discernment – have the capacity to act before the juvenile judge. They are informed of their right to be heard and to be assisted by a lawyer in the court summons, while for children without sufficient understanding, guardians or parents are informed that they have to come to the hearing with the child.*'

According to German rules, Judge Britta Irgang, Judge at the District Court of Berlin-Schöneberg, indicates that '*[i]n most cases the court appoints a guardian ad litem (Verfahrensbeistand) who will represent the interests of the child and inform the child of his or her rights.*'¹³ Meanwhile, if the case does not present any difficulties, Judge Martina Erb-Klünenemann, Judge at the District Court of Hamm and Liaison Judge at the European and International Hague Judicial Networks, adds that '*[t]hey are all asked to come to court by information given to the parents, and older children (starting at 14) receive a standardized letter from the court.*' In England and Wales, Judge Gordon Y Lingard, District Judge of the Family and County Courts of England and Wales (sitting in retirement) specifies that children are informed of their rights to be heard '*[n]ot by the court, but by a CAFCASS (Children and Family Court Advisory and Support Service) appointed Officer (social worker).*' Similarly, in Ireland, Judge Mary Dorgan handling the Childcare, Family Law and under 18 crime lists in Cork mentions

⁹ See FRA, 'Child-friendly justice - Perspectives and experiences of children involved in judicial proceedings as victims, witnesses or parties in nine EU Member States', February 2017.

¹⁰ See European Commission, 'Study on children's involvement in criminal, civil and administrative judicial proceedings in the 28 Member States of the EU', July 2015.

¹¹ See Article 388-1 of the French Civil Code and Article 338-1 of the French Civil Procedure Code.

¹² See Article 229-2 of the French Civil Code, Article 1144 of the French Civil Procedure Code.

¹³ See section 158(b) of the Procedure Act in Family Matters and Non-contentious Jurisdiction Matters.

that '[c]hildren are told that they can be heard by their social worker and/or Guardian ad litem'. Whereas in Hungary, according to Judge Eszter Juhász, at the Local Court of Győr, a child's right to information is provided 'if they [children] have to appear at the court in order to be heard. Otherwise, they can ask to be heard by any parent. Under 14 years, the child gets the writ of summons via the legal representative (parent), over 14 years the child gets the writ of summons personally.'

These findings reveal, on the one hand, that the institutions responsible for providing information to children involved in judicial proceedings differ from one Member State to another, whether it be judges, parents, guardians *ad litem*, lawyers, special services or social workers. On the other hand, some inequalities appear, considering that the content of the information is not specified. Whether or not a child receives adequate information depends on the commitment and training of the person sharing the information, which might be problematic when the information is provided by the parents. The latter have a personal interest in the proceedings and may not objectively evaluate their child's discernment or relay information to him or her in an objective manner. In addition, it also shows that judges have a less prominent role in informing children because they do not see the latter before the hearing. Furthermore, if the person that informed the child is not a professional, judges are not able to verify that the child has received the relevant information. Therefore, it is crucial to have common standards to ensure that every child receives relevant information from specially ap-

pointed and well-trained professionals using child-friendly materials.

B. UNSATISFACTORY RIGHT TO BE HEARD

According to Nacho de la Mata, 'children [must be] effectively listened to, have a voice in the world in which we live'.¹⁴ The child's right to be heard stems from the fundamental principle of the best interest of the child and constitutes the main tool to fulfil this goal. The CRC was based on four principles, two of them being the best interest of the child and the views of the child. Article 12 of the CRC stresses that '[s]tates parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child [...]'. This idea fully inspired European Union law and the European Convention on Human Rights. For instance, according to Article 24 of the Charter of Fundamental Rights of the European Union children 'may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity'.

The Guidelines of the Council of Europe also emphasize that 'judges should respect the right of children to be heard in any matters that affect them or at least to be heard when they are deemed to have a sufficient understanding of the matters in question'. The way the hearing is con-

¹⁴ See quotes by the European Judicial Training Network (EJTN) in its course 'Promoting a child friendly justice', 2014. Available at <https://www.ejtn.eu/fr/Training/Catalogue-2014/Promoting-a-child-friendly-justice/> [last access April 2022].

ducted '*should be adapted to the child's level of understanding and ability to communicate and take into account the circumstances of the case*'. The environment of the hearing should be adapted to the age of the child so he or she feels safe and at ease to talk. Since its recognition, the child's right to be heard has been transcribed into national legislation in Europe but has encountered difficulties in practice.

On the one hand, one condition to hear a child is his or her maturity or 'sufficient understanding'. This is an essential condition, but it also leads to a subjective assessment by the judge that generates inequalities in the application of this right in Europe. There is no definition of the 'sufficient understanding' concept. However, there are criteria on which judges can rely to decide whether a child is able to express him or herself. The Guidelines of the Council of Europe explain that the concept of '*sufficient understanding*' implies a certain level of comprehension without implying that the child should fully understand all aspects of the case. There is no age limit, '*as it tends to be too rigid and arbitrary and can have truly unjust consequences*'. Therefore, the analysis of '*sufficient understanding*' must be carried out individually and take into account the development of the child, his or her '*personal capacities, life experiences, cognitive skills*'¹⁵ and the issues at stake. Some 10-year-old children might

be more mature than a 12-year-old. Age is only one criterion among others, because the level of understanding of a child is not uniformly linked to their biological age.¹⁶

In practice, some Member States set minimum age requirements for children to be heard. The age limit differs considerably from one country to another. In adoption cases, eleven Member States set an age limit between 10 and 12 years old, while one sets an age limit of 14. In placement cases, where the child is in danger, eight Member States set an age limit between 10 and 12, and two between 14 and 16 years old. In these two kinds of proceedings, only twelve Member States apply no age limit.¹⁷ As a result, it is worth noting that in almost half of the Member States, age is in fact the main criterion.

Furthermore, in family law proceedings, children under 5 or 6 years old are not considered as having sufficient understanding. However, these same young children are heard in criminal proceedings which begs the following question: why would we take their voices into account in criminal proceedings and not in family law matters? In matrimonial matters, a child may also be either a witness or a victim of his or her parents' behaviour, even though no direct physical harm has been caused.

¹⁵ Guidelines of the Council of Europe, n° 96, p. 75.

¹⁶ See A. Parkes, C. Shore, C. O'Mahony and K. Burns, 'The right of the child to be heard? Professional experiences of childcare proceedings in the Irish district court', *Child and Family Law Quarterly*, vol. 27, n° 4, 2015.

¹⁷ FRA, '*Mapping minimum age requirements: Children's rights and justice*', September 2017. Available at <https://fra.europa.eu/en/publication/2018/mapping-minimum-age-requirements-childrens-rights-and-justice> [last access April 2022]. In Norway, the Children Act gives an unconditional right to be heard for children above 7 years old. Under this age, they can be heard if the judge decides he or she is able to do so. But in practice, only '*children aged 12 or above are often invited to the hearing in the tribunal*': see A. Nylund, '*Children's Constitutional Rights in Nordic Countries*', in '*Children's right to participate in decision-making in Norway*', Chapter 11, Brill, 2019, point 5.2.

To improve the child's right to be heard in France, the 'Défenseur des droits' advised in 2013 that a presumption of sufficient understanding should be granted to any child who asks to be heard, so the judge would have no other choice than to meet the child to decide if he or she is mature enough to be heard.¹⁸ One may also draw inspiration from Germany. An interviewed judge highlighted the fact that hearings are now systematically organized for every child in family matters, no matter whether he or she has sufficient understanding. The child will meet the judge so that he or she can at least get a first impression. This is a great improvement, worth setting up as a binding principle at European level.

On the other hand, to make the right to be heard effective, the conditions in which the child is heard and the way the hearing is conducted is decisive, keeping in mind that one of the objectives of such a hearing is to enlighten the judge on what is the best interest of the child. Family law judges in Europe are not always specialized and trained for children's hearings. They can therefore either be reluctant to hear a child or forced to do so by law without having the right training to do so effectively. For children who are mature enough to be heard, the conditions in which the hearing is conducted are crucial.

Family law proceedings are often very stressful for the child. Whether a divorce or a placement is at stake, the proceedings are very intrusive in the private life of a family and it is often very hard for the child to feel free to express his or her opinion and wishes without feel-

ing guilty. Therefore, the conditions in which the child is heard are crucial and must enable the child to talk freely and the judge or the child's representative to understand correctly what is being said. This not only involves a person specially trained to hear young people, but also a special 'friendly' room adapted to the age of the child.

Firstly, the place where the child is heard is decisive. Courthouses are often intimidating for children. An environment outside the court is preferred in some countries. The European Commission recommends at least a child-friendly room, which is colourful, and has toys for the very young and positive images. In many European countries, influenced by the Guidelines of the Council of Europe, 'children's houses' or special places for hearings have been created. Poland and Bulgaria developed 'blue-rooms', containing a two-way mirror so that other childhood professionals can see the child's reactions and attitude. In England and Wales, Judge Lingard stressed that the child is heard in the judge's private room in the presence of an officer from the Children and Family Court Advisory and Support Service and that the hearing is recorded on tape. In France, family law judges mostly hear the children in their office, but such places are sometimes filled with toys and stuffed animals. Responding to our survey, a judge from Hungary explains that children are heard in a special room outside the judicial conference room, in the absence of the parties (parents and lawyers). It is indeed very important that the child feels free to talk without any other adults around, especially family members.

¹⁸ This idea is also well reflected in the Guidelines of the Council of Europe: see Guidelines of the Council of Europe, point 47.

Secondly, concerning the way the hearing is conducted, the Council of Europe points out that judges are often untrained to proceed with efficient child hearings. In 2018, the European Commission also noted the importance of specialized adults to communicate with children and it '*urges practitioners not to use language and jargon that alienated children and their families*'. The European Commission rightly points out that clear guidance must be given '*so that children's voices were really heard, and so that they felt safe and secure*'.¹⁹

Hearing children in criminal proceedings is really advanced in France and in other EU countries, using the National Institute of Child Health and Human Development (NICHD) protocol. This hearing protocol was developed in Canada to permit efficient and friendly hearings of potential young victims of sexual crimes. The main objective of this protocol is to manage the hearing without any suggestion at all, which is a very difficult exercise in practice, because the answer is often suggested in the way the question is asked. The NICHD proved that suggestion does not work with children, because it will either influence them to answer what they feel the listener wants them to say or make them feel so uncomfortable that they will not say anything at all. A French police officer interviewed by the team said: '*if you're waiting for an answer in your question, you won't get anything credible*'. This protocol could well be adapted to family law proceedings.

When the child is heard correctly, there is so much to benefit from in his or her opinion and point of view. Furthermore, the child feels that he or she is heard and understood. The FRA is calling for many improvements.²⁰ When useful, hearings should be video recorded in family law cases, in respect of procedural rules. The listener should carefully prepare the hearing, know the case perfectly, as well as the child's environment and hobbies, and make sure he or she asks all the necessary questions to avoid the child having to be heard more than once. The hearing should always be organized with very few people and with a good explanation of the role of everyone in the room. To help the child feel secure and comfortable, the professional should make sure that any contact between the child and any person the child does not wish or need to see is avoided. Finally, the FRA proposes the establishment of clear guidelines and detailed rules on how to hear a child. With specialized training, judges will have the tools to approach hearing a child. The aim is to give judges the opportunity to have all the evidence necessary to decide in the best interest of the child.

Finally, the right of a child to be heard is clearly a way to assess his or her best interest.²¹ The Guidelines of the Council of Europe highlight the fact that listening to a child is not sufficient and judges must give due weight to their words and opinions. This requires major changes in the way one regards young people. Age alone cannot determine the significance

¹⁹ European Commission, '*Child friendly justice and integrated child protection systems – lessons learned from EU projects*', Conference background paper, 25-26 June 2018, p. 6.

²⁰ FRA, '*Child-friendly justice - Perspectives and experiences of children involved in judicial proceedings as victims, witnesses or parties in nine EU Member States*', February 2017.

²¹ See J. Eekelaar, R. George, *Routledge Handbook of Family Law and Policy*, Routledge, 1st ed., 2014, p. 290.

of a child's view. Judge Lingard vouches that '*[s]ection 1 of the Children Act 1989 requires the court, in making decisions about children, to take into account inter alia the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)*'. Another judge from Hungary assesses that '*[o]ver 14 years, the judge has to decide on the rights of custody according to the opinion of the child unless his [or] her choice is risky to his [or] her improvement*'.

Once the judge has decided that the child can form his or her own views, the former will decide what weight he or she must give to the child's point of view in the decision to come. Beyond the right of a child to be heard lies the best interest of the child. The principle of the best interest of the child is the very first a judge, when ruling on a case involving a child, must have in mind.²² However, this principle has been highly criticized as one with too many possible interpretations. For example, it has been qualified as elusive or even as a '*magical notion [...] favoring judicial arbitrariness*'.²³ In practice, assessing the best interest of the child will rarely come without hearing the latter, when such a hearing may take place after consideration of the capacity of the child to express his or views. With this hypothesis in mind, taking down the views of the child is a strong element to assess his or her best interest. Obviously, when the child is too young to express his or her views, assessing the best inter-

est of the child would impose the consideration of other elements, such as the context in which he or she lives or how the child may react. Judge Dorgan from Ireland pointed out that '*the child is heard carefully but on occasion, his view may not be in his best interest, and this is where the exercise of judicial discretion and judgment comes into play*'.

C. INSUFFICIENT RIGHT TO ACCESS JUSTICE

When children understand and trust the justice system, they feel confident in using it. In this respect, the most absolute right for any child is to take his or her own voice into court. A child's right of access to justice stems from Articles 6, 13 and 34 of the ECHR and Article 12 of the CRC stating that the right to access justice may be exercised '*either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law*'.

As holders of rights, children should have recourse to remedies to effectively exercise their rights or act upon violations of their rights. Only a few applications have however been brought directly by minors before the European Court of Human Rights²⁴ or national courts. Indeed, the main obstacles for children to take legal action are, on the one hand, a lack of information for children about their rights and, on the other hand, the child's lack of legal capacity to act in domestic

²² See, within the legal order of the European Union, Charter of Fundamental Rights of the European Union, Article 24§2, and case C-491/10 PPU, *Zarraga*, (EU:C:2010:828), at para 64-65. See also, within national legal orders, the influence of the European Convention on Human Rights, J.-R. Binet, 'L'intérêt de l'enfant dans la jurisprudence de la CEDH', *CEDH et droit de la famille*, Rennes 1, Coll. Colloque et Essais, p. 79. Every rule in Regulations Brussels II-bis and Brussels II-ter dealing with the situation of a child must reflect the best interest of the child.

²³ J. Carbonnier, case note of CA Paris, 30 April 1959: D. 1960, p. 673.

²⁴ See '*La place du mineur dans la convention européenne des droits de l'homme*', XI^{ème} assises nationales des avocats d'enfants. Available at <https://www.cairn.info/revue-journal-du-droit-des-jeunes-2009-6-page-8.htm> [last access April 2022].

law. In fact, access to justice for children usually depends on the support provided by adults, who themselves may not be aware of children's rights or know how to best support their children. Thus, children often have no capacity to act without their parents or legal representatives, which is particularly problematic in cases of conflict of interest. In this situation, a child's right to have their own legal counsel and representation in proceedings in their own name should not be restricted.

According to a FRA study, the capacity of children to take legal action or invoke judicial proceedings varies within the European Union.²⁵ In every Member State, one simple rule is applied: children cannot bring a case to court on their own before they acquire full procedural capacity, which is 18 years old in most Member States. Moreover, in half of the Member States, only legal representatives and guardians, usually the parents, enjoy procedural capacity to bring a case before a court in civil and administrative proceedings.

Nevertheless, the report points out some exceptions. For instance, in Poland, from the age of 13 onwards, children can bring family and custody cases related to their person to court, while in Lithuania, from the age of 14 onwards, children can bring all cases regarding relations in which they have full legal capacity to court (and, if they are married, cases related to their marriage). In the Netherlands, children can bring family issues related to them to court from the age of 12 onwards. Children aged 16 or over can also bring cases related to authorized

contracts to court, especially employment issues or medical treatment agreements. It appears from the FRA study that, once more, some disparities exist within Member States. Therefore, common standards need to be implemented to increase the child's right to access to justice within the European Union.

2. THE NECESSARY APPROXIMATION OF LAWS IN AN EVER-GROWING EUROPEAN CONTEXT

National law and procedure govern many aspects of children's rights in family law proceedings. An approximation of laws in this regard would smooth the recognition and enforcement process of cross-border decisions. It would also be a way to set common standards in the very best interest of European children (B).

A. ENSURING A SMOOTH ENFORCEMENT OF CROSS-BORDER DECISION

In some cases, the hearing of a child is crucial to obtain the recognition and enforcement of cross-border decisions. As the child is clearly impacted by decisions taken in parental responsibility matters, but also in child abduction cases, regulations adopted at the level of the European Union aiming at establishing a European judicial system in family law litigation have not evaded this question. The importance given to children's rights

²⁵ See FRA, 'Age at which a child plaintiff can bring a civil case to court on their own - Minimum age requirements concerning children's rights in the European Union', April 2018.

varies however, depending on the case at stake.

As far as parental responsibility litigation is concerned, the Brussels II-*bis* Regulation allows the judge of the Member State in which the recognition and enforcement of a decision is sought, to refuse the latter when the child, except when faced with an emergency, has not been given the possibility to be heard in accordance with the fundamental principle of its state.²⁶

This ground for non-recognition and non-enforcement of a decision obviously calls for an approximation of laws within the European Union. The Brussels II-*ter* Regulation, recasting Regulation Brussels II-*bis*, did not head in that direction, however. In parental responsibility matters, the judge of the Member State where the recognition and enforcement of a decision is sought will have fewer options at his or her fingertips when a child has not been given a true and genuine opportunity to be heard.

It stems from the Regulation that the judge *may* — but *shall* not anymore — refuse to recognize and enforce such a decision when the child has not been given the possibility to be heard. Besides, the judge will not be able to refuse when the decision deals with the child's assets or when the urgency of the procedure compels the judge of the issuing Member State not to give that possibility to the child.²⁷ The two exceptions laid

down in Article 39 of Regulation Brussels II-*ter* are easily understandable,²⁸ provided, for the second, that there is a common understanding of the matter of urgency. Here also, an approximation of laws is very much required.²⁹ The Court of Justice of the European Union ruled that, as far as provisional measures are concerned, urgency refers, for children, to a situation '*likely seriously to endanger their welfare, including their health or their development*'.³⁰ Nevertheless, what is fully understandable for awarding provisional measures may not be the same when dealing with the setting up of a child hearing. Precision on the notion of urgency may be useful. It is even more so when Recital 57 of Regulation Brussels II-*ter* distinguishes between 'urgency' and other 'serious grounds' justifying the absence of any hearing.

If, beyond these two exceptions, the judge may still refuse to recognize and enforce a decision, he or she may not however invoke the fundamental principle of his or her state in the future.³¹ This is a big change from the previous Regulation and calls into question what may specifically constitute, without any clear guidance, the common standard of the hearing of the child being enough to refuse recognition and enforcement of a decision in parental responsibility matters.

Regulation Brussels II-*ter* has indeed cleared any reference to the fundamental principle of the state where recogni-

²⁶ See Regulation Brussels II-*bis*, Article 23 (b).

²⁷ Regulation Brussels II-*ter*, Article 39§2, (a) and (b).

²⁸ No exceptions are however laid down for recognition and enforcement of an 'authentic instrument' dealing with parental responsibility: see Regulation Brussels II-*ter*, Article 68§3.

²⁹ The interpretation given by the Court of Justice of the European Union for provisional measures may not be sufficient to cover all cases of urgency: see case C-523/07, A (EU:C:2009:225), at para 48.

³⁰ See case C-523/07, A (EU:C:2009:225), at para 48.

³¹ Compare Regulation Brussels II-*bis*, Article 23 (b), and Regulation Brussels II-*ter*, Article 39§2.

tion and enforcement is sought and replaced it with a reference to Article 21 of the Regulation stressing, for the very first time, the right of the child to be heard in any proceedings about to impact him or her.³² This reference is still unsatisfactory, as Article 21 of the Brussels II-ter Regulation orders, with many ambiguities, the hearing of the child only with reference to '*national law and procedure*'.

Article 21 of the Brussels II-ter Regulation defines the scope of the right of the child to be heard. It prescribes giving a child '*capable of forming his or her own views*' '*a genuine and effective opportunity to express his or her views, either directly, or through a representative or an appropriate body*'. Nevertheless, it seems that it remains with '*national law and procedure*' to fix the age at which the child may be given the right to be heard.³³ As a matter of fact, the European legislator has not chosen the path of the approximation of laws of Member States, despite clear disparities.

What may also be unsatisfactory is that, in the future, a judge may certify a decision in parental responsibility matters, in particular the full observance of Article 21 of the Brussels II-ter Regulation. This certification will enable bypassing the *exequatur* procedure. Consequently, the judge of the executing Member State will have no other choice than to accept the decision, without having a chance to put forward the fundamental principle regarding the hearing of a child in civil

proceedings. Also, contrary to the Brussels II-bis Regulation, it will be up to the losing side, in the Member State where the recognition and enforcement is sought, to file an application to oppose such enforcement.³⁴

By removing the *exequatur* procedure for parental responsibility decisions, the Brussels II-ter Regulation compels in some way the judge of the Member State where the recognition and enforcement is sought to accept the standards of the issuing Member State, even if those standards are lower.

Removing the *exequatur* is only a good idea when the laws of the Member States are sufficiently close. The principle of mutual trust between Member States may not be invoked as a counter-argument when disparities are that great between Member States. It is unquestionable that removing the *exequatur* procedure is a way to speed up procedure and avoid undue delay. Nonetheless, it should not be done without the sufficient approximation of laws, or for the European legislator to put the cart before the horse.³⁵

These issues are even more significant when dealing with much more sensitive cases, such as child abduction cases or decisions awarding right of access. For these cases, Regulations Brussels II-bis and its recast Brussels II-ter admit no grounds whatsoever for non-recognition and non-enforcement based on the absence of the hearing of a child.³⁶ Conse-

³² See Regulation Brussels II-ter, Article 21 and Article 26 for cross-reference.

³³ Recital 39 of Regulation Brussels II-ter could lead to a totally different interpretation as the reference to '*national law and procedure*' would only, according to the Recital, target '*who will hear the child and how the child is heard*'. This interpretation may be questioned.

³⁴ See Regulation Brussels II-ter, article 59.

³⁵ See F. Marchadier, 'La suppression de l'*exequatur* affaiblit-elle la protection des droits fondamentaux dans l'espace judiciaire européen?', *Journal européen des droits de l'Homme*, 2013, 3, p. 348.

³⁶ See however, as an exception, when the child is facing a grave risk, Art. 56§6 of regulation Brussels 2B.

quently, the judge of the Member State where the certified decision must be enforced will not be able to verify the respect of standards regarding the hearing of the child.³⁷

Child abduction cases also raise different and much more complex questions. When an authority is asking for the return of an abducted child, the judge of the Member State where the child has been taken will obviously, even if it is not expressly written in both Regulations, have to hear the child according to national law and procedure.³⁸ If the judge issues a decision of non-return, it will be up to the judge of the child's habitual residence to assess again the situation of the child by issuing a new decision on the substance of right of custody, following Regulation Brussels II-ter.³⁹ To issue that decision, the judge will have no other choice than to give the child a genuine and effective right to be heard. However, giving a child who is residing in another Member State a genuine and effective right to be heard may become a true enigma to solve.

In *Zarraga*, brought in 2010 before the Court of Justice of the European Union, a Spanish judge ordered the return of a child taken from Germany under Regulation Brussels II-bis.⁴⁰ After receiving a formal refusal by his German counterpart, the Spanish judge issued a new decision imposing return by the judge and cer-

tified that the child had been given the right to be heard, while this was, in fact, highly questionable.⁴¹

Indeed, the Spanish judge only sent a request to the child and her mother to come to Spain for the hearing and denied the organization of the hearing by videoconference.⁴² Without any guarantee for the child to return to Germany, the hearing of the child never took place. The decision ordering the child to come back to Spain was then issued without a proper hearing. In this situation, the Court of Justice of the European Union denied any right for the German judge to oppose the execution of the decision since the child had not been given a chance to be heard. A certified judgment may only be appealed in the issuing Member State.⁴³

This case is a very good example of the need for an approximation of laws between Member States. It may avoid any difficulties, in particular in child abduction cases, to organize a genuine hearing of a child in the Member State of habitual residence. Instead, the hearing might take place in the Member State where the child has been taken, provided that, with the approximation of laws, the standards of both Member States are nearly the same.

³⁷ See case C-195/08 PPU, *Rinau* (EU:C:2008:406), at para 89.

³⁸ See Regulation Brussels II-ter, Article 26.

³⁹ See Regulation Brussels II-ter, Article 29. Under Regulation Brussels II-bis, the situation is different. The judge may force the return of the child, without ruling on the substance of right of custody: see Regulation Brussels II-bis, Article 11§8 and case C-211/10 PPU, *Povse* (EU:C:2010:400).

⁴⁰ See case C-491/10 PPU, *Zarraga* (EU:C:2010:828).

⁴¹ *Ibid.*, points 16-36.

⁴² *Ibid.*, point 22. The organization of any hearing by videoconference may be requested under Article 10§4 of Council Regulation (EC) n° 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ 2001, L 174/1).

⁴³ See case C-195/08 PPU, *Rinau* (EU:C:2008:406), at para 89.

B. THE DETERMINATION OF COMMON STANDARDS

The determination of common standards deserves proper thinking. By clearing up differences between Member States, the European legislator will automatically lift any obstacle to recognition and enforcement of any decision in cross-border proceedings. Most of all, giving European children the same rights would be a way to reduce to a bare minimum any differences of approach in the principle of the best interest of the child.⁴⁴

After analysing the different European studies and the survey sent to European judges, our team considers that it has become essential for the European Union and, by extension, Member States to adopt common standards and ensure that children's rights are guaranteed to every child and for all judicial proceedings through statutory provisions. The appropriate forum to obtain an approximation of laws between European countries as quickly as possible is the European Union, where the European judicial system is well advanced.

The first common standard the European Union should implement relates to the provision of child-friendly information to children involved in judicial proceedings. This is critical to ensure equal treatment between children, for them to fully exercise their rights to participate in proceedings and express their views.

To that effect, at the beginning of all civil proceedings, it is important to appoint a mandatory childhood or youth professional such as a psychologist or social worker and to increase their role to ensure the child gets all relevant information. They should not only inform, but also support children before, during, and after the trial.

Every child should receive the same information according to his or her age and maturity, which requires appropriate interdisciplinary training of all professionals informing children with the same methods and tools to guarantee a standardized child-friendly approach. Indeed, it is essential to develop different means to inform children of their rights as widely as possible, even at school, by using materials such as brochures and leaflets, which should be available online as well as in printout form and including written and oral information. Moreover, at a time of massive use of mobile phones and internet, child-friendly information should be presented through specialized websites, online forums, or social networks where children can communicate and have access to childhood and youth professionals.

Another way to increase a child's right to information is to establish dedicated helplines to provide information and support to children who are eager to have simple access to childhood and youth professionals. The phone number should be easy to memorize and should be the same throughout the European Union.

⁴⁴ See European Commission, 'Study on the assessment of Regulation (EC) n° 2201/2003 and the policy option for its amendment', section 1.3.

The right for every child to access justice should be taken into consideration as a second common standard. As rights holders, children should have recourse to remedies to effectively exercise their rights or act upon violations of their rights, without any restriction. For this reason, one common standard the European Union should adopt is to remove any obstacle to access court, such as the cost of proceedings or the lack of legal counsel. Children involved in judicial proceedings should systematically have the right to access legal counsel and representation in their own name through freely available legal aid, including children's free and easy access to legal representation. In addition, any obstacle regarding the age of the child should also be removed. This improvement would enable children having sufficient understanding of their rights to access court and make use of any remedies to protect them.

Finally, the hearing of children should become mandatory, without any condition of maturity or age. The decision whether the child can form his or her own views should be left to the judge alone. The only way to refuse to hear a child would be to preserve him or her from any pressure or danger or, obviously, if the child expressly opposes the hearing. The German example is worth considering. This must not come without real and precise guidelines to help judges conduct their hearing. The judges must be able to hear what the child has to say, in any event, when the child takes the initiative in this way.⁴⁵

Drafting a proper directive binding European judges in family law proceedings could be rather a long way to go. Any approximation of laws would indeed require the unanimity of Member States as family law is a sensitive topic. Article 81§3 of the Treaty on the Functioning of the European Union (TFEU) clearly states that '*measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament*'.

In the meantime, the determination of common standards could be achieved by relying on undefined notions mentioned in the Brussels II-ter Regulation. The Regulation has already headed in the right direction by making a distinct provision stressing the right of any child to express his or her views.⁴⁶ The previous Brussels II-bis Regulation only stressed that right in its recitals, lowering its impact on the entire Regulation. However, the European legislator only went half-way by considering that the way the child is given the opportunity to be heard would still be according to '*national law and procedure*'. Even if Regulation Brussels II-ter deals with cross-border proceedings, any approximation of laws within its framework would obviously have an impact on national proceedings.

⁴⁵ See guidelines of the Council of Europe, point 47.

⁴⁶ See Regulation Brussels II-ter, Article 21 and 26.

CONCLUDING REMARKS

The determination of common standards may come from the Court of Justice of the European Union in preliminary ruling proceedings. National judges are indeed able to apply Article 267 TFEU and refer any question of interpretation of a European regulation directly applicable to their proceedings to the Court of Justice of the European Union. This must be strongly considered, as, in cross-border proceedings, Recital 39 of the Brussels II-ter Regulation apparently restricts the scope left to 'national law and procedure' to the question of who will hear the child and how the child will be heard. The Court of Justice of the European Union will however not act on its own but will need judges from Member States to refer questions.

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ANNEX

Copy of the survey sent to European judges

What is the place of children's voices in family law proceedings and how may their opinions affect decision-making processes?

We would like to know your professional practices when you hear children in judicial proceedings.

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1/ In which proceedings do you hear children?

2/ How are children informed of their rights to be heard? What is the content of this information?

3/ Are hearings systematically organized for every child?

4/ Otherwise, What are the conditions that you require to hear a child?

5/ How do you hear a child?

6/ What is the scope of children's voices in the decision-making process?

SEMI-FINAL C

EU AND EUROPEAN CIVIL PROCEDURE

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PARTICIPATING TEAMS

GERMANY, ALBANIA, ROMANIA, HUNGARY, THE NETHERLANDS,
FRANCE, HUNGARY (PROSECUTORS), PORTUGAL

1st place: Romania
2nd place: The Netherlands
3rd place: Germany

Selected papers for TAJ:
Germany, the Netherlands, Romania

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28 JUNE - 1 JULY 2022, BALATONSZEMES, HUNGARY -
NATIONAL OFFICE FOR THE JUDICIARY

JURY MEMBERS

APOSTOLOS ANTHIMOS (GR)

ATTORNEY AT LAW [THESSALONIKI], MLE [HANOVER],
INSTRUCTOR, EJTN / HELLENIC SCHOOL OF JUDGES,
EJN MEMBER, BOARD MEMBER [EAPIL]

I had the pleasure and the honour to participate as a THEMIS Annual Moot competition Jury member in the course of the 2022 Semi Final-C on EU and European Civil Procedure. The Moot competition was hosted by the Balatonszemes Judicial Training Centre (BOK), and organized by the EJTN, in cooperation with the Judicial Institute of Hungary. I am indebted to Dr Enikő Szilágyi, head of the Department for International Relations, and the staff of the Centre for the exceptional organization and the friendly environment surrounding us. Needless to say, the location was an additional reason for being thankful to the host.

This was my first face-to-face THEMIS competition. Last year we were confined in front of our monitors. I hope that we won't need to return to online sessions. The difference is immense. It is not just the chance to see the teams presenting their topic in the flesh. Moreover, it is the unique opportunity to meet jurists from many European states, discuss their legal orders, their studies, and their future projects. Last but not least, face-to-face events allow us to get to know each other better, and to deepen our relations towards our common law: a European legal culture.

This year's competition featured a wide array of European jurisdictions: Romania, France, The Netherlands, Portugal, Albania, Germany, and two Hungarian teams gave us the opportunity to elaborate on a number of different topics in the field of EU law and European Civil procedure. Admittedly, and with an apparent reason, the focus was shifted to climate justice. Other subjects were dedicated to the EAPO Regulation, e-justice, doctrinal issues of the preliminary reference to the CJEU, and special issues in the field of recognition and enforcement of foreign judgments. All topics selected were thought-provoking and innovative, opening new paths of legal research. Readers of the Themis Annual Journal will only benefit from the articles included in this volume.

I had the pleasure to work together with Professor Aleš Galič and Carlos Santaló Goris. Our cooperation was exemplary, and I hope to have the pleasure of joining a similar panel in the future. Last but not least, we had reliable backstopping by Ms Sara Sipos, Senior Project Manager / Programmes Unit, who assisted us throughout the entire process of the THEMIS competition.

All teams worked hard; all teams gave their best; they all deserve congratulations. Two teams have made it to the final. Dura lex, sed lex.

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The THEMIS competition is an excellent project and a fantastic experience both for the teams and the panellists. Apart from the purely scientific part, sharing almost a week together with jurists from different European countries is a genuine cultural enrichment.

ALEŠ GALIČ (SI)

PROFESSOR OF INTERNATIONAL PRIVATE LAW,
UNIVERSITY OF LJUBLJANA

I have been delighted to accept the EJTN's call to act as a juror in this year's THEMIS European Civil Procedure semi-finals. Being part of the jury of the THEMIS competition is always an extremely valuable professional and personal experience and it is a privilege to be able to participate. I am particularly happy that we were finally able to organize the event as a physical meeting (in the beautiful shores of the Balaton lake) and meet my fellow co-jurors, Apostolos and Carlos, as well as members of the participating teams and their tutors. A special word of gratitude to our hosts, the Hungarian National Office for the Judiciary at the Hungarian Academy of Justice and the team of Balatonszemes Judicial Training Centre. This brand new and excellently equipped and managed training and conference venue for Hungarian Judiciary is truly impressive and we were certainly privileged to be one of its first guests.

I have participated in numerous moot courts and similar competitions, in different capacities: as a law student, as a tutor and as a juror. Comparing all these events, I can, without a shred of exaggeration, say that – for a juror at least – the THEMIS format is by far the most interesting and rewarding. The reason is this: In other competitions all teams deal with the same topic and the same legal problems, based on the same underlying facts, and thus, from the viewpoint of a juror, after reading all the papers there is quite some amount of repetition. In THEMIS format however, each team does research on a topic of its own choice. This guarantees, already in and of itself, that a juror will have a great opportunity to learn a lot and to broaden significantly his or her horizons.

While the diversity of the topics covered by the teams is what makes the THEMIS most interesting for a juror, it is also its biggest disadvantage when it comes to the unavoidable task to do the final ranking. It is much easier objectively to compare – and rank – papers and presentations which all examine the same case. It is however extremely difficult to compare and rank excellent papers, dealing with different topics – of which some are novel, some are 'evergreen' (but thus probably also highly important in practice), some written in an area of law where there is already a huge body of case law and scholarly research, and some where the team is almost pioneering a research, some are dealing with topics which fall within the main academic/professional interest and expertise of a juror and some with topics, which are novel for the jurors as well... It is unavoidable that there might be some disappointment among some teams after the results are proclaimed. Yet I can assure you that the jurors do this final part of our work with much diligence, in good faith and striving for fair results.

All participating teams along with their tutors are the winners in the THEMIS competition. They should all be proud of their outstanding and inspiring performance and the displayed intellectual fervour and in-depth knowledge of EU law, international law and (comparative) national laws during the competition and the weeks or months of research, writing and preparing a video-presentation leading up to it. The diversity and the originality of chosen topics, already in and as of itself, demonstrates the tremendous amount of scholarly knowledge, accumulated in the papers and presentations.

CARLOS SANTALÓ GORIS (LU)

RESEARCH FELLOW MAX PLANCK INSTITUTE LUXEMBOURG
FOR PROCEDURAL LAW

After two consecutive years in which the THEMIS competition was held online, 2022 marked a return to the traditional, in-person format. In the case of the THEMIS Semi-Final on EU and European Civil Procedure, such a return to normality came with an amazing view of Balaton Lake in the Hungarian riviera on the premises of the Hungarian Judicial Authority. This was also my first year as a jury member, and my overall impression could not have been better.

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The chosen topics by the teams participating in the competition covered a wide range of areas. Several teams shared a particular interest in environmental subjects, symptomatic of the growing concern about climate change and how humanity's activities affect nature. Still, each of these teams addressed the issue from a different angle. Other teams opted for classic topics such as the preliminary reference to the European Court of Justice or cross-border litigation on civil matters. Overall, each presentation provided an interactive and thoughtful illustration of its topic. Teams were able to bring to life the paper they had submitted. The discussions that followed the presentations were a fruitful exchange of ideas between legal professionals from different backgrounds. Such an enriching experience could not have been achieved without the commitment and diligence of all THEMIS' participants. Initiatives such as the THEMIS Competition also enhance the sense of community among judges, future judges, and prosecutors who might eventually have to cooperate with peers from the other EU Member States in their careers. In this regard, the THEMIS Competition can be seen as another brick in the piecemeal construction of the EU Area of Freedom, Security, and Justice. Therefore, I can only reiterate how much of an honour it was to participate as a jury member.

MAX OBERFELD
GESCHE RIPKEN
KRISTINA REMPEL

TUTOR: NILS IMGARTEN



TEAM GERMANY II

THE PRELIMINARY RULING PROCEDURE: A LEGAL VACUUM IN UNION LAW?

The preliminary reference procedure is one of the cornerstones of European Union integration. It allows courts from each Member State to request a preliminary ruling from the ECJ on issues of European Union law, thus having a central role in its uniform application. According to Art. 267(3) TFEU, national courts are obligated to make such reference if such question is raised in a case pending before a national court of last instance.

In 1982, the ECJ formulated the CILFIT criteria creating exceptions from this rather broad obligation to refer. These criteria - especially the *acte clair* doctrine - have oftentimes been criticized as vague, hard to apply in practice and not enforceable. In the recent *Conorzio* judgment, the ECJ had the opportunity to take another stance on CILFIT.

As this paper points out, the ECJ did not make any major changes to the CILFIT criteria, thereby ensuring a wide range of referrals from the national courts. However, the ECJ stressed the national courts obligation to state reasons when refraining from making a reference. Against this backdrop, *Conorzio* can be seen as a first step towards a future enforcement mechanism.

KEY WORDS

Preliminary reference procedure ▪ European Court of Justice ▪ Uniform application of European Union law ▪ CILFIT doctrine ▪ *Acte clair* ▪ *Conorzio* judgment ▪ Enforcement mechanism.

A. INTRODUCTION

The preliminary ruling procedure of Art. 267 TFEU allows courts of the EU member states to submit certain questions on the interpretation and validity of Union law to the European Court of Justice (hereinafter “ECJ” or “the Court”). Insofar, it has played an undisputedly important role not only in advancing European integration in general but also the harmonization in the field of civil law which is particularly affected by European specifications.¹ Art. 267(3) TFEU constitutes an obligation to refer for national courts of last instance but in 1982, the ECJ formulated the so called CILFIT doctrine, stipulating by now well consolidated exceptions to that obligation - most notably the *acte clair* and the *acte éclairé*.

The CILFIT doctrine has never been exempt of criticism, however, in recent years those critics have grown more numerous and vocal, even likening the preliminary ruling procedure to a legal vacuum, or with Jaeger, a ‘union law-free zone’.² Considering the importance of this procedure for the uniform application of Union law, such criticism - if found to be true - would put the European Union as a community of law at risk. In *Conorzio*, a preliminary reference made by the Italian *Consiglio di Stato*, the ECJ

recently had the opportunity to take another stance on the CILFIT criteria. Posed by AG Bobek in his opinion, the Court had to *inter alia* answer the question whether the CILFIT doctrine still provides the necessary answers to guarantee a reasonable implementation of the preliminary reference procedure.

B. OBJECTIVES OF THE PRELIMINARY RULING PROCEDURE

The preliminary ruling procedure of Art. 267 TFEU can be described as one of the essential driving forces of European integration. This description covers various dimensions:

For one, the preliminary ruling mechanism is the procedural safeguard of the ECJ’s exclusive power to interpret and annul Union law.³ It provides an indirect mechanism to review the legality of EU acts by allowing a preliminary reference on validity.⁴ Furthermore, Art. 267 TFEU safeguards the ECJ’s monopoly on interpretation and decreases the risk that a national court will adopt an incorrect or inconsistent interpretation.⁵

¹ Cf. I. Klauer, *Die Europäisierung des Privatrechts - Der EuGH als Zivilrichter*, 1998, at 17 et seq.; Fredriksen, ‘Die Zusammenarbeit zwischen dem EuGH und deutschen Zivilgerichten im Lichte des Vorausscheidungsverfahrens nach Art. 234 EGV’, 26 *Berliner Online Beiträge zum Europarecht* (2005) 1, at 6.

² Jaeger, ‘CILFIT nach dem Urteil Conorzio: Rückenwind für den Acte clair’, 1 *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)* (2022) 19, at 19.

³ Cf. Kühling and Drechsler, ‘Alles “acte clair”? - Die Vorlage an den EuGH als Chance’, 41 *Neue Juristische Wochenschrift (NJW)* (2017) 2950, at 2951.

⁴ E.g. Case 263/02 P, *Commission v Jégo-Quéré* (ECLI:EU:C:2004:210), at para. 30.

⁵ Joutsamo, ‘Community law - National law relationship - judicial cooperation under the system of preliminary rulings (Art. 177)’, *Tidskrift utgiven av Juridiska Föreningen i Finland (JFT)* (1991) 337, at 339; Broberg and Fenger, ‘Theorie und Praxis der Acte-clair-Doktrin des EuGH’, 6 *Europarecht (EuR)* (2010) 835, at 838.

Another dimension concerns the relationship between the ECJ and the national courts. The preliminary ruling procedure is a non-contentious court-to-court procedure without any possibility of initiative for the concerned parties.⁶ These characteristics make it a unique procedure within the remedies available before the ECJ. The Court itself emphasized the relationship of cooperation between the national courts and the Court that is embodied in the obligation to make a reference in Art. 267(3) TFEU.⁷ Insofar, the preliminary reference procedure reflects the complexity not only of the European legal framework, but also of the European judicial order. It acknowledges the reality that the national courts are more numerous and have better resources than the ECJ as a single court responsible for an ever-growing number of member states.⁸ They take on the role of a gatekeeper and thus offer some relief in workload for the ECJ.⁹ On the other hand, it also results in the procedure's success being dependent on the national courts actually participating in it, i.e. making the reference; a participation to which they are obliged under Art. 267(3) TFEU but which cannot be enforced by the ECJ.

Most notably however, the preliminary reference procedure is a key instrument in the coherent development of Union law. Integral principles like the supremacy of Union law¹⁰, direct effect,¹¹ state liability in damages,¹² procedural autonomy,¹³ equivalence and effectiveness¹⁴ have all been developed by the ECJ through preliminary rulings as well as significant rulings in most fields of secondary Union law.¹⁵ At the same time, the preliminary ruling procedure is a means to ensure that Union law is applied uniformly across all member states.¹⁶ Two quotes almost forty years apart demonstrate the continued importance of this dimension. In 1974, the ECJ opened its judgment in the case of *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* by stating:

'Article 177 [now Art. 267] is essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of the Community. [...] [I]t likewise tends to ensure this application by making available to the national judge a means of eliminating difficulties which may be occasioned by the requirement of

⁶ C. Barnard and S. Peers (eds.), *European Union Law* (2nd ed., 2017), at 293; Case 44/65, *Hessische Knappschaft v Maison Singer* (ECLI:EU:C:1965:122); D. Chalmers, G. Davies and G. Monti, *European Union Law* (4th ed., 2019), at 167. 7 Case 283/81, *CILFIT* (ECLI:EU:C:1982:335), at para.7.

⁸ Cf. D. Chalmers, G. Davies and G. Monti, *supra* note 6, at 166.

⁹ *Ibid.*, at 167; L. Hornuf and S. Voigt, 'Preliminary References - Analyzing the Determinants that Made the ECJ the Powerful Court It Is', 3769 *CESifo Working Paper Series* (2012) 1, at 5.

¹⁰ Case 6/64, *Costa v ENEL* (ECLI:EU:C:1964:66).

¹¹ Case 26/62, *Van Gend en Loos* (ECLI:EU:C:1963:1).

¹² Joined Cases 6/90 and 9/90, *Francovich* (ECLI:EU:C:1991:428).

¹³ Case 33/76, *Rewe* (ECLI:EU:C:1976:188).

¹⁴ Case 45/76, *Comet BV v Produktschap voor Siergewassen* (ECLI:EU:C:1976:191).

¹⁵ C. Barnard and S. Peers (eds.), *supra* note 6, at 294; D. Chalmers, G. Davies and G. Monti, *supra* note 6, at 180. 16 Cf. C. Barnard and S. Peers (eds.), *supra* note 6, at 294; Case 66/80, *International Chemical Corporation v Amministrazione delle finanze dello Stato* (ECLI:EU:C:1981:102), at para. 11. See also Case 166/73, *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (ECLI:EU:C:1974:3), at para. 2.

*giving Community law its full effect within the framework of the judicial systems of the Member States.*¹⁷

A similar sentiment is displayed in the 2011 judgment of *Commission v Spain*:

*'[...] [I]t follows from the need for uniform application of European Union law and from the principle of equality that the terms of a provision [...] for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union.'*¹⁸

The importance of the preliminary reference procedure of Art. 267 TFEU within and for the functional structure of the European Union can therefore hardly be overestimated.

C. THE CILFIT CRITERIA

While the wording of Art. 267(3) TFEU suggests an absolute duty to refer relevant questions imposed on courts of last resort, the ECJ has essentially created two exceptions to this obligation in the judgments *Da Costa*¹⁹ and *CILFIT*.²⁰

The first exception stipulates that a reference is not obligatory if the referred question is materially identical to a question already answered in a previous preliminary ruling or to points of law that

have already been addressed by the Court.²¹ This situation is described as an *acte éclairé*.²² Of course, even in case of an *acte éclairé*, the national court in question *may* still refer the case to the ECJ under Art. 267(2) TFEU;²³ the exception merely eliminates the obligation.

As a second exception, there is no obligation to refer where the correct application of Union law is so obvious as to leave no scope for any reasonable doubt to the manner in which the question raised is to be resolved.²⁴ Continuing the terminology on exceptions, this exception is referred to as the *acte clair* doctrine.

Sensing perhaps that the second exception of the *acte clair* doctrine in particular with its indefinite legal terms was open to misuse by national courts unwilling to conduct the reference to Luxembourg, the ECJ imposed concrete requirements for determining when a reference was not necessary. National courts wanting to forego a reference have to (1) compare all language versions of the provision of Union law at stake, (2) take account of the peculiar Union law terminology and of the different meaning of legal concepts in Union law and in the national legal systems, and (3) place every provision of Union law in its context and interpret it in light of Union law as a whole and of its particular state of evolution.²⁵ These conditions are referred to as the CILFIT criteria.

¹⁷ Case 166/73, *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (ECLI:EU:C:1974:3), at para. 2.

¹⁸ Case 281/09, *Commission v Spain* (ECLI:EU:C:2011:767), at para. 42.

¹⁹ Joined Cases 28-30/62, *Da Costa v Nederlandse Belastingadministratie* (ECLI:EU:C:1963:6).

²⁰ Case 283/81, *CILFIT* (ECLI:EU:C:1982:335).

In recent years, the ECJ has clarified and amended the CILFIT conditions in a number of judgments. In *X and van Dijk*, the Dutch Supreme Court (*Hoge Raad*) had asked the ECJ to clarify whether the fact that a question was referred for a preliminary ruling by a lower national court precluded the highest national court from taking the view that the correct application of Union law is so obvious as to leave no scope for reasonable doubt.²⁶ The ECJ emphasized the national court's discretion in determining whether it assumed an *acte clair*. In accordance with the principle of cooperation that the preliminary reference procedure is based on, the interpretation of the CILFIT criteria would be conducted independently by the respective national court of last resort.²⁷ Stating further that an *acte clair* should be considered in the light of the particular circumstances of the case, the Court concluded that a reference by a lower national court did not preclude a court of last resort to come to the conclusion that an *acte clair* was involved.²⁸

The judgment of *X and van Dijk* was followed closely by the judgment of *Ferreira da Silva*.²⁹ In this case involving an action against collective redundancy, the Portuguese Supreme Court (*Supremo Tribunal de Justica*) had invoked an *acte clair* by stating there was no reasonable doubt regarding the interpretation of the relevant Union law. The parties to the case had a different view and initiated an action for civil liability against the Portuguese state for breach of Art. 267(3) TFEU during which the court of first instance made a reference to the ECJ to ask whether the Portuguese Supreme Court was obliged to make a reference in the foregoing case under Art. 267(3) TFEU. While in this particular case, the ECJ assumed there was no *acte clair* and the *Supremo Tribunal de Justica* thus breached its obligation to refer³⁰, on a more general level, the Court stated that the fact that other national courts may have rendered contradictory decisions did not stop a provision from being an *acte clair*.³¹

²¹ Joined Cases 28-30/62, *Da Costa v Nederlandse Belastingadministratie* (ECLI:EU:C:1963:6); Case 283/81, *CILFIT* (ECLI:EU:C:1982:335), at para. 14.

²² C. Barnard and S. Peers (eds.), *supra* note 6, at 300; D. Chalmers, G. Davies and G. Monti, *supra* note 6, at 191.

²³ The ECJ would not issue a decision on the merits in case of an *acte éclairé*, instead the Court would issue an order or a note pointing out the existing case law and suggesting that the referring court withdraw its preliminary reference, cf. B. Wägenbaur, '*EuGH Verfo*' (2nd ed., 2017), Art. 99, at paras. 3 et seq.

²⁴ Case 283/81, *CILFIT* (ECLI:EU:C:1982:335), at para. 16.

²⁵ *Ibid.*, at paras. 17-20.

²⁶ Joined Cases 72/14 and 197/14, *X and van Dijk* (EU:C:2015:564), at para. 32.

²⁷ *Ibid.*, at paras. 57-59.

²⁸ *Ibid.*, at para. 60.

²⁹ Case 160/14, *Ferreira da Silva e Brito* (EU:C:2015:565).

³⁰ As it happens, this was the first time since the introduction of the preliminary ruling procedure that the ECJ assumed such a breach of the obligation to refer.

³¹ Case 160/14, *Ferreira da Silva e Brito* (EU:C:2015:565), at para. 41.

It therefore allowed some scope for disagreement about the interpretation of a provision before the matter had to be referred.³² *Ferreira da Silva* can be regarded as a continuation of the jurisprudence started in *X and van Dijk* where the Court ruled on the question of diverging opinions between a lower and a higher court, i.e. within one member state.

In general, there are limited possibilities to review the application of the CILFIT criteria. Theoretically, the European Commission or other member states could bring an infringement proceeding under Art. 258 and 259 TFEU if they were of the opinion that a national court wrongly assumed an *acte clair* or an *acte éclairé*. For an individual, however, the only mechanism to determine misuse of the CILFIT criteria appears to be by way of the doctrine of state liability in damages, as first established in *Köbler*.³³ To date, there are relatively few instances of a member state being successfully sued in application of the *Köbler* case-law because of a failure to refer.³⁴

D. THE PRELIMINARY RULING PROCEDURE IN PRACTICE

In order to adequately give an assessment of the CILFIT criteria, it is necessary to look at their practical implementation – as well as the application of the preliminary ruling procedure in general. Several observations apply:

One is the preliminary ruling procedure's evident increase in importance over the years, in particular over the last 20 years. This observation can be quantified in the number of proceedings resolved before the ECJ. Whereas in 2000, preliminary ruling procedures already had a share of 51%³⁵ of all ECJ decisions, in 2010 that number was up to 59%³⁶ and by 2020 two-thirds of all decisions were based on preliminary ruling procedures.³⁷ This development also appears to be continuing for the foreseeable future: Of the 725 new procedures brought before the ECJ in 2020, 556 were intended for a preliminary ruling; taking the percentage above 75%.³⁸

³² D. Chalmers, G. Davies and G. Monti, *supra* note 6, at 194; Limante, 'Recent Developments in the Acte Clair Case Law of the EU Court of Justice: Towards a More Flexible Approach', 54 *Journal of Common Market Studies (JCMS)* (2016) 1384, at 1392.

³³ Case 224/10, *Köbler* (EU:C:2003:513). A number of states have developed an alternative remedy that is linked to the denial of access to justice or the denial of the right to a fair trial, cf. D. Chalmers, G. Davies and G. Monti, *supra* note 6, at 190; Valutyte, 'Legal Consequences for the Infringement of the Obligation to make a Reference for a Preliminary Ruling under Constitutional Law', 19 *Jurisprudence* (2012) 1171, at 1182; Lacchi, 'Multilevel Judicial Protection in Preliminary References', 53 *Common Market Law Review (CMLRev)* (2016) 679.

³⁴ D. Chalmers, G. Davies and G. Monti, *supra* note 6, 190; Varga, 'National Remedies in the Case of Violation of EU Law by Member State Courts' 54 *Common Market Law Review (CMLRev)* (2017) 51, at 56.

³⁵ Court of Justice of the European Union, Annual Report on Judicial Activity 2000, 2001, 3, at 3.

³⁶ Court of Justice of the European Union, Annual Report on Judicial Activity 2010, 2011, D., at 8. 37 Court of Justice of the European Union, Annual Report on Judicial Activity 2020, 2021, at 214.

³⁸ *Ibid.*, at 209.

That the ECJ now has to deal with a generally higher caseload than 20 years ago³⁹ is, of course, a natural consequence of the EU's continued expansion.

Another observation concerns the referral rate of the individual member states. There are significant differences in the total number of referrals from member state to member state. Since the introduction of the preliminary reference mechanism in 1961, national courts in some member states consistently refer cases to the ECJ less frequently than courts in other member states. While these variations can be explained by structural factors, such as the date of accession, population size, economic activity, social conflicts and specific interests, to some extent,⁴⁰ there remain differences that cannot fully be attributed to structural factors. One example of two member states with substantially diverging referral rates are Germany and France - both founding members of the European Communities and the two most populous countries in the EU. While Germany boasts a traditionally

high number of preliminary references to the ECJ with an average of 80.9 cases per year between 2000 and 2020 (139 in 2020), France referred an average of 23.1 cases in the same period (21 in 2020).⁴¹ Another example can be drawn by comparing referral statistics of the Baltic countries (Estonia, Lithuania, and Latvia) which all joined the EU in 2004. Since then, Estonia used the preliminary reference mechanism in 33 cases (3 in 2020), Lithuania in a total of 75 cases (7 in 2020), and Latvia in 94 cases (17 in 2020) - despite Lithuania being the most populous of the three countries and comparatively similar population sizes of Estonia and Latvia.⁴²

This pattern extends to preliminary references by national courts of last resort. Between 1978 and 2001, the French Administrative Court of last resort (*Conseil d'État*) considered Union law 191 times but made only 18 references. During the same period, the Austrian Constitutional Court (*Verfassungsgerichtshof*) referred about half of the cases in which it considered Union law.⁴³

³⁹ In 2000 the Court completed 526 proceedings, up to 792 in 2020, cf. Court of Justice of the European Union, *supra* note 35; Court of Justice of the European Union, *supra* note 37.

⁴⁰ Cf. Rösler, 'Die Vorlagepraxis der EU-Mitgliedstaaten', *Europarecht* (EuR) (2012) 392, at 392; Broberg and Fenger, 'Variations in Member States' Preliminary References to the Court of Justice - Are Structural Factors (Part of) the Explanation?', 19 *European Law Journal* (ELJ) (2013) 488, at 500.

⁴¹ Court of Justice of the European Union, *supra* note 37, at 231.

⁴² *Ibid.*, at 231. Estonia has a population size of 1,3 Mio. (https://eacea.ec.europa.eu/national-policies/eurydice/estonia/population-demographic-situation-languages-and-religions_en), Lithuania of 2,8 Mio. (https://eacea.ec.europa.eu/national-policies/eurydice/content/population-demographic-situation-languages-and-religions_44_en) and Latvia of 1,9 Mio. (https://eacea.ec.europa.eu/national-policies/eurydice/content/population-demographic-situation-languages-and-religions-40_en).

⁴³ D. Chalmers, G. Davies and G. Monti, *supra* note 6, at 190; Fenger and Broberg, 'Finding Light in the Darkness: On the Actual Application of the Acte Clair Doctrine' 30 *Yearbook of European Law* (YBEL) (2011) 180, at 188. Preliminary references by constitutional courts pose a separate issue as the constitutional courts often do not classify themselves as a 'court or tribunal' within the meaning of Art. 267 TFEU and refuse the possibility of a referral for this very reason, and a discussion of it would exceed the limitations of this paper. For further information see e.g. Dicosola, Fasone, and Spigno, 'After the Treaty of Lisbon and the Euro-Crisis' 16 *German Law Journal* (GLJ) (2015) 1317, at 1318; Millet and Perlo, 'The First Preliminary Reference of the French Constitutional Court to the CJEU: Révolution de Palais or Revolution in French Constitutional Law?', 16 *GLJ* (2015) 1471, at 1472.

In view of these pronounced differences in the member states' referral practice and the ongoing rapid increase in the density of Union law, it appears probable that a high number of proceedings before national courts are not being referred despite involving relevant interpretation issues. At the same time, these divergences demonstrate that domestic courts in different member states apply different standards when assessing a duty to refer - which in turn suggests both flexibility and a certain ambiguity in the application of the criteria for a referral.

E. CRITICISM OF THE CILFIT CRITERIA

The CILFIT judgment has been discussed and criticized since it was passed in 1982. In particular, the Advocates-General repeatedly raised critical thoughts in the decision-making process before the ECJ in regards to the CILFIT criteria.⁴⁴

I. LACK OF PRACTICALITY OF THE ACTE CLAIR DOCTRINE

To date, national courts have been reluctant to comply with the obligation to refer to the ECJ as part of the preliminary ruling procedure. The reasons for this are *inter alia* uncertainties in regard to the application of the *acte clair* doctrine.⁴⁵

On a subjective level - the condition of the absence of reasonable doubt - there is a considerable degree of vagueness which cannot be ascertained or verified. Additionally, the CILFIT criteria set objective demands on the national courts that are virtually unattainable.⁴⁶ With its strict criteria for the assumption of an *acte clair*, the ECJ demands a hardly achievable comprehensive examination of the wording, systematics, meaning and purpose, as well as comparative legal considerations of the Union law in question.⁴⁷ The ECJ pointed out in its CILFIT judgment that all language versions of the Union law in question are equally compulsory.⁴⁸ At the time of the CILFIT judgment the EU had 7 official working languages, while today there are 24. Given the required degree of certainty, an examination of the interpretation in all languages by the court of last instance would be necessary.⁴⁹

⁴⁴ Cf. Case 338/95, *Wiener v Hauptzollamt Emmerich* (ECLI:EU:C:1997:352), Opinion of AG Jacobs, at paras. 54 et seq.; Case 495/03, *Intermodal Transports* (ECLI:EU:C:2005:215), Opinion of AG Ruiz-Jarabo Colomer, at paras. 99 et seq.; Joined Cases 72/14 and 197/14, *X and van Dijk* (ECLI:EU:C:2015:319), Opinion of AG Wahl, at paras. 62 et seq. ⁴⁵ Obert, 'Zur Zukunft der CILFIT-Doktrin', 18 *Zeitschrift für das Privatrecht der EU (GPR)* (2021) 150, at 152; Case 72/14, *X and van Dijk* (ECLI:EU:C:2015:319), Opinion of AG Wahl, at para. 1.

⁴⁵ At 152.

⁴⁶ Obert, *supra* note

⁴⁷ K. Hummert, *Neubestimmung der acte-clair-Doktrin im Kooperationsverhältnis zwischen EG und Mitgliedstaat*, 2006, at 35.

⁴⁸ Case 495/03, *Intermodal Transports* (ECLI:EU:C:2005:215), Opinion AG Stix-Hackl, at para. 99.

⁴⁹ Broberg and Fenger, *supra* note 5, at 839 et seq.

Since a comparison of all language versions can be considered practically impossible for the national courts, the comparison and examination of jurisdiction of courts from other member states becomes an insurmountable obstacle. Often, the national courts will only be able to assume that they reach the same conclusion. The obligation to carry out such an extensive examination lessens the practical significance of the *acte clair* doctrine.⁵⁰

The strict requirements imposed on the complex process of interpretation, which national courts have to carry out, mean that it is almost impossible to assume that there is an *acte clair*.⁵¹ Nevertheless, courts of last instance of the member states regularly refrain from a referral because they believe that they can solve the respective Union law question on their own with the necessary self-confidence or they want to elude the complex examination of all language versions of the Union law in question and jurisdiction of the other member states.⁵²

Additionally, the concept of doubt used by the ECJ in CILFIT is not clearly defined. Doubts about the meaning of a provision can never be completely ruled out from a critical point of view.⁵³

Since the national courts have discretionary powers to decide whether there is reasonable doubt, they have the possibility to refrain from a reference by relying on apparent but inexistent clarity even though a reference is, in fact, necessary due to the disputability of a question.⁵⁴ This is problematic because a careless use of the CILFIT doctrine could result in a flawed application of Union law at the national level.⁵⁵ The consequence is contradiction. Because the requirements to establish an *acte clair* in the true meaning of the CILFIT case-law are exceptionally high, the criteria are often neglected or applied in a superficial way. Consequently, the strict interpretation of the CILFIT doctrine might arguably have the opposite effect than intended, not intensifying but limiting judicial scrutiny.⁵⁶ In conclusion, the ambiguous interpretation poses a strong barrier in the communication process between national and European jurisdictions.⁵⁷

Aside from the national courts, even the ECJ does not apply the criteria consistently. Looking at the jurisprudence citing the CILFIT criteria, it is striking that while judgments refer to the CILFIT judgment and some even refer to the exceptions, none of them actually apply the criteria concretely.⁵⁸

⁵⁰ Palmstorfer and Kreuzhuber, 'Keine Abkehr von Cilfit - Anmerkung zum Urteil des EuGH v. 6.10.2021', *Zeitschrift Europarecht (EuR)* (2022) 239, at 242; K. Hummert, *supra* note 47, at 37.

⁵¹ K. Hummert, *supra* note 47, at 37.

⁵² *Ibid.*, at 39.

⁵³ *Ibid.*, at 37.

⁵⁴ Jaeger, *supra* note 2, at 20.

⁵⁵ C. Barnard and S. Peers (eds.), *supra* note 6, at 300 et seq.

⁵⁶ K. Hummert, *supra* note 47, at 39.

⁵⁷ Hilpold, 'Stärkung der Vorlagepflicht letztinstanzlicher Gerichte', 45 *Neue Juristische Wochenschrift (NJW)* (2021) 3290, at 3291.

⁵⁸ Case 160/14, *Ferreira da Silva e Brito* (EU:C:2015:565); Joined Cases 72/14 and 197/14, *X and van Dijk*, (ECLI:EU:C:2015:546); Case 379/15, *Associatio France Nature Environnement* (ECLI:EU:C:2016:603); Case 561/19, *Consorzio Italian Management v Catania Multiservizi* (ECLI:EU:C:2021:291), Opinion AG Bobek, at para. 80. 59 K. Hummert, *supra* note 47, at 38.

II. THE ADVANCED STAGE OF DEVELOPMENT OF THE EU

The CILFIT judgment shows the ECJ's endeavours to define its own competences as broadly as possible by means of a narrow definition of the *acte clair* doctrine and, on the other hand, to leave the national courts as little scope of decision-making as possible. The judgment was passed in 1982, thus at a time when the European internal market was not yet complete and the level of development of the EU was not as advanced as it is today. At this point in time, the ECJ was still striving to take on as many proceedings as possible in order to consolidate its position and to advance the development of Union law.⁵⁹ In the meantime, this situation has changed due to the establishment of the European jurisdiction and the greatly increased demands on the ECJ.⁶⁰ Accordingly, the CILFIT criteria are criticized as outdated.⁶¹ It is argued that they must be adapted to the challenges that the modern EU poses to its legal protection system.⁶²

The effectiveness of the jurisdiction of the ECJ depends in particular on the cooperation of national judges, which in return depends on the acceptance of the Court's jurisdiction by the national courts.⁶³ That being the case, critics have voiced the opinion that it would make sense not to burden the national courts with unfulfillable criteria, but to accommodate them in order to bring

about a sensible handling of the *acte clair* doctrine by appealing to their willingness to cooperate. Only by strengthening the responsibility of the national courts and transferring tasks to them as 'union courts' within the framework of a relationship based on the division of labour can the preliminary ruling procedure be dealt with properly. Through their margin of assessment, the national courts are given the task of ensuring that Union law is effective by checking whether clarification by the ECJ appears necessary for its further development.⁶⁴

III. ENSURING THE EFFECTIVENESS OF THE PRELIMINARY RULING PROCEDURE

An evaluation of the CILFIT criteria must also take into account the objectives of the preliminary ruling procedure. As already described, the preliminary ruling procedure has a dual purpose. On the one hand, it maintains the uniformity of Union law. On the other hand, the preliminary ruling procedure ensures the effective application of European law. Consequently, individual legal protection in the European Union is better guaranteed. Theoretically, legal unity would be best achieved by the ECJ taking a position on all questions of European law.⁶⁵ However, some critics argue that in a complex and extensive legal system such as the European one, it would serve legal unity more if the ECJ would concentrate

⁶⁰ L. Malferrari, *Zurückweisung von Vorabentscheidungsersuchen durch den EuGH*, 2003, at 225 et seq.

⁶¹ Jaeger, *supra* note 2, at 19.

⁶² *Ibid.*, at 19; L. Malferrari, *supra* note 60, at 228.

⁶³ Case 72/14, *X and van Dijk* (ECLI:EU:C:2015:319), Opinion of AG Wahl, at para. 64; K. Hummert, *supra* note 47, at 38.

⁶⁴ K. Hummert, *supra* note 47, at 39 et seq.

⁶⁵ *Ibid.*, at 225 et seq.

on giving clear, well-reasoned and well-thought-out solutions to fundamental legal problems than for it to settle the greatest possible number of legal questions, regardless of their importance, as quickly as possible.⁶⁶ At a certain point, the increase in the quantity of decisions entails a decrease in their quality.⁶⁷ Apart from a few exceptions, it has become normal for most national courts to treat European law not like international law but very much like higher-ranking national law. Therefore, the most frequent use of the preliminary ruling procedure is no longer necessary for the effective application of European law. The cooperation relationship between the national courts and the ECJ must be adapted to the changed status and the new requirements of European integration.⁶⁸

IV. DIFFERENTIATION BETWEEN APPLICATION AND INTERPRETATION

Another point of criticism, particularly expressed by Advocate General *Bobek*, is that the reasoning for the obligation to refer is not expressed consistently in the practice of the ECJ. The CILFIT judgment explicitly referred to the correct and proper *application* and *interpretation* of Union law. AG *Bobek* proposes that when it comes to the *application* of Union law, the national courts should be exempt from the obligation to refer.⁶⁹ Since the ECJ includes the application of Union

law in the scope of 'absence of reasonable doubt', national courts also submit questions of fact and rather technical questions of application.⁷⁰ However, critics advocate that the role of the ECJ should primarily consist of formulating and further developing the essential principles and abstract standards of Union law which can be left for concrete application to the national courts.⁷¹

This differentiation becomes necessary especially because of the ECJ's increasing workload. If the national courts nowadays generally treat Union law like higher ranking national law, it is no longer necessary for this willingness to be constantly promoted through the preliminary ruling procedure. Instead, the increase of quantity and complexity of European law leads to an overload of preliminary ruling procedures.⁷²

V. SYSTEMATIC COHERENCE OF UNION LAW REMEDIES

Advocate General *Bobek* makes another argument as to why it is necessary to revisit CILFIT: the systematic coherence of Union law remedies. The CILFIT criteria are disconnected from Union law's own means of enforcing the obligation to make a reference under Art. 267(3) TFEU. There is no specific and direct Union law remedy available to the parties if they believe that their right to have a case referred to the ECJ has been violated.⁷³

⁶⁶ Ibid., at 227; Case 17/00, *De Coster* (ECLI:EU:C:2001:651), Opinion AG *Colomer*, at para. 62. 67 L. Malferrari, *supra* note 60, at 227.

⁶⁸ Ibid., at 228.

⁶⁹ Case 561/19, *Consorzio Italian Management v Catania Multiservizi* (ECLI:EU:C:2021:291), Opinion AG *Bobek*, at para. 135 et seq.

⁷⁰ T. Groh, *Die Auslegungsbefugnis des EuGH im Vorabentscheidungsverfahren*, 2005, at 32 et seq. 71 Obert, *supra* note 45, at 151 et seq.

⁷² L. Malferrari, *supra* note 60, at 220 et seq.

⁷³ Opinion AG *Bobek*, *supra* note 58, at para. 113.

Since the judgment in *Köbler*⁷⁴ 2003, there is the possibility of obtaining legal redress before national courts because of damage caused by the violation of individual rights through the judgment of a last-instance national court. Therefore, the infringed law must be intended to confer rights on individuals, the breach must be sufficiently serious and there must be a direct link between the breach of the obligation incumbent on the member state and the damage sustained by the parties.⁷⁵ However, AG *Bobek* argues that Art. 267(3) TFEU is not a rule intended to confer rights on individuals, so the non-compliance with the obligation to refer can actually not invoke state liability on its own.⁷⁶ This shows a dogmatic incoherence regarding the *Köbler*-requirements of state liability and their application on the preliminary ruling procedure. Furthermore, the standard in such cases is an obvious violation of the applicable law, which may lead to a sufficiently serious breach. *Bobek* declares that the CILFIT criteria, objectively, play no role in the evaluation of whether or not there has been a violation of other Union laws.⁷⁷ Therefore, this mechanism for legal protection is practically insufficient.⁷⁸

In contrast, infringement proceedings pursuant to Art. 258 TFEU were fully implemented in 2018 in the judgment

Commission v. France, in which the ECJ decided that a member state was in breach of Union law specifically for the failure of a last-instance national court to make a reference to the ECJ in order to fulfill their obligation to refer in a situation where the interpretation of the substantive provisions of Union law in question was not so apparent as to leave no scope for reasonable doubt.⁷⁹ This judgment can be assessed as a plea to the national courts to take their obligation to refer more seriously. It is not to be expected that the European Commission will take more action to protect individual rights in this context in the future, due to the universality of its control function. The decision whether to take action will depend on several political considerations.⁸⁰

Furthermore, in that judgment the ECJ referred to the CILFIT in general and contended itself with merely stating that the criterion - the absence of reasonable doubt - was laid down in CILFIT, without applying it. AG *Bobek* accuses the ECJ of a hardly defensible selectivity as to what is in fact being applied and enforced, as well as why and how that application and enforcement takes place. This lack of consistency in enforcing the obligation to refer increases the uncertainty in regards to the preliminary ruling procedure.⁸¹

⁷⁴ Case 224/10, *Köbler* (EU:C:2003:513).

⁷⁵ *Ibid.*, at para. 51 et seq.; Case 168/15, *Tomášová* (ECLI:EU:2016:602), at para. 22 et seq.

⁷⁶ Opinion AG *Bobek*, *supra* note 58, at para. 115.

⁷⁷ *Ibid.*, at para. 115.

⁷⁸ Hilpold, *supra* note 57, at 3292.

⁷⁹ Case 416/17, *Commission v France (Advance payment)* (ECLI:EU:2018:811); Opinion AG *Bobek*, *supra* note 58, at para. 116.

⁸⁰ Hilpold, *supra* note 57, at 3292.

⁸¹ Opinion AG *Bobek*, *supra* note 58, at para. 120.

F. THE PARADIGM SHIFT⁸² PROPOSED BY AG BOBEK

In light of this criticism against the CILFIT criteria it is no real surprise that in his opinion on the *Conorzio* case, Advocate General *Bobek* seized the opportunity to suggest a re-definition of the criteria developed under Art. 267(3) TFEU to the ECJ.

The key idea of *Bobek's* proposal can be described in the following way: The subjective approach of the CILFIT criteria with its reasonable doubt criterion as the centre point should be shifted towards a more objective understanding of the duty to refer, meaning that there shall be such duty if there is an '*objective divergence detected in the case-law at the national level and thereby threatening the uniform interpretation of EU law (...)*'.⁸³ Thus, *Bobek* suggested that there shall be an obligation to refer under Art. 267(3) TFEU provided three conditions are fulfilled, i.e. the case raises ' [1] *a general issue of interpretation of EU law (as opposed to its application)*; [2] *to which there is objectively more than one reasonably possible interpretation*; [3] *for which the answer cannot be inferred from the existing case-law of the Court of Justice (...)*'.⁸⁴

The first important change to the CILFIT criteria in *Bobek's* proposal is that in order to assume an obligation to refer all three of the above mentioned criteria must be fulfilled cumulatively rather than being stand-alone exceptions to the obligation to refer.⁸⁵ This would mean a drastic dogmatic change to the obligation to refer since national courts would not search for an exception to the obligation to refer as under CILFIT but rather decide whether all criteria to create such an obligation are met. Second, an obligation to refer shall only arise from questions regarding the interpretation (and not the application) of Union law.⁸⁶ *Bobek* drew a line between application and interpretation, stating that an issue of interpretation requires a '*reasonable and appropriate level of abstraction*'⁸⁷ meaning that the interpretation shall be of '*general or generalisable impact*'.⁸⁸ Third, as his key idea already mentioned above, *Bobek* suggested replacing the often-criticized *acte-clair* criteria defined by the lack of any reasonable doubt by a more objective criteria defined as the existence of objectively more than one reasonably possible interpretation.⁸⁹

Furthermore, according to *Bobek*, national courts shall not be obliged to carry out research regarding divergent opinions on a certain issue of interpretation of Union law but rather be attentive towards any divergence in legal interpretation brought to their attention.⁹⁰

⁸² Ibid., at para. 4.

⁸³ Ibid., at para. 133.

⁸⁴ Ibid., at para. 134.

⁸⁵ Ibid., at paras. 166 et seq.

⁸⁶ Ibid., at para. 135.

⁸⁷ Ibid., at para. 144.

⁸⁸ Ibid., at para. 147.

⁸⁹ Ibid., at paras. 150 et seq.

⁹⁰ Ibid., at para. 157.

Lastly, there shall be no obligation to refer if a certain legal question can be settled by taking a look into the ECJ's established case-law.⁹¹ This criteria can be seen as a confirmation of the *acte éclairé* since it follows the same principles: there is no need to refer a certain question to the ECJ if that question has already been answered. Nonetheless, *Bobek* emphasized that national courts even in such a case may seek guidance from the ECJ if they need clarification or want to depart from a certain definition.⁹² Finally, according to *Bobek*, national courts must give adequate reasons in case they conclude that a certain case which raises a question of Union law does not meet one or more of the three criteria.⁹³

G. THE *CONSORZIO* JUDGMENT

In its decision on *Consortio*⁹⁴ the ECJ did not fully adopt the changes to the CILFIT doctrine as suggested by AG *Bobek*, rather, it affirmed its case law on the duty to refer according to Art. 267(3) TFEU. Nonetheless, the ECJ made a few small but relevant amendments.

First, the Court adopted a new version of the *acte clair* doctrine stating that a national court 'may refrain from referring to the Court a question concerning the interpretation of Union law (...) where the correct application of Union law is so

obvious as to leave no scope for any reasonable doubt'. At first glance, the wording appears to be identical with the ECJs judgment in CILFIT. Nevertheless, there is a small difference: Unlike in CILFIT, the ECJ uses the term 'interpretation' instead of 'application' in the French and Italian versions of *Consortio*, which suggests that the Court followed *Bobek's* proposal.⁹⁵

Second, the Court addressed the challenges that arise from having different language versions of Union law provisions: It reiterated that one language version cannot serve as the basis of a provision of Union law but that it must be interpreted and applied in the light of all language versions.⁹⁶ The ECJ then put a limit to the national courts' obligation to assess all language versions by stating that a national court cannot be required to examine each of the language versions but must be aware of existing divergences especially when those divergences have been subject to the case or were raised by the parties.⁹⁷

Third, the Court introduced a new, more objective approach regarding the concept of doubt. It stated that for a national court of last instance to be freed from its duty to refer the national court must conclude '*that there is no circumstance capable of giving rise to any reasonable doubt as to the correct interpretation of EU law*'.⁹⁸

⁹¹ Ibid., at paras. 158 et seq.

⁹² Ibid., at paras. 162, 164.

⁹³ Ibid., at paras. 166 et seq.

⁹⁴ Case 561/19, *Consortio Italian Management and Catania Multiservizi* (ECLI:EU:C:2021:799). ⁹⁵ Ibid., at para 33, French version: "*l'interprétation*", Italian version: "*interpretazione*".

⁹⁶ Ibid., at para. 43.

⁹⁷ Ibid., at para. 44.

⁹⁸ Ibid., at para. 47.

This means a development towards a more objective understanding of the *acte clair* considering that until *Conorzio* the Court referred to doubts of the national court itself rather than doubts raised by (objective) circumstances.⁹⁹ However, the Court outlines that the mere fact that different interpretations of a provision of Union law exist does not result in there being a reasonable doubt.¹⁰⁰ Nonetheless, the Court emphasized the necessity of a ‘particularly vigilant (...) assessment’ especially if the national court is made aware of divergent case law among the courts of one member state or between the courts of several member states.¹⁰¹ In this context the ECJ once again accentuated the national courts responsibility for the correct use of the preliminary ruling procedure.¹⁰²

Fourth, the Court concretized the national courts’ obligation to give sufficient justification in case it decides to refrain from making a reference under Art. 267(3) TFEU. In this context, it referred to Art. 47(2) of the Charter of Fundamental Rights of the European Union (CFR). In particular, the Court demanded that the national courts clarify whether the question posed was irrelevant to the case or if there was an *acte éclairé* or an *acte clair*.¹⁰³

H. A NEW NUANCED STANDARD AFTER *CONSORZIO*

Even though the ECJ did not make any radical changes to the CILFIT doctrine in *Conorzio*, the new version of CILFIT means a new nuanced standard regarding the duty to refer under Art. 267(3) TFEU.

I. INTERPRETATION VS. APPLICATION

The ECJ has re-adopted the *acte clair* doctrine by replacing the term ‘application’ with ‘interpretation’. Even though the English language version of the judgment still shows the word ‘application’, this must be considered a translation inaccuracy given that the Italian and the French version of the judgment use the word interpretation. On the one hand, this could be seen as a concession to the critics of the *acte clair* who could argue that the scope of application of Art. 267(3) TFEU is now reduced to questions of interpretation of Union law. On the other hand, it stands out that the ECJ did not give any reasons for adopting this new understanding of the *acte clair*.

⁹⁹ Obert, ‘Fortentwicklung der CILFIT-Judikatur’, *Zeitschrift für das Privatrecht der EU (GPR)* (2022) 11, at 15.

¹⁰⁰ Case 561/19, *Conorzio Italian Management and Catania Multiservizi* (ECLI:EU:C:2021:799), at para. 48.

¹⁰¹ *Ibid.*, at para. 49.

¹⁰² *Ibid.*, at para. 50.

¹⁰³ *Ibid.*, at para. 51.

This could lead to the assumption that the ECJ simply intended to repeat the wording used by Art. 267 TFEU. In both scenarios, it is a rather big surprise that the ECJ did not deal with the arguments made by AG *Bobek*. As a consequence of this lack of reasoning, national courts of last instance now face uncertainty about how to interpret and apply the new version of the *acte clair* doctrine.

In any case, the use of the term ‘interpretation’ should not be seen as a fundamental change to the *acte clair* doctrine with the intention of trying to reduce the scope of the preliminary ruling procedure as suggested by AG *Bobek*. Instead, it could be conceived as a mere linguistic change which does not affect the basis of the well-consolidated *acte clair* doctrine since a fundamental change on the doctrine would require a solid reasoning. As a consequence, it is unlikely that the use of the term ‘interpretation’ in the *acte clair* doctrine will lead to a significant decrease in the number of preliminary reference procedures since the term still leaves room for the national courts of last instance to decide whether to declare that a question raises matters of interpretation and thus could be referred. By not even mentioning the argument made by AG *Bobek*, the ECJ showed that it does not see the distinction between application and interpretation of Union law to be a useful and practical criterion when it comes to determining the scope of the duty to refer.

Limiting this scope to questions of interpretation of Union law would also cause the risk of a so called ‘escape into application’¹⁰⁴, meaning that national courts of last instance could refrain from making a reference to the ECJ by using the justification that the case only raises questions of the application of Union law and not of its interpretation. This would eventually endanger the uniform interpretation of Union law.¹⁰⁵ From this point of view, it makes sense that the ECJ emphasized the importance of mutual trust between itself and the national courts as it heavily relies on the latter exercising their ‘gatekeeper-function’¹⁰⁶ appropriately. Nonetheless, in regard to the omission of the term ‘application’ the ECJ should have made its intentions clearer because the subsequent lack of certainty could turn out as an obstacle for a trustful and transparent relation between the Court and the national courts of last instance. In this regard, the change in wording must be evaluated by its practice to be certain of its effects.

II. THE SHIFT OF RESPONSIBILITY TO THE DISPUTING PARTIES

In *Conorzio*, the ECJ basically confirmed the subjective CILFIT criterion. Certainly though, the Court continued to further objectify the crucial condition that there must not be any reasonable doubt as to the correct interpretation of the law.

¹⁰⁴ Obert, *supra* note 45, at 153; Jaeger, *supra* note 2, at 21.

¹⁰⁵ Palmstorfer and Kreuzhuber, *supra* note 50, at 251 et seq.

¹⁰⁶ Cf. D. Chalmers, G. Davies and G. Monti, *supra* note 6, at 167.

In addition, the objective requirements with regard to the examination of language versions and alternative decisions by national courts of other member states were changed. Thereby, the standard with regard to the decision whether the conditions for an *acte clair* are fulfilled or not has been refined. It is questionable though whether these modifications have led to a better manageability of the *acte clair* doctrine.

1. PLAUSIBLE ALTERNATIVES OF INTERPRETATION

With the explicit implementation of an objective element - the absence of *circumstances* that are capable of giving reasonable doubt - the Court seems to move towards AG Bobek's proposal for a more objective approach regarding the declaration of an *acte clair* by the national courts. From now on, there has to be a *plausible* alternative of interpretation to affirm an *acte clair*. This continuation of objectifying the *acte clair* doctrine is a positive modification, particularly, because the ECJ provides a clear definition, when those circumstances are given:

*'[...]the mere fact that a provision of EU law may be interpreted in another or several other ways, in so far as none of them seem sufficient plausible to the national court or tribunal concerned, in particular with regard to the context and the purpose of that provision as well as the system of rules of which it forms part, is not sufficient for the view to be taken that there is a reasonable doubt as to the correct interpretation of that provision.'*¹⁰⁷

Big changes in practice, however, are not to be expected, because the connection to objective indications is nothing new. Factually, the Court had already used objective indications in judgments before *Conorzio*.¹⁰⁸ Nevertheless, more clarity with regard to the *acte clair* doctrine is an improvement which serves legal certainty and could contribute to a further harmonization concerning the standard that is applied by the national courts in deciding whether an *acte clair* is given or not. As a result, there is a more objective limit to the margin of discretion of the national courts, which could benefit the enforcement of the preliminary ruling procedure in the future.

2. SUBJECTIVE KNOWLEDGE OF THE NATIONAL COURTS

The Court mitigated the requirements concerning the examination of all official language versions and alternative interpretations by national courts from different member states. It explicitly abandoned the national courts' obligation to examine the Union law in question in all official languages which is an advancement since it is doubtful whether the national courts ever carried it out. However, the Court emphasized that the national courts have to be considerate and exceptionally careful in the assessment of an *acte clair*, if they have subjective knowledge of such differences among language versions. The national courts have to apply the same diligence if they have subjective knowledge of alternative interpretations in judgments of other member states.

¹⁰⁷ Case 561/19, *Conorzio Italian Management and Catania Multiservizi* (ECLI:EU:C:2021:799), at para. 48.

¹⁰⁸ Case 495/03, *Intermodal Transports BV* (ECLI:EU:2005:552) - deviating interpretation by authorities; Joined Cases 72/14 and 197/14, *X and van Dijk*, (ECLI:EU:C:2015:546) - doubts of a lower-ranking court regarding the interpretation of Union law in question; Case 160/14, *Ferreira da Silva e Brito* (EU:C:2015:565) - contradicting judgments of courts from other member states.

This shift to the subjective knowledge of the courts is an improvement in two ways.

First, the disputing parties are encouraged to introduce differences in language versions and interpretations by courts from other member states into the legal trial. The responsibility to identify those differences is shifted to the disputing parties, which entails a reduced workload for the national courts. Consequently, the role of the disputing parties is strengthened in the preliminary ruling procedure.

Second, the national courts no longer have to fulfill the unattainable requirement of comparing all official language versions, which might have facilitated misuse of the *acte clair* in the past. The more realistic requirements could possibly eliminate the need of the national courts to elude the examination of alternatives in the interpretation of the Union law in question by escaping into the adoption of an *acte clair*. This serves the purpose of the preliminary ruling procedure to ensure the uniform interpretation of Union law in the EU and also strengthens the cooperative character of the judicial dialogue.

III. IMPORTANCE OF THE OBLIGATION TO STATE REASONS

By reaffirming the national courts' obligation to state reasons in case they refrain from making a reference to the ECJ,

the Court prevents the national courts from giving superficial or meaningless justifications.

There are different perspectives to this affirmation: First, it has a symbolic meaning that the ECJ (for the first time in this context) referred to Art. 47(2) CFR - the right to a fair trial - because thereby the Court explicitly declared that an insufficient reasoning from the national courts would constitute a violation of individual rights. It should be noted though that no effective mechanism to enforce a violation of Art. 47(2) CFR currently exists. However, the mentioning of Art. 47 (2) CFR has already led to a vivid discussion regarding the implementation of such a mechanism.¹⁰⁹

Second, the emphasis on the obligation to state reasons can be seen as an attempt to encourage the national courts to exercise their function properly and apply self-control but also as criticism towards the approach of some national courts.¹¹⁰ Third, the ECJ also acted in its own interest: The reasons given by the national courts present the only way for the Court to further investigate whether the national courts apply the CILFIT doctrine according to the case law of the Court. Fourth, the reaffirmation of the obligation to state reasons can be seen as a recognition of the ECtHR's extensive case law already available on the question of the importance of the national courts' duty to state reasons.¹¹¹

¹⁰⁹ Hilpold, *supra* note 57, at 3292.

¹¹⁰ Obert, *supra* note 99, at 17.

¹¹¹ ECtHR, *Ullens de Schooten and Rezabek v. Belgium*, Appl. no. 3989/07 and 38353/07, Judgment of 20 September 2011, paras. 57 et seq.; ECtHR, *Somorjai v. Hungary*, Appl. no. 60934/13, Judgment of 28 August 2018, paras. 57 and 62; *Harisch v. Germany*, Appl. no. 50053/16, Judgment of 11 April 2019, para. 42; all ECtHR decisions are available at <http://hudoc.echr.coe.int/>.

For the future, it needs to be observed whether the national courts will put these changes into practice. Unfortunately, it remains a major issue that there is no effective mechanism of EU law to enforce any violation of the obligation to state reasons, an issue that neither AG Bobek nor the Court addressed in *Conсорzio*.

IV. CILFIT - STILL A LEGAL VACUUM?

As can be concluded from the foregoing, the changes to the substance of the *CILFIT* criteria in *Conсорzio* are fairly limited. Ultimately, major changes were also not to be expected since they would stand in contrast to the Court's own interest. Derived from its position as the monopolist on the interpretation and validity of Union law, the ECJ has the natural aspiration to receive the 'right' preliminary references, i.e. those cases that are integral for shaping and furthering the development within the European Union. The only method to ensure this objective are criteria that allow for a wide range of referrals. Insofar, the ECJ's approach can be compared to trawl netting at the bottom at the sea.

However, *Conсорzio* can be regarded as an indication that the ECJ acknowledges the increased responsibility of national courts within the cooperative system of the preliminary ruling mechanism. Against the backdrop of continuous harmonization, the gatekeeper-role taken up by national courts gains more and more importance, as they ultimately decide which cases are referred and for which cases they deem the *CILFIT* criteria fulfilled. The adaptations to *CILFIT* that were now established in *Conсорzio* take account of this development on two levels:

First, the attempt to objectify the *CILFIT* standard in order to achieve a more homogeneous interpretation by the national courts. As already pointed out above, the practical significance of this more objective standard is questionable because the lack of a uniform monitoring mechanism means that there is no possibility for the ECJ to interfere in the national courts' discretion when it comes to preliminary referrals.

Second, the closer involvement of the parties to the proceeding through the requirement of subjective knowledge by the national courts takes account of the increased workload both the ECJ and the national courts are facing. The parties tend to have greater resources than the courts, especially in cases involving significant economic interests, and - with the *Conсорzio* adaptations - are now incentivized to provide the national courts with the necessary knowledge to instill the amount of reasonable doubt necessary for a preliminary reference.

At the same time, the changes in *Conсорzio* mean a *de facto* shift in responsibility from two actors - the ECJ and the national courts - to three actors - the ECJ, the national courts, and the parties to the proceeding. Due to the non-contentious nature of the preliminary ruling procedure, the parties to the referred procedure were traditionally of little relevance. The explicit linking of the exacerbated obligation to state reasons with the right to a fair trial (Art. 47(2) CFR) now indicates a strengthening of the role of the parties to the proceeding. Nevertheless, this measure will not exceed mere symbolic character if it is not enforceable. Once again, the need for a pan-European enforcement mechanism for infringements in relation to the

preliminary ruling procedure becomes clear. Until such a mechanism exists, the preliminary ruling procedure will indeed remain a legal vacuum to some extent. In this light, the adapted standard after *Conсорzio* might help a potential future enforcement mechanism.

I. CONCLUSION

The ECJ's decision in *Conсорzio* once again illustrates the balancing act between theory and practice that can often be observed where the framework of the European Union is concerned. Since its introduction, the preliminary ruling procedure has been a cornerstone in the coherent development of European integration and the current statistics demonstrate that its value remains undiminished. In this light, it is unsurprising

that the ECJ wants to ensure its grasp as *the* authority on the interpretation of Union law for the indefinite future. At the same time, it faces the harsh reality of a rapidly growing number of preliminary references and is confronted with the challenge of ensuring the mechanism's practicality. With its adaptations to the CILFIT doctrine, the ECJ tries to resolve this conflict of interests by emphasizing the accountability of actors other than itself: the national courts and the parties to the proceeding. Of these changes, the stronger involvement of the parties to the proceeding is a particularly welcome addition. At the same time, the analysis of the *Conсорzio* judgment reveals that the need for a uniform enforcement mechanism specifically designed to meet the characteristics of the preliminary ruling procedure is becoming increasingly urgent.

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CLIMATE CHANGE LITIGATION ENFORCEABILITY OF ACTION THROUGH LEGAL CLAIMS AND THE ROLE OF JUDGES IN EUROPE

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Tackling climate change is a hot topic. Ambitious targets have been set. However, in practice it appears hard for governments and private sector companies to take the necessary (legal) actions to reach those goals. This has led to an increase of court cases in which claimants call on the individual responsibility of states and private sector companies to intensify efforts towards the collective pursuit of a more sustainable tomorrow. Judges across Europe have applied different approaches in these cases: from restrained judgments to more radical judgments holding the government and private companies accountable for their climate inaction and even issuing specific orders. This touches upon some fundamental issues, e.g. the role of the judiciary in a democratic state under the rule of law (*trias politica*), the cross-border aspect of climate change and the question of whose rights and obligations are involved and who may enforce them. In this article we discuss these issues: how they have been dealt with so far and how, in our opinion, they should be dealt with in the future. Also, we suggest other possible (non)judiciary actions or solutions to enable the judiciary to deal with such claims.

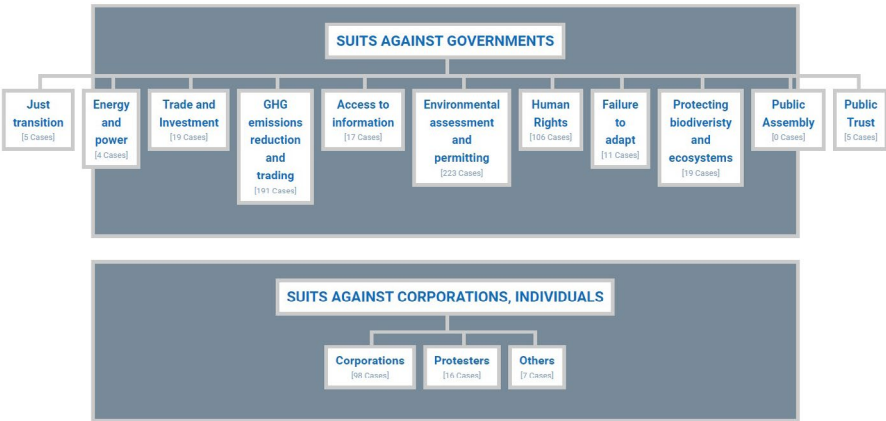
KEY WORDS

Climate change • Role judiciary • Trias politica

1. INTRODUCTION

It is commonly accepted that the next decade is critical for tackling climate change and significantly reducing damages for future generations. The latest report of the Intergovernmental Panel on Climate Change (IPCC) shows that the world is not on track to meet the global rise in temperature to 1.5 degrees Celsius and outlines what needs to be done to limit climate change.¹ Secretary-General of the United Nations António Guterres has published a video message on the launch of this report in which he states: ‘The jury has reached a verdict. And it is damning. This report of the Intergovernmental Panel on Climate Change is a litany of broken climate promises. It is a file of shame, cataloguing the empty pledges that put us firmly on track towards an unlivable world. We are on a fast track to climate disaster.’²

From an international perspective, the Paris Agreement adopted in 2015 was a milestone towards setting more ambitious targets and taking a long-term perspective to escape irreversible damage. However, in practice it appears hard for governments and private sector companies around the globe to take the necessary actions to reach those goals. This has led to an increase of court cases in which claimants call on the individual responsibility of states and private sector companies to intensify efforts towards the collective pursuit of a more sustainable tomorrow. According to the Global Climate Change Litigation Database these are the numbers of climate change related court cases – not including cases in the United States:³



¹ H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.), *IPCC, 2022: Climate Change 2022: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*.

² <https://www.un.org/sg/en/content/sg/statement/2022-04-04/secretary-generals-video-message-the-launch-of-the-third-ipcc-report-scroll-down-for-languages>.

³ <http://climatecasechart.com/climate-change-litigation/non-us-climate-change-litigation/>.

More and more, national courts are allowing such claims. For example, in the Dutch landmark *Urgenda* case, the Supreme Court ruled that the Netherlands had to reduce its greenhouse gas (GHG) emissions by at least 25% by the end of 2020 compared to 1990.⁴ In a recent ruling the District Court of the Hague ruled that a similar obligation lies on Royal Dutch Shell (Shell); a private company.⁵ Also, the German Constitutional Court recently ruled in the *Neubauer* case that the German Federal Climate Law (*Klimaschutzgesetz*) violates the constitutional freedoms of future generations, enshrined in the Basic Law of Germany.⁶

These examples are not (yet) followed by all courts around Europe, including the European Court of Justice (CJEU), and while praised by some, these rulings have also been highly criticized.

Are these judges protecting the rule of law or is this judicial activism which goes beyond the boundaries of the powers of the judiciary?

The case law in climate litigation cases – and the literature discussing it – touches upon some fundamental issues regarding e.g., the role of the judiciary in a democratic state under the rule of law (*trias politica*), the cross-border aspect of climate change, and the question whose rights and obligations are involved. We will zoom in to these issues: how they

have been dealt with so far and how, in our opinion, judges should deal with climate litigation cases in the future.

To that end, we will first briefly set out the legal framework (§ 2) and address the different concepts in climate litigation (§ 3), before discussing some of the most noteworthy national (§ 4) and European case law (§ 5) into more detail and setting out the main issues in climate litigation (§ 6).⁷ Finally, we will summarize our observations and appreciations (§ 7).

2. LEGAL FRAMEWORK

A. THE UNITED NATIONS CLIMATE CONVENTION

A UN conference on ‘Human Environment’ was held in Stockholm in 1972. The conference brought forth the Stockholm Declaration, in which the principles of international environmental policy and environmental law were laid down. The United Nations Environment Program (UNEP) was established as a result of the conference.

In 1992 the United Nations Framework Convention on Climate Change (UNFCCC) was concluded. The UNFCCC is the main international treaty on fighting climate change and seeks to protect the planet’s ecosystems and mankind and strives for sustainable development for the

⁴ Hoge Raad (Supreme Court of the Netherlands), 20 December 2019, *the State of the Netherlands v. Foundation Urgenda*, ECLI:NL:HR:2019:2006. We refer to § 4.A for a further discussion of this judgment.

⁵ Rechtbank Den Haag (District Court of the Hague), 26 December 2021, *Friends of the Earth Netherlands et al vs Shell plc*, ECLI:NL:RBDHA:2021:5337. We refer to § 4.B for a further discussion of this judgment.

⁶ Bundesverfassungsgericht (German Federal Constitutional Court) 24 March 2021, BvR 2656/18/1 BvR 78/20/1 BvR 96/20/1 BvR 288/20, ECLI:DE:BVerfG:2021:rs20210324.1bvr265618, *Neubauer and others v. Germany*. This judgment is discussed in § 4.C.

⁷ For examples of cases that have been filed worldwide, we refer to: <https://www.urgenda.nl/en/themas/climate-case/global-climate-litigation/>.

protection of current and future generations. The ultimate objective of the convention is to achieve stabilization of GHG concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. According to Article 4(2) of the convention, the countries listed in Annex I must take the lead, in an international context, in counteracting climate change and its negative consequences. They have committed themselves to reducing GHG emissions. They must periodically report on the measures they have taken. The objective is to return the level of emissions to the level in 1990. The EU and all its member states are among the 197 parties to the Convention.

Article 7 has established the Conference of the Parties (COP), which usually convenes every year (the so-called climate change conferences). The COP is the highest decision-making entity under the convention, although COP decisions are not legally binding. Numerous COPs have since been held, including the COP 21 in 2015 in Paris (the Paris Climate Conference), culminating in the Paris Agreement.

B. THE PARIS AGREEMENT

The Paris Agreement, which was signed on 22 April 2016, entered into effect on 4 November 2016. The Paris Agreement is the first-ever universal, legally binding global climate change agreement. The EU and its member states are among the nearly 190 parties to the Paris Agreement. Each party to the agreement is called to account regarding its individual responsibility (bottom-up approach). The Paris Agreement stipulates that global warming must be kept 'well below 2°C' as compared to the average

pre-industrial levels, while striving to limit the temperature increase to 1.5°C. The parties must prepare ambitious national climate plans and the level of ambition must increase with each new plan. The use of fossil fuels must quickly be brought to an end, as this is a major cause of excessive CO₂ emissions.

C. EU CLIMATE POLICY

Article 191 of the Treaty on the Functioning of the European Union (TFEU) contains the EU's environmental goals. For the implementation of its environmental policy, the EU has worked out a large number of directives, including the so-called ETS directive (Directive 2003/87/EC), which was subsequently amended. ETS stands for 'Emissions Trading System'. This system entails that companies in the ETS sector may only emit (GHG) in exchange for the surrender of emissions rights. These emissions rights may be bought, sold or retained. Companies in the EU that fall under the ETS system, which are energy-intensive companies such as those in the energy sector, may only emit GHG in exchange for surrendering emission allowances. The system currently provides for an emissions reduction of 43% by 2030 relative to 2005 (Directive (EU) 2018/410).

In addition, on 29 July 2021 the European Climate Law (Regulation (EU) 2021/1119) entered into force. It transposes into law the goal set out in the European Green Deal for Europe's economy and society to become climate neutral by 2050. The law also increases the ambition for 2030 by setting a more ambitious interim target: the GHG reduction target for 2030 becomes 55% compared to 1990, instead of the previously applicable target of 40%. The EU institutions and the

Member States are bound to take the necessary measures at EU and national level to meet these targets. The Climate Law includes measures to keep track of progress and adjust actions accordingly. Progress will be reviewed every five years. The Climate Law also addresses the necessary steps to reach the 2050 target.

D. THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 1 of the European Convention on Human Rights (ECHR) provides that the contracting parties must secure the rights and freedoms defined in Section I of the ECHR to everyone within their jurisdiction.⁸ In other words, ECHR protection is afforded to the persons who fall within the states' jurisdiction. In relation to climate change, primarily the right to life (Article 2) and the right to private life (Article 8) are important. Climate cases frequently rely upon those articles. Furthermore, Article 13 is relevant for the interpretation of Articles 2 and 8 since it provides the right to an effective remedy before a national authority if the rights and freedoms under the ECHR are violated. The remedy must be both practically and legally effective.⁹

E. THE EU CHARTER OF FUNDAMENTAL RIGHTS

While the ECHR is more frequently invoked in the context of climate litigation in the European Union than the EU Charter of Fundamental Rights (the Charter) and many of the rights in the Charter overlap with those of the ECHR, the EU's – and the CJEU's – ambitions for the Charter are to provide a stronger and more ambitious protection than the ECHR. This is possible due to the nature of EU law and the remedies that the CJEU and national Courts are able to offer for violations of EU law. Especially Article 47 of the Charter is an important provision with respect to climate litigation, as it establishes the right to an effective remedy and to a fair trial. In three German climate litigation cases Article 47 of the Charter is used to deal with problems of standing (of environmental associations).¹⁰

F. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Furthermore, the International Covenant on Civil and Political Rights (ICCPR) is of relevance since all ECHR contracting states have ratified it. Article 6 protects the right to life. According to the Human Rights Committee on environmental degradation, climate change and unsustainable development are some of the most pressing and serious threats to the ability of present and future gener-

⁸ https://www.echr.coe.int/Documents/Convention_ENG.pdf

⁹ ECtHR, *Kudla v. Poland*, Appl. no. 30210/96, Judgment of 26 October 2000 at § 157, ECtHR, *Neshkov et al. v. Bulgaria*, Appl. no. 36925/10, Judgment of 27 January 2015 at § 180 and 181, and ECtHR, *Ulemek v. Croatia*, Appl. no. 21613/16, Judgment of 31 October 2019 at § 71. All ECtHR decisions are available at <http://hudoc.echr.coe.int/>

¹⁰ *Neubauer*, *supra* note 6, Verwaltungsgericht Berlin (Administrative Court Berlin), 22 November 2018, *Friends of the Earth Germany and others v. Germany*, Verwaltungsgericht Berlin (Administrative Court Berlin) 25 October 2018, *Family Farmers and Greenpeace Germany v. Germany*, ECLI:DE:VGBE:2019:1031.VG10K412.18.00.

ations to the enjoyment of the right to life. State obligations under international environmental law should thus consider the contents of Article 6 and the obligation of states to respect and ensure the right to life should also consider their relevant obligations under international environmental law.¹¹ The interpretation of the Human Rights Committee emphasizes that climate change raises an issue under Article 6.

G. THE LEGAL FRAMEWORK APPLICABLE TO COMPANIES AND PRIVATE MARKET PARTIES

The aforementioned conventions, laws and regulations address the obligations of states in relation to (the consequences of) climate change. The liability and responsibility of private companies and financial market parties (asset owners) with regard to sustainability and climate change are affected both by legal provisions and by soft law instruments.¹² E.g. there are legal provisions to identify and report on the ecological (climate), social (social and physical living environment) and governance (management, supervision, accountability and control) factors (ESG factors) of their investments and financing, and soft law rules on the corporate social responsibility (CSR rules) for private companies and financial market parties with regard to their activities.

Examples of legal provisions to identify and report on ESG factors can be found in various EU sources such as the Sustainable Finance Disclosure Regulation, the Taxonomy Regulation and the Directive on disclosure of non-financial and diversity information by certain large undertakings and groups (to be amended by the proposed Corporate Sustainability Reporting Directive (COM(2021) 189 final, 2021/0104)).¹³ Non-compliance with these legal obligations may result in liability of the non-compliant party vis-à-vis the party relying on those rules (provided that they have direct effect or have been implemented into the national legislation).

Examples of CSR rules can be found in the UN Guiding Principles on business and human rights, OESO Guidelines for Multinational Enterprises, the UN Global Compact Principles and the ISO 26000 Social Responsibility Guidance Standard. In addition, several sector-specific CSR frameworks have been developed.¹⁴ CSR rules require companies and financial market parties to respect human rights and refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights.¹⁵ The responsibility to respect human rights requires that business enterprises: (a) avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) seek to pre-

¹¹ Human Rights Committee, General Comment No. 36, Article 6 (Right to Life), CCPR/C/GC/36, 3 September 2019, at para. 62.

¹² Asset owner are e.g. pension funds, asset managers and investment managers.

¹³ Council Regulation 2019/2088/EU, OJ 2019 L 317/1, Council Regulation 2020/852/EU, OJ 2020 L 198/13, Commission Directive 2014/95/EU, OJ 2014 L 330/1.

¹⁴ Such as the Equator Principles and the IFC Environmental and Social Performance Standards (financial markets) and the Voluntary Principles on Security and Human Rights (oil and gas industry).

¹⁵ United Nations, Guiding principles on business and human rights: implementing the United Nations Protect, Respect and Remedy framework (2011), Principle 12.

vent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.¹⁶ In addition, companies should support a precautionary approach to environmental challenges, undertake initiatives to promote greater environmental responsibility, and encourage the development and diffusion of environmentally friendly technologies.¹⁷

These soft laws instruments are in principle not binding on companies. However, CSR standards as expressed in such soft law instruments can give substance to the explanation and interpretation of civil law relationships and the (unwritten) standard of due care of companies and private market parties and may become *de facto* binding on companies. In addition to these CSR rules, a group of legal experts has – in light of the Paris Agreement – developed the principles on Climate Obligations of Enterprises which should provide guidance to governments, companies, investors, accountants, regulators, judges, lawyers, academia and NGOs on the obligations of all stakeholders in achieving the goals of the Paris Agreement.¹⁸

As these principles have no legal status, the application thereof is dependant on whether judges are willing to apply these principles in the interpretation of the unwritten standard of due care of companies and private market parties.

3. CONCEPTS IN CLIMATE LITIGATION

In environmental action in general two different concepts are apparent: adaptation and mitigation. Such concepts are related to the way in which the harms are presented. In climate litigation trends this distinction is also visible.¹⁹ The figure of adaptation is often associated with direct harm which has already occurred as a result of climate change. In such cases, the opposing party claims for specific money or funds. Since most ecological harm is related to direct activities of companies, the defendant is usually a company. Mitigation is used to achieve restriction of present and future GHG emission reduction. Mitigation litigation aims to push governments towards more political action and corporations towards better policies, for instance in the *Urgenda* case (§ 4.A).

¹⁶ Ibid. Principle 13.

¹⁷ United Nations, UN Global Compact Principles (<https://www.unglobalcompact.org/what-is-gc/mission/principles>) Principle 7

¹⁸ These principles contain different types of obligations: limiting emissions, obligations regarding products, services, choice of suppliers, disclosure of certain data and how financial institutions and investors should deal with the threat of climate change. According to the authors, the legal basis for these principles can be found in sources of international law, human rights, international treaties, environmental law, tort law, case law (of national and international courts), all kinds of rules of 'soft law', authoritative reports and views in doctrine.

¹⁹ Hoek, Van Uhm and Zaitch, 'Climate Change Litigation: learning from the *Urgenda* case,' 1 *Tijdschrift over Cultuur & Criminaliteit* (2021) 14.

The rise in climate specific cases shows that the legal position of climate change is becoming significantly more robust.²⁰ Literature on this subject identifies that the legal techniques and strategies used in climate litigation show similarities between mitigation and adaptation, but that the grounds of climate litigation have been gradually shifting towards newer obligations and values, focusing on the more imminent and extensive harms of climate change, for example in the *Urgenda* case.²¹

4. EXAMPLES OF NATIONAL CASE LAW

A. URGENDA CASE

With its ruling, the Dutch Supreme Court finalized the first case in which a national court issued a specific order to a government to reduce GHG emissions on the basis of human rights. *Urgenda*, a Dutch non-profit sustainability foundation, successfully called upon the right to life and the right to private and family life (Articles 2 and 8 ECHR) to justify the positive obligation of the state to take measures that reduce risks that could jeopardize the welfare of Dutch residents, even if such impacts would only materialize a few decades from now. The Supreme Court ruled that the State must comply with the target, considered necessary by the international community, of a reduc-

tion by at least 25% in 2020 compared to 1990 levels. If legislative measures are required to achieve such compliance, it is up to the state to determine which specific legislation is desirable and necessary.

B. SHELL CASE

In this matter before the District Court of The Hague in the Netherlands, the association 'Friends of the Earth Netherlands' together with several individuals asked the court to rule that Shell and its subsidiaries should reduce their CO₂ emissions by 45% in 2030 as compared to the levels of 2019. Friends of the Earth Netherlands based its claim on an unwritten duty of care under Article 6:162 of the Dutch Civil Code. Although Friends of the Earth Netherlands was unable to directly invoke human rights, the District Court still recognized the importance of human rights in the assessment of the claim. Therefore, the District Court used these, among other things, for the interpretation of the duty of care. The District Court, moreover, stated that from the *Urgenda* judgment it could be deduced that Articles 2 and 8 ECHR offer protection against the consequences of climate change. The District Court therefore decided in favour of the claimants and ordered Shell to reduce its CO₂ emissions. Meanwhile, Shell has lodged an appeal against the judgment of the District Court with the Court of Appeal in the Hague, which is still pending. In its appeal Shell argues, amongst other

²⁰ Burgers and Staal, 'Climate Action as Positive Human Rights Obligation: The Appeals Judgment in *Urgenda v the Netherlands*', in J.E. Nijman and W.G. Werner (eds), *Netherlands Yearbook of International Law* (2018) 223. See for examples of cases that have been filed worldwide: <https://www.urgenda.nl/en/themas/climate-case/global-climate-litigation/>. Furthermore, we refer to the Global Climate Change Litigation Database for a more extensive overview of climate change caselaw: <http://climatecasechart.com/non-us-climate-change-litigation/>.

²¹ Hoek, Van Uhm and Zaitch, *supra* note 19 at 14.

things, that, given the decision by the Supreme Court of the Netherlands in the *Urgenda* case, decision-making on the reduction of GHG emissions is a power of government and parliament, and that courts must demonstrate restraint in the assessment of the measures taken by the state, as the government has discretionary powers when making such political assessments. Therefore, there is – according to Shell – no room for a new rule of unwritten law such as the one recognized by the District Court. Furthermore, the District Court has used ECHR and UN General Principles to construct a legal obligation, whereas both sources do not constitute binding obligations for Shell. Therefore, Shell argues that the court wrongfully devised the reduction obligation based on these principles. As the appeal is still pending, it is unclear how the Court of Appeal will assess these arguments of Shell.

requires taking mitigation measures towards achieving climate neutrality and engaging in ‘internationally oriented activities to tackle climate change at the global level’.²³ In its ruling, the court concluded that due to the insufficient reduction target of 55% by 2030, almost the entirety of the German emissions budget would be exhausted by 2030. This would create an impossible reduction task for the generations after 2030. The court found that creating this near-impossible task would infringe the plaintiffs’ fundamental freedoms. The court considered that Germany’s climate protection law violates the fundamental rights of young people and future generations and it must therefore be improved. The court explicitly stated that the state obligations are directed towards the future and can entail a duty towards future generations.²⁴

However, different from the *Urgenda* judgment, the court did not provide specific instructions as to which action the government is to undertake. Nevertheless, the decision has had a significant impact on German climate policy. Shortly after the decision of the court, the German government increased its reduction target from 55% to 65% by 2030, compared to 1990 levels. Similar to the *Urgenda* case, this case supports the argument that the right to life generally provides protection against climate change.

C. NEUBAUER CASE

Another landmark decision is the *Neubauer* case of the German Federal Constitutional Court.²² In this case a group of young people argued that Germany’s climate law, which set a reduction target of 55% by 2030 compared to 1990 levels, was insufficient to protect against dangerous climate change and therefore violated their fundamental rights, including their right to life, right to health and right to a decent future. The court recognized that climate change represents a ‘catastrophic or even apocalyptic’ threat to society and that under Article 2(2) of the German Constitution, the state has a constitutional duty to protect against dangerous climate change. This duty

D. KLIMAATZAAK CASE

The final national case we will shine a light on is the biggest climate case worldwide so far. In its judgment in this case,

²² *Neubauer*, *supra* note 6.

²³ *Ibid.* Para. 149.

²⁴ *Ibid.* Para. 146.

the Brussels Court of First Instance established for the first time the negligence of the Belgian public authorities.²⁵ Filed in 2015 by the association *Klimaatzaak*, which was founded by 11 Belgians, the case was joined by more than 58,000 co-plaintiffs during the proceedings. The applicants relied on similar arguments as those in the *Urgenda* case and also referred to it. The claim was based on (inter alia) Articles 2 and 8 ECHR and the applicants argued that Belgium's current climate policy is in violation of the rights enshrined in these articles.

In its judgment, the court recognized that the NGO *Klimaatzaak*, as well as the over 58,000 co-plaintiffs, are directly, personally and realistically at risk of harm because of the ongoing climate crisis. The court concluded that the federal state of Belgium and three regional governments are jointly and individually responsible for protecting their citizens from the negative impacts of the climate crisis. Referring to their failure to take adequate climate measures to date, the court found both the nation-

al and regional authorities in breach of their duty of care towards their citizens and had violated fundamental rights in general and Articles 2 and 8 ECHR specifically by not taking sufficient climate action. In its ruling, the court did not impose any concrete reduction targets.²⁶ The court did not specify what the Belgian government has to undertake to mend the violation, because the court found that the separation of powers does not allow it to make that decision.²⁷

5. EUROPEAN CASE LAW

A. THE EUROPEAN COURT OF HUMAN RIGHTS (ECTHR)

Although Articles 2 and 8 ECHR play a big role in climate litigation, the ECtHR has not yet dealt with a case that directly relates to the problem of climate change so far. However, currently four climate change cases are pending before the ECtHR.²⁸ In the *Duarte Agostinho and Others v. Portugal* case, the applicants

²⁵ Tribunal de première instance francophone de Bruxelles, Section Civile (Brussels Court of First Instance), 17 June 2021, *VZW Klimaatzaak v. de Belgische Staat en anderen*, 2015/4585/A.

²⁶ For this reason, *Klimaatzaak* filed an appeal on 16 November 2021. The Brussels Court of Appeal decided to give priority to the handling of the *Klimaatzaak*, which will take place from 14 September until 23 October 2022, see: <https://twitter.com/Klimaatzaak>.

²⁷ In its judgment the Court considered at para. 2.3.2: 'However, this request for an injunction cannot be granted without infringing the principle of the separation of powers. Indeed, the judge cannot determine the content of the obligations of a public authority and thus deprive it of its discretionary power. In other words, if the judiciary is competent to establish the fault committed by the public authority, even in the exercise of its discretionary power, it cannot, on this occasion, deprive the latter of its political freedom nor substitute itself for it. The judiciary cannot assess the appropriateness of the action of the public authority when the latter is exercising its competence nor exercise itself the discretionary power which belongs to this public authority. It is therefore necessary to check whether the injunction requested does not tend to lead the tribunal to substitute itself for the legislative or administrative authority in the exercise of its discretionary competence. ... In other words, while it is within the remit of the tribunal to note a failure on the part of the federal state and the three regions, this does not authorize it, by virtue of the principle of separation of powers, to itself set targets for reducing Belgium's GHG emissions.'

²⁸ *Duarte Agostinho and Others v. Portugal and 32 Other States*, Appl. no. 39371/20, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, Appl. no. 53600/20, *Greenpeace Nordic and Others v. Norway*, Appl. no. 34068/21 and *Mex M. v. Austria*, filed 25 March 2021, see: https://climaterightsdatabase.com/database/?_deciding_body=european-court-of-human-rights, (accessed 14 May 2022).

complain that the 33 respondent states have failed to comply with their positive obligations under Articles 2 and 8 (as well as Article 14, prohibition of discrimination), read in the view of the commitments made within the context of the Paris Agreement.²⁹ In this case the applicants have not exhausted domestic remedies and are attempting to rely on an exception to the rule to exhaust domestic remedies first.³⁰ The applicants argue that such a rule should not apply due to the absence of an adequate domestic remedy. The decision of the court on these arguments will determine if the case will be heard on the merits.

However, the states' obligations regarding climate change can be indirectly derived from case law pertaining to environmental dangers.³¹ The right to life (Article 2) is about the positive obligation of the state to take all necessary measures to protect the lives of persons under its jurisdiction,³² or the negative obligation of the state not to inflict death, except in the events stated in Article 2 paragraph 2. In terms of the positive obligation, the state must take preventive measures in the event of dangerous activities or disasters.³³

The ECtHR made the link between environmental damage and damage to private life protected by Article 8 in the *Lopez Ostra* case.³⁴ However, the ECtHR considered that in striking a fair balance

²⁹ In this case the issue raised is that, on the one hand, the ECHR focusses on the individual state as a respondent and that state's obligations to 'secure to everyone within its jurisdiction' the rights under the Convention, whilst on the other hand, climate change is a global problem that needs to be solved globally. Furthermore, it is noted that when the ECtHR communicated the case, it asked the parties to comment not only on the alleged violations of Art. 2, 8 and 14 ECHR, but it also invoked Art. 3 ECHR, the prohibition of torture and inhuman and degrading treatment, as well as the right to property in Art. 1 of Protocol No. 1 to the Convention.

³⁰ Since the applicants are lodging their case against 33 states, making use of domestic remedies in each of these states would have taken several years.

³¹ We refer to ECtHR, factsheet Environment and the European Convention on Human Rights, May 2022, at 1, which states: 'Even though the European Convention on Human Rights does not enshrine any right to a healthy environment as such, the European Court of Human Rights has been called upon to develop its case-law in environmental matters on account of the fact that the exercise of certain Convention rights may be undermined by the existence of harm to the environment and exposure to environmental risks.' See also Dikkers, 'Towards European consensus on climate change as a human rights problem', 2 *Ars Aequi* (AA) 2022, 89 in which relevant ECtHR environmental jurisprudence is discussed.

³² ECtHR, *Kiliç v. Turkey*, Appl. no. 22492/93, Judgment of 28 March 2000, at para 62 and ECtHR, *Valentin Câmpeanu v. Romania*, Appl. no. 47848/08, Judgment of 17 July 2014, at para. 130.

³³ ECtHR, *Öneryildiz v. Turkey*, Appl. no. 48939/99, Judgment of 30 November 2004 at para. 90; ECtHR 2008, *Budayeva and Others v. Russia*, Appl. nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 Judgment of 20 March 2008 at para. 130. In the *Öneryildiz* case, the ECtHR explained that in the context of dangerous activities, the state has a primary duty to put in place a legislative and administrative framework to provide effective deterrence against threats to the right to life (para. 89). Moreover, special emphasis must be placed on regulations geared to the special features of the activity in question, which means that a state has obligations such as the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks (para. 90).

³⁴ ECtHR, *López Ostra v. Spain*, Appl. no. Judgment of 9 December 1994. In this case a malfunction in a waste treatment plant caused health issues for the inhabitants living nearby. At para 51 the Court considered that 'it is self-evident that serious environmental damage may affect the well-being of a person and deprive him of the enjoyment of his home in such a way as to adversely affect his private and family life, without however seriously endangering his health'.

between individual interests and those of the community, the state has a margin of appreciation. In the *Tàtar* case, the ECtHR stated that the existence of a serious and substantial risk to the applicants' health and well-being placed a positive obligation on the state to adopt reasonable and adequate measures capable of protecting the rights of the persons concerned to respect for their private life and home and, more generally, to the enjoyment of a healthy and protected environment.³⁵

With regard to environmental protection, Articles 2 and 8 may overlap in certain circumstances. Therefore, the ECtHR has explained that the principles developed under Article 8 can also be relied upon in respect of Article 2.³⁶

In order to determine whether a state meets its positive obligations under Articles 2 and 8, the victim must be able to invoke a direct, clearly identifiable and locally specific interference.³⁷ For instance in the *Cordella* case, the ECtHR considered that 19 out of 180 applicants

did not have victim status, since they did not live in one of the towns classified as being at high environmental risk and they had not shown that they were personally affected. For the other applicants, the ECtHR held that there had been a breach of Article 8. Furthermore, the ECtHR recalled that the ECHR does not contain a general right to environmental protection and that popular actions are prohibited.³⁸

Lastly, we remark that the ECtHR has made it clear that the choice of appropriate measures is within the broad discretion of the State.³⁹ Under its existing case law, especially in cases regarding broader policy choices, the margin of appreciation left to states in the sphere of environmental protection has generally been held to be wide, leaving the ECtHR to consider only whether there has been a 'manifest error of appreciation by the national authorities in striking a fair balance between the competing interests of different private actors in this sphere. However, the complexity of the issues involved with regard to environmental

³⁵ ECtHR, *Tàtar v. Romania*, Appl. no. 67021/01, Judgment of 27 January 2009, at para. 107.

³⁶ See *Budayeva and Others v. Russia*, *supra* note 33 at para 133 and *Öneryildiz v. Turkey*, *supra* note 33 at paras. 90 and 160.

³⁷ See for example ECtHR, *Ivan Atanasov v. Bulgaria*, Appl. no. 12853/03, Judgment of 2 December 2010 at para 66. In earlier case law, for instance in ECtHR, *Fadeyeva v. Russia*, Appl. No 55723/00, Judgement of 9 June 2005, at para 68, the ECtHR explained that, since protection in that case is derived from Art. 8, an individual's home, family life or private life has to be directly affected in order for human rights to be engaged. This requirement makes for a seemingly high threshold for establishing a violation under Art. 8.

³⁸ ECtHR, *Cordella and Others v. Italy*, Appl.nos. 54414/13 and 54264/15, Judgment of 24 January 2019, at paras. 100-101.

³⁹ ECtHR, Guide on Article 2 of the European Convention on Human Rights Right to life, 31 December 2021, 12: 'There are different avenues to ensure Convention rights, and even if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means. In this respect an impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources; this results from the wide margin of appreciation States enjoy, as the Court has previously held, in difficult social and technical spheres.' In this regard we also refer to *Budayeva and Others v Russia*, *supra* note 33 at paras. 134-135; ECtHR, *Vilnes and Others v. Norway*, Appl. nos. 52806/09 and 22703/10, Judgment of 5 December 2013, at para. 220 and ECtHR, *Brincat and Others v. Malta*, Appl. nos. 60908/11, 62110/11 and 62129/11, Judgment of 24 July 2014, at para. 101.

protection renders the Court's role primarily as a subsidiary one'.⁴⁰

B. CJEU AND THE GENERAL COURT: PEOPLE'S CLIMATE CASE

The *Carvalho* case, also known as the *People's Climate* case, was brought by 36 individuals from families from various member states of the European Union (Germany, France, Italy, Portugal and Romania), as well as from Kenya and Fiji, and an association governed by Swedish law, the *Sáminuorra*, which represents young indigenous Samis. All of them were active in agriculture and tourism in climate-sensitive areas in and outside of Europe. Already suffering from consequences of climate change such as sea-level rising, flooding or droughts, the applicants complained about the EU's 2018 legislative package regulating GHG emissions for the years 2021 to 2030. They claimed that this legislation was an infringement of their fundamental rights and they relied on the Paris Agreement. The applicants filed an action for annulment and a claim for damages pursuant to Article 340(2) TFEU, not aimed at pecuniary damages but an order directed at the Council and the Parliament to adopt stricter GHG emission targets of 50% to 60%.

In 2019, just like the CJEU now, the General Court did not touch on the question whether the EU should be obliged to set stricter GHG emission targets (which it did now set with the Climate Law), but declared the actions inadmissible. Relying on the *Plaumann* decision, in which the CJEU has set the barriers for individual concern for natural or legal persons, the General Court decided that the applicants were not individually concerned and therefore did not have standing.⁴¹ Furthermore, it held that the *Sáminuorra* did not fulfil the conditions under which case law allows associations to bring an action for annulment. The General Court also dismissed the damages claim, as it aims to obtain the same result as the action for annulment.

6. MAIN ISSUES IN CLIMATE CHANGE LITIGATION

The case law discussed in paragraphs 4 and 5 above – and academic literature discussing this case law – show that some of the most controversial points in climate litigation are (i) the separation of powers (*trias politica*, § 6.A), (ii) the question whether or not individuals and NGOs have standing (§ 6.B) and (iii) the liability of asset owners (§ 6.C).

⁴⁰ *Fadeyeva v. Russia*, *supra* note 37, at para. 105 regarding Art. 8. With regard to Art. 2, see for instance *López Ostra v. Spain*, *supra* note 34, at para. 51 and *Öneryildiz v. Turkey*, *supra* note 33 at para. 107. Since cases involving environmental issues are likely to give rise to difficult social and technical issues, the ECtHR often refers to the need to give the state a wide margin of appreciation in assessing the best policy.

⁴¹ ECJ 15 July 1963, case 25/62 (*Plaumann v. Commission*), in which the ECJ ruled that, in order for individuals to have standing in such cases the contested act must affect them 'by reason of certain attributes that are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the addressee.'

C. SEPARATION OF POWERS (TRIAS POLITICA)

The constitutional structure of the governments of most nations in Europe has been based on the doctrine of separation of powers, or the *trias politica*. According to Montesquieu, the need for the separation of powers was to protect citizens from an arbitrary government.⁴² By the division of the government into separate powers, each with a personal, well-defined task, the risk of arbitrariness would be the smallest. The separation of powers is structured as follows: the legislator makes the law, the executive administers the law, and the judiciary applies the law. The boundaries between these different functions may not be sharp in all events and powers may overlap.

As for the role of the judiciary in some climate cases, the question arises whether the judges are protecting the rule of law or if their rulings are best described as judicial activism which exceeds the boundaries of the judiciary in the *trias politica* doctrine. For example, in the *Urgenda* case, the Supreme Court dictated climate policy to the government with-

out a basis in law other than the open, civil law standards of 'social responsibility' and 'duty of care'. This, whilst in a case in 2003 the Supreme Court adopted a more restrained tone, and decided that the judiciary is not empowered to order the legislature to enact legislation.⁴³ In light thereof, a more restrained attitude and less activist judgment would be conceivable.

One of the critical remarks on the *Urgenda* case is that the judges in this case undermined the separation of powers.⁴⁴ In other words, the Supreme Court's decision qualifies as judicial activism which endangers the balance of powers. On the other hand, it is argued that such judicial decisions confirm a working system of separation of powers.⁴⁵ One point of view in this regard is that the legislator and (Supreme) court(s) are 'partners in law business', a partnership which is not the same for each country.⁴⁶ For instance, in the Netherlands, the principle of judicial restraint applies and is reflected in assessment prohibitions and restrictions.⁴⁷ Also, it can be argued that judges do not think within terms of power, but seek solutions for concrete legal questions in individual cases within the limits

⁴² C. de Montesquieu, *De l'esprit des loix* (1748).

⁴³ Hoge Raad (Supreme Court of the Netherlands) 21 maart 2003, ECLI:NL:HR:2003:AE8462 (*Waterpakt* case).

⁴⁴ E.g., Bergkamp and Hanekamp, 'Climate Change Litigation against States: The Perils of Court-Made Climate Policies', 5 *European Energy and Environmental Law Review* (2015) at 105 and 106, Besselink, 'Rechter en Politiek: Machtenscheiding in de Urgenda-zaak', 8 *Tijdschrift voor constitutioneel recht* (2020) at 130. In the Netherlands, judges were accused of being 'dikastocrats': politician Baudet wrote that this 'dikastocracy' (rule by judges) is the 'Achilles heel' of the liberal state. See <https://twitter.com/thierrybaudet/status/1194613924462772224>.

⁴⁵ E.g. Eckes, *Separation of Powers in Climate Cases: Comparing cases in Germany and the Netherlands*, 10 May 2021, available at <https://verfassungsblog.de/separation-of-powers-in-climate-cases/>. The author states that such cases strengthen the processes of deliberation and reason-giving and create conditions for greater legitimacy of the exercise of public power.

⁴⁶ J.B.M. Vranken, 'Toeval of beleid? Over rechtsvorming door hoogste rechters' 75 *NJB* (2000), at 1.

⁴⁷ For example, pursuant to Art. 120 of the Dutch Constitution the constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts. The Netherlands do not have a constitutional court. However, judges are able to refer to equivalents of the same constitutional rights in European and international law, which allows for judicial fundamental rights reviews via Arts. 93 and 94 of the Dutch Constitution.

of law.⁴⁸ As long as democratic majorities fail to enact effective climate laws, fundamental rights – essential for the protection of the democracy as such – may create legitimate operational space for the judiciary to provide remedies against climate change.⁴⁹

B. STANDING OF CLAIMANTS IN CLIMATE LITIGATION

One of the most fundamental aspects of the rule of law is standing, or *locus standi*: the capacity of a party to bring a suit before a court, and the corresponding requirements a claimant must meet to demonstrate they have the right to sue. Standing can be a significant obstacle in climate litigation, as climate change harms are diffuse and difficult to attribute with a clear causal chain.

For example, as set out in paragraph 5.B, the CJEU ruled in the *People's Climate* case that the claimants do not have standing because they had not established that the contested provisions of the acts at issue distinguished them individually from all other natural or legal persons concerned by those provisions.⁵⁰ The standards set by the CJEU for direct access to the EU courts are high and academics have argued that

they are too high, at least in climate actions.⁵¹ They argue that, because climate change affects everyone in current and future generations, it is almost impossible to establish an individual concern. It seems paradoxical that climate cases are therefore dismissed by the CJEU, as the fact that climate change affects everyone means the damage is serious, which should be reason to allow legal action, rather than dismiss it on formal grounds. However, the *People's Climate* case shows that standing in climate actions against EU legislative acts will – at least for now – remain a difficult hurdle to overcome.⁵²

This also applies to NGOs, and especially to NGOs who do not represent a specific group of individuals but idealistic interests such as fighting climate change. For comparable reasons, and for reasons related to *trias politica* discussed above, it is controversial in academic circles whether NGOs should have standing in climate litigation cases.⁵³ Critics, e.g., fear that supra-individual cases against governments will lead activist judges to infringe the prerogative of the democratically elected legislature. However, especially NGOs are capable of representing those mostly affected by climate change since a substantial part are

⁴⁸ See for instance De Werd, 'Dikastofobie', *NJB blog*, 4 February 2020 available at <https://www.njb.nl/blogs/dikastofobie/>

⁴⁹ Cf. Burgers, 'Should Judges Make Climate Change Law' 9 *Transnational Environmental Law* (2020), at 70. The author states at p. 71 that the different decisions in climate cases indicate that we are facing a legal transition: 'Climate change clearly was a political subject but that understanding is shifting, as not only the body of the law on the environment is growing, but also as the environment is *constitutionalizing*' at 70.

⁵⁰ ECJ 25 March 2021, ECLI:EU:C:2021:252.

⁵¹ See e.g. Kucko, 'The Status of Natural or Legal Persons According to the Annulment Procedure. Post-Lisbon', *LSE Law Review*, (2017) 2, at 101-119 and <https://europeanlawblog.eu/2021/04/06/the-cjeu-dismissed-the-peoples-climate-case-as-inadmissible-the-limit-of-plaumann-is-plaumann/>.

⁵² The 2021 amendment of European Parliament and Council Regulation implementing the Aarhus Convention (Regulation 1367/2006, as amended by regulation 2021/1767) might change this.

⁵³ Stolk, 'De legitimiteit van strategisch procederende belangenorganisaties', *Preadviezen Jonge VAR* (2018).

not (yet) legal persons with rights they can invoke themselves, e.g. future generations, non-human entities, and the earth itself.

In the *Urgenda* case (§ 4.A) the courts did grant Urgenda – an NGO – standing. However, while the district court of The Hague (the District Court) ruled that Urgenda *itself* had standing, because it defends the collective interests of present and future generations related to sustainability, the Supreme Court held that Urgenda had standing *only* in so far as it filed a class action on behalf of the residents of the Netherlands. The Supreme Court found that those citizens – and not Urgenda itself – can invoke the state's obligation (following from Articles 2 and 8 ECHR) to take appropriate measures against the threat of dangerous climate change, because (only) those citizens are potential victims of the (threatened) violation of that obligation by the Dutch state. It further found that the interests of the residents of the Netherlands are sufficiently similar and therefore lend themselves to being pooled, so as to promote efficient and effective legal protection for their benefit.

In the *Shell* case (§ 4.B) the District Court held that this does not apply to the interests of current and future generations of the world's population; those interests are not suitable for bundling. The court

ruled that, although the entire world population is served by curbing dangerous climate change, there are huge differences in the time and manner in which the global population at various locations will be affected by global warming caused by CO₂ emissions. Therefore, this principal interest does not meet the requirement of 'similar interest'. However, in line with its earlier judgment in the *Urgenda* case in which the court explicitly accepted the principle of intergenerational equity (which – in short – means that each generation has a responsibility to the next, especially when it comes to the use of natural resources), the District Court did find that the interests of current – and future – generations of Dutch residents are suitable for bundling.⁵⁴ According to the District Court, the differences in time, extent and intensity to which these inhabitants will be affected by climate change caused by CO₂ emissions do not stand in the way of bundling in a class action. In its appeal Shell has challenged this decision and it may, in our opinion, very well be successful.⁵⁵ The fundamental issue with granting future generations standing is that they simply do not exist. Because of their non-existence, it is impossible to establish what their interests will be. Future generations cannot be considered as part of one single community. While it is already hard to divide existing generations into distinct groups with the

⁵⁴ This principle has been accepted before (e.g. in the *Minors Oposa* case in the Philippines in which the Supreme Court of the Philippines ruled that the right to a clean environment, to exist from the land, and to provide for future generations are fundamental and that there is an intergenerational responsibility to maintain a clean environment, meaning each generation has a responsibility to the next to preserve that environment, and children may sue to enforce that right on behalf of both their generation and future generations) and claims and court decisions often mention future generations. Also, the German Federal Constitutional Court stated in the *Neubauer* case that the German state's obligations are directed towards the future and can entail a duty towards future generations (see § 4.C).

⁵⁵ [https://www.shell.nl/media/nieuwsberichten/2022/waarom-shell-in-hoger-beroep-gaat/_jcr_content/par/textimage_1538868955.stream/1647937612380/09807a0bc888002fec77cc718dbd364e28a19820/20220322StatementofAppeal\(ENG\).pdf](https://www.shell.nl/media/nieuwsberichten/2022/waarom-shell-in-hoger-beroep-gaat/_jcr_content/par/textimage_1538868955.stream/1647937612380/09807a0bc888002fec77cc718dbd364e28a19820/20220322StatementofAppeal(ENG).pdf) (para. 10.8).

same interests, this is even more the case for future humans. Not only because of intergenerational differences, but also because distant humans may have different needs and interests than those who will be born in the next ten years. However, the District Court's approach does do justice to the fact that climate change – and the action taken to fight it now – will especially affect those future generations; it should be possible to enforce their (future) rights.

Similarly, in many jurisdictions the idea of giving standing (and other legal rights) to the environment has been raised. Recently Spain's Congress of Deputies voted in favour of giving legal entity status to the Mar Menor, a severely polluted natural lagoon in Spain's south-west Murcia region.⁵⁶ Providing ecosystems with the status of a legal entity will solve standing issues in some climate litigation cases and (thus) provide new opportunities for climate litigation.

C. LIABILITY OF (DIRECTORS OF) COMPANIES AND ASSET OWNERS

As mentioned above, climate change and environmental issues are more and more seen in the human rights context, primarily the right to life and the right to private life are important in relation to climate change (Articles 2 and

8 ECHR). States, as addressees of these human rights obligations, are held to have certain obligations in respect of climate change.⁵⁷ However, recent case law shows that claimants have also a cause of action in cases on environmental matters against private parties, especially those companies that are large scale CO₂ emitters.⁵⁸ The claimants in these cases cannot directly invoke human rights against these private parties. Claims in these matters are based on the interpretation of national rules on fault-based liability, liability without fault or strict liability, as most national laws are lacking direct enforceable environmental provisions for companies. In order to assess these claims, courts rely on CSR rules in the interpretation whether there is a liability, making CSR rules de facto binding on companies.

To date, the *Shell* judgement is one of the patent examples where the claimants have been successful and it has a certain knock-on effect for other companies: immediately following the *Shell* judgment, the main claimant, Friends of the Earth Netherlands, announced that it would consider commencing similar proceedings against other large-scale CO₂ emitters based in the Netherlands.⁵⁹

Meanwhile, in the United Kingdom, a shareholder of Shell (ClientEarth) has brought a derivative action against

⁵⁶ https://spanishnewstoday.com/spanish_mps_vote_to_give_mar_menor_lagoon_personhood_and_rights_1759340-a.html.

⁵⁷ See e.g. the case of *Urgenda* in the Netherlands, *supra* note 4, *Neubauer and others v. Germany*, *supra* note 6 and *VZW Klimaatzaak v. de Belgische Staat*, *supra* note 32.

⁵⁸ See e.g. *Friends of the Earth Netherlands and others v. Shell plc*, *supra* note 5, Tribunal Judiciaire de Nanterre (Nanterre Judicial Court), 30 January 2020 *Les Amis de la Terre v. SA Total* N°R.G. : 19/02833 - N° Portalis DB3R-W-B7D-VIPX and Landgericht Essen (Regional Court Essen), 15 December 2016, *Luciano Lliuya v. RWE AG*, ECLI:DE:LGE:2016:1215.20285.15.00.

⁵⁹ These include companies such as Tata Steel, Chemelot, electricity producers such as Engie, RWE, Eneco and Vattenfall, DOW Benelux, the fertilizer producer Yara, the BP refinery in Rotterdam, and Air Liquide. See: Te Winkel and Van Heesch, 'The Shell judgment – a bombShell in private international law?', *NIPR* (2021) 3, at 532-542.

Shell's 13 directors to hold each of them personally and legally responsible for failing to adopt a strategy to prepare the company for net zero emissions (and to bring the climate policy of Shell in accordance with the Paris Agreement), which according to ClientEarth is a breach of their duties under the UK Companies Act. Furthermore, Friends of the Earth Netherlands is also threatening to bring action against the directors of Shell in the Netherlands for their non-compliance with the judgement of the District Court of the Hague.⁶⁰ We note that also in these cases the claims are based on general (corporate) law rather than specific rules aimed at the protection of the environment/climate, and that it will be a matter of interpretation for the courts to see if any liability in respect of failures to comply with climate goals can be based on the general (corporate) liability rules for directors.

7. [FURTHER] COMMENTS AND OBSERVATIONS

Climate change is an eminently cross-border issue, which requires a cross-border approach. International law in the area of climate change as is at present seems not really suitable for that at first glance, since it is primarily interstate and territorial oriented. Climate cases demonstrate that judges may contribute to the solution of urgent environmental problems by applying alternative legal instruments.

We observe different approaches from the judiciary: from restrained to more radical judgements holding the government and private companies accountable for their climate inaction and even issuing specific orders. While many argue that – in light of the *trias politica* – this goes beyond the scope of the powers of the judiciary, in our opinion, the (in)capability of judges to examine the science, facts and interests necessary to reach a reasoned conclusion on climate issues is also a concern. In general, the judiciary lacks the required research capacity and specific scientific knowledge.⁶¹

⁶⁰ <https://milieudefensie.nl/actueel/brief-aan-de-bestuurders-van-shell/@download/file/2022-04-25%20Letter%20to%20Shell's%20directors.pdf>.

⁶¹ With regard to the latter, we point out that in practice this lack of information might be partially overcome by having the judge gathering information from (third) parties and experts. In this regard, we refer for instance to a federal lawsuit in San Francisco, United States, in which for five hours, opposing sides in a climate change case offered the judge their accounts of the history and current state of climate science (<https://www.science.org/content/article/san-francisco-court-room-climate-science-gets-its-day-docket>). The judge has invited the counsels to conduct a two-part tutorial on the subject of global warming and climate change, available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180227_docket-317-cv-06011_notice.pdf.

Judges are trying to find new ways of taking hold of the facts and science relevant to climate change, for example via *amicus curiae*, scientific committees or comparative law studies. Nevertheless, the legislator is better suited than the judge to take into account all legitimate interests and alternatives, and to make the choices needed in order to meet the objectives of climate goals.

Therefore, it is first and foremost up to international and national legislators to make those choices and provide for clear rules, which make sure the internationally set targets can and will be achieved and enforced. If legislators assume responsibility, judges in general will no longer be inclined to seek the boundaries of their powers and endanger the *trias politica*. As long as those rules are not there, we expect that the struggle of the judiciary will continue. Judges are dependent on the claims and arguments of parties. Another – less politically sensitive – way for the judiciary to deal with climate litigation cases like *Urgenda*, *Shell*, *Neubauer* and *Klimaatzaak* would be to summon the government to provide for sufficient (legislative) measures within a set timeframe and/or establish an (international) monitoring committee, which would report on the compliance with those measures and the progress on the given climate targets.

With regard to enforcement, one would expect an important role for European courts because of the cross-border nature of climate change and relevant legislation. However, both the ECtHR and the CJEU did not provide clarity on the main issues raised in climate cases up to date.

From ECtHR case law regarding environmental dangers it can be concluded that the threshold for a violation under Article 8 ECHR is quite high.⁶² If the judiciary aims to protect human rights effectively with regard to climate change, it should be willing to lower this threshold. For example by abandoning the requirement of direct affection of an individual's home, family life or private life. Furthermore, the individual aspect required in this regard is not in line with the more collective nature of climate change. A possible alternative to individual proceedings (including the requirement to exhaust domestic remedies) would be a request for an advisory opinion from the ECtHR.⁶³ Although non-binding, in this way the ECtHR may provide clarity on how the ECHR applies in climate cases.

The CJEU did not make any attempt to answer the question whether the rights of citizens are infringed by insufficient EU climate legislation. In light of the right to legal remedies set out in Article 47 of the Charter and because of the collective, cross-border nature and the impact of climate change, it would make sense for the CJEU to apply a less strict interpretation of the criteria for standing,

⁶² The pending case of 'the Climate Grandmothers vs Switzerland' gives the ECtHR an opportunity to lower this threshold.

⁶³ Pursuant to Protocol No. 16, entered into force in 2018 for the states that ratified it, the ECtHR can issue advisory opinions on questions concerning the application and interpretation of the ECHR. Such opinions can only be requested by the highest courts and tribunals of a state. Advisory opinions are not binding, but they may provide clarity on how the ECHR applies in climate change cases.

so it can give guidance to national courts and governments. This standing should not be limited to individuals with legal personality. Because the consequences of climate change will be felt especially in the future, it should be possible to enforce the relevant laws on behalf of future generations.

With regard to climate litigation against private companies, it is noted that the human rights approach which is used in court cases vis-à-vis states, cannot be used against private companies. Although certain courts use CSR rules and human rights in the interpretation of the duty of care of private companies or in the assessment of a liability claim against such companies, there is no specific legal framework on the basis of which the courts may render their decision in climate litigation against private companies. Moreover, it is very difficult to convert general global or regional climate goals into specific legal obligations of a private company.

This is even more pressing in a judicial determination by a court, as a judgment rendered against a private company cannot fully account for the broader social and economic trade-offs and technical challenges involved in addressing climate change.

Such judicial determination will be static in nature (captures a certain moment in time, not taking into account any changes in policies, techniques etc.). Imposing an obligation on an individual company also cuts across existing policy benchmarks of governments, including the legislative framework. Furthermore, if any obligations would exist or be created for private companies with regard to climate change it needs to be created in countries around the world (or at least a certain region) in order to create an impact on the global climate targets. We do not expect that to be the case in the near future. It is therefore upon legislature/governments to act and propose a suitable legal framework.

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THE EAPO: ICARUS' WINGS OR MEDUSA'S GAZE

European Account Preservation Order (EAPO) Regulation aims at facilitating cross-border debt recovery in civil and commercial matters by establishing a provisional measure which allows creditors from a Member State to temporarily attach their debtor's bank accounts located in another Member State, by means of an ex parte procedure. This paper aims at analysing some of the key provisions of the Regulation, by outlining its novelty and advantages. Then we look at some issues that may arise in practice, concerning the debtor's rights throughout the proceeding, especially the right to be heard, the creditor's request for information on debtor's bank accounts and the remedies against the issuance and the enforcement of the order. Such a complex procedure requires harmonization between Member States' national legislation and the provisions of the Regulation, but also cooperation between different Member States' authorities. In the last part, we shall consider these levels of harmonization and cooperation, bearing in mind the principle of procedural autonomy.

KEY WORDS

European Account Preservation Order Regulation ▪ Ex parte procedure ▪ Information mechanism ▪ Remedies against enforcement ▪ Procedural autonomy

1. INTRODUCTION

A subtle action or a blunt blow? If you were the EU legislator, what would you choose in order to facilitate cross-border debt recovery in an age where debtors 'are able to move their assets in a blink of an eye into other accounts unknown to their creditors in another Member State,¹ temporarily or permanently hindering creditors' efforts to find value? Would you design a fragile pair of wings just like the ones Icarus had, hence some sort of soft harmonization instrument, or would you draw up a more intrusive petrifying Medusa-like one, inclining more towards unification? What margin of national autonomy would you establish? The European Account Preservation Order² is in a crossroad of all those inquiries.

Time travelling to the past, 'the idea of establishing a European attachment procedure arose at the end of the 1990s' when the European Commission 'proposed to confine reflection [on a possible intervention in enforcement law] initially to the problem of banking seizures:³

Public debate was triggered in 2006 with the publication of the Commission's Green Paper on the attachment of bank accounts.⁴ Nonetheless, it was not until 2009 that the talks turned into action, namely into a real priority of the EU for the 2010-2014 timeframe, hence being included in the Stockholm Programme of December 2009.⁵ The EAPO Regulation has its roots in these academic and institutional works and discussions.⁶

The European Account Preservation Order represents 'a European uniform procedure which enables creditors to protect the future enforcement of their claims by preventing their debtor from withdrawing or transferring funds held in bank accounts'.⁷ Alongside the Commission Implementing Regulation (EU) 2016/1823⁸ that lays down the necessary forms for the above-mentioned procedure, the EAPO is applicable from 18th January 2017⁹ and appears to be an additional measure aimed at strengthening the field of EU civil procedure law, especially concerning the cross-border recovery of pecuniary claims. *Ratione*

¹ Further referred to as 'MS'.

² Regulation 655/2014, OJ 2014 L 189/59. Further referred to as 'EAPO Regulation'.

³ G. Cuniberti and S. Miglioni, *The European Account Preservation Order Regulation: A Commentary* (2018), at 7.

⁴ European Commission's Green Paper on improving the efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts COM(2006) 618 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52006DC0618>.

⁵ See Recital 4 EAPO Regulation.

⁶ See Opinion of the European Economic and Social Committee on the 'Proposal for a Regulation of the European Parliament and of the Council creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters' COM (2011) 445 final 2011/0204 (COD), OJ 2012 C 191/57. According to paragraphs 3.1 and 3.2, the proposal of regulation is qualified as 'formally flawless, carefully thought-out and [containing] limpid technical and legal texts', its only drawback being 'its tardy arrival'. It is also stated that an initiative regarding the transparency of debtors' assets is equally necessary (paragraph 3.9).

⁷ Cuniberti and Miglioni, *supra* note 3, at 3.

⁸ Commission Implementing Regulation 2016/1823, OJ 2016 L 283/1.

⁹ Pursuant to article 54 EAPO Regulation, 'it shall apply from 18 January 2017, with the exception of Article 50, which shall apply from 18 July 2016'.

materiae, it shall apply only in 'pecuniary claims in civil and commercial matters'¹⁰ related to 'cross-border cases' in the autonomous meaning established in Article 3, thus implying a lack of identity between the state in which the accounts are maintained on one hand and either the state of the court seized or the state of domicile of the creditor on the other hand, having regard to the 26 EU Member States in which it is applicable.¹¹

Bearing these ideas in mind, our paper aims to raise awareness first and foremost regarding the EAPO, as being a complex yet insufficiently promoted EU instrument.¹² For this purpose, we are to shed light on the advantages of this mechanism (2), on some practical difficulties that legal professionals may encounter while applying the procedure (3) as well as on some implementation solutions by MS (4).

Lastly, we aim to argue that the EAPO procedure consists in a fine blend of EU and national rules, thus representing a clear expression of the autonomy principle (5) as enshrined in the case law of the Court of Justice of the European Union.¹³

Given the EAPO's date of entry into force, we have unsurprisingly noticed that both national and CJEU's case law is scarce in this matter.¹⁴ Yet practical difficulties do not cease to emerge. Thus, we aim to put forth some answers while at the same time to enhance the legal debate with newly identified emerging questions.

¹⁰ According to Article 2(2), EAPO Regulation shall not apply to: (a) rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage; (b) wills and succession, including maintenance obligations arising by reason of death; (c) claims against a debtor in relation to whom bankruptcy proceedings, proceedings for the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions, or analogous proceedings have been opened; (d) social security; (e) arbitration.

¹¹ EAPO Regulation applies in all Member States except Denmark, which, though participating in the negotiations that led to the EAPO Regulation, decided to exercise its right to drop out. See: Comments on Chapters I, II and III from the delegation of Denmark, 3 September 2012, 13260/11 JUSTCIV 205 CODEC 128, 13140/12 ADD.

¹² Unlike the European Payment Order (EPO) or the European Small Claims Procedure (ESCP) Regulations, the e-Justice portal lacks a practice guide about the EAPO Regulation. Furthermore, see J. Von Hein and T. Kruger (eds), *Informed Choices in Cross-Border Enforcement: The European State of the Art and Future Perspectives* (2021), for the reports on Belgium, Germany, Poland, which show that the stakeholders were unaware of the EAPO Regulation and other EU civil procedural instruments.

¹³ Further referred to as 'CJEU'.

¹⁴ For instance, in the database of the IC2BE project created in 2021 there were only 25 judgments in 5 Member States: <https://ic2be.uantwerpen.be/#/search/national>. The scarce number of judgments about the EAPO Regulation is also reflected in the reports about national case law of the EFFORTS Project: <https://efforts.unimi.it/research-outputs/reports/collection-of-national-case-law/>. On CJEU case law, besides the decided case C-555/18, there is another pending preliminary reference about the EAPO Regulation: Case C-291/21, *Starkininvest SRL*, Request for a preliminary ruling from the Tribunal de première instance de Liège (Belgium) lodged on 7 May 2021, OJ C 278, 12.7.2021, p. (pp.) 35–36.

2. A SPOTLIGHT ON THE EAPO – A PROMISING EU TOOL?

A. WHY ANOTHER EUROPEAN INSTRUMENT?

Articles 67(4) and 81(2) vested the European legislator with the necessary powers to approve the EAPO. It may be qualified as an 'optional instrument in EU private law'¹⁵ aimed at achieving the 'Europeanization' of civil procedure rules across MS, yet in a different less intrusive manner as compared to traditional methods, such as harmonization and unification, thus being qualified as a 'soft form of harmonization'.¹⁶ Having regard to the entire EU legal framework, it must be underlined that '[the EAPO] is only the third uniform procedure established... after the European Payment Order and the Small Claims Procedure'.¹⁷

Hence, it can be concluded that the EAPO is an alternative procedure which only enriches the domestic legal means at the disposal of the creditor, who now has a choice between EAPO and the equivalent domestic attachment orders. On the one hand, the main reason that justifies the EAPO becomes clearer in the context of cross-border disputes which invariably might imply heterogeneous conditions of national equivalent procedures,¹⁸ which can represent a deterring factor for creditors engaged in transnational disputes.¹⁹ Indeed, taking into account the 'different levels of efficiency' of claims enforcement measures as well as the effects therein on competition between companies across the EU, 'the legislation on the enforcement of payment procedures is often considered the 'Achilles heel' of the European Civil Judicial Area'.²⁰ The elevated costs, alongside the difficult implementation of precautionary measures, emphasize the need for a uniform procedure in the EU.²¹

¹⁵ R. Mańko, *Europeanisation of civil procedure: towards common minimum standards?* (EPRS in-depth analysis; No. PE 559.499), European Parliamentary Research Service (2015), at 16, 19. According to the author, 'an "optional instrument" is an EU legislative act, usually in the form of a regulation, which creates a parallel and optional EU-wide legal regime for a given legal issue ... [which] does not replace national regimes, but coexists alongside them'.

¹⁶ Ibid. The cited author states that 'harmonization requires that a majority of Member States agree on a certain level of harmonization ('minimum' or 'maximum') which can be politically difficult, for example if conflicting interests of various groups (e.g. consumers and businesses) are at stake' while 'unification requires Member States to give up their existing legal rules and apply a uniform EU regulation instead, which can also be difficult to accept, not only because a common set of rules must be reached, but also because of concerns to preserve national legal culture'.

¹⁷ Cuniberti and Migliorini, *supra* note 3, at 3. The Regulations cited by the author are Council Regulation 1896/2006 OJ 2006 L 399/1 and Council Regulation 861/2007 OJ 2007 L 199/1.

¹⁸ For a general comparative overview about the differences to access to provisional enforcement and protective measures, see: B. Hess, *Study No. JAI/A3/2002/02 on making more efficient the enforcement of judicial decisions within the European Union: Transparency of a Debtor's Assets Attachment of Bank Accounts Provisional Enforcement and Protective Measures Version of 2/18/2004* (2002), available at: <http://www2.ipr.uni-heidelberg.de/studie/General%20Report%20Version%20of%2018%20Feb%202004.pdf>.

¹⁹ N. Kyriakides, 'An Economic Analysis of the European Commission's Proposal for a European Account', 3 *Risk governance & control: financial markets & institutions* (2013) 45, at 46.

²⁰ L. Monteiro, 'The Bank Account Preservation Procedure in the European Union Regulation (EU) No 655/2014 of the European Parliament and of the Council 15 May 2014', 1 *EU Law Journal* (2015) 121, at 122.

²¹ European Commission's Green Paper, *supra* note 4.

The EAPO is granted *ex parte* and can circulate freely from one Member State to another. The debtor is not informed about the EAPO request once the EAPO has been already enforced (Article 28 EAPO Regulation). By issuing the EAPO *inaudita altera parte*, the European legislator intended to achieve a surprise effect that would prevent debtors from adopting specific measures intended to hinder the effectiveness of the EAPO.²² This meant a major breakthrough in the Area of Freedom, Security, and Justice. Under the Brussels I bis Regulation, only provisional measures have to be served to the debtor otherwise cannot from its simplified scheme of recognition and enforcement, depriving the measures of their surprise effect. Such a limit derives from the CJEU landmark judgment *Denilauler*,²³ rendered under the already disappeared 1968 Brussels Convention.²⁴

The European legislator decided to codify it in the text of the Brussels I bis Regulation.²⁵

Lastly, from an economic perspective, the EAPO further justifies its endorsement. In light of the prior assessment data gathered by the Commission and

observed by the European Economic and Social Committee, it has been reported that cross-border debt has reached high levels yearly while the level of national preservation orders is unexpectedly low, i.e. 11.6%. Moreover, optimistic prospects showed that the EAPO regulation could 'secure the recovery of EUR 373 to 600 million of additional bad debt per year' and 'produce estimated cost savings for companies engaged in cross-border trade of EUR 81.9 million to 149 million per year'.²⁶ Still, in order to assess the current impact of the EAPO in economic terms, the Commission report to be issued in accordance with Article 53 of the Regulation is highly expected.²⁷

B. A STATIC VIEW UPON THE EAPO: SUBSTANTIAL INSIGHTS FOR NATIONAL JUDGES

The Regulation operates with two main stages: pre-judgement EAPO, and the post-judgement EAPO.²⁸ The essential distinction consists in whether the creditor applying for a EAPO already has an enforceable title – judgment, court settlement or other authentic instrument – comprising the obligation of payment that incurs to the debtor.

²² Article 11 EAPO Regulation and Recital 15, the latter explicitly mentioning the surprise effect.

²³ C-125/79, *Bernard Denilauler v SNC Couchet Frères* (EU:C:1980:130).

²⁴ 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ 1972 L 299/32.

²⁵ Such codification was done against the Commission's approach which defended its partial derogation: Article 2(a) of the Commission Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2010) 748 final 2010/0383 (COD).

²⁶ See Opinion of the European Economic and Social Committee on the 'Proposal for a Regulation of the European Parliament and of the Council creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters' COM (2011) 445 final 2011/0204 (COD), OJ 2012 C 191/57, paragraph 2.11.

²⁷ Article 53 (1) EAPO Regulation requires that a report should be sent by the Commission to the European Parliament by January 2022. By September 2022, when this article was written, the report was not published yet.

²⁸ Article 5 EAPO Regulation.

It is for this reason that the EAPO has been qualified as having a dual nature, as an interim relief before or during the proceeding on the merits of the claim and as a protective enforcement measure.²⁹

In both cases, the fundamental requirement for the successful issuance of the account freezing order implies that the creditor provides evidence in order to prove that 'his claim is in urgent need of judicial protection and ... the enforcement ... may be impeded or made substantially more difficult.'³⁰ As outlined in the preamble, the urgency stems from the conduct of the debtor who generates *periculum in mora*, namely 'a real risk that, by the time the creditor is able to have the existing or a future judgment enforced, the debtor may have dissipated, concealed or destroyed his assets or have disposed of them under value, to an unusual extent or through unusual action.'³¹

When the creditor has not yet obtained an enforceable title, the creditor is additionally required to prove the *fumus boni iuris*, which implies evidence that he/she is likely to succeed in the procedure on the merits of his/her claim.³²

Whereas the Preamble is not binding,³³ it may prove useful in this respect as it provides some guidance for the evaluation of the *periculum in mora*.³⁴ Without prejudice to domestic courts' margin of appreciation, the preamble puts forward a series of non-exhaustive criteria which may be taken into account by the court; in brief, these refer to 'the debtor's conduct in respect of the creditor's claim or in a previous dispute between the parties, to the debtor's credit history, to the nature of the debtor's assets and to any recent action taken by the debtor with regard to his assets.'³⁵

At the same time, it is highlighted that certain isolated stances of the creditor are not *per se* enough for the issuance of the order, since they are deemed as usual and not at all fraudulent.³⁶ That is the case when it comes to 'withdrawals or expenditures covered by the normal conduct of the debtor's business or family life, the non-payment of the claim, contesting the claim, the plurality of creditors; or poor or deteriorating financial status of the debtor'.³⁷ Only combining the above-mentioned circumstances it can be considered enough to issue the EAPO.

²⁹ I. Pretelli, 'Provisional and Protective Measures in the European Civil Procedure of the Brussels I System', *Brussels Ibis Regulation, Short Studies in Private International Law* (2016) 97, at 108. G. Schumann Barragán, 'Article 20' in E. D'Alessandro and F. Gascón Inchausti (eds.), *The European Account Preservation Order: A Commentary on Regulation (EU) No 655/2014* (Edward Elgar 2022), at para. 20,17.

³⁰ See Recital 14 and article 7 paragraph 1 EAPO Regulation.

³¹ See Recital 14 EAPO Regulation.

³² Article 7 EAPO Regulation.

³³ Courts are not compelled to follow the content of the Preamble, unlike it occurs with the content of the articles. See C-215/88, 13 July 1989, *Casa Fleischhandel* (EU:C:1989:331), at para. 31.

³⁴ See Recital 14 EAPO Regulation.

³⁵ See Recital 14 EAPO Regulation.

³⁶ See Cuniberti and Migliorini, *supra* note 3, at 111.

³⁷ Recital 14 EAPO Regulation.

According to Article 12(1) of EAPO, creditors that have not yet obtained an enforceable judgment, court settlement or authentic instrument are required to submit a security. For those creditors with an enforceable title, courts can require a security when they it necessary and appropriate.³⁸ The security is perhaps the most relevant prerequisite to obtain a EAPO since it serves to cover the potential damages the EAPO might cause to the debtor. In this sense, it the main counterbalance to the EAPO's *inaudita altera parte* character.³⁹

As far as the duration of EAPO is concerned, no fixed time-limit is provided, yet there are three rather determinable final moments. According to Article 20 of EAPO Regulation, the three moments are: (i) revocation of the EAPO, (ii) termination of EAPO's enforcement, (iii) effective enforcement of the title obtained by the creditor for the concerned funds.

To compensate the *inaudita altera parte* of the EAPO procedure, the EU legislator has established several safeguards for the rights of the debtor such as: a specific time-frame for the applicant to bring forth the proceedings on the merits when the EAPO is requested *ante de-*

mandam,⁴⁰ the provision of the already referred security⁴¹ or the creditors' liability regime.⁴²

C. DYNAMICS OF THE EAPO PROCEDURE

As far as the procedure is concerned, it can be qualified as written and expeditious.⁴³ This legislative option is justified by the lower costs of transmission of documents as compared to appearing before court. Consequently, this influences the evidentiary regime with notable benefits, such as the rapid management of the application and the protection of the debtor.

Regarding the competent court to issue a EAPO, the distinction pre-judgment as opposed to post-judgment EAPO remains applicable. While in the first situation jurisdiction lies with 'the courts of the Member State which have jurisdiction to rule on the substance of the matter, in accordance with the relevant rules of jurisdiction applicable',⁴⁴ in the latter it lies with 'the courts of the Member State in which the judgment was issued or the court settlement was approved or concluded'.⁴⁵ Bearing in mind consumers' interests, a derogatory rule has

³⁸ Article 12(2) EAPO Regulation.

³⁹ Something that it was highlighted by the Finnish delegation during the negotiations of the EAPO Regulation.

⁴⁰ Article 10(1) EAPO Regulation.

⁴¹ Article 12 EAPO Regulation.

⁴² Recital 19 EAPO Regulation. Pursuant to Article 13, a conflict-of-laws rule is also stipulated as far as the law applicable to creditor's liability is concerned, namely the law of the state of enforcement. In case there are several states of enforcement, the Regulation provides for an order of application: (i) the law of the Member State of enforcement in which the debtor is habitually resident and in default (ii) the law of the Member State of enforcement with which the case has the closest connection, according to the amount preserved.

⁴³ Article 9(1) EAPO Regulation states that '[t]he court shall take its decision by means of a written procedure on the basis of the information and evidence provided by the creditor in or with his application.' This is also the case with other European procedures, e.g. EPO and ESCP.

⁴⁴ Article 6(1) EAPO Regulation.

⁴⁵ Article 6(3) EAPO Regulation. Article 6(4) states that regarding authentic instruments, jurisdiction lies with the courts designated for that purpose in the Member State in which that instrument was drawn up.

been established for this particular case which grants the competence to issue the Order to the courts of the debtor's domicile.⁴⁶ The special jurisdictional rule for consumers only applies when the claimant has not obtained an enforceable title.

As far as the application itself is concerned, by far the most important aspect that the national court must verify is the 'number enabling the identification of the bank, such as the IBAN or BIC and/or the name and address of the bank, with which the debtor holds one or more accounts to be preserved'.⁴⁷ Lacking such information, the court must take the alternative path, namely to verify whether the creditor filed a request for obtaining account information.⁴⁸ In the request, the creditor has to indicate the reasons why he/she believes that there might be bank accounts in a Member State.⁴⁹ Afterward, the court will examine if the information provided by the creditor justifies the search for the debtors' bank accounts.⁵⁰

On the formal requirements of the application, EAPO reveals a rather balanced approach. Thus, an incomplete application does not lead necessarily to the EAPO rejection. The court can request the creditor to duly amend the application. Only in case of failure of completion

or rectification upon expiry, the application is to be rejected.⁵¹ Another reason for rejection refers to the essential element of the application, i.e. the bank account of the debtor which is initially unavailable. If application of the procedure of requesting information proves to be unsuccessful, the court will issue the same solution of rejection.⁵² The court has discretion to decide whether the EAPO is granted or not, despite the existence of an equivalent national preservation order.⁵³

When examining the merits of the case, the court may reach the conclusion that the proof submitted by the creditor does not suffice. In this case, the order is to be issued only partially, i.e. in the amount justified in accordance with the evidence submitted by the creditor and determined pursuant to the law applicable to the claim.⁵⁴ Additionally, the request of a EAPO along with a domestic equivalent attachment order might trigger a comparable solution (Art. 16 EAPO Regulation), i.e. admission in full or in part. In any case, a EAPO can be requested along with domestic attachment orders, but not along with other EAPOs

In light of the above-mentioned practical aspects, it is worth noting the manner in which the case law of the CJEU shed light on the obscurities of the EAPO Regulation.

⁴⁶ Once the claimant has obtained an enforceable title, then consumers no longer enjoy this jurisdictional protection offered by Article 6(2) EAPO Regulation. See Cuniberti and Miglioni, *supra* note 3, 103.

⁴⁷ Article 8(2)(d) EAPO Regulation.

⁴⁸ Access to the information mechanism is limited to creditors with a title. This is something that Advocate General Szpunar remarked in its Opinion for the case C-555/18. See: Opinion AG Szpunar, in C-555/18, 29 July 2019, *K.H.K. v B.A.C., E.E.K.* (EU:C:2019:652), at paras. 62 – 63. See also *infra* 3.A.

⁴⁹ Article 8(2)(f) EAPO Regulation.

⁵⁰ See *infra* 3.B.

⁵¹ Article 17(3) EAPO Regulation.

⁵² Article 14(7) EAPO Regulation.

⁵³ See Article 16(4) EAPO Regulation.

⁵⁴ Article 17(4) EAPO Regulation.

Almost inadvertently, the first preliminary reference of the CJEU to EAPO can be found in C-379/17, *Società Immobiliare Al Bosco Srl*. Even if this judgment clarifies the construction of certain provisions in Regulation (EC) no. 44/2001,⁵⁵ it is worth analyzing it from the EAPO perspective as it highlights the principle of procedural autonomy in terms of enforcement norms.⁵⁶ In order to underpin this reasoning, the Court put forward ‘a broader systemic perspective’,⁵⁷ by referring to Article 23 of EAPO Regulation that also prescribes the applicability of national enforcement legislation.

It is only in C-555/18, *K.H.K. v B.A.C. and E.E.K.* that the CJEU delivered its first judgment in the interpretation of the EAPO Regulation. The core question raised by the national court referred essentially to whether enforceability constitutes a prerequisite condition for the issuance of a EAPO on the basis of an ‘authentic instrument’. While abandoning the literal interpretation of the provisions, the CJEU took into account the context of the provision and hence

analysed the *travaux préparatoires* of the EAPO Regulation which confirmed the requirement of enforceability as a mandatory condition of the title invoked by the creditor.⁵⁸ This condition applies in order to ensure ‘an appropriate balance between the interests of the creditor and those of the debtor’ who find themselves in objectively different circumstances: ‘in the first situation, the creditor is required to establish only that the measure is needed as a matter of urgency on account of imminent risk, whereas in the second situation, he must also satisfy the court that he is likely to succeed on the substance of his claim’.⁵⁹ As it has already been noted, the aforementioned judgment ‘constitutes a good example of the balances that the CJEU has to make in order to maintain the status quo between the defendant and the claimant’,⁶⁰ thus distinguishing between two opposing perspectives: ‘a pro-defendant approach regarding the first question, and a pro-claimant position on the one hand in its approach to the second and third questions’.⁶¹

⁵⁵ Council Regulation 44/2001, OJ 2001 L 012/1.

⁵⁶ C-379/17, *Società Immobiliare Al Bosco Srl* (EU:C:2018:806), at para. 33. To be more precise, ‘since the enforcement, in the strict sense, of a decision issued by a court of a Member State other than the Member State in which enforcement is sought, and which is enforceable in the latter Member State, has not been the subject of harmonization by the EU legislature, the procedural rules of the Member State in which enforcement is sought are to apply to matters relating to enforcement’ (at para. 33).

⁵⁷ *Ibid.*, at para. 38. Having to decide upon the applicability of a peremptory time limit stipulated in national legislation for the enforcement of a judgment issued in another MS, the Court reached the conclusion that ‘the procedural rules of the Member State in which enforcement is sought alone are applicable’, as seen in para. 36.

⁵⁸ C-555/18, *K.H.K. v B.A.C. and E.E.K.* (EU:C:2019:937), at para. 38, 43.

⁵⁹ *Ibid.*, at para. 38, 40. The last two interpretations therein are rather technical as they clarify the fact that “ongoing proceedings for an order for payment, such as those in the main proceedings, may be regarded as proceedings ‘on the substance of the matter’ within the meaning of that provision” while setting aside judicial vacations from the scope of the ‘exceptional circumstances’ that may justify an infringement of the time frames established by the Regulation.

⁶⁰ Carlos Santaló Goris, *The CJEU renders its first decision on the EAPO Regulation – Case C-555/18* (2019), available at: <https://conflictflaws.net/2019/the-cjeu-renders-its-first-decision-on-the-eapo-regulation-case-c-555-18%20/>.

⁶¹ *Ibid.*

3. PRACTICAL ISSUES

A. SAFEGUARDING THE DEBTORS RIGHTS IN THE EAPO PROCEDURE

One practical issue that may arise concerns the area in which the EAPO may touch upon the fundamental rights of the debtor and how the courts can make sure its actions do not amount to violations of said rights.

Firstly, we must determine whether the procedure falls under the right to a fair trial of the Convention for the Protection of Human Rights and Fundamental Freedoms.⁶²

Article 52(3) of the Charter of Fundamental Rights of the European Union⁶³ allows both the national judge and CJEU to refer to the ECHR as a reference when interpreting EU legal acts which might interfere with rights guaranteed by both instruments. Indeed, ECHR is the minimum standard of protection which should be taken into account when dealing with corresponding rights.⁶⁴

In *Avotiņš v. Latvia*,⁶⁵ the European Court of Human Rights⁶⁶ considered, *inter alia*, the relation between the EU system of judicial cooperation in civil and commercial matters and the right to a fair trial.

The question pertained to the enforcement of a final judgment in a different member state than the state of origin, in default of appearance of the defendant. Would a provisional enforcement measure ruled without any notification of the defendant meet the criteria of legitimate interest and proportionality?

In *Micallef v. Malta*, the ECtHR determined Article 6 of the ECHR also applies to *interim* procedures if certain criteria are met.⁶⁷

The first of prerequisite is that, 'the right at stake in both the main and the injunction proceedings should be "civil" within the autonomous meaning of that notion under Article 6 of the Convention'.⁶⁸ Secondly, 'the nature of the interim measure, its object and purpose as well as its effects on the right in question should be scrutinized. Whenever an interim measure can be considered effectively to determine the civil right or obligation at stake, notwithstanding the length of time it is in force, Article 6 will be applicable'.⁶⁹

Looking at Article 2 (1) and Recital 12 from the Regulation we notice it applies to 'pecuniary claims in civil and commercial matters' including claims that arise 'from a transaction, (...) relating to tort, delict, or quasi-delict and civil claims for

⁶² Further referred to as 'ECHR'.

⁶³ Further referred to as 'CFR'.

⁶⁴ C-235/17, *Commission v Hungary (Usufruct over agricultural land)* (EU:C:2019:432), at para. 72. For more details on this matter, see Onișor, 'CJEU, the Charter and the ECHR. The Sunset of an Atypical Relationship?', 1 THEMIS (2021) 179, 192.

⁶⁵ ECtHR, *Avotiņš v. Latvia*, Appl. no. 17502/07, Judgment of 23 May 2007.

⁶⁶ Further referred to as 'ECtHR'.

⁶⁷ ECtHR, *Micallef v. Malta*, Appl. no. 17056/06, Judgment of 15 October 2009, at para. 83-86. See also ECtHR, *Maniscalco v. Italy*, Appl. no. 19440/10, Judgment of 2 December 2014, at para. 32.

⁶⁸ ECtHR, *Micallef v. Malta*, Appl. no. 17056/06, Judgment of 15 October 2009, at para. 84; ECtHR, *Stran Greek Refineries and Stratis Andreadis v. Greece*, Judgement of 9 December 1994, at para. 39.

⁶⁹ *Ibid.*, at para. 85.

damages or restitution', while it excludes matters relating 'to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority'. Therefore, it can be clearly seen that EAPO applies only to disputes between private individuals.⁷⁰

The first condition set out by the ECtHR, namely that the rights at stake should be civil, is without a doubt fulfilled.

The second criterion put forward by the ECtHR is met if the 'interim measure can be considered effectively to determine the civil right or obligation at stake'.⁷¹ As the court cannot rule on the substance of the matter, only on the conditions for issuing a EAPO, this condition seems to not be met. However, keeping in mind the purpose of the EAPO - securing claims that have fallen due - and its duration - until the order is revoked, enforced or terminated -, one can conclude it effectively determines the success of the enforcement, as it is so closely tied with it. Thus, we consider the second criteria met and Article 6 applicable to the procedure surrounding the EAPO.

Having established this, we will shift our focus to one of the essential elements of the procedure: its ex parte nature. This represents a major violation of the right

to be heard, but as the ECtHR stated in *Micallef v. Malta*, the *inaudita altera parte* of an interim measure might be justified on the grounds that the effectiveness of the measure depends upon a rapid decision-making and the unforeseeability from the debtor's perspective.⁷² In compensation of the ex parte character, debtors have to be informed about the EAPO at the earliest possibility and once they learn about the EAPO, they are entitled to challenge the EAPO or its enforcement (Articles 33 and 34 of the Regulation).

Article 28 of the Regulation requires that service of the EAPO on the debtor must be initiated within 3 days upon the implementation of the EAPO⁷³ if the debtor is domiciled in a Member State, and declares that rules applicable to service depend on the domicile of the addressee. Cases in which the debtor is domiciled in the Member State of origin or in a third State shouldn't raise issues for the national court, as it is called upon to apply its national rules. Also, the 3 days deadline does not apply to the service of documents to debtors domiciled in third States.⁷⁴ When the debtor is domiciled in the Member State of enforcement and this is not the Member State where the EAPO was granted, the documents are served to the debtor according by the authorities of that Member State.⁷⁵

⁷⁰ Article 2 (2) EAPO Regulation further excludes some private matters from the scope of the EAPO, namely: (a) rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage; (b) wills and succession, including maintenance obligations arising by reason of death; (c) claims against a debtor in relation to whom bankruptcy proceedings, proceedings for the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions, or analogous proceedings have been opened; (d) social security; (e) arbitration.

⁷¹ ECtHR, *Micallef v. Malta*, Appl. no. 17056/06, Judgment of 15 October 2009, at para. 85.

⁷² *Ibid.*, at para. 86.

⁷³ It must be also mentioned that the bank has the possibility of informing their client earlier, as Article 25 (4) EAPO Regulation allows it.

⁷⁴ Article 25(3) EAPO Regulation.

⁷⁵ Article 25(3) EAPO Regulation

It must be noted that there is no obligation to resort to means required under the European Service Regulation, as Article 48 (a) excludes its application, but it can be used as a means to supplement Article 29.⁷⁶

In these types of cases, EAPO allows for the transmission of documents ‘by any appropriate means’, the only requirement being that the content of the documents transmitted be true and faithful and easily legible.⁷⁷ From the requirement, national courts must understand that they have to choose a method which ensures that the document cannot be easily altered or lose information.

Another element that is equally as important as the actual transfer of documents, is their translation, seeing as the language used by the Court called to rule upon the matter will seldom be one that the debtor understands. Article 49(1) provides that the EAPO and the application lodged to obtain it shall be transmitted to the debtor in an official language of the state of his/her domicile or in a language that he/she understands.

Here the Court should take extra steps to ensure that the documents in need

of translation⁷⁸ are clearly indicated⁷⁹ and the translation actually takes place before the service. We draw attention to this point because even though the creditor is obliged to provide a translation before the day of service to the debtor, no immediate sanction is attached to the failure to do so. In this scenario, the debtor can seek the revocation of the EAPO,⁸⁰ but this will only be granted if the creditor fails to comply and provide an adequate translation within 14 days from the date in which the creditor was informed of the application for a remedy.⁸¹

B. ACCESSING THE INFORMATION MECHANISM

At the national level, the identification of the debtors’ assets in national enforcement proceedings generally depend on the information supplied directly by the debtor, the creditor or, as a subsidiary option,⁸² by a third party. In the case of the debtor, this derives from the obligation⁸³ to disclose all of his assets at the start of the enforcement procedures.

The EAPO took a big leap forward through Article 14 by giving the creditor the right to request information

⁷⁶ G. Cuniberti and S. Migliorini, *supra* note 3, at 262.

⁷⁷ Recital 24 EAPO Regulation.

⁷⁸ According to Article 28(5) EAPO Regulation, the following documents shall be served on the debtor and shall, where necessary, be accompanied by a translation or transliteration as provided for in Article 49(1): (a) the Preservation Order using parts A and B of the form referred to in Article 19(2) and (3); (b) the application for the Preservation Order submitted by the creditor to the court; (c) copies of all documents submitted by the creditor to the court in order to obtain the Order.

⁷⁹ Article 19(3) (d) EAPO Regulation.

⁸⁰ Article 33(1) EAPO Regulation.

⁸¹ Article 33 (4) EAPO Regulation.

⁸² For instance, under the German civil procedural system, the enforcement agent (*Gerichtsvollzieher*) can retrieve information about the debtors’ bank accounts from the German Federal Central Tax Office (*Bundeszentralamt für Steuern*): Section 802l Zivilprozessordnung (German Civil Procedure Code).

⁸³ For instance, see: § 802c of Zivilprozessordnung (German Civil Procedure Code); Article 647 Cod Procedura Civila (Romanian Civil Procedure Code); § 47 Exekutionsordnung (The Austrian Execution Act).

directly, notwithstanding the fact there is not an actual enforcement procedure underway. Nevertheless, as we set out to prove, this right is not untethered, as no account information is automatically given under any circumstances.

The request of information under Article 14 is available only in post-judgment EAPOs under the condition that the creditor who envisages an enforceable title⁸⁴ shows that he has reasons to believe 'that the debtor holds one or more accounts with a bank in a specific Member State'. For those creditors with a non-enforceable title there are two additional prerequisites. The first one is that amount of the claim has to be substantial (Art. 14(1) EAPO Regulation). Furthermore, there has to be 'an urgent need for account information because there is a risk that, without such information, the subsequent enforcement of the creditor's claim against the debtor is likely to be jeopardized and that this could consequently lead to a substantial deterioration of the creditor's financial situation'.⁸⁵

Disclosure of the information obtained under Article 14 is to concern only the requesting court and in exceptional situations the debtor's bank; the creditor is not informed regarding the identification of the debtor's bank accounts while the debtor's notification is postponed for 30 days, so that the effectiveness of the EAPO is not endangered.⁸⁶ Yet, this general approach is perfectible due to the 'lack of an adequate design of the information mechanism for cross-border dialogue'⁸⁷ and equally due to the 'lack of adequate national implementation'.⁸⁸

As we can see, the Regulation places the burden of proof on the creditor who submits the information request,⁸⁹ but it remains silent on the standard of proof required of him. From the vague wording of Article 14(1) - *the creditor has reasons to believe* - and Article 14(2) - *creditor shall substantiate why he believes* -

⁸⁴ A creditor who lacks an enforceable title must further prove an 'urgent need for account information because there is a risk that without such information, the subsequent enforcement of the creditor's claim against the debtor is likely to be jeopardized and that this could consequently lead to a substantial deterioration of the creditor's financial situation', according to Article 14 EAPO.

⁸⁵ Article 14(1) EAPO Regulation.

⁸⁶ Recital 21 and Article 14(8) EAPO Regulation.

⁸⁷ Santaló Goris, 'Searching for Debtors' Bank Accounts Across the European Union: The EAPO Regulation Information Mechanism' 5 *MPILux Research Paper Series* (2021) 2, at 11. According to the author, 'this provision [Article 14 EAPO] is silent on the content of the request for information submitted by the court of origin; or the answer to be provided by the information authority. Neither is there a standard form for the courts to submit the request.'

⁸⁸ Santaló Goris, *supra* note 71, at 12. The author emphasizes that 'due to the number of references to the national laws of the Member States, some sort of national legislative implementation could be expected. ... As a result, certain Member States were less prepared than others to ensure adequate functioning of the information mechanism'. Similarly, it is noted that 'national implementation also encompasses preparing domestic authorities to deal with the EAPO. The lack of awareness about the EAPO can also lead to disruptions in its application.'

⁸⁹ Article 14(2) EAPO Regulation: '[t]he creditor shall substantiate why he believes that the debtor holds one or more accounts with a bank in the specific Member State and shall provide all relevant information available to him about the debtor and the account or accounts to be preserved. If the court with which the application for a Preservation Order is lodged considers that the creditor's request is not sufficiently substantiated, it shall reject it.'

no conclusions can be drawn on the type of evidence the creditor must put forth. Indeed, any creditor, regardless whether his title is enforceable or not,⁹⁰ has to provide the court with 'all relevant information available to him'⁹¹ on the existence of bank accounts in a certain country. Should national courts require the creditor to provide extensive evidence on the existence of accounts⁹² or should they be more lenient and accept mere indications?⁹³

If a stricter approach is taken, creditors lacking evidence would see their efforts rendered useless by the simple fact that they won't have anything to freeze. On the other hand, if the standard is too low, it may open up the possibility for so-called *fishing expeditions*. Looking at the jurisprudence of the ECtHR, we can see 'that information retrieved from banking documents undoubtedly amounts to personal data concerning an individual, irrespective of it being sensitive information or not',⁹⁴ so it undoubtedly falls

under the protection of Article 8 of the ECHR. From this view-point, a lenient approach in giving away information could amount to a breach of the right to private life, by failing to meet the final criteria of the Three Data Protection 'tests',⁹⁵ namely it being necessary for the protection of the rights and freedoms of others. Also, the more lenient approach, as stated above, could pave the way for abusing the information mechanism, which comes in contradiction with the approach envisaged by Recital 17 from the Preamble.⁹⁶

However, we must keep in mind that the information mechanism was put in place by the Regulation 'in order to overcome existing practical difficulties in obtaining information'. By setting a high threshold in the way of obtaining information, risks depriving applicants of this mechanism, leaving them stranded in the same place they were to begin with. Such an interpretation cannot be supported, as it comes against the principle of *effet utile*,

⁹⁰ According to Article 14(1) paragraph 2 EAPO, a creditor who lacks an enforceable title has additionally to submit sufficient evidence to satisfy the court that there is an urgent need for account information because there is a risk that, without such information, the subsequent enforcement of the creditor's claim against the debtor is likely to be jeopardized.

⁹¹ Article 14 (2) EAPO Regulation.

⁹² For instance, a Spanish court found its request for information in Germany rejected, because the German information authority considered that information provided was insufficient to justify that the debtor could have bank accounts in Germany, see Santaló Goris, *supra* note 71, at 11. Also, a Dutch Court rejected a request for information on the grounds that, the mere circumstances that the debtor was doing business with companies located in other states, was insufficient to substantiate the presumption that he held a bank account there, see Rechtbank Rotterdam 4 April 2018, C/10/543305 / KG RK 18-104 (NL:RBROT:2018:3235), as seen in Krans, Ribbers, 'The European Account Preservation Order in Dutch Practice', in M. Deguchi (ed.), *Effective Enforcement of Creditors' Rights* (2022) 121, at 132. It was noted that all case law in Netherlands surrounding this issue are rejected attempts to obtain information, on the grounds that the creditor failed to substantiate why he believes that the debtor holds one or more accounts with a bank in the specific Member State. Onțanu, 'The Netherlands' in J. Von Hein and T. Kruger (eds), *Informed Choices in Cross-Border Enforcement: The European State of the Art and Future Perspectives* (2021) 303.

⁹³ For example, the fact that the debtor regularly accepts payments in a certain currency; he worked in another MS, he holds properties in a certain country; owns or regularly drives cars, owns airplanes, utility vehicles, boats registered in that state; the business website of a company is registered to servers in a certain country; fluently speaks a certain language.

⁹⁴ ECtHR, *M.N and others v. San Marino*, Appl. no. 28005/12, Judgment of 7 July 2015, at para. 51.

⁹⁵ Article 8 (2) ECHR.

⁹⁶ 'This Regulation should provide for specific safeguards in order to prevent abuse of the Order and to protect the debtor's rights.'

which aims at always interpreting EU norms with a view to effectively achieving the intent of legislation.⁹⁷

C. REMEDIES AND RIGHT TO APPEAL

Chapter 4 of the Regulation mainly deals with the remedies available to debtors who, on a certain day, surprisingly, find that they can no longer use his bank accounts. The order has been issued without him being priorly notified or heard.⁹⁸ Some authors suggest that the expeditious *ex parte* procedure makes the EAPO an efficient tool not necessary to block debtors' accounts, but mainly to force a debtor, who otherwise would refuse to cooperate, to appear in trial.⁹⁹ These remedies are provided by Articles 33, 35(1), 34 of EAPO Regulation. The first and the second allow the debtor to request the revocation and modification of the EAPO in the Member State of Origin, while the third allows the debtor to request termination of the enforcement of the EAPO in the Member State where the bank accounts have been attached.

However, the exact nature of the remedies available under the Regulation might be subject to debate. In a matter concerning the competence to solve an application of the debtor based on Article

33 of the Regulation, some Romanian courts asked the question if the remedy is to be provided by the court that issued the order or the court above it. At that moment, Romania did not adopt any implementation legislation.¹⁰⁰ As such, given the lack of legal guidance, the High Court of Cassation and Justice of Romania (name of the court in Romanian in *Italics*), vested with a national conflict of competence, ruled in favor of the court above the one that issued the order.¹⁰¹

In doing so, the Court made the following reasoning: the Regulation provides only for the international competence of the court of the Member state of origin or of enforcement, the national competence is to be decided by *lex fori*, the closest figure to an account preservation order in *lex fori* provides only for a hierarchical remedy, therefore the court that issued the order is not competent to solve an application under Article 33 of the Regulation, which provides for an ordinary appeal under the national law of each state.

This solution is different in other domestic judicial systems. For instance, in France, the competence to revoke the order or to limit or terminate its enforcement lies with the enforcement judge

⁹⁷ K. Gombos, *EU Law viewed through the eyes of a national judge* (2021), available at https://ec.europa.eu/dgs/legal_service/seminars/20140703_gombos_speech_en.pdf. Dimitris Liakopoulos, 'Character of *effet utile* and interpretation of EU law through CJEU jurisprudence', 13 *Cadernos de Dereito Actual* (2020) 32.

⁹⁸ Article 11 EAPO Regulation.

⁹⁹ Monteiro, *supra* note 16, at 128.

¹⁰⁰ Implementation legislation was adopted only in 2019, through Government emergency ordinance nr. 75/2019 which modified Article 1st8 of Government emergency ordinance nr. 119/2006 on necessary measures for the implementation of some EU Regulations (Ordonanța de urgență nr. 75/2019 pentru completarea Ordonanței de urgență a Guvernului nr. 119/2006 privind unele măsuri necesare pentru aplicarea unor regulamente comunitare de la data aderării României la Uniunea Europeană, precum și pentru modificarea Ordonanței de urgență a Guvernului nr. 80/2013 privind taxele judiciare de timbru).

¹⁰¹ High Court of Cassation and Justice of Romania, First Civil Chamber, Decision no. 3730, 24 October 2018.

at the Regional Court i.e. the same level of courts as the ones that issued the order.¹⁰² Such different approaches among Member States would be acceptable if we were to conclude that the nature of the remedy against the order or against is a 'procedural issues not specifically dealt with in this Regulation',¹⁰³ thus falling within the procedural autonomy. A literal and systematic interpretation of the EAPO Regulation provides reasons to justify that the court which granted the EAPO should be the one that decides on the debtors' request to revoke it

First, Article 33 of the Regulation uses a term 'revocation' which is a specific form of control coming precisely from the body that issues the measure. Revocation, compared to annulment or cassation, does not generally mean a hierarchical control of a measure. Moreover, apart from the first reason of revocation (i.e. the conditions or requirements set out in this Regulation were not met), the others, under Article 33(1) letters (b) to (g) concern motives which may appear only after the order has been issued. Furthermore, since the EAPO is granted *inaudita altera parte*, Article 33's remedy is the mechanism for the debtor to be heard at a later stage.

By hearing the debtor through the request to revoke the EAPO, the court which granted the EAPO would have both parties' views on the EAPO request.

Second, Article 35 (2) of the Regulation, containing a third set of remedies available, states that 'the court that issued the PO may also, where the law of the MS of origin so permits, of its own motion modify or revoke the Order due to changed circumstances.' It may be argued that Articles 33, 35 (1) and 34 of the Regulation refer to remedies to be sought from the court that issued or that enforces the order, available upon application, either by debtor or creditor, while Article 35(2) concerns remedies which might be activated *ex officio* by the issuing court.

Thirdly, Article 37 of the Regulation grants a true right of appeal against the decision on the debtors' request to revoke the EAPO. This appeal has to be decided by a superior hierarchical court.

Therefore, Article 33 only regulates a specific remedy for the debtor who is to appear before the court that issued the order and to present his arguments.

¹⁰² According to e-Justice portal, available at: https://e-justice.europa.eu/379/EN/european_account_preservation_order?FRANCE&member=1.

¹⁰³ Article 46 (1) EAPO Regulation.

4. MEMBER STATES' LEGISLATIVE APPROACH TOWARDS THE EAPO REGULATION?

Being the last of the second generation instruments,¹⁰⁴ EAPO raised challenges not only to the judiciary, but also to national legislators, as it relies heavily on national procedure.¹⁰⁵ Expecting that judicial authorities of each Member State would struggle with application of national law to the EAPO Regulation, some national Parliaments, minding Article 50 of the Regulation,¹⁰⁶ came up with new rules that would make EAPO fit in the domestic civil procedural systems.

Such implementing legislation might come as a surprise. Since the EAPO was approved through a regulation and not a directive, there was no need to introduce any supporting national legislation. However, supporting national legislation could prove useful to establish uniform solutions for the application of

the Regulation, both within a Member State, but also in the EU. Implementing national laws about the EAPO 'may operate as "door openers", guiding the legal practice to the applicable EU instrument in the case at hand'.¹⁰⁷

A. LEGAL APPROACHES

There are three main approaches concerning the implementation of EAPO Regulation, depending on the autonomy of existing national procedures and the mechanism established by the Regulation: (1) separate implementation law, extending all or some provisions of EAPO Regulation to domestic cases; (2) separate implementation law, no extension to domestic cases; (3) no implementing legislation, courts use analogy to similar domestic procedures.¹⁰⁸

A close example for the first approach is Belgium. When embedding the EAPO Regulation, the legislator has chosen to transpose some aspects of the EAPO procedure into the domestic attachment order procedure, e.g. regarding the possibility of obtaining information about

¹⁰⁴ The first three being European Enforcement Order (Council Regulation 805/2004, OJ 2004 L143/15), the European Order for Payment and the European Small Claims Procedure (cited above *supra* note 17). The expression 'second generation' instruments is mentioned *inter alia* in R. Mañko, *supra* note 15.

¹⁰⁵ The general provision in Article 46(1) EAPO Regulation establishes that 'all procedural issues not specifically dealt with in this Regulation shall be governed by the law of the Member State in which the procedure takes place. Some of the specific references to domestic law are related to the enforcement EAPO (e.g. Article 23(1) EAPO), the liability of the banks (e.g. Article 26 EAPO).

¹⁰⁶ Article 50 EAPO Regulation requires Member States to inform the Commission about the application of certain aspects of the EAPO procedure at the national level, whereas there is no direct obligation to enact implementing legislation.

¹⁰⁷ Hess, 'Towards a More Coherent EU Framework for the Cross-Border Enforcement of Civil Claims. Informed Choices in Cross-Border Enforcement of Civil Claims' in J. Von Hein and T. Kruger (eds), *Informed Choices in Cross-Border Enforcement: The European State of the Art and Future Perspectives* (2021) 389, at 390.

¹⁰⁸ Hess, *supra* note 30, at 391.

the debtors' bank accounts.¹⁰⁹ Therefore, the domestic attachment order was harmonized along with the EAPO, so that both are granted under similar conditions.¹¹⁰

Another example is France.¹¹¹ Initially there was no formal embedding of the EAPO Regulation within the French legal system. Indeed, the existing French procedure of *saisie conservatoire* is relatively similar to the conditions from EAPO. Most notably, the already disputed¹¹² conditions of 'real risk' and 'urgency' used in the EAPO Regulation may be perceived as equivalent to the 'threat' to the recovery of the debt from the French legislation.¹¹³ However, there was one essential difference: creditors without an enforceable title who apply for a French domestic preservation order could not be given information about the debtors' bank accounts

from FICOBA, on the bank accounts of their debtors. Conversely, creditors with non-enforceable title who apply for a EAPO would be granted such a benefit.¹¹⁴ In a decision rendered 28 January 2021,¹¹⁵ the Paris Court of Appeals (*Cour d'appel de Paris*) found that such a difference of treatment between creditors with and without access to the EAPO Regulation 'constitutes an unjustified breach of equality and discrimination between creditors'.¹¹⁶ Months later, the French legislator codified this decision into French law¹¹⁷.

Most Member States opted for the second approach towards the implementation of the EAPO Regulation: introducing specific provisions in their national civil procedural systems which address those procedural aspects that depend on the national law. Among these Member States one can find Germany¹¹⁸ or

¹⁰⁹ Act of 18 June 2018, Belgian Official Journal 02.07.2018 ('Wet houdende diverse bepalingen inzake burgerlijk recht en bepalingen met het oog op de bevordering van alternatieve vormen van geschillenoplossing'). See also Act of 8 July 2018, Belgian Official Journal 16.07.2018 ('Wet houdende organisatie van een centraal aanspreekpunt van rekeningen en financiële contracten en tot uitbreiding van de toegang tot het centraal bestand van berichten van beslag, delegatie, overdracht, collectieve schuldenregeling en protest').

¹¹⁰ Overbeeke, 'Belgium', in J. Von Hein and T. Kruger (eds), *Informed Choices in Cross-Border Enforcement: The European State of the Art and Future Perspectives* (2021) 163, at 164.

¹¹¹ Eeckhout, Santaló Goris, 'France' in J. Von Hein and T. Kruger (eds), *Informed Choices in Cross-Border Enforcement: The European State of the Art and Future Perspectives* (2021) 191.

¹¹² Wiedemann, 'The European Account Preservation Order', in J. Von Hein and T. Kruger (eds), *Informed Choices in Cross-Border Enforcement: The European State of the Art and Future Perspectives* (2021) 103, at 122.

¹¹³ Article L. 511.1 Code des procédures civiles d'exécution.

¹¹⁴ Santaló Goris, *A Reform of French Law Inspired by an Inaccurate Interpretation of the EAPO Regulation?*, 22 January 2022, available at <https://conflictoflaws.net/2022/a-reform-of-french-law-inspired-by-an-inaccurate-interpretation-of-the-eapo-regulation/>.

¹¹⁵ Cour d'appel de Paris, Pôle 1 – chambre 10, 28 janvier 2021, n° 19/21727.

¹¹⁶ Santaló Goris, *supra* note 97.

¹¹⁷ There was an amendment to the French Manual on Tax Procedures, allowing bailiffs to collect information about the debtors' bank accounts from the French national register containing information about all the bank accounts in France based on a *saisie conservatoire* (Art. 58 LOI n° 2021-1729 du 22 décembre 2021 pour la confiance dans l'institution judiciaire).

¹¹⁸ Gesetz zur Durchführung der Verordnung (EU) Nr. 655/2014 sowie zur Änderung sonstiger zivilprozessualer, grundbuchrechtlicher und vermögensrechtlicher Vorschriften und zur Änderung der Justizbeitragsordnung (EuKoPfVODG) (Law implementing Regulation (EU) No. 655/2014 and amending other civil procedural, land register and property law regulations and amending the Judiciary Enforcement Ordinance (EuKoPfVODG)).

Luxembourg.¹¹⁹ Both Member States passed special acts that regulate those aspects of the Regulation which are left to the discretion of national law.

The third of the approaches consists of not approving any kind of legislation, blindly trusting the direct applicability of the EAPO Regulation. This was the approach followed by the Romanian legislator until 2019.¹²⁰ A lack of any implementation legislation can hinder the foreseeability of the applicable national law to the EAPO proceedings. However, neither did EAPO impose on the countries the obligations to alter their existing institutions, nor did it ask to adopt complex implementation mechanisms. Indeed, the EU designed a quasi-complete Regulation, only requiring Member States, as it was already noted before,¹²¹ to provide the Commission with some information about the application of the EAPO Regulation at the national level.

B. INSTITUTIONAL APPROACHES

At the institutional level there seem to be two patterns: concentration and specialization as opposed to spreading competences amongst different types and levels of national authorities.

Czech national law is an example of the first. In 2021, an implementation law was adopted which establishes the competence for one single court to rule on all the applications for EAPO.¹²² One must acknowledge that such an approach enhances a uniform and coherent application of a complex and technical Regulation such as EAPO at the national level.

¹¹⁹ In Luxembourg there are two acts. One from 2017: Loi du 17 mai 2017 relative à la mise en application du Règlement (UE) N° 655/2014 du Parlement européen et du Conseil du 15 mai 2014 portant création d'une procédure d'ordonnance européenne de saisie conservatoire des comptes bancaires, destinée à faciliter le recouvrement transfrontière de créances en matière civile et commerciale, modifiant le Nouveau Code de procédure civile et la loi modifiée du 23 décembre 1998 portant création d'une commission de surveillance du secteur financier (Law of May 17, 2017 on the implementation of Regulation (EU) No. 655/2014 of the European Parliament and of the Council of May 15, 2014 creating a European account preservation order procedure, intended to facilitate the cross-border recovery of claims in civil and commercial matters, amending the New Code of Civil Procedure and the amended law of 23 December 1998 establishing a commission for the supervision of the financial sector). Another one from 2018: Loi du 18 juillet 2018 complétant le Nouveau Code de procédure civile en vue de l'introduction d'un titre VIIbis relatif à la conversion de l'ordonnance européenne de saisie conservatoire des comptes bancaires émise sur base du règlement (UE) N° 655/2014 en saisie exécutoire des comptes bancaires (Act of 18 July 2018 supplementing the New Code of Civil Procedure with a view to introducing Title VIIbis relating to the conversion of the European Order for the Preservation of Bank Accounts issued on the basis of Regulation (EU) No. 655/2014 in enforceable seizure of bank accounts).

¹²⁰ Elena Alina Onțanu, *From Direct Application of European Uniform Procedures to Implementation Legislation in Romania* (2020), available at: <https://eapil.org/2020/11/19/from-direct-application-of-european-uniform-procedures-to-implementation-legislation-in-romania/>.

¹²¹ See *supra* note 101.

¹²² Santaló Goris, *A Centralized Court for the EAPO Regulation in the Czech Republic?*, 5 February 2021, available at <https://conflictflaws.net/2021/a-centralized-court-for-the-eapo-regulation-in-the-czech-republic/>.

The concentration and specialization is also consistent with CJEU's standing on this from *Sanders*: 'a centralization of jurisdiction ... promotes the development of specific expertise ... while ensuring the proper administration of justice and serving the interests of the parties to the dispute.'¹²³

However, given the yet too small number of EAPOs issued in Member States,¹²⁴ one can ask if such a specialization of courts would actually make the procedure more attractive. After all, most of the issues so far seem to have arisen from different interpretations coming from different Member States, rather than from divergent interpretations at the national level. For instance, a uniform standard of *periculum in mora* would hardly be established by a specialized national court only.

5. PROCEDURAL AUTONOMY: MYSTERIOUS CONCEPT OR EVOLVING EU CIVIL PROCEDURE PRINCIPLE?

A. IN SEARCH OF EMERGING AUTONOMY

One of the main characteristics of the EAPO proceeding is the fundamental role that the principle of procedural autonomy plays in its configuration.¹²⁵ Indeed, this technique of referring to *lex fori* is not new, since other EU civil procedural instruments contain also numerous references to the national law of the Member States.¹²⁶ However, as it has already been emphasized, the 'delicate interplay between national and European law' may impede its unitary application across the EU and hence trigger difficulties in its application.¹²⁷

¹²³ C-400/13, *Sanders and Huber* (EU:C:2014:2461), at para. 45.

¹²⁴ See *supra* note 14.

¹²⁵ When attentively reading Article 46 of the EAPO Regulation, one may notice the subtle contours of procedural autonomy as it is established that 'all procedural issues not specifically dealt with in this Regulation shall be governed by the law of the Member State in which the procedure takes place'.

¹²⁶ See R. Mañko, *supra* note 15, at 19. References to national law are also enshrined in Article 26 of Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure and in Article 19 of Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure.

¹²⁷ M. Župan, 'Cross-border recovery of maintenance taking account of the new European Account Preservation Order (EAPO)', 16 *ERA Forum Journal of the Academy of European Law* (2015) 163, at 176. The author advances the following example: 'the same banks with branches situated in different Member States would not be able to adopt uniform patterns of EAPO Regulation application, but would have to develop practices for distinctive Member States'.

Enshrined for the first time in two landmark rulings delivered in 1976, i.e. *Rewe* and *Comet*,¹²⁸ the principle of procedural autonomy underlines the ‘necessary co-existence of procedural autonomy with the requirements and principles related, more specifically, to the rules governing the relations between national law and EU law.’¹²⁹ In these two landmark judgments, CJUE emphasized the limits of procedural autonomy, also known as ‘*Rewe* criteria’, namely the equivalence and effectiveness principles.¹³⁰

Technically speaking, it must be noted that ‘the principle of national procedural autonomy comes with a prefatory condition and two closing qualifications.’¹³¹ This means that the absence of specific¹³² EU norms leads to the application of rules pertaining to the national legal system,¹³³ yet provided that national procedural rules not be ‘less favorable than those relating to similar actions of a domestic nature’, and that Member States’ procedural rules not render the enjoyment of Community rights ‘practically impossible’ or, as later established, ‘excessively difficult.’¹³⁴ The main purpose of

this praetorian creation is to ensure the plenary and equal enjoyment of rights guaranteed by EU law in all Member States.¹³⁵

This initial construction has been further developed and reached its second phase, i.e. the ‘functionalization’ phase which began by means of *van Schijndel*.¹³⁶ Built upon the effectiveness criterion, this approach implies ‘the idea of a duty of the national court ... to ‘functionalize’ the means already made available in its domestic law to allow the achievement of the goal of effectiveness of the EU law.’¹³⁷

The preceding considerations mainly impose a complex task for national judicial practitioners, i.e. to verify on a case-by-case basis whether the national procedural rules are applied in accordance with the principles of equivalence and effectiveness. Therefore, in the practice, judges are required not only to refuse the application of domestic provisions that fail the *Rewe* test, but they are actually called to fulfill the positive obligation of functionalizing the provisions of the

¹²⁸ C-33-76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* (EU:C:1976:188); C-45-76 *Comet BV v Produktschap voor Siergewassen* (EU:C:1976:191).

¹²⁹ D.-U. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost? A Study on the “Functionalized Procedural Competence” of EU Member States* (2010), at 8.

¹³⁰ It has been observed that this judgment ‘cannot be understood as supporting any hard autonomy, at least not in the sense of complete freedom from Union control’. See Halberstam, ‘Understanding National Remedies and the Principle of National Procedural Autonomy: A Constitutional Approach’, 23 *Cambridge Yearbook of European Legal Studies* (2021) 128, at 132.

¹³¹ Halberstam, *supra* note 105, at 130-132.

¹³² C-518/17, *Stefan Rudigier* (EU:C:2018:757), at para. 60; C-102/16, *Vaditrans BVBA v Belgische Staat* (EU:C:2017:1012), at para. 55.

¹³³ C-518/17, *Stefan Rudigier* (EU:C:2018:757), at para. 60; C-102/16, *Vaditrans BVBA v Belgische Staat* (EU:C:2017:1012) at para. 55.

¹³⁴ C-199/82, *Amministrazione delle Finanze dello Stato v SpA San Giorgio* (EU:C:1983:318) at para. 14.

¹³⁵ L. Cadiet, ‘L’autonomie procédurale dans la jurisprudence de la Cour de justice de l’Union européenne – Réflexions naïves d’un Huron au Palais du Kirchberg’, 22 *Studies of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law: The 50th Anniversary of the European Law of Civil Procedure* (2020) 203, at 210.

¹³⁶ Joined Cases C-430/93 and C-431/93, *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* (EU:C:1995:441).

¹³⁷ D.-U. Galetta, *supra* note 104, at 50.

national legislation to assure the effective application of the EAPO Regulation.

B. EAPO JUDICIAL PROCEDURE THROUGH THE LENS OF THE PRINCIPLE OF PROCEDURAL AUTONOMY

There are several provisions of the EAPO Regulation in which the interaction between the principles of procedural autonomy, effectiveness and equivalence is reflected.

Firstly, in terms of court fees or other fees charged by authorities, the rule thereby imposed implies as a reference criterion the equivalent national order.¹³⁸ It refers to the national law of the Member States (principle of procedural autonomy), while codifying the principle of equivalence, since the fees cannot be superior to those charged for obtaining a national attachment order. For instance, in Romania, application for a EAPO shall be subject to a court fee consisting of a fixed sum which is equal to the amount applicable to national precautionary measures.¹³⁹ Other EU states apply a fixed sum (Malta), a variable sum in relation to the amount of the claim (Greece) or a combination of both (Czech Republic, Italy).¹⁴⁰

A second reference to national law can be found in the special rules concerning the service of documents to the debtor. When the debtor is domiciled in the Member State where the EAPO was

granted or the Member State of enforcement, then the documents would be served to the debtor in accordance with the national law of those Member States.

Thirdly, as far as evidence is concerned, certain means of evidence such as hearing of witnesses might be admitted only if they are permitted under national law.¹⁴¹ For instance, in this regard, the German legislator decided to restrain the means of evidence to 'evidence that can be taken immediately is permissible'.¹⁴²

Lastly, concerning the representation of the parties by a lawyer, procedural autonomy is enshrined as far as the debtors' remedies are concerned.¹⁴³ To be more precise, while for the issuance of EAPO legal representation is not necessary,¹⁴⁴ when it comes to the remedies against the EAPO, the representation by a lawyer depends on the national law of the Member States.¹⁴⁵

C. THE ENFORCEMENT OF THE EAPO UNDER THE AMBIT OF AUTONOMY PRINCIPLE

At the enforcement stage of the EAPO, there are numerous procedural aspects which are established by the domestic law of the Member States.

As regards the scope of the preservation order, the law of the state of enforcement dictates (i) which are the accounts immune from seizure, (ii) the amounts

¹³⁸ See Article 42 and 44 EAPO Regulation.

¹³⁹ See Article 11(1) b) of Ordonanța de urgență nr. 80/2013 privind taxele judiciare de timbru (Government Emergency Ordinance no. 80/2013 on judicial fees).

¹⁴⁰ See national approaches according to article 50 EAPO at: https://e-justice.europa.eu/379/EN/european_account_preservation_order.

¹⁴¹ Article 9(2) EAPO Regulation.

¹⁴² See Section 947(1) Zivilprozessordnung (German Civil Procedure Code).

¹⁴³ Article 33 and 34 EAPO Regulation.

¹⁴⁴ Article 41 EAPO Regulation.

¹⁴⁵ Article 41 EAPO Regulation.

exempt from preservation as well as (iii) the possibility of preservation in the hypothesis of joint or nominee accounts.¹⁴⁶ For instance, regarding the amounts exempt from seizure, national approaches are quite varied.¹⁴⁷ Furthermore, the liability of the bank shall also be governed by the law of the state of enforcement, in case of failure to comply with obligations prescribed by the EAPO Regulation.¹⁴⁸ Correlatively, if a third party decided to challenge the enforcement of the EAPO, their rights would be determined according to the law of the Member State of enforcement.¹⁴⁹

Another expression of the principle of procedural autonomy at the enforcement level can be found in the diversity that concerning the authorities in charge of enforcing the EAPO: Some states have vested bailiffs with this procedure (Romania, Greece), while others opted for courts (Czech Republic, Italy, Malta).¹⁵⁰

In other words, it can be arguably stated that the herein analysed instrument encompasses several instances of applying domestic rules and thereby represents

indeed an expression of Member States' autonomy. A procedural autonomy that has to be always understood within the boundaries of the principles of equivalence and effectiveness set by the CJEU.

6. CONCLUSIONS

Far from polarizing with either of the two myths invoked in the beginning of this thesis, it may be concluded that the EAPO procedure is rather comparable to a gentle giant. Neither too forceful and brute, nor too fragile and powerless, the EAPO devised at the EU level appears to bring about quite noticeable advantages that would definitely improve transnational civil and commercial relations.

By analysing the EAPO, there are several remarks that we would like to put forward.

As we have shown, rather than being totally uniform, the EAPO is a hybrid procedure that combines references to the national law of the Member States

¹⁴⁶ See Article 2(3), Article 31 and Article 30 EAPO Regulation.

¹⁴⁷ In Romania, the civil procedure legislation permits enforcement against wages or other income paid regularly to the debtor as a means of subsistence, up to half of net monthly income in the case of amounts owed by way of maintenance obligation or child allowance and up to a third of net monthly income in the case of any other debts. Similarly, in Italy, the sums owed by private persons by way of wages, salaries or other payments related to the employment relationship, including those owed for redundancy, may be attached for maintenance payments to the extent authorized by the president of the court or by a judge delegated by them, but only up to a fifth of these or, exceptionally, in case of multiple seizures, up to half of them; the debtor must prove the applicability of an exemption case. In contrast, in Greece the civil procedure code provides that claims for maintenance, salaries, pensions, insurance benefits etc. are exempt from seizure without any application from the debtor. See national approaches according to article 50 EAPO Regulation in the e-Justice portal : https://e-justice.europa.eu/379/EN/european_account_preservation_order.

¹⁴⁸ Article 26 EAPO Regulation.

¹⁴⁹ Article 39(1) and (2) EAPO Regulation.

¹⁵⁰ See national approaches according to Article 50 EAPO Regulation in the e-Justice portal: https://e-justice.europa.eu/379/EN/european_account_preservation_order.

with the uniform rules set by the EAPO itself.¹⁵¹ The interaction between two levels of legislation requires respect for the principles of equivalence and effectiveness which are the core components of procedural autonomy.

Nevertheless, it must be kept in mind that the national judges will find themselves at the center of this interaction, as it is their task to find the balance between the two legislative layers. This tedious exercise creates a degree of complexity that puts into question the idea behind the EAPO itself, namely the creation of a uniform and simple instrument that would help to overcome the fragmentation that exists at the national level concerning the domestic attachment orders.

As novel and complex legal problems lead to different solutions even within the same legal system, *a fortiori* this will be the case at EU level, where completely distinct legal systems advance solutions based on their own legal traditions. As such, references to national law can hinder the balance between the parties that the CJEU defended in C-555/18, since the protection of the debtor and the accessibility of the creditor to the EAPO vary from one Member State to another.

One thing is clear: the EAPO is a necessary tool. But will this giant find its deserved place among the heterogeneous and sometimes too narrow legal framework of Member States?

Five years of applying this Regulation have exposed some of its deficiencies, the extent of which have been analysed only in an unsystematic manner. The dialogue between national courts and the CJEU has proved to be useful, yet the few preliminary rulings issued so far did not manage to attain the degree of uniformity envisaged by the EU legislator.

This is why the foreseen report of the Commission will be an essential tool in amending the Regulation as provided by Article 53 so that it reaches its goal of being a uniform and simple instrument that facilitates cross-border debt recovery in civil and commercial matters.

¹⁵¹ M. L. Villamarín López, 'Harmonisation of the Rules on Protective Measures? The European Account Preservation Order' in Fernando Gascón Inchausti and Burkhard Hess (eds), *The Future of the European Law of Civil Procedure: Coordination or Harmonisation?* (2020) 113.

SEMI-FINAL D

JUDICIAL ETHICS AND **PROFESSIONAL CONDUCT**

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PARTICIPATING TEAMS

PORTUGAL, CZECHIA, ROMANIA, GERMANY, HUNGARY, THE
NETHERLANDS, BULGARIA, AUSTRIA, FRANCE, ITALY, POLAND,
GREECE

1st place: Greece

2nd place: Austria

3rd place: Poland

Selected papers for TAJ:
Austria, France, Germany

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12 - 15 JULY 2022 BARCELONA, SPAIN - GENERAL COUNCIL OF THE
JUDICIARY

JURY MEMBERS

CHRISTA CHRISTENSEN (UK)

FEE PAID JUDGE IN THE EMPLOYMENT TRIBUNAL (ENGLAND & WALES) AND IN THE MENTAL HEALTH TRIBUNAL (ENGLAND).
JUDICIAL COMMISSIONER, JUDICIAL APPOINTMENTS COMMISSION FOR ENGLAND AND WALES.

This was the first year that I have had the honour of being asked to be a juror on the THEMIS Semi Final D. I was delighted to be able to join the esteemed jury on this important THEMIS strand on Judicial Ethics and Professional Conduct.

The standard of contribution from each team was outstanding. I thank each and every member of the team and their tutors for their obvious commitment to the papers they presented and their innovation, bravery, curiosity and quality of thought. This was evident in their exploration of their chosen topic, their team work, their presentation tools and their identification of future solutions on their chosen topics. I am full of admiration for the willingness of the judicial trainees to tackle profoundly complex and sensitive topics relevant to the judicial ethics and conduct. I am reassured that the EU judges of the future are engaging with the emerging issues of judicial ethics and conduct in our fast developing world.

After two years of the competition being run on-line because of Covid, there was a palpable sense of enthusiasm from the 12 teams to come back to a face to face event. This allowed a much needed sense of engagement between the teams and greater cross fertilization of ideas. It is fair to say that this also allowed the jury to direct some challenging and in-depth questioning to each team. We did not hold back and used each day to its full extent to properly explore each paper. To their credit each team met our questioning head on and with honesty, humour, humility and innovative thought. I thank them for that; and also thank each team for challenging me to explore some new ideas and approaches to judicial ethics and conduct.

GORAN SELANIC (HR)

JUSTICE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA

Congratulations to yet another successful year of mooting. Being part of this competition is a privilege. However, this year was particularly satisfying since the format returned to pre-COVID standard. The organizers did a great job keeping the competition alive in virtual form in the previous years. However, nothing can beat the experience of personal contact. Accordingly, many thanks to the organizers who ensured swift transition to regular format even though they themselves were going through some administrative transitions and personal changes.

I was satisfied to see that the two trends I had noticed in the previous years developed further. First, the competition continued expanding. It was exciting to find out that new states are joining. Equally exciting, significant number of judicial academies trained more than one team for the competition. Moreover, new jury members joined the competition which is a great plus. It increases diversity and expands the views not only of those competing but also of us 'judging'. Second, styles of mooting that different teams coming from different judicial academies developed and nurtured through previous years showed further improvements. If the trend continues for few more years, it will be possible to talk of different mooting traditions characteristic for different training centres.

However, despite these differences between teams they shared one similarity that is worth addressing. As a member of the Judicial Ethics round of the Competition I could have observed a particular dominant approach participants have towards the issue of use of popular social networks. The approach was noticeable last year as well although this year it saw a particular emphasis. It is becoming clear that within the area of judicial ethics many participants find the issue of appropriate behaviours on internet social platforms not merely important but rather troublesome. Many of them are not certain what is considered an appropriate use of these platforms by judges and/or public prosecutors. Their presentations often hinted at frustration by the fact that although important the issue is not sufficiently regulated (in their view). Moreover, many have favoured the regulation approach consisting of clear-cut, preferably detailed and easily applicable rule-like provisions. Accordingly, it has been argued that the approach favouring principled standard-like provisions would not suffice.

It is not possible to address this trend in greater detail here. However, a quick word of caution seems to be appropriate. I would challenge the participants to think about this considering the following. True, clear-cut and detailed rules may be easier to understand and apply. However, they come at a cost. The key aim of such provisions is to constrain, not merely the behaviour of those who they address but equally important the actions of those who apply them. Their ‘mechanical’ character is suited for those who are meant to observe and follow the authority of those at the higher level of hierarchy of power. The main role of an independent and impartial judge is not to ‘observe and follow’ the commands. Just the opposite, it is to control those commands and balance them out with other competing interests. It is to put power, whichever form it takes, in check. Hence, judges ought not to be overly enthusiastic about over-extensive regulation based on the idea of detailed rules and commands. Even if such approach could be achieved, which often proved naïve, the main question would remain the same: Is it desirable. As noted, the role of a judge is to put the power in check, even to protect a weaker side in order to ensure equality between two opposing sides. Consequently, judges ought to be aware that from the perspective of ensuring balanced, proportional or fair outcome the mechanical application of clear-cut rules will often be more challenging than assuming professional responsibility for interpretation and case-by-case clarification of principled, standard-like provision.

CRISTINA SAN JUAN SERRANO (UNODC)

JUDICIAL INTEGRITY AND RULE OF LAW SPECIALIST,
UNITED NATIONS VOLUNTEER, UNITED NATIONS OFFICE
ON DRUGS AND CRIME

This year, 2022, is the third consecutive year that a member of the UNODC Judicial Integrity team has participated as a judge in THEMIS Semi-Final D. In previous editions, the THEMIS competition has been held in an online format due to the pandemic, however this year we have had the opportunity to resume the competition in person at the Judicial Academy of Spain. This has had a very positive effect both on the enthusiasm during the presentations and on the interaction between the participants from the countries with each other and with the members of the jury. It was a real pleasure to collaborate with the EJTN Secretariat, with the other members of the jury and with the twelve teams competing in this Semi-Final. It was also a great opportunity to share with future European judges the work that the United Nations Office on Drugs and Crime is doing through the Global Judicial Integrity Network (www.unodc.org/ji) to support judges and judiciaries in promoting judicial integrity and preventing corruption within the justice system.

I would like to emphasize from this opportunity how much I have learned from each of the future judges about so many profound and important issues related to judicial ethics and professional conduct in this extremely enriching experience. Each team defended their written proposal during their presentations and the question-and-answer session with great originality and dedication. Despite the different topics, we could see how they addressed very similar cross-cutting issues of judicial ethics and integrity. It was very encouraging to see them delve into so many important and difficult issues facing the judiciary today, including those related to judicial independence and equal access to justice, the ethical use of social media by judges, the freedom of expression by judges, judicial wellbeing and the ethical use of artificial intelligence by judges, among others. Many of these topics are indeed thematic priorities of the UNODC Global Judicial Integrity Network, which demonstrates the importance of continuing to work on these thematic areas with both experienced and recently appointed judges to guarantee the future of judicial integrity.

The Global Judicial Integrity Network was established as a platform for judges and judiciaries to collectively address existing and emerging challenges to judicial integrity. It is a platform 'of judges, for judges', based on peer learning and mutual support. It was therefore an honour to be able to participate as a member of the Semi-Final D jury and to see how all the teams embodied these principles in their work. The THEMIS competition is certainly a very relevant and commendable initiative carried out by the EJTN to encourage exchanges among future judges in Europe and an excellent training opportunity for them. The UNODC Judicial Integrity team wishes all the teams that participated in the competition all the best in their future careers as judges and hopes that they will continue in the same spirit of collegiality, critical thinking and peer support. Furthermore, we would like to extend our thanks to the EJTN Secretariat for the opportunity to be part of this rewarding initiative for the third year in a row.

SUSANNE DEMUTH
HANNAH STADLOBER
KERSTIN WICK



Team AUSTRIA

‘OPEN COURT DAY’ A TOOL TO CONNECT JUDGES WITH THE PUBLIC OR AN IMPEDIMENT TO PROFESSIONAL CONDUCT?

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The purpose of this paper is to analyse the ethical challenges arising in the context of Austrian ‘Open Court Days’ and, by doing so, to draw broader conclusions about unrepresented parties receiving assistance when going through the judicial system. To this end, this paper focuses on the interactions of judges with unrepresented parties and the scope of judges’ general duty to provide guidance.

First, by thoroughly analysing the relevant Austrian legal sources as well as the wider European context, the variety of ways unrepresented parties may receive assistance are explored. Using Austrian Open Court Days as a lens through which interactions with unrepresented parties can be viewed, the most challenging aspects for professional conduct are then identified and examined based on a survey among 200 Austrian judges. As a next step, this paper offers concrete reform proposals for Open Court Days in particular, and interactions with unrepresented parties in general.

In conclusion, this paper argues that it is crucial to pay special attention to balancing the need of unrepresented parties for information and guidance in the context of Article 6 ECHR with the need to uphold the central judicial principles of impartiality and objectivity.

KEY WORDS

Open Court Day • Unrepresented parties • Right to a fair trial • Legal aid • conflict of judicial roles • Appearance of bias

1. INTRODUCING 'OPEN COURT DAY'

A. THE AUSTRIAN AMTSTAG

Any Tuesday morning in Austria, members of the public may appear in district and regional courts in front of a judge to verbally file lawsuits or legal motions. This legal institution is what is referred to in the Austrian judicial system as *Amtstag* (hereinafter translated and referred to as 'Open Court Day').

There are few judicial tools as polarizing as Open Court Day. While some refer to it as a 'valuable bridge between the court and the general population seeking legal protection'¹ or as a 'useful institution serving work efficiency',² others see it as 'a danger for objectivity'³ and a 'disrespect of the separation of powers'⁴ that 'conveys a false image of the judiciary to the public'.⁵ Dr. Irmgard Griss, former president of the Supreme Court in Austria, once said in an interview with the Austrian daily newspaper *Die Presse*: 'When you experience Open Court Day at a Viennese district court, you feel like you are not in a court, but in a therapy ward.'⁶

In principle, Open Court Day allows litigants with no representation (or people who are not yet party to a court proceeding) to appear in court and file a lawsuit or an application verbally in front of a

judge without the opposing party being present. One of the underlying principles governing Open Court Days in Austria is the idea that the court shall be *open* for the requests of the people, which is why we have chosen to translate *Amtstag* as Open Court Day.

B. INVESTIGATING OPEN COURT DAY

Due to a range of legal provisions presented in part 3 of this paper, the role of the judge at Open Court Day often goes beyond merely recording verbal applications, motions and lawsuits or providing general procedural information. In reality, judges often end up giving legal advice to unrepresented litigants at Open Court Day.⁷ It will come as no surprise that, as a result, tensions may arise between the demands of guaranteeing a low-threshold access to justice on the one hand and those of upholding the principles of impartiality, objectivity and professional conduct of judges on the other.

Our research has shown that Open Court Day is a purely Austrian phenomenon. As will be shown below (see part 4. C.), other European countries have opted for different ways to ensure that unrepresented parties receive the required assistance when going through the judicial system. It may therefore seem counter-intuitive to choose a topic that, at least at first glance, appears purely

¹ Lackner, 'Ein Plädoyer für den Amtstag', 11 *Richterzeitung* (RZ) (2010) 257.

² Mayr, 'Amtstag - die Rechtsgrundlagen einer österreichischen Institution', 9 *Richterzeitung* (RZ) (2010) 197, at 198.

³ Ertl, 'Amtstag 2010 - Eine kritische Betrachtung', 9 *Richterzeitung* (RZ) (2010) 201, at 203.

⁴ Ibid.

⁵ Ibid.

⁶ Die Presse, OGH-Präsidentin: "Aufgaben der Justiz überdenken", 21.02.2010, available at <https://www.diepresse.com/541359/ogh-praesidentin-aufgaben-der-justiz-ueberdenken>.

⁷ Mayr, *supra* note 2, at 198.

Austria-centric. However, we believe that a thorough analysis of the issues surrounding professional judicial conduct in the context of Open Court Day will make apparent that it goes to the heart of judicial ethics in general, raising questions related to impartiality, objectivity, clarity of roles and professional conduct of judges like hardly any other. There is, therefore, a strong link to Article 6 ECHR, to the Council Directive to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes⁸ and to the Regulation establishing a European Small Claims Procedure⁹ (see part 4 below). Accessibility of justice for citizens is also a topic that remains relevant in all Member States, as it is one of the factors examined in the yearly EU Justice Scoreboard.¹⁰

newly established Austrian government explicitly included a 'commitment to and preservation of the Open Court Day' in its government program for the years 2020-2024.¹³

C. OPEN COURT DAY - A SURVEY

In an attempt to go beyond a mere literature review and in an effort to shine a light on the specific ethical challenges judges face when conducting Open Court Day, we designed a brief survey on Open Court Day, paying special attention to judicial ethics and professional conduct.¹⁴ We believe that by closely examining the way Austria seeks to uphold Article 6 ECHR through Open Court Day, we can draw important conclusions that are relevant to other European countries. As questions regarding the scope of judges' general duty to provide guidance, (appearance of) bias and liability are challenges that judges face everywhere, ways to reform and improve Open Court Day can also serve as useful pointers for professional judicial conduct in general (see part 6 below).

For our survey, we used official allocations of duties to ensure that our sample would be evenly distributed across Austria. In order to arrive at a representative cross-section of all Austrian courts

This topic is also timely given the rate of technological progress, especially in the field of artificial intelligence and its application in the legal sector.¹¹ As a result, it becomes increasingly important to ensure that the 'human factor'¹² does not get lost and the judiciary is not perceived as sitting in an ivory tower, far removed from the public. Therefore, direct contact with parties is of great importance to Austria's jurisprudence and politics. In fact, just two years ago, the

⁸ Council Directive 2003/8/EC, OJ 2003 L26/41.

⁹ Council Regulation 861/2007, OJ 2007 L 199/1; amended by Council Regulation 2015/2421, OJ 2015 L 341/1.

¹⁰ European Commission, *The 2022 EU Justice Scoreboard*, available at https://ec.europa.eu/info/sites/default/files/eu_justice_scoreboard_2022.pdf, at 20-39.

¹¹ Kunesch, 'GPT-3 als Richter? Künstliche Intelligenz und Art 6 EMRK', *Jahrbuch Öffentliches Recht* 2021 (2021), 305.

¹² Summer, 'Zusammenfassung der 2. Podiumsdiskussion', 1-2 *Richterzeitung (RZ)* (2022) 23, at 24.

¹³ Federal Chancellery of Austria, *Aus Verantwortung für Österreich. Regierungsprogramm 2020-2024*, available at <https://www.bundeskanzleramt.gv.at/bundeskanzleramt/die-bundesregierung/regierungsdokumente.html>, at 22.

¹⁴ By choosing to focus on the judge's challenges during Open Court Day, this paper adopted a rather judge-centric perspective, which is also reflected in our survey design. Recognizing the resulting limitations of this paper, future research should be conducted on a broader level to also include the views of the members of the public that have used Open Court Day.

conducting Open Court Days, we chose three district courts of varying sizes per regional court division as well as those regional courts acting as labour and social courts. We used Google Forms to design a survey with multiple choice questions and sent out the link to the 489 judges we had selected according to the aforementioned criteria. For ease of use, our survey was conducted in German. The participants were guaranteed that their replies would remain anonymous and that they would only be analysed for the purposes of this paper and the subsequent presentation.

Out of 489 judges the survey was emailed to, a total of 209 (42.7%) had submitted responses by the date of submission. This high response rate reflects the strong interest in this particular way of providing guidance to and interacting with parties, as well as the salience of the ethical questions that arise in the course of Open Court Day. Fundamentally, the high response rate underlines how crucial it is that we as (aspiring) judges remain aware of the variety of ethical questions that arise when interacting with unrepresented parties, especially as we reflect on how to best fulfil our obligations as representatives of the judicial power, while ensuring that the guarantees under Article 6 ECHR apply to unrepresented parties as well.

2. UNDERSTANDING OPEN COURT DAY

A. (UN-)REPRESENTED IN COURT

To understand the legal background and purpose of Open Court Days in Austria, a brief look at the Austrian system of obligatory representation of parties by lawyers in court is inevitable. In district courts, parties in a civil proceeding have the obligation to be represented by a lawyer when the amount in dispute exceeds € 5000.¹⁵ In regional courts or any other higher courts, there is a general obligation to be represented by a lawyer. In family law proceedings as well as in proceedings concerning rental and lease agreements – which are held in district courts regardless of the amount in dispute¹⁶ – a general obligation to be represented by a lawyer does not exist.¹⁷ This also applies to labour and social law proceedings, which are held in regional courts regardless of the amount in dispute.¹⁸ As a result, unrepresented parties are not an anomaly but quite a regular occurrence in Austrian courts.

B. OPEN COURT DAY IN PRACTICE

As the possibility for parties to appear in court and file a suit or an application verbally during Open Court Day is only open for unrepresented parties, Open Court Days are predominantly held regarding small claims, family law proceedings, proceedings concerning rental and lease agreements and labour and social law proceedings. Other legal matters (e.g. insolvency law and law of execution) can

¹⁵ § 27(1) of the Austrian Code of Civil Procedure (*Zivilprozessordnung*).

¹⁶ § 49(2) of the Act on the Exercise of Jurisdiction and the Jurisdiction of the Ordinary Courts in Civil Cases (*Jurisdiktionsnorm*).

¹⁷ § 27(2) of the Austrian Code of Civil Procedure (*Zivilprozessordnung*).

¹⁸ § 3 and § 39(3) of the Austrian Labor and Social Court Act (*Arbeits- und Sozialgerichtsgesetz*).

also be covered, however, Open Court Days regarding these issues are commonly not held by judges but by judicial officers. In practice, the way Open Court Day is conducted varies from court to court. In general, Tuesday mornings from 8:00 to 12:00 a.m. are uniformly designated for conducting Open Court Days.¹⁹ In order to reduce the spread of SARS-CoV-2, a new legal provision was introduced in 2020 which allows for the use of pre-registration systems. This includes the rejection of non-urgent applications and motions if the party fails to pre-register in a timely manner.²⁰ Currently, parties usually make an appointment with an office worker via phone for the next Tuesday morning and briefly state why they want to appear in court. At the scheduled appointment, the party may then file a suit or application or raise an objection before a judge, judicial clerk or candidate judge, the latter two being supervised by a judge.

In practice, the conduct of Open Court Days is often stressful both for the party and the judge. On the one hand, court appointments concerning issues such as parental custody, divorce, disputes with the landlord, imminent eviction or disputes with the employer/employee might place the party in an emotionally exhausting situation. On the other hand, the judge normally does not have sufficient information on the content of the motions of the party before the appoint-

ment, and therefore needs to react spontaneously while remaining professional at all times. Procedurally, after the complaint, motion or other procedural act has been verbally declared on the court record, it is served to the opposing party, who may then raise a written objection, file a written statement or appear in court at an Open Court Day themselves. Of course, when all the necessary procedural acts are in place, a date for a court hearing will be set and the claim will be negotiated in a trial with both parties.

3. THE LEGAL PROVISIONS BEHIND OPEN COURT DAY

A. NATIONAL LEGAL SOURCES

In Austria, the holding of Open Court Days has a long tradition. Back in 1873, § 15 of the Small Claims Procedure Act (*Bagatellverfahrensgesetz*) already stipulated that on certain ‘court days’, which are to be determined in advance and announced by ‘a posting at the courthouse’, the plaintiff and the opposing party may appear before the court even without a summons in order to file and hear a lawsuit, which shall be recorded in the minutes of the hearing.²¹ In 1895, the provision was transferred to § 439(1) of the Austrian Code of Civil Procedure (*Zivil-*

¹⁹ On 9 March 1982 the Austrian council of ministers decided that in all federal offices with official opening hours for the public, employees would be available on Tuesday mornings from 8.00 to 12.00 a.m. This was done in an attempt to bridge the gap between the public sector and the general public. The Federal Ministry of Justice implemented this decree dated 10 May 1982, ordering that Tuesday mornings from 8:00 a.m. to 12:00 a.m. are to be designated as Open Court Days within the scope of § 54 Geo (Danzl, ‘Geo’ in K.-H. Danzl [ed], § 54 Geo. *Mündliches Parteianbringen bei Gericht* [2021], at para 7).

²⁰ § 54(3a) of the Austrian Rules of Procedure for the Courts of First and Second Instance (*Geschäftsordnung für die Gerichte I. und II. Instanz*, BGBl II 2020/90 [Federal Law Gazette]).

²¹ Mayr, *supra* note 2, at 197.

prozessordnung, hereinafter 'ZPO') which is still in force today.²² In connection with § 439 ZPO, other legal sources exist that have implications for Open Court Day in general as well as for the ways in which unrepresented parties may verbally put motions and applications on court record:

While § 433 ZPO allows for pre-trial in-court settlements, § 434 ZPO provides that parties, if they are not represented by lawyers, may verbally file all motions at the court. According to § 54(1) of the Austrian Rules of Procedure for the Courts of First and Second Instance (*Geschäftsordnung für die Gerichte I. und II. Instanz*, hereinafter 'Geo') in district courts certain days and hours, namely at least one day a week, may be set aside for the receipt of such verbal complaints, applications and declarations in contentious and non-contentious matters as well as in matters of private prosecution, with the effect that at other times all non-urgent submissions of this kind may be referred to that particular day (Open Court Day). As § 54(1) Geo is the only provision in Austrian law that explicitly refers to Open Court Day, it constitutes the key provision regarding Open Court Days in Austria. Considering the exact wording, § 54(1) Geo does not regulate that Open Court Days must be established in district courts. Rather, the provision provides the opportunity to restrict multiple court appearances to one day, thereby channelling and concentrating appointments with the public. This suggests that it used to be possible to appear in court any day to verbally file a suit or an application.

B. MANUS + DUCERE

These legal provisions all show that Open Court Day is, in principle, restricted to the holding of pre-trial in-court settlements, hearings without summons or the verbal filing of actions, appeals, remedies and declarations on court record.²³ Nonetheless, parties often expect to receive legal information, guidance and advice when they appear at Open Court Day.²⁴ As will be highlighted below (see part 5.C.1.), in practice, their expectations are often met. This is due to several legal provisions in connection with the possibility of procedural actions by unrepresented parties: § 432 ZPO contains a general obligation to give instructions on procedural acts by unrepresented parties. It stipulates that the judge shall, if necessary, give parties unacquainted with the law and not represented by lawyers the necessary instructions for the performance of their procedural acts and inform them of the legal consequences associated with their acts or omissions. In Austria, this obligation is called *Manuduktionspflicht* (originating from the Latin words *manus* for hand and *ducere* which means to guide someone). In addition, § 435 ZPO mandates that, if in the judge's opinion, the complaint submitted in writing requires supplementation or clarification in any respect, or if there are doubts about the initiation of the proceedings, the judge shall, if the plaintiff is not represented by a lawyer, give the plaintiff the necessary instructions for the corresponding completions or corrections before the motion is filed. If the action is put on court record verbally, the plaintiff has to be informed about its potential inadmissibility.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

§ 435 ZPO not only requires judges to inform parties about issues of inadmissibility, but also if the action appears to be obviously unfounded. The admission of futile lawsuits without appropriate instruction may even give rise to claims for official liability (see part 5. C. 5.). However, the recording of the action may not be refused if the plaintiff insists on the recording despite the instruction.

Another legal provision linked to the expectation of litigants to receive general advice and information is § 54(4) Geo, according to which the judge or other court officials entrusted with receiving and certifying verbal submissions shall instruct the parties on the legal provisions in question and shall ask them to include all information required for their particular case.

The judge's general duty to instruct unrepresented parties is even more wide-ranging in non-contentious proceedings and in labour and social court proceedings.²⁵

All in all, what the aforementioned legal provisions regarding the Austrian Open Court Day have in common is their alignment with the conception of a *social* civil procedure that has fundamentally shaped the Austrian Code of Civil Procedure of Franz Klein.²⁶ As the architect of the Austrian Code of Civil Procedure, Klein regarded legal conflicts as a '*social* evil' (*soziales Übel*) with high stakes and costs not only for the parties involved but for society as a whole.²⁷ Therefore,

he wanted civil procedure to enable conflict resolution and, by doing so, serve the interests of the parties as well as the general public.²⁸ Given this holistic view of court proceedings, it appears consistent that Austria remains committed to its Open Court Day as a way to solve conflicts pragmatically and in an unbureaucratic setting.

4. EUROPEAN LEGAL SOURCES

A. RIGHT TO A FAIR TRIAL

As stated above, the majority of parties that appear before a judge on Open Court Day are people who are legally unacquainted and not represented by lawyers. The opportunity to bring a case before a judge or file a suit or an application is therefore closely connected to the right to a fair trial.

Article 6 ECHR states that in determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. An inherent feature of a fair trial, which applies to both criminal and civil cases,²⁹ is the equality of arms, in the sense of a fair balance between the parties, which requires that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not

²⁵ Ibid., at 198. § 39 of the Austrian Labour and Social Court Act (*Arbeits- und Sozialgerichtsgesetz*) as well as § 14 of the Non-Contentious Jurisdiction Act (*Außerstreitgesetz*) contain such provisions.

²⁶ Mayr, *supra* note 2, at 200.

²⁷ G. E. Kodek and P. G. Mayr, *Zivilprozessrecht* (2nd ed., 2013), at 32.

²⁸ Ibid.

²⁹ ECtHR, Guide on Article 6 of the ECHR (civil limb), 85, available at https://www.echr.coe.int/documents/guide_art_6_eng.pdf.

place him at a substantial disadvantage vis-à-vis the other party.³⁰

Similarly, Article 47 of the Charter of Fundamental Rights of the European Union (EUCFR) stipulates the right to an effective remedy and to a fair trial. In addition, it codifies in its third paragraph that legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice. This provision primarily affirms the relevant case law of the European Court of Human Rights (ECtHR), while also taking into consideration the system of legal assistance for cases before the Court of Justice of the European Union (ECJ).³¹

However, whilst an effective right of access to the courts is therefore guaranteed, Article 6 ECHR leaves to the State a free choice of the means to be used towards this end. As the ECtHR has stated in *Airey v. Ireland*: 'it is not the Courts function to indicate, let alone dictate, which measures should be taken; all that the Convention requires is that an individual should enjoy his effective right of access to the courts in conditions not at variance with Article 6 para 1'.³² In any case, this provision 'may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective

access to court either because legal representation is rendered compulsory ... or by reason of the complexity of the procedure or of the case'.³³ The ECJ also references the case law of the ECtHR in his judgments³⁴ and states that when making the assessment whether the conditions for granting legal aid constitute a limitation on the right of access to the courts, the national courts must consider the subject-matter of the litigation, the applicant's prospect of success, the importance of what is at stake for the applicant, the complexity of the case and the applicant's capacity to represent himself effectively.³⁵

It is therefore clear that the right to legal aid is not absolute and may be subject to restrictions, provided that they pursue a legitimate aim and are proportionate. Conditions on the granting of legal aid may be based on the financial situation of the litigants or their prospects of success in the proceedings.³⁶

These conditions are also established in the Austrian legal system, where legal aid not only entails the waiver of court fees but also the appointment of a lawyer if necessary. Legal aid shall be granted to parties to the extent that they are unable to meet the costs of proceedings without endangering their livelihood and the intended prosecution or defence

³⁰ ECtHR, *Kress v. France*, Appl. no. 39594/98, Judgment of 7 June 2001, at para 72; *Regner v. The Czech Republic*, Appl. no. 35289/11, Judgment of 19 September 2017, at para 146; *Dombo Beheer B.V. v. The Netherlands*, Appl. No. 14448/88, Judgment of 27 October 1993, at para 33; All ECtHR decisions are available at <http://hudoc.echr.coe.int/>.

³¹ C. Drexel, *Der Zugang zum Recht* (2016), at 98; Explanations Relating to the Charter of Fundamental Rights, OJ 2007/C 303/30.

³² ECtHR, *Airey v. Ireland*, Appl. no. 6289/73, Judgment of 9 October 1979, at para 26.

³³ *Ibid.*

³⁴ C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Germany* (ECLI:EU:C:2010:811); C-156/12, *GREP GmbH v Bavaria* (ECLI:EU:C:2012:342) at para 38-42; Drexel, *supra* note 31, at 103.

³⁵ C-279/09, *supra* note 34, at para 60-61.

³⁶ ECtHR, *Steel and Morris v. The United Kingdom*, Appl. no. 68416/01, Judgment of 15 February 2005, at para 62.

does not appear malicious or futile.³⁷ As long as a party's livelihood is not endangered, which in principle means that they exceed a minimum level of income, legal aid is denied. This sometimes leads to a gap in the protection of the right of access to the courts where parties that are 'too rich' for legal aid might still not be able to afford legal representation on their own.³⁸

Since the states have a free choice of the means to guarantee the right to a fair trial and equality of arms, legal aid is only one of the measures that can be taken. Simplifying the applicable procedure can also ensure that legally unacquainted parties who are not represented by lawyers are able to have effective access to court.³⁹

This is why Austrian law stipulates the aforementioned *Manuduktionspflicht* (see part 3. B. above). By means of judicial assistance and instruction, the parties are informed of the legal consequences associated with their procedural acts, which they would otherwise not be able to comprehend in terms of their significance and scope. Therefore, the parties are enabled to perform the necessary acts themselves, thus simplifying the applicable procedure.⁴⁰

This obligation of judicial assistance and instruction corresponds to the Council of Europe's Recommendation on the independence, efficiency and responsibilities of judges, which stipulates that they 'should act independently and impartially in all cases, ensuring that a fair hearing is given to all parties and, where necessary, explaining procedural matters'.⁴¹ However, in civil cases, the Austrian *Manuduktionspflicht* goes further than that and includes not only procedural but also substantive matters.⁴²

The same goes for Open Court Day, where judges not only address how a specific procedural act is to be set, but also discuss the legal and factual issues of a case, which includes procedural and substantive law. In international comparison, this is rather unusual, since most states only provide guidance by state organs on questions of procedural law as recommended by the Council of Europe.⁴³ Nonetheless, Open Court Day has significance going beyond Article 6 ECHR and Article 47 EUCFR, as it has previously been used for the implementation of other legislative acts of the EU as well, namely the Council Directive to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes⁴⁴ (hereinafter the 'Legal Aid

³⁷ §§ 63, 64 of the Austrian Code of Civil Procedure (*Zivilprozessordnung*).

³⁸ Drexel, *supra* note 31, at 228-232.

³⁹ ECtHR, *Airey*, *supra* note 32, at para 26; ECtHR, *Steel and Morris*, *supra* note 36, at para 60.

⁴⁰ § 432 of the Austrian Code of Civil Procedure (*Zivilprozessordnung*); Drexel, *supra* note 31, at para 245.

⁴¹ Council Recommendation of 17 November 2010, No. (2010) 12, available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805afb78, at Chapter VII/60.

⁴² Kodek, '§ 432 ZPO', in H.W. Fasching and A. Konecny (eds), *Zivilprozessgesetze* (2017), at para 1/1. This is in contrast to Austrian administrative law. In its decision dating from 14 June 2022 (Ra 2020/10/0123), the Austrian Supreme Administrative Court (*Verwaltungsgerichtshof*) underlined that there is no obligation under administrative law to provide guidance to parties on substantive matters. According to this decision, even unrepresented parties are only to be given the instructions necessary for the performance of their procedural acts.

⁴³ Kodek, '§ 439 ZPO', in H.W. Fasching and A. Konecny (eds), *Zivilprozessgesetze* (2017), at para 2.

⁴⁴ Council Directive 2003/8/EC, *supra* note 8.

Directive') and the Regulation establishing a European Small Claims Procedure⁴⁵ (hereinafter the 'Small Claims Regulation').

B. ADDITIONAL EU LEGISLATION

The Legal Aid Directive set out to provide legal aid in cross-border disputes for persons who lack sufficient resources where aid is necessary to secure effective access to justice by laying down certain minimum common standards.⁴⁶ Article 3(2) (a) of this Directive stipulates that legal aid is considered to be appropriate when it guarantees – among others – pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings. The provided legal aid should cover the costs relating to the assistance of a local lawyer or any other person entitled by the law to give legal advice.⁴⁷

To a large extent the Austrian procedural provisions already complied with the provisions of the Legal Aid Directive.⁴⁸ Regarding Article 3(2)(a) it was clarified through an amendment of the Austrian Code of Civil Procedure that the assistance of a lawyer by means of legal aid also extends to pre-litigation advice with regards to an out-of-court settlement of the dispute.⁴⁹ Furthermore, it was stated in the Explanatory Notes to this amendment that the criteria of the Legal Aid Directive are otherwise met by the existing

legal services provided through Open Court Day as well as other free legal information provided by the bar associations and interest groups such as the Chamber of Labour or Commerce.⁵⁰

Similarly to the Legal Aid Directive, the free legal advice provided on Open Court Day was also referred to regarding the application of the Small Claims Regulation. This legal framework established 'a European procedure for small claims, intended to simplify and speed up litigation concerning small claims in cross-border cases, and to reduce costs'.⁵¹ The European Small Claims Procedure provides an alternative to the procedures existing under the laws of the Member States, where all parties use the according standard forms provided in Annex I to IV. Representation by a lawyer or another legal professional is not mandatory.⁵²

Therefore, the Member States have to ensure that the relevant forms are available at all courts and tribunals where such a procedure can be commenced and that the parties can receive practical assistance in filling in these forms. Additionally, the court or tribunal shall inform the parties about procedural questions if necessary.⁵³ In Austria, these objectives are again met through Open Court Day and the so-called *Manuduktionspflicht*.⁵⁴

⁴⁵ Council Regulation 861/2007, *supra* note 9.

⁴⁶ Council Directive 2003/8/EC, *supra* note 8, Explanatory Notes nos. 5, 8.

⁴⁷ Council Directive 2003/8/EC, *supra* note 8, Article 8.

⁴⁸ Obenaus and Kühtreiber, 'Gemeinschaftsrechtliche Aspekte der Verfahrenshilfe', 17 *Zivilrecht aktuell (Zak)* (2007) 323, at 325.

⁴⁹ BGBl. I Nr. 128/2004 (Federal Law Gazette); § 64(1)(3) of the Austrian Code of Civil Procedure (*Zivilprozessordnung*).

⁵⁰ ErlRV 613 BlgNr. XXII. GP, 4, 12 (Explanatory Notes to Government Bill).

⁵¹ Council Regulation 861/2007, *supra* note 9, Article 1.

⁵² *Ibid.*, Articles 1, 5, 10.

⁵³ *Ibid.*, Articles 4(5), 11, 12.

⁵⁴ Mayr, 'Das Europäische Bagatellverfahren in Österreich', 2 *Fachzeitschrift für Verkehrsrecht (ZVR)* (2009) 40, at 41; Mayr, *supra* note 2, at 198.

C. ASSISTING UNREPRESENTED PARTIES – OTHER SOLUTIONS

While other Member States are also obligated to protect the fundamental rights of Article 6 ECHR and Article 47 EUCFR, implement the Legal Aid Directive and apply the Small Claims Regulation, none of them have opted to do so by establishing a similar institution where judges themselves provide legal advice directly to parties without the opposing party present.⁵⁵

In Germany, for example, simple motions and declarations can be filed with a judicial clerk at the court office.⁵⁶ In cases where a lawyer is mandatory or otherwise necessary, the parties can apply for legal aid. In further contrast, in the Netherlands no legal information is given by members of the court, neither judges nor judicial clerks, since assistance offered by the court would contravene the principle of impartiality and the passive role of the judge.⁵⁷

However, not only other EU Member States have chosen not to provide legal advice by judges. An institution like Open Court Day is also unheard of in states like New Zealand, Australia, Armenia and the United States of America.⁵⁸

Given Austria's unique way of granting assistance to unrepresented parties, the following section will analyse Open Court Day and ethical issues beyond it.

5. JUDGING OPEN COURT DAY: THE GOOD AND THE CHALLENGING

A. QUESTIONS ASKED

After conducting a thorough literature review, we identified four central advantages (low-threshold access to justice, direct contact with the parties, the possibility to 'intercept' futile lawsuits, and the possibility to find pragmatic solutions) as well as four central challenges (time spent at Open Court Day, conflict of roles, appearance of bias, and risking a liability case) in the context of Open Court Day that were then included as possible answers in the survey, along with one box that allowed respondents to include answers that did not correspond with the provided answer options. Choosing this particular survey design, we made sure that responses could be analysed in a meaningful way. In order to ensure a high response rate, the survey was designed to take no more than five minutes. To this end, we included only one open question ('My ideas for improving Open Court Day'), while the other eight were multiple-choice questions that included one open-answer field for each ('Other').

⁵⁵ O. Scheiber, *Mut zum Recht* (2020) at 162; Ertl, *supra* note 3, at 203; European Commission, Directorate-General for Health and Consumers, *Guide to legal aid and advice in the European Economic Area* (1997), available at <https://op.europa.eu/en/publication-detail/-/publication/d4c6255e-b1bb-4801-bb3a-2fe5c6613562/language-de>, at 54-163.

⁵⁶ § 129a of the German Code of Civil Procedure (*Zivilprozessordnung*).

⁵⁷ Ertl, *supra* note 3, at 202; Kramer and Ontanu, 'The functioning of the European Small Claims Procedure in the Netherlands: normative and empirical reflections', *Nederlands Internationaal Privaatrecht* (2013) 319, at 322.

⁵⁸ Ertl, *supra* note 3, at 203.

B. THE GOOD

1. LOW-THRESHOLD ACCESS TO JUSTICE

As shown above, the law stipulates that the overarching purpose of Open Court Day is to collect verbal application by parties on one particular day. As such, Open Court Day offers a low-threshold way of gaining access to the justice system.⁵⁹ In this respect, it is important to note that Open Court Day is free of charge and without major bureaucratic hurdles. This is particularly relevant for and helpful to parties whose language skills prevent them from putting in a request in writing.⁶⁰ As such, Open Court Day often serves as the first point of contact with the judicial system. The low-threshold access to justice made possible by Open Court Day is considered an important advantage by the majority of our survey's respondents (61.2%).

2. BREAKING BARRIERS

Besides facilitating access to justice, Open Court Day can also serve as a tool to connect judges with the public, thereby reducing the barriers between the population and the court system.⁶¹ By doing so, general acceptance of the justice system and trust in the proceedings can be enhanced.⁶² In times of ever increasing digitalization, Open Court Day can act as a bridge between the court and the parties,⁶³ which is something that 30.1% of all respondents considered advantageous about Open Court Day.

3. PRAGMATISM RULES

Open Court Day also offers judges and parties a way to find pragmatic solutions to legal issues in a less formal setting. Rather than having to start formal proceedings, questions can be answered directly and settlements can be sought outside the realm of official court proceedings, thus enabling parties to swiftly reach an agreement.⁶⁴ Furthermore, parties can be pointed to other institutions that are more apt at dealing with their particular request.⁶⁵ 43.1% of the survey's respondents see the possibility to find pragmatic solutions as a positive effect of Open Court Day.

4. CHANNELLING & INTERCEPTING

Moreover, Open Court Day enables judges to channel requests by parties and to 'intercept' legal disputes that have no chance of success. By listening to the party's concerns and offering them general legal information, parties can be dissuaded from futile lawsuits⁶⁶ that would otherwise burden the justice system, as starting official proceedings in the case would lead to an increased workload. This aspect of Open Court Day is endorsed by 35.9% of all respondents.

C. THE CHALLENGING

1. EXPECTATION VS REALITY

Overall, the findings of our survey in regard to the positive aspects of Open Court Day show that it can be a tool to connect the public to the justice system.

⁵⁹ O. Scheiber, *supra* note 55, at 161.

⁶⁰ Beran, 'Familienrechtlicher Amtstag - was sonst?', 3 *Richterzeitung* (RZ) (2018) 44, at 45.

⁶¹ Kodek, *supra* note 43, at para 59.

⁶² Täubel-Weinreich, 'Über die unvereinbare Liebe zum Amtstag', 4 *Richterzeitung* (RZ) (2011) 89.

⁶³ Summer, *supra* note 12, at 24; Lackner, *supra* note 1, at 257.

⁶⁴ Rassi, 'Three steps to justice?', 9 *Richterzeitung* (RZ) (2005), 182, at Fn 11.

⁶⁵ Täubel-Weinreich, *supra* note 62.

⁶⁶ Kodek, *supra* note 43, at footnote 60; Fucik, '§ 439 ZPO', in W.H. Rechberger and T. Klicka (eds), *Kommentar zur ZPO* (2019) at para 2.

However, while those supporting Open Court Day hail its achievements particularly in the context of access to justice, Open Court Day has also drawn widespread criticism, in particular given the ethical challenges it gives rise to.

As argued above, giving guidance to parties constitutes an important hallmark of Open Court Day. At the Austrian Open Court Day, however, it is not only procedural questions that the court informs parties about. As outlined above (see part 3. B.), according to Austrian civil procedure law, the judge is obliged to provide guidance and instruction to unrepresented parties for concretely planned legal actions.⁶⁷ In principle, a general need for information on the side of the party does not suffice.⁶⁸ To a certain extent, even an assessment of the chances for success offered by the judge to the party present at Open Court Day is assumed to be permissible, but only within the boundaries established by § 435(2) of the Austrian Code of Civil Procedure.⁶⁹ Such 'acts of compensatory legal protection'⁷⁰ are intended to make up for the lack of legal knowledge and routine of unrepresented parties and therefore constitutes a crucial element towards ensuring the upholding of Article 6 ECHR.

As a result of these legal provisions, however, judges at Open Court Day may be faced with the daunting task of having to decide where their general duty to

provide legal guidance ends and where the provision of legal advice begins. For parties who have a particular (legal) problem and therefore decide to seek advice (free of charge) from the court, it can be difficult to understand that there are limits to what the judge can give instructions on. In this context, there is a discrepancy between expectation and reality.⁷¹

2. BLURRED LINES

As a result, there is an area of tension between the self-image of the judge as a representative of the judicial power and the expectations of parties who often seek not only legal guidance but also concrete legal advice from the court.⁷² In practice, a lot of judges may end up providing such advice in the course of consultations at Open Court Day.⁷³ In part, this is done because the careful gathering of information for the purpose of properly providing legal guidance as stipulated by law may require providing legal information on the distribution of the burden of proof and consideration of the (presumed) probative value of evidence.⁷⁴ In practice, this means that it can be very difficult to draw the line between providing general legal guidance to unrepresented parties and offering concrete legal advice.⁷⁵

As a result, there is concern that by providing legal guidance in the widest sense, judges may encroach on the sphere of activity of legal advisory professionals.

⁶⁷ Mayr, *supra* note 2, at 198.

⁶⁸ *Ibid.*, at 198.

⁶⁹ Kodek, *supra* note 43, at para 13.

⁷⁰ Mayr, *supra* note 2, at 198.

⁷¹ Ertl, *supra* note 3, at 201.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ Toifl, '18. Familienrichtertag - Neues Gesetz - neuer Richter, AußStrG 2005 - eine Standortbestimmung', 3 *Richterzeitung (RZ)* (2006) 58.

From the perspective of the separation of powers, this leads to the fundamental question whether and to what extent the judiciary should really be tasked with giving legal instructions in general.⁷⁶ When it comes to interacting with unrepresented parties on the occasion of Open Court Day, further concern exists that a judge conducting Open Court Day may be faced with having to act as a therapist, a mediator, a life coach and a social worker, while still upholding their judicial role.⁷⁷ It goes without saying that this particular constellation comes with a wide range of (ethical) challenges.

3. A CONFLICT OF ROLES

In addition to the several non-legal roles a judge at Open Court Day may take over because of the specific circumstances of the parties involved, there is a particular internal conflict of roles that Open Court Day-judges may be confronted with. Given that Open Court Day takes place in all kinds of courts – including very small courts with only one or two judges – the following situation may arise: the judge conducting Open Court Day may be the one who ends up being the judge who decides the case and then perhaps also records the appeal (at Open Court Day) against their own decision.⁷⁸ This potential conflict of roles has been widely criticized.⁷⁹ Simply appearing before the decision-making body gives many parties the impression that the judge was on their side anyway because they were friendly.⁸⁰ Even with careful clarification,

it comes as no surprise that many parties will not be able to understand why they end up losing the case after the judge has taken up their request after all.⁸¹

It goes without saying that this particular setup does not lead to an increased trust in the judicial system. It may instead serve to undermine public trust in the way justice is administered. Unsurprisingly, the majority of judges who took part in our survey considered this conflict of roles a major problem in the context of Open Court Day (67.5%). More than a decade ago, this sentiment was already echoed in the resolution passed by the Conference of English-German language Judges in the area of family law, ‘supporting efforts ... to substantially reform Open Court Day so that the judge who provides assistance to a party at Open Court Day is not the same as the one who decides the case.’ Furthermore, the resolution demanded ‘that litigants [shall] not be given the opportunity to discuss their case with the adjudicating judge without being asked to do so.’⁸² So far, however, the system has not been changed. On the contrary, as mentioned above, the current government programme even features a renewed commitment to Open Court Day and includes no reference whatsoever to its potential reform.⁸³

4. THE APPEARANCE OF BIAS

According to 60.8% of our respondents, another major ethical challenge inherent

⁷⁶ Kodek, *supra* note 43, at para 21.

⁷⁷ Täubel-Weinreich, *supra* note 62.

⁷⁸ Ertl, *supra* note 3, at 201.

⁷⁹ *Inter alia*: Ibid., at 203; Täubel-Weinreich, *supra* note 62, at 89; Mayr, *supra* note 2, at 200.

⁸⁰ Täubel-Weinreich, *supra* note 62.

⁸¹ Ertl, *supra* note 3, at 201.

⁸² Fucik, ‘8. Englischsprachig-deutschsprachige Richterkonferenz 2010 in Berlin-Bericht samt Schlussfolgerungen und Entschlüsseungen’, 4 *Interdisziplinäre Zeitschrift für Familienrecht (iFamZ)* (2011), 226, at 227.

⁸³ Federal Chancellery of Austria, *supra* note 13, at 22.

in Open Court Day that may have a negative impact on public trust in the judiciary concerns the appearance of bias. As judges, we are supposed to always keep an equidistance to all parties involved. At Open Court Day, however, the judge is faced with a situation that may call into question this equidistance, since formal proceedings may commence as the result of one party having verbally filed a motion with the judge at Open Court Day. Legally, a party is allowed to verbally put a motion on the court record during Open Court Day, which is then sent to the opposing party.⁸⁴ As a result, a party that is not well-versed in legal handlings of the court, upon receiving such a document might arrive at the conclusion that the other side already had a chance to talk to the judge and by doing so convince them of their arguments.

proceedings. On a greater scale, this can be harmful for the overall acceptance of the justice system as a whole.

This balancing act between ensuring impartiality and objectivity while properly providing legal services as part of Open Court Day can be daunting and, procedurally, has led to the concern that having offered legal guidance on the occasion of Open Court Day can lead to judges being reported for being biased. So far, however, Austrian courts have ruled that it is not a ground for rejection if the judge has expressed a certain legal opinion on the occasion of Open Court Day.⁸⁶ Even repeated consultations of a certain party as part of Open Court Day do not allow for the assumption that the judge will not be guided exclusively by objective points of view in a legal dispute.⁸⁷ As a result of these rulings, it is generally accepted that consultations that take place as part of Open Court Day do not constitute judicial bias.⁸⁸ The ECtHR has stated in a similar context regarding pre-trial decisions by judges that ‘the fact that the judge has detailed knowledge of the case file does not entail any prejudice on his part that would prevent his being regarded as impartial when the decision on the merits is taken. Nor does a preliminary analysis of the available information mean that the final analysis has been prejudged.’⁸⁹

Generally speaking, if a party – expecting from the court an unbiased, objective hearing and examination of their case – learns of contact between the opposing party and the judge outside of the official hearing dates, it is likely that the party will suspect that the opposing party will have improperly attempted to influence the judge by a one-sided presentation of the facts on their side.⁸⁵ Therefore, there is an imminent danger that the process will be perceived as one-sided from the get-go by one of the parties, which might then have a negative impact on the forthcoming

⁸⁴ Aistleitner and Zinkl, ‘Die Ethik der Unabhängigkeit’, 2 *Richterzeitung* (RZ) (2004) 40.

⁸⁵ Ciresa and Hofmeister and Widerin, ‘Amtstag real’, *Anwaltsblatt* (AnwBl) (1994) 415.

⁸⁶ Regional Civil Court Vienna EFSlg 57.661 (Collection of Marriage and Family Law Decisions); Higher Regional Court Innsbruck 2 R 262/89; Regional Civil Court Vienna 43 R 734/88; Regional Civil Court Vienna 43 R 181/01p.

⁸⁷ Regional Civil Court Vienna 43 R 2107/92; Higher Regional Court Vienna 13 R 23/99v.

⁸⁸ Regional Civil Court Vienna EFSlg 69.688 (1992) (Collection of Marriage and Family Law Decisions); Higher Regional Court Innsbruck 2 R 262/89; Supreme Court (Austria) 1 Ob 2/88; Regional Civil Court Vienna EFSlg 57.661 (1988) (Collection of Marriage and Family Law Decisions); Kodek, ‘§ 435 ZPO’, in H.W. Fasching and A. Konecny (eds), *Zivilprozessgesetze* (2017), at para 4.

⁸⁹ ECtHR, *Morel v. France*, Appl. no. 34130/96, Judgment of 6 June 2000, at para 45.

5. LIABILITY RISKS

Beyond questions of bias, there is concern that a judge offering legal guidance and/or assistance during Open Court Day may lead to a higher risk of liability. In our survey, 27.3% of all respondents considered this a challenge. If legal information (on the occasion of Open Court Day) is given incorrectly or inadequately, or if the person seeking legal assistance is given incorrect or incomplete advice or instruction, but also if the assistance is not given or is delayed, official liability applies if the other prerequisites (in particular damage and causality) are met.⁹⁰ However, as long as the legal instruction in question was based on an interpretation or application of the law that is justifiable on the basis of due consideration, official liability may not apply.⁹¹

6. CONCLUSION

A. REFORMING OPEN COURT DAY

Overall, of the judges that responded to our survey, roughly a third were in favour of keeping the status quo, while a third voted for reforming Open Court Day, and a third to abolish it completely. With only a third satisfied with the Open Court Day in Austria as it is now, it is worthwhile to examine the ways in which it may be improved in an attempt to better serve unrepresented parties and judges alike. The fact that 128 respondents (61.2%) chose to reply to the open answer question by offering reform proposals further serves to underline the need to closely examine ways to ensure a better implementation of Open Court Days in Austria. Building on

a thorough analysis of these responses, in combination with our own findings, in the following section we will put forward a proposal of how Open Court Day can be improved. Going beyond the specifics of a reform of Open Court Day, we then draw larger conclusions by discussing ways to uphold professional conduct in the context of the interaction with unrepresented parties as a whole.

B. HOW THE JUDGES RESPONDED

The reform proposals put forth by the respondents of our survey can be grouped into four broad categories: organizational, clarity of roles, outsourcing and expectation management.

1. ORGANIZATIONAL MATTERS

The fact that the majority of suggestions of the respondents can be categorized as organizational shows that ensuring ways of handling Open Court Days efficiently is a crucial aspect for Austrian judges. 37.8% of all respondents were concerned with the time-consuming aspect of Open Court Days and many therefore want to be compensated accordingly. Many of the suggestions made include the request that appearing in court on Open Court Days should only be possible by appointment (if it is not yet) or that Open Court Days should be conducted by telephone for brief questions. It was even proposed that Open Court Day should be conducted online if the party agrees. Many proposals included moving away from a fixed morning to a more flexible setting. Moreover, it was suggested that time limits for each party should be introduced. It was further proposed that consideration be given to the compe-

⁹⁰ Supreme Court (Austria) 1 Ob 9/03k RZ 2003/23.

⁹¹ Supreme Court (Austria) 1 Ob 12/80 SZ 53/83; RS0049955, T8.

tence of the judges in conducting Open Court Days, e.g. that a judge in criminal law should not have to provide guidance in civil law proceedings, or that one fixed judge per division should conduct Open Court Days with corresponding compensation for the workload. Moreover, it was suggested that there should be clear guidelines for appointments in order to avoid futile appearances in court or that Open Court Days should in fact only be open for applications.

2. FIXING CONFLICT OF ROLES

Due to impartiality being the core aspect of the judicial power, it is not surprising that many suggestions put forth by respondents of our survey concern the need for a clarity of roles. A great number of judges put forward the proposal that the judge conducting Open Court Day should not be the judge deciding the case. To facilitate the implementation of such a rule, the judge who records the suit or application during an Open Court Day should be subsequently excluded from the case. Moreover, it was suggested that there should not be any Open Court Day appointments during ongoing proceedings (especially in family law matters) and that there should be very limited consultation or filing of motions by the judge deciding the case.

3. OUTSOURCING

The proposals mentioned above have a strong link to the suggestions that Open Court Days should be ‘outsourced’, either to a separate office at the court under judicial guidelines, to an independent institution with equally easily accessible legal advice or to the office of lawyers within the scope of initial consultations.

For example, it was proposed that Open Court Day should be replaced by an initial consultation with a lawyer free of charge for the party but remunerated to the lawyer. Some suggestions refer to the advisory services of the Austrian Chamber of Labour (*Arbeiterkammer*) and would like to see them expanded. It was also suggested that ‘simple’ motions should be filed at service centres already established at some courts or that separate offices should receive such applications.

4. EXPECTATION MANAGEMENT

Although many suggestions concern outsourcing Open Court Days, numerous proposals were also made to improve them for the parties as well as for the judge through clear guidelines as to what Open Court Days offer. It was suggested that legal advice should only be given in connection with a specific application, submission of claim or statement on a subject of a proceeding. The respondents propose that it should be clarified that the judge conducting Open Court Day does not serve the purpose of providing general legal information without reference to a specific legal matter. It was further suggested that this clarification could be made by handing out standardized information sheets to the parties at Open Court Day.

C. WAYS FORWARD

All in all, we believe that Open Court Day continues to play an important role in narrowing the gap between citizens and their judicial system. Accordingly, it seems counter-intuitive to abolish this institution completely as it serves the purpose of enabling citizens to make

use of their rights under Article 6 ECHR and Article 47 EUCFR. Nonetheless, the disadvantages, especially the conflict of roles, must not be underestimated.⁹²

As some of the survey participants have suggested, at first glance it seems like a feasible solution to automatically exclude the judge that advised a certain party during Open Court Day from conducting any further proceedings in this matter. However, this would only be possible for larger courts where several judges are assigned to cover the respective legal field. In addition, parties would need to be prevented from being able to exclude a judge from conducting their trial by selecting them as their judge on Open Court Day, therefore indirectly picking their judge for the trial.

When considering outsourcing Open Court day, the costs of a non-court organization providing legal guidance for parties unacquainted with the law obviously have to be taken into consideration.⁹³ Additionally, parties should still be able to file actions verbally and directly at court, since it would otherwise not be possible for people not represented by lawyers to file a claim without familiarizing themselves with the formal requirements of such legal documents.⁹⁴ Using existing internal resources therefore seems preferable to establishing a separate organizational unit.

In order to prevent a conflict of roles, positions for judges who would be primarily responsible for Open Court Day could be established.⁹⁵ These judges could then conduct Open Court Days at their regional court and the district courts in their area. In order to make these positions desirable, the duration for such positions could be limited to a certain time period⁹⁶ or a higher compensation could be considered.⁹⁷ Alternatively, the time judges spend conducting Open Court Days could be reflected in their overall workload, so that they are assigned fewer 'non-Open Court Day' cases.⁹⁸ Smaller organizational changes, especially making appointments mandatory, seem to have had a positive impact for judges conducting Open Court Day during the pandemic and should therefore be maintained.

As suggested by the respondents to our survey, to better manage expectations of parties, informational pamphlets could be provided to parties before entering the judge's office in order to communicate directly what the purpose of their meeting is or should be and what the role of the judge is during Open Court Day.

⁹² Drexel, *supra* note 31, at 259; Täubel-Weinreich, *supra* note 62.

⁹³ Drexel, *supra* note 31, at 261.

⁹⁴ *Ibid.*, at 260.

⁹⁵ Täubel-Weinreich, *supra* note 62.

⁹⁶ Drexel, *supra* note 31, at 261.

⁹⁷ Similar to the way prosecutors of the Economic and Corruption Prosecutor's Office are automatically classified as senior prosecutors, see § 175(1)(6) of the Austrian Judicial and Prosecutorial Service Act (*Richter- und Staatsanwaltschaftsdienstgesetz*), such 'Open Court Day judges' could also be classified higher. Alternatively, they could profit from additional compensation similar to judges on call according to § 66 Abs 3 of the Austrian Judicial and Prosecutorial Service Act (*Richter- und Staatsanwaltschaftsdienstgesetz*).

⁹⁸ Ciresa and Hofmeister and Widerin, *supra* note 85.

To further establish that judges are not obligated to provide general legal advice during these meetings, a clarification regarding the relevant legal provisions could also be helpful in order to prevent miscommunication regarding the purposes of Open Court Day.

While managing expectations of the public is key to overcome some of the ethical as well as practical challenges highlighted in this paper, it is also important that future judges are aware of their role and responsibilities during Open Court Day. Trainee judges in Austria are currently often ‘trained on the job’, which means that they themselves conduct Open Court Days but are supervised by a judge. While such hands-on training should continue to play a major role in preparing trainee judges for their profession, we consider it crucial to include complementary training that will ensure that common standards are met by all future judges. This should include a compulsory one-day seminar that would cover the central aspects of Open Court Day, focusing on professional approaches for interacting with unrepresented parties. This seminar should take into consideration the vulnerability of such parties, raise awareness for the ethical challenges and could also cover issues of corruption and compliance. In addition, the seminar should include sessions in which participants are assigned roles and are asked to act out pre-determined, typical Open Court Day situations that cover some of the core aspects related to dealing with unrepresented parties. This would allow participants to put into practice what they have learned, while receiving useful feedback from the instructors and their peers. In addition, instructional material

and/or videos with typical Open Court Day-scenarios could be made available via the Judiciary’s Intranet. While special emphasis should be put on training future judges, it would also be useful to offer Open Court Day-trainings to judges during their career as a way to remain aware of its challenges.

D. BEYOND OPEN COURT DAY

The results of our survey as well as our findings in the literature have shown that communication is key: as trivial as it may sound, the way judges interact and communicate with parties, especially those not well acquainted with the law and not represented by an attorney, have profound implications. As judges, we have to be well-versed in the legal language while at the same time being able to transport the contents thereof to the general public. This places high demands on judges – be it in trials, hearings or Open Court Days. When interacting with unrepresented parties in particular, judges need to be continuously aware of their role and the responsibility that comes with it. In this respect, it is crucial to pay special attention to balancing the need of unrepresented parties for information and guidance in the context of Article 6 ECHR, which enables them to make themselves heard in the judicial system, with the need to uphold the central judicial principles of impartiality, objectivity and professional conduct. Furthermore, in an effort to ensure the continued trust in the integrity of judicial decision-making, special care needs to be taken to avoid any actual as well as apparent bias. As Lord Hewart C.J. put it, ‘not only must Justice be done; it must also be seen to be done.’⁹⁹

⁹⁹ R v Sussex Justices, ex parte McCarthy ([1924] 1 KB 256, [1923] All ER Rep 233.

Even though Open Court Day may seem to some – coming from different legal traditions – as an anachronistic legal institution that may even disrespect the separation of powers, we hope that, by analysing the ways in which Open Court Day is conducted in Austria and what this means for judges in their quest to act ethically and professionally, we have provided a new avenue into thinking about unrepresented parties and their need for (legal) information. We strongly believe that a court should not be a fortress built with legal texts that laymen can hardly understand but a forum for settling disputes and for finding solutions to problems. In this context, Open Court Days – as flawed as they may be – are an important way of connecting the judicial system to the public. As such, we believe it would be beneficial to consider introducing Open Court Day (or institutions similar to Open Court Day) in other European countries, while leaving room for divergent application depending on the national legal frameworks.

We do recognize that some EU countries have no tradition of providing guidance to unrepresented parties in procedural and/or substantive matters.

Therefore, we propose that working groups with legal and judicial experts could be established for those countries interested in Open Court Day to evaluate the existing systems in each state and the parties' access to legal information before and during the proceedings while taking into account the existing legislation as well as existing institutions outside the judicial system.

There is inherent value in being able to sit before a judge and to be heard, without any bureaucratic or financial obstacles. This direct contact can also help to establish the trust of citizens in their national legal systems, a goal that should be held high in all Member States.¹⁰⁰ Therefore, even though there are challenging and even problematic aspects that come with Open Court Days and the Austrian legal provisions surrounding the judge's general duty to provide guidance to unrepresented parties, we hope that this paper will open up space for further discussion and exchange about how we can best fulfil our roles as judges in the context of impartiality and objectivity while ensuring that the guarantees of Article 6 ECHR apply to everyone.

¹⁰⁰ European Commission, The 2022 EU Justice Scoreboard, available at https://ec.europa.eu/info/sites/default/files/eu_justice_scoreboard_2022.pdf, at 52.

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JUDICIAL ASSISTANTS: ETHICAL AND MANAGERIAL CONCERNS A COMPARATIVE STUDY

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Judicial assistants are present in courts all across Europe. In this article, we analyse the challenges the vast recruitment of judicial assistants represents to judicial ethics and professional conduct. Although assigned duties can differ significantly from one country to another, this paper aimed at outlining certain common traits and features of interest through a comparative study of the way the different European judicial systems organize their judicial assistants' schemes.

We will argue that the involvement of judicial assistants in the adjudication process raises ethical dilemmas concerning the right to an independent and impartial tribunal protected by Article 6.1 of the European Convention of Human Rights. Furthermore, the increased reliance on judicial assistants necessarily impacts the role of judges themselves who need to develop managerial skills.

In conclusion, we propose that additional safeguards be put into place: a thorough and equitable selection process; the provision of systematic initial and continuous training to judicial assistants and ethical guidelines with accompanying guidelines on their role and duties. Additionally, Judiciaries could implement lists of incompatibilities and restrictions on extrajudicial functions, rules for transparency around the drafting process and, finally, team management and human resources method courses.

NB: As part of our research, we interviewed judges and judicial assistants across Europe. Some of our discussions are mentioned in this paper. These conversations significantly contributed to our reflection. We thank all those interviewed for their participation and insight. We also thank our tutor for her availability and support.

KEY WORDS

Judicial assistants ▪ Decision-making ▪ Impartiality ▪ Independence ▪ Management ▪ Transparency

There was a time when the loneliness and isolation of judges was a major concern to many judiciaries.¹ Henceforth, recent efforts to modernize public institutions across Europe have redefined the working environment of the judge. Now head of a team that includes judicial assistants, this change has raised new fundamental concerns with regards to judicial ethics and professional conduct. Western societies have entrusted judges with the responsibility to adjudicate on the basis of standards believed to guarantee judicial independence, now enshrined in Article 6 of the European Convention on Human Rights, which upholds the right to an independent and impartial tribunal established by law.

Relying on the responses to a questionnaire sent out by the Consultative Council of European Judges of the Council of Europe in preparation for Opinion No. 22 (2019) on judicial assistants, it is safe to say that a large majority of European countries employ judicial assistants.² Indeed, with the exception of Liechtenstein, all replied that their judges have the support of judicial assistants.³ Increasing caseloads and delays in the administration of justice, the search for efficiency and qualitative judgments, as well as the need for judges to focus on their core mission of adjudicating, are some of the main reasons given for

employing judicial assistants. However, despite these honourable objectives, a large proportion of judicial duties are now susceptible to being performed by judicial assistants, thus raising important concerns.

This paper understands 'judicial assistants' as being persons with a legal education contractually recruited to assist judges in their adjudicative work. Beyond the traditional duo of judge and administrative assistant, this new figure has appeared through the creation of a new position or by assigning additional duties to existing positions. The scope of this paper is European countries, understood as Member States of the Council of Europe. Across European countries, judicial assistants can be referred to under different names, such as *judicial assistants* in Ireland, *law clerks* in the United Kingdom, *assistants de justice*, *juristes assistants* or *assistants spécialisés* in France,⁴ *Referendaris* in Belgium and Finland, *Wissenschaftliche Mitarbeiter* in Germany, *Letrados del Gabinete Técnico del Tribunal Supremo* in Spain, and *Référéndaires* or legal officers in some international organizations.

The term 'ethics' derives from the ancient Greek word *ethos* and is defined as the moral principles that control or influence a person's behaviour.⁵ In working envi-

¹ European Commission for the Efficiency of Justice, Council of Europe, Breaking up judges' isolation, CEPEJ(2019)15.

² CCJE, Summary of responses to the questionnaire for preparation of Opinion No 22 (2019) on "The role of court clerks and legal assistants within the courts and their relationships with judges", available at <https://rm.coe.int/summary-of-the-responses-to-the-questionnaire-for-the-preparation-of-o/168093f579>.

³ Albania, Andorra, Austria, Azerbaijan, Bosnia and Herzegovina, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Finland, France, Georgia, Germany, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, the Netherlands, Norway, Poland, Romania, Russia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine and the United Kingdom handed in responses.

⁴ Frédéric Charlon and Clément Cousin, Les juristes assistants nouveaux venus dans l'équipe autour du magistrat, *Recueil Dalloz*, February 2018.

⁵ 'Ethics' in the Oxford Advanced American Dictionary, 25 April 2022.

ronments, professional ethics govern the standards and moral conduct of a profession and its members. Professional ethics provide guidelines and norms that govern a professional's responsibilities to colleagues and the public. While competence and integrity are ensured by technical training coupled with an institutional means of validating knowledge, associations made up of these professionals have set standards to monitor their conduct in the public interest.⁶

Threats to the judicial ethics and expected professional conduct of judges are expressed in different ways. As judicial assistants are not held to the same ethical standards as judges, their influence on the decision-making process raises the question of the effectiveness of the right to an independent and impartial judge and to a fair trial. Indeed, excessive reliance on the work of judicial assistants may lead to the dilution of a judge's sense of responsibility and authority over his or her cases. Judges might be influenced by the work provided upstream by a judicial assistant, thus infringing on their impartiality. The status and safeguards around judicial assistants might prove inadequate when faced with the reality of their duties. Lastly, there is a risk of distrust in the judicial process. Public trust stems from the confidence and expectations placed in a judicial system, which should be transparent and accountable, as well as from the image of judges and judiciary and the ensuing respect for their authority, independence and impartiality.⁷ If 'justice must not only be done: it

must also be seen to be done',⁸ the realization that judicial decision-making might stem from judicial assistants could have serious consequences. Finally, the redefinition of the way judges work poses challenges. From a somewhat isolated adjudicator, the judge is increasingly required to become a manager, expected to allocate work, supervise and train judicial assistants.

Thus, the increased employment of judicial assistants in European countries makes a comparative study meaningful. Though research remains scarce, this paper aims at presenting and comparing the different European schemes of judicial assistants' involvement in the judicial process, their status, duties and ethical safeguards. It also delves into the influence of judicial assistants on judicial decision-making and on the adjudicative process as a whole, thereby addressing the following question: **to what extent can the influence of judicial assistants on decision-making lead to a dilution of judicial ethics?**

After a comparative overview of judicial assistants in European countries (part I), answering the above question will involve identifying the ethical and practical issues raised by the vast recruitment of such personnel (part II). Finally, pointing out the ethical issues at stake, this paper will further formulate proposals in order to combine the search for efficiency in the judicial system with the fundamental ethical principles expected by the rule of law (part III).

⁶ 'Professional Ethics' in the New Catholic Encyclopedia, 25 April 2022.

⁷ Ms Julia Laffranque, Securing public trust in the Judicial process, in Strengthening judicial independence and impartiality as a pre-condition for the rule of law in Council of Europe Member States, Opening and Concluding Remarks, Key Speeches and General Rapporteur's Report, presented at the High-Level Conference of Ministers of Justice and representatives of the Judiciary (Sofia, Bulgaria, 21-22 April 2016), at 37.

⁸ As quoted in ECHR, *Case of Delcourt v. Belgium*, application n 2689/65, 17 January 1970, para. 31.

1. COMPARATIVE ANALYSIS OF JUDICIAL ASSISTANTS IN EUROPE

A. DIFFERENT SYSTEMS OF JUDICIAL ASSISTANTS

1. THE RATIONALE BEHIND THE EMERGENCE OF JUDICIAL ASSISTANTS

Judicial assistants or clerks may now be found in almost all judicial systems across Europe⁹ and a comparative analysis of the different legal systems reveals that their numbers are growing. Judges no longer work alone but are assisted in their adjudicative duties by judicial assistants. For example, in Norway, the Norwegian Supreme Court formally created its clerk unit in 1989. It was originally comprised of six clerks but their numbers doubled in the same year. The two largest Courts of Appeal, Gulatings and Borgarting, started experimenting with the use of clerks in around 2010 and formalized their clerk units in 2015 and 2018 respectively. Since then, the number of clerks in these units has increased rapidly.¹⁰ In France, the position of *assistant de justice* was created in 1995 as a form of part-time temporary employment for young graduates and a new

category of *juriste assistant* appeared in 2016 for more specialized or experienced candidates.¹¹

This rather recent phenomenon may be explained by the driving force of different rationales. Three main reasons for creating or increasing the number of judicial assistants may be identified: helping judges cope with increasing backlogs, coupled with the idea of an apprentice model where future or young judges can gain experience, and improving the quality of adjudication. Increasing backlogs seem to be a frequent justification for resorting to judicial assistants and stepping up the tasks they perform. The introduction of judicial assistants in Slovenia was linked directly to a 'serious problem of backlogs'.¹² Similarly, adding clerks in the Norwegian Supreme Court was an answer to the rapid increase in cases that was overstressing its capacity.¹³ However, the use of this pretext to create the first clerk units was later overshadowed by a growing ambition to see them contribute to a higher quality of adjudication.¹⁴ Behind these reasons emerges the idea of increasing efficiency in judicial organization based on managerial concepts.¹⁵ The judge and the judiciary should be efficient, and surrounding them with a team to relieve them of non-core tasks may be a solution.

⁹ CCJE, Summary of responses to the questionnaire for preparation of Opinion No 22 (2019), *supra* note 2.

¹⁰ Gunnar Grendstad, William R. Shaffer, Jørn Øyrehagen Sunde and Eric N. Waltenburg, 'From Backlogs to Quality Assurance. The Development of Law Clerk Units at Norwegian Courts' (2020), 11(3) *International Journal for Court Administration* 3.

¹¹ François Melin, 'Le statut des juristes assistants', *Dalloz actualité* (2022).

¹² Slovenian response to the questionnaire for preparation of Opinion No 22 (2019) on "The role of court clerks and legal assistants within the courts and their relationships with judges", available at <https://rm.coe.int/compilation-all-replies-/16809463ff>.

¹³ Gunnar Grendstad, *supra* note 10, at 4.

¹⁴ *Ibid*, at 11.

¹⁵ Holvast, N. L., In the shadow of the judge: The involvement of judicial assistants in Dutch district courts, (2017) Eleven International Publishing.

However, in Opinion No 22 (2019), the CCJE points out that very few countries actually collected data on how useful judicial assistants really are to the judicial system.¹⁶ An attempt to apply the rational choice theory to judges and judicial assistants has shown that judges tend to sacrifice leisure or the quality of their decisions when faced with increasing backlogs. However, while increasing the number of judges would lead to a higher proportion of resolved cases, a rise in the number of assistants would not necessarily have the same impact. Judges would nevertheless spend more time on improving the quality of their decisions.¹⁷ There is no straight answer as to whether judicial assistants contribute to reducing backlogs, thus avoiding unreasonable delays for litigants, or improving the quality of adjudication. They probably do both to varying degrees depending on the organization and extent of their duties in each judicial system. Either way, their presence is beneficial with regards to the rights of litigants enshrined in Article 6 of the ECHR.

Incidentally, delegating tasks to competent subordinates allows judges to focus on the heart of their role – decision-making – and reduces stress.¹⁸ Studies in social sciences show that even though judges consider the nature of their work and the associated intellectual challenge as a major source of satisfaction, judi-

cial professionals are amongst the most vulnerable to occupational stress.¹⁹ This stress not only exposes them to a variety of signs and effects but also increases the risk of a dysfunctional judicial system delivering poor decisions due to improper working conditions.²⁰ In practice, this occupational stress stems from the ever-increasing volume of work, which requires judicial professionals to work at high speed and outside regular hours, especially in lower courts, as they fear backlogs, overbooking of cases and expired deadlines. The recruitment of judicial assistants is therefore beneficial in this respect. This is particularly true where the appointment of qualified judicial assistants has been an institutional response to the insufficient funding available for the recruitment of judges. However, the CCJE warns that ‘judicial assistants should not be employed at the expense of appointing judges in adequate numbers. If the workload of judges is too high, this might increase the pressure to delegate more duties to judicial assistants than is desirable.’²¹

Finally, employing judicial assistants may be a way to contribute to the training of future or young judges. Indeed, it is often seen as a stepping-stone to gain experience ‘behind the bench’.²² For example, Germany employs young judges as judicial assistants in the higher courts to gain experience and qualify for pro-

¹⁶ CCJE, Opinion 22 on the role of judicial assistants (2019), available at <https://www.coe.int/en/web/ccje/ccje-opinions-and-magna-carta>, at 4.

¹⁷ Fatih Deyneli and Peter Mascini, ‘Utility Maximizing Judges and Judicial Assistants: Testing Rational Choice Theory in 22 EU Countries’ (2020) 11(3) *International Journal for Court Administration* 6.

¹⁸ *Ibid*, at 2.

¹⁹ Three-quarters of UK salaried judges are satisfied with the challenge of their job (77%) and the variety of their work (73%) ; Paula Casaleiro, et al., ‘A Critical Review of Judicial Professionals Working Conditions’ Studies’ (2021) 12(1) *International Journal for Court Administration*, at 20.

²⁰ Paula Casaleiro, et al., ‘A Critical Review of Judicial Professionals Working Conditions’ Studies’ (2021) 12(1) *International Journal for Court Administration*.

²¹ CCJE, Opinion 22 on the role of judicial assistants (2019), *supra* note 16, at 4

²² British and Irish responses to the questionnaire for preparation of Opinion No 22 (2019), *supra* note 12.

motion. The same is true in Albania and Spain.²³ This rationale for employing judicial assistants is very often reflected directly in the type of organization that is chosen by the states.

2. THE INSTITUTION OF JUDICIAL ASSISTANTS

Judicial systems in Europe originate from different models. While the influence of a common law or civil law system may be found, the responses to the questionnaire on judicial assistants sent out by the CCJE in preparation for Opinion No. 22 (2019) show a vast variety in types of organization. However, at second glance, it is possible to highlight some main features of interest.

First, judicial assistants may be employed on a temporary basis or as career assistants. Temporary assistants correspond to the apprentice model discussed above. They only serve as such for a short period of time, usually for a maximum of five years depending on the system, on fixed term contracts for future judges or judges on secondment. Resorting to temporary assistants might also be seen as a way to minimize the risk of judicial assistants gaining too much influence.²⁴ Employing young and inexperienced assistants is sometimes considered as a safeguard against allocating them too many duties and therefore undue influence on the adjudicative process that is inherent to the judge. On the other hand, this is detrimental to the efficiency and quality that the judicial assistant can provide to the judicial system. Another

model is to employ career assistants. In this case, opportunities for promotion should be offered, although this is not systematic.²⁵ This model is usually found in civil law systems that have a tradition of court scribes: the Swiss *Gerichtsschreiber* and the Dutch *Griffers*, for example. However, not all civil law systems follow this model. The Belgian *Greffier* or the Spanish *Letrado de la Administración de Justicia* only perform administrative duties while other judicial assistants are employed to support the judge in his or her adjudicative work. Career judicial assistants offer advantages and disadvantages that mirror those of their temporary counterparts. However, in some states, a model that provides for career assistants may in effect become a system with temporary assistants. The goal of young assistants is not always to stay in such a career. This common feeling is expressed by a young Slovenian judicial assistant: 'I think there comes a day when you want to get some extra responsibility and want to be in charge. Because here we are just helping judges do their work. For me, actually, personally, this will be a problem someday.'²⁶

A second distinguishing criterion is the method of organization where judges are concerned. Judicial assistants may be assigned to one judge specifically, to a panel of judges or be placed in a pool available on a needs basis to all the judges in a court. When assigned to one judge, the latter is usually involved in the selection process, thus making for a closer relationship. The judge then becomes

²³ German, Albanian and Spanish responses to the questionnaire for preparation of Opinion No 22 (2019), *supra* note 12.

²⁴ Nina Holvast, *supra* note 15, at 73.

²⁵ In Slovenia for example, where the role can constitute a career but was designed as a stepping stone to becoming a judge.

²⁶ In Anne Sanders, 'Judicial Assistants in Europe – A Comparative Analysis' (2020) 11(3) *International Journal for Court Administration* 12, at 5-6.

a sort of mentor, which might in turn lead to increased influence on decision-making. This method of organization tends to be chosen most often in apprentice models like those in Germany or France. In the pool system, judicial assistants form a pool available to the whole court and they will work with different judges. This type of organization is found mostly in countries with career assistants such as Switzerland or the Netherlands for example.²⁷

Judicial assistants need to complete studies in law in all European states. In some countries, they also need to have practical experience after their legal education.²⁸ However, few states provide training, whether it be initial or continuous, for their judicial assistants. The Irish judiciary, for instance, does provide its judicial assistants with initial training, which consists of guidelines on their role and ethical obligations, but the process differs significantly from that of judges. Additionally, the Irish judicial authority enables its judicial assistants to attend the continuous training made available to judges.

Finally, the standards of professional conduct expected of assistants are usually minimal and limited to confidentiality. For example, French judicial assistants swear an oath to keep any information they may acquire during their duties secret. Other states like Austria and Belgium have similar oaths.

However, swearing an oath is not a common feature for European judicial assistants.²⁹ Some states require their judicial assistants to follow the same standards of ethical conduct as other civil servants,³⁰ but these standards are not specific to judicial assistants and do not reflect their particular involvement in the adjudicating process. Only a few states said they had rules imposing guarantees of impartiality, such as the obligation to reveal conflicts of interest or recusal.³¹ However, many informal rules or the attitude of judicial assistants who aspire to become judges can compensate to some extent for this lack of textual framework. A young Irish judicial assistant expressed his view on his impartiality in these terms: 'With regards to impartiality, we must not try to mislead or exercise influence on our judges – in a common law system where case law is a fundamental source of law, we cannot seek to exercise *mala fides* influence on our judge's work.... It's a very well-understood principle – we, as JAs, understand why we are there and what we are there to do.'³²

Even so, the ethical and professional conduct standards of judicial assistants around Europe seem a bit thin, especially with regards their involvement, which can be substantial.

²⁷ Ibid, at 7-8.

²⁸ CCJE, Summary of responses to the questionnaire for preparation of Opinion No 22 (2019), *supra* note 2.

²⁹ Ibid.

³⁰ Cyprus, Moldova.

³¹ Responses to the questionnaire for preparation of Opinion No 22 (2019) : Denmark, Finland, Norway, Croatia, Slovenia, Sweden, Switzerland, *supra* note 12.

³² Response to our questionnaire on the role of judicial assistants by an Irish judicial assistant.

B. THE INVOLVEMENT OF JUDICIAL ASSISTANTS IN THE ADJUDICATIVE PROCESS

1. DIFFERENT DEGREES OF INVOLVEMENT

'The role of the judicial assistant follows from the role of the judge. Judicial assistants must support judges in their role, not replace them.'³³ Duties of judicial assistants vary considerably from one country to another. Indeed, their 'assistance to judges can reach from acting as a "sounding board" for the judge's ideas, to conducting research and performing administrative duties to the drafting of decisions and participating in deliberations.'³⁴ For the purpose of clarity, judicial assistants' duties may be divided into three stages: prior to, during and after a ruling.

Prior to a ruling, judicial assistants may undertake legal research. Indeed, in their responses to the CCJE questionnaire in preparation for Opinion No 22, all countries declared that judicial assistants undertake research, including rules and jurisprudence, often summarized in a memo, in order to provide the judge with the necessary information. In Bulgaria, for instance, 'judicial assistants are prevaillingly involved in the stage when preparation of the decision-making is conducted – as far as the main part of their work consists in research and finding relevant case law/preparing memos and summaries.'³⁵ In Ireland, research skills of judicial assistants are particularly valued in the recruitment process.

They are required to have 'a good knowledge of modern online research methods, materials and databases and some experience in conducting legal research.'³⁶

During the decision-making process, judicial assistants are involved in the drafting stage in the majority of European states, yet at varying intensity from one country to the next. The task may be restricted to the facts of the case or go as far as drafting complete judgments. However, in some common law countries, writing the judgment is the personal responsibility of the judge who cannot delegate to anyone. Thus, in Ireland and the United Kingdom, judicial assistants are excluded from the drafting process. In other countries, the involvement of judicial assistants in the drafting process raises a concern as to how much leeway the judge has in his or her decision. In an ideal world, the judge could rewrite the entire decision if he or she disagreed with the draft provided by a judicial assistant, but given the time available and the material constraints of the judiciary, this is unlikely to happen. As a result, the dilution of the judge's involvement in the drafting of a judgment raises an immense ethical difficulty. Aware of the implications of such involvement, drafting in many countries is only open to judicial assistants in precise parts of the judgment under the sole authority of the judge. However, there are systems, such as Austria and the Czech Republic, in which judicial assistants can autonomously draft and make procedural

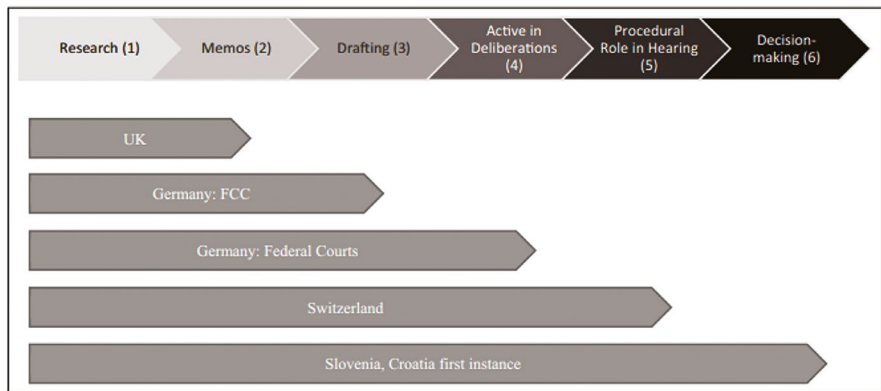
³³ CCJE, Opinion 22 on the role of judicial assistants (2019), *supra* note 16, at 19.

³⁴ Anne Sanders, and Nina Holvast, 'Empirical Studies on the Role and Influence of Judicial Assistants and Tribunal Secretaries' (2020) 11(3) *International Journal for Court Administration*, p. 1.

³⁵ Responses to the CCJE questionnaire for preparation of Opinion No 22 (2019) : Bulgaria, *supra* note 12.

³⁶ *Ibid* : Ireland.

Figure 1



decisions.³⁷ Furthermore, some judicial assistants may be present or even active in deliberations.³⁸ This takes them a step further in their involvement in the adjudication process itself. Conscious of this, most European states do not allow judicial assistants to be present during deliberations.³⁹

Following the decision-making process, judicial assistants perform diverse missions such as proofreading decisions, cross-checking references or preparing decisions for publication with respect to the rights of the parties cited in the judgment. Thus, judicial assistants' duties are characterized by their diversity and varying degrees of involvement in the judicial process. Anne Sanders used these differences to develop a scale of involvement and studied five examples.⁴⁰

2. THE LARGELY INFORMAL ROLE OF JUDICIAL ASSISTANTS

An analysis of the different judicial assistant systems reveals that the role and responsibilities of judicial assistants are 'rather scarcely mentioned in legislation and official policy documents'.⁴¹ This appears to be true for all models in Europe. One consequence is a certain discrepancy between the texts creating and organizing the role and what is actually happening in courts across a country. The texts, when they exist, are most often short and terse which inevitably leads to an informal definition of duties, blurred lines and local interpretations by judges. For example, the Slovenian response to the CCJE questionnaire in preparation for Opinion No 22 explains that:

'As already described, they have a wide range of duties, from very routine ... to highly intellectual tasks...There is an informal consensus among judges that the final decision has to be made by

³⁷ Ibid : Austria, Czech Republic.

³⁸ They may be invited in Lithuania or Malta, they are present but do not participate in Belgium or Denmark, they are present and may be invited to participate in Austria and the UK Court of Appeal: Anne Sanders, *supra* note 25, at 12.

³⁹ Responses to the CCJE questionnaire for preparation of Opinion No 22 (2019), *supra* note 12.

⁴⁰ Anne Sanders, *supra* note 25, at 15.

⁴¹ Holvast, *supra* note 15, at 72-73.

the judge who also bears the responsibility for the decision made. In practice, the duties of judicial assistants vary per court. Moreover, it can be argued that the duties of judicial assistants are heavily influenced by factors such as their knowledge and experience. The level of trust established between the judicial assistant and the judge he/she works for is equally important.⁴²

In the Netherlands, the text providing for judicial assistants bestows only administrative tasks upon them. The role they have today in the adjudication process, which can be extensive, has developed in practice outside any textual framework. As a result, the duties they actually perform “differ to some degree based on the court (division), and are largely informally outlined.”⁴³ In other states, such as the United Kingdom or Ireland, judicial assistants appeared when the Courts decided to hire them of their own accord. An Irish judicial assistant commented: ‘My only feedback would be that judges should be told to what extent they can rely on their JAs. Some judges will engage with their JAs minimally, especially those who are newly appointed, as they are somewhat unclear as to what we can do.’⁴⁴

British or Irish judicial assistants have less potential influence as they do not draft decisions or sit in hearings. This is not the

case for Norwegian clerks who were also created by an administrative decision of the courts themselves.⁴⁵ French judicial assistants all derive from legislative texts. However, the texts are terse and the multiplicity of different judicial assistants with similar duties (*assistants de justice*, *juristes assistants*, *assistants spécialisés*) creates blurred lines that can confuse judges and lead to local interpretations of the roles.⁴⁶

Furthermore, in the model where judicial assistants are assigned to a specific judge, a personal relationship is created between the judge and the judicial assistant. As the relationship grows, this may lead to an allocation of duties that increases beyond official regulations and therefore varies from one judge-judicial assistant duo to another. This clearly transpires in the different responses to the questionnaire sent out in preparation for Opinion No 22, e.g. ‘this depends on the individual judge’s discretion,’⁴⁷ ‘the concrete delegation of preparatory (drafting) work very much depends on the respective judge and the respective assistant,’⁴⁸ ‘yes, it is possible for the *Référéndaire* to be entrusted with such work. The reality of such a practice depends on the concrete situation and the way the *Référéndaire* and the judge work together.’⁴⁹

⁴² Slovenian response to the questionnaire for preparation of Opinion No 22 (2019), *supra* note 12.

⁴³ Nina Holvast, ‘The Power Of The Judicial Assistant/Law Clerk: Looking Behind The Scenes At Courts in the United States, England And Wales, And The Netherlands’ (2016) 7(2) *International Journal for Court Administration*, at 16.

⁴⁴ Response to our questionnaire on the role of judicial assistants by an Irish judicial assistant.

⁴⁵ Gunnar Grendstad, *supra* note 10.

⁴⁶ Ludovic Belfanti, ‘La création des juristes assistants : Entre utilité et questionnements’ (2018), 20 *Gazette du Palais*, at 11.

⁴⁷ Lithuanian response to the questionnaire for preparation of Opinion No 22 (2019), *supra* note 12.

⁴⁸ Austrian response to the questionnaire for preparation of Opinion No 22 (2019), *supra* note 12.

⁴⁹ Belgian response (translated from French to English) to the questionnaire for preparation of Opinion No 22 (2019), *supra* note 12.

The approach taken by the Czech Republic to define the duties of judicial assistants in legislation is worth noting. Instead of explaining vaguely what a judicial assistant should do, legislation chose to set out what they could not do.⁵⁰ This negative definition is interesting because it draws a line that seems to aim at protecting the adjudicative duty of the judge and creating core responsibilities that cannot be delegated. This shortage of official regulations and the development of local informal rules might be related to the sensitivity of the subject of the involvement of judicial assistants in the adjudication process, as will be discussed below.

2. REPERCUSSIONS ON ETHICS AND PROFESSIONAL CONDUCT

A. ETHICAL IMPLICATIONS

1. ETHICAL STANDARDS AND ARTICLE 6.1 OF THE ECHR

Every judicial authority draws its legitimacy from the law, which is the pillar on which public confidence lies. Article 6 of the European Convention on Human Rights guarantees the right to an independent and impartial tribunal established by law.

Aside from this legal standard, judges are bound by codes of ethics that their respective national judicial councils safeguard through the adjudication of any ethical question that arises in the exercise of their judicial duties.

These values may differ from state to state but, as an illustration, the French Superior Council for the Judiciary has listed integrity and probity, fairness, professional conscience, dignity and respect for and attention to others as the values that French judges and prosecutors must uphold.⁵¹ Judges face disciplinary sanctions should they disregard these ethical standards, as well as criminal and civil liability. The European Court of Human Rights can also condemn States for a violation of the principles of independence and impartiality.

Independence consists of the need to protect the judiciary from partisan interference and is understood to have both an institutional and an individual aspect.⁵² At the institutional level, it is guaranteed by the separation of powers and by the means provided to the judiciary.⁵³ At the individual level, it is attained through rigorous appointment methods and comprehensive and effective training. To this end, the Council of Europe recommends that States allocate sufficient resources to guarantee that such training programs meet the requirements of competence, openness and impartiality inherent to judicial office.⁵⁴

⁵⁰ Czech Republic response to the questionnaire for preparation of Opinion No 22 (2019), *supra* note 12.

⁵¹ Superior Council for the Judiciary, Compendium of the Judiciary's Ethical Obligations, available at http://www.conseil-superieur-magistrature.fr/sites/default/files/atoms/files/gb_compendium.pdf.

⁵² Opinion no.3 of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality (2002), at 16.

⁵³ *Ibid*; Superior Council for the Judiciary, Compendium of the Judiciary's Ethical Obligations.

⁵⁴ CCJE, Opinion 22 on the role of judicial assistants (2019), *supra* note 16, para. 19.

Furthermore, training programs should be reviewed periodically to ensure their effectiveness, and be coupled with practical training opportunities, assisting judges in office.⁵⁵

Impartiality is also two-fold: the European Court of Human Rights has ruled that it encompasses both a subjective and an objective approach that consists of ‘the personal conviction or interest of a particular judge in a given case’, and ‘whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect.’⁵⁶ Impartiality is the key to public trust in the institution and judges are required to rid themselves of any prejudice, which allows them to uphold the principle of equality of all persons before the law.

The role of judicial assistant was created to provide support to the judiciary and removes the burden of non-judicial tasks from judges, thus helping them to deliver decisions of the highest caliber in a timely manner.⁵⁷ Indeed, Article 6 of the ECHR also guarantees the right to a speedy judicial process. With European judiciaries facing the issue of court backlogs, the ability to deliver cases in a timely and cost-efficient way has become a fundamental goal. The support offered by judicial assistants therefore works to strengthen the rights of litigants in light of Article 6 ECHR. The same is true when

it comes to their ability to directly or indirectly improve the quality of adjudication. Specialized assistants can provide knowledge to better a judicial decision and even the support of a young graduate assistant can unburden a judge.

Judicial assistants, as contractual subordinates, are protected by the status of the judge, as their duties derive directly from the judge’s responsibility to adjudicate. As such, their role should not raise any ethical dilemma, as they do not officially partake in the decision-making process. However, there has been concern over the extent to which their work may influence the final decision.

2. THE INFLUENCE OF JUDICIAL ASSISTANTS IN THE DECISION-MAKING PROCESS

Researchers point out that by delegating some of their work, judges will by default sacrifice a part of the autonomy that lies at the heart of a fully independent and impartial decision.⁵⁸ As an example, studying case files enables judges to form an opinion and judge equitably.⁵⁹ Suggestions made by the judicial assistant, as constructive as they may be, might steer the judge’s thinking, especially if the judicial assistant is asked to prepare a draft including proposals on the legal outcome of the case.⁶⁰ People, including judges, are inevitably influenced by the manner in which information is

⁵⁵ Council of Europe, 2016 Action Plan on Strengthening Judicial Independence and Impartiality, available at <https://rm.coe.int/1680700125>.

⁵⁶ *Piersack v. Belgium*, judgment of 1 October 1982, para 30. See also *De Cubber*, judgment of 26 October 1984 para 24 and *Demicoli*, judgment of 27 August 1991, para. 40.

⁵⁷ CCJE, Opinion 22 on the role of judicial assistants (2019), *supra* note 16, at 3.

⁵⁸ Peter Mascini and Nina L. Holvast, ‘Explaining Judicial Assistants’ Influence on Adjudication with Principal- Agent Theory and Contextual Factors’ (2020) 11(3) *International Journal for Court Administration* 5, at 8.

⁵⁹ Peter Bieri, ‘Law Clerks in Switzerland – A solution to cope with the caseload?’ *International Journal for Court Administration*, Vol. 7 No.2 March 2016, at 33.

⁶⁰ CCJE, Opinion 22 on the role of judicial assistants (2019), *supra* note 16, at 6.

presented to them.⁶¹ Such is the case in Switzerland, where judicial assistants, who are highly qualified lawyers, have considerable influence as they often write the reasoning for judgments.⁶² As the CCJE recalls in its 2019 Opinion, ‘judges are not simply case managers but must command the law and the facts in a way that judicial decisions remain fully theirs.’⁶³ Even when judicial assistants are limited to drafting memos or part of the decision on the facts of a case, they bear influence on the judge’s decision if he or she cannot or will not make time to take ownership of those facts.

This could also be the case if a judge relies heavily on the work of a judicial assistant due to the trust placed in the latter. Social scientists worry that the surge in the recruitment of judicial assistants might diminish judges’ sense of personal responsibility for judgments and lead them to abdicate their fundamental duties. To this end, studies based on principal-agent theory and contextual factors, i.e. the circumstances under which an actor (the agent) is able to make decisions on behalf of, or that impact another actor (the principal), were used to measure judicial assistants’ influence on the adjudication process. The system relies on the trusting relationship between the superior and the subordinate.⁶⁴ Trust emanates from competence, benevolence and integrity.

An ethnographic study conducted in Dutch district courts has shown that out of these three components, competence is the main factor that judges look at, which explains the competitiveness surrounding the recruitment of judicial assistants in most jurisdictions. Competence is what will determine the influence that the judicial assistant will have on the decision-making process. The study concludes that the trust placed in judicial assistants positively correlates with the judge’s perception that the benefits of involving them in the adjudication process outweigh the risks.⁶⁵ However, contextual factors do also show that regular collaboration allows the judge to acknowledge which duties they can or cannot delegate safely, in light of the potential effect on the decision-making process,⁶⁶ but also on whether their experience would make it more efficient to conduct the task themselves.⁶⁷

Another factor that may weigh in on the influence of judicial assistants is the duration of employment. As mentioned in the first part of this paper, the judicial assistant position may constitute a permanent career in many European countries. This may aid efficiency, as there is no need to train incoming judicial assistants. However, this may also increase their influence in the adjudicative process.⁶⁸ The CCJE advises that States find a proper balance so that judicial assistants can be of valuable assistance whilst mitigating the risks of influencing judges in

⁶¹ Nina Holvast, *supra* note 15, at 202.

⁶² Peter Bieri, *supra* note 58, at 32.

⁶³ CCJE, Opinion 22 on the role of judicial assistants (2019), *supra* note 16, at 5.

⁶⁴ Nina Holvast, *supra* note 15, at 12.

⁶⁵ Peter Mascini and Nina L. Holvast, *supra* note 57, at 17.

⁶⁶ *Ibid*, at 17.

⁶⁷ We also found that social scientists stress the need for further research on these matters. See *Ibid*, at 17.

⁶⁸ CCJE, Opinion 22 on the role of judicial assistants (2019), *supra* note 16, at 9.

the decision-making process.⁶⁹ Indeed, undue influence by an assistant not possessing sufficient safeguards may deprive the adjudicative process of its own.

B. REPERCUSSIONS ON THE ORGANIZATION OF LABOR

1. JUDICIAL ASSISTANTS, NEW PUBLIC MANAGEMENT AND THE JUDICIARY

The novel role and duties attributed to judicial assistants also raises more pragmatic questions, such as the managerial skills of judicial professionals. It is fundamental to note that the rationale underlying the provision of judicial assistance to judges is not specific to the legal field.⁷⁰ Nina Holvast recalls the influence that the New Public Management movement of the 1980s had on public service organizations. Other public bodies such as hospitals, government agencies or universities began adopting private-sector principles and practices that include the delegation of duties to subordinates. In practice, the subordinate performs most of the work, under the final supervision – and responsibility – of the superior. The reasoning behind this new system is economical, and includes an acute concern for how public administrations are funded, in order to save costs. To this end, public agencies were restructured around a strict hierarchy, which also allows for increased productivity.⁷¹

Delegating tasks to subordinates is seen as a key to increasing efficiency and allowing the superior, the highly qualified professional, to focus on the core of his or her work. The experience gained by the subordinate may also serve as training, ahead of his or her promotion, even though this could also be a source of tension.⁷² The work conducted by the subordinate might also contribute to the increased quality of the final product, if they have expertise that the judge lacks. Nevertheless, this new organizational model presents practical difficulties. On a symbolic level, the public is often aware of the role played by subordinates, and will expect to deal with the professional. This is particularly true in judicial systems where traditionally, when thinking of the judge, one will picture a lone figure. Judicial assistants rarely attend trial and will remain in the background, invisible to the public, despite playing an important role in the adjudicative process. The realization that most of the work of these professionals is carried out by assistants who do not possess the same skills might considerably undermine the trust placed in the organization.⁷³

On the other hand, this transformation might be welcomed as a modernization of an institution that used to be portrayed as archaic, inefficient and fragmented; an adaptation effort that increases its legitimacy.⁷⁴

⁶⁹ Ibid, at 9.

⁷⁰ Nina Holvast, *supra* note 15, at 11.

⁷¹ Ibid, at 92.

⁷² A Swiss judicial assistant declared: 'You must live with the fact that you may have influence but not the last word. That's not easy for all.' in Anne Sanders, *supra* note 25, at 12.

⁷³ Nina Holvast, *supra* note 15, at 14.

⁷⁴ Ibid, at 17.

However, perhaps one of the biggest practical challenges is that the mass recruitment of judicial assistants could have an impact on the effectiveness of the work of the judge. For Posner, the judge transforms 'from a draftsman to an editor'⁷⁵. Indeed, when a judge delegates the drafting of a judgment to a judicial assistant, the former will conversely have to supervise and edit the final product.

2. THE JUDGE AS A MANAGER

As mentioned above, judges must demonstrate a plethora of personal qualities whilst rendering decisions of the highest legal caliber, in a timely manner. Additionally, they must now train and manage their team, which comprises judicial assistants. In Switzerland, one author feels that 'judges lead, delegate and supervise, but do not fulfill the traditional judicial activities.'⁷⁶

Therefore, the judiciary must develop novel skills, which include maximizing efficiency, and effective allocation of labor, leadership and communication. Such tasks require advanced planning. The higher the number of judicial assistants, the greater the role becomes.⁷⁷ To this end, managerial rules have come to the forefront of judicial principles in countries such as the Netherlands and are sometimes even codified in official acts.⁷⁸ While some countries have regulated the profession of judicial assistant by drafting statutes or internal regulations, judicial assistants must in prac-

tice be trained and managed in order to fulfill their role effectively.⁷⁹ The CCJE considers that 'if Member States aim to support speedy decision-making with judicial assistants, this purpose cannot be achieved by employing judicial assistants for purely educational purposes because that burdens judges with mentoring and teaching.'⁸⁰

This is especially true when judicial assistants only stay for a limited time. The turnover in such cases is so high that the judge continuously has to train an assistant who then leaves just as he or she is truly able to provide effective support to the judge.

A small number of Member States allow judicial assistants to conduct hearings and work on minor cases. Judges are expected to approve the decision and to closely supervise the assistant.⁸¹ This very process is time-consuming, and may affect the time judges allocate to critical examination of cases.⁸² The process can be confrontational, as the involvement of the judge might sometimes prevent the judicial assistant from having a role in the final product by providing detailed instructions on how to draft the judgment, extensively modifying their draft or redacting the judgment themselves. A judicial assistant commented 'I sometimes get irritated by a judge. There are a few judges who you really do not want to have a hearing with because they rebuild your entire judgment (...) I

⁷⁵ Posner, R. A., *'The federal courts: Crisis and reform'*, Harvard University Press, (1985), quoted in Nina Holvast, 'In the shadow of the Judge : The involvement of judicial assistants in Dutch district courts', Eleven International Publishing, (2017), at 19.

⁷⁶ Peter Bieri, *supra* note 58, at 33.

⁷⁷ *Ibid*, at 34.

⁷⁸ Nina Holvast, *supra* note 15, at 91.

⁷⁹ CCJE, Opinion 22 on the role of judicial assistants (2019), *supra* note 16, at 8.

⁸⁰ *Ibid*, at 4.

⁸¹ *Ibid*, at 6.

⁸² Peter Bieri, *supra* note 58, at 34.

mean, of course you might write it very differently yourself, but then you should write it yourself.⁸³

This highlights the need for good communication skills and constructive feedback, especially in common law systems where the hierarchy is strict. The US system, which has largely inspired European common law judiciaries, is an interesting illustration. In *Olivia v. Heller*, the United States Court of Appeals for the Second Circuit stated that ‘The work done by law clerks is supervised, approved, and adopted by the judges who initially authorized it. A judicial opinion is not that of the law clerk, but of the judge. Law clerks are simply extensions of the judges at whose pleasure they serve.’⁸⁴

Judges as managers will also become involved in the necessary evaluation process of their judicial assistants. Regular assessment of judicial assistants is both an important aspect of the effective communication needed for a fruitful working relationship and important for career prospects, as providing feedback will help the judicial assistant in his or her professional development. The CCJE has recommended that assessment be carried out according to objective criteria; for example by using the principles developed for the evaluation of judges as guidelines. Judicial assistants, like judges, should be heard in the process.

An interesting case study is that of the training program implemented in the State Court of Minas Gerais, one of the 26 Brazilian States.⁸⁵ The Judicial School of the Court of Appeals provided judges with a judicial training program on management, as judges were believed not to be adequately prepared for the mission. The program had three phases: training, practical implementation and an online course in judicial administration. First, a select number of judges were involved in a 3-day course on the information and skills needed to develop and deliver effective judicial administration. Training included courses on leadership, communication, team management, climate at work and motivation and conflict management.⁸⁶ The second phase involved conceptual group discussions and monitoring of the implementation of the management model in the 6 participating district courts. Results were impressive: from 1,316 new pending cases recorded for the year 2016 in the Juvenile and Domestic Relations District Court, the number of pending cases was at -4,572 by the end of 2017.⁸⁷ The final stage consisted in online training in judicial administration, which permitted judges in geographically dispersed jurisdictions to follow courses, as most would face difficulties attending courses at a central location.⁸⁸ The majority of participants found a significant or moderate improvement in their professional conduct and data showed that the training led to a systematic gain in productivity.⁸⁹

⁸³ Nina Holvast, *supra* note 15, at 155.

⁸⁴ 839 F.2d 37 (2d Cir. 1988), at 40.

⁸⁵ Carlos H. B. Haddad, ‘Developing Management Skills for Judges’, *International Journal for Court Administration* (2020) 11(1).

⁸⁶ *Ibid*, at 6.

⁸⁷ Carlos H. B. Haddad, ‘Developing Management Skills for Judges’, *International Journal for Court Administration*, (2020) 11(1), at 4.

⁸⁸ *Ibid*, at 5.

⁸⁹ *Ibid*, at 7.

As such, this experiment enhanced judges' competence as well as the administration of justice. It might also have strengthened confidence in the justice system.⁹⁰

3. PROPOSALS

In the light of the challenges raised by the growing involvement of assistants in the judicial process, we believe that additional safeguards should be put into place. Our proposals are structured around three key ideas: selection, training and prevention.

First, we found a thorough and equitable selection process to be the guarantee of independence and impartiality. It is key that the independence of the judicial assistant be assessed at recruitment to reduce the risk of external pressure on judges. Judicial assistants should not be selected by the executive but by the judiciary, insisting on their 'trustworthiness, competence and motivation'.⁹¹ To this extent, the judge should have a say in their selection and assessment and, in order to ensure equal treatment, judicial assistants should be recruited according to a transparent and uniform chart across all national jurisdictions.

Second, we found that systematic initial and continuous training is a guarantee of competence, for both judges and judicial assistants. Mandatory courses could be administered on recruitment

by the body charged with the training of incoming judges. In addition, states, especially those with long-term judicial assistants, should provide continuous training opportunities, which would also enable them to keep abreast of new legal developments.

For judges, team management and human resources methods courses should be delivered. Indeed, while many states provide judges with management courses, we found that most concern stress management, workload management or conflict prevention.⁹² Beyond training, judges should be able to discuss problems they might encounter in their relationship with judicial assistants. All the while, they should still be afforded the time to consult with their peers on legal principles and cases, as *interview* allows for feedback, the exchange of working methods and an overall improvement in the administration of justice.⁹³

Finally, we found preventing ethical infringements to be key in addressing the threats posed by increasing recruitment policies. States could provide ethical guidelines to judicial assistants along the lines of the standards for judges, and include integrity and discretion. As an example, judicial assistants should be required to perform their duties diligently and with a high degree of competence.⁹⁴ Additionally, for judicial assistants, introducing guidelines on their role and duties would clarify what type of work may be delegated. Rules for transparency could also be set in order

⁹⁰ Ibid, at 8.

⁹¹ CCJE, Opinion 22 on the role of judicial assistants (2019), *supra* note 16, at 9.

⁹² European Commission for the Efficiency of Justice, 'Breaking up judges' isolation, Guidelines to improve the judge's skills and competences, strengthen knowledge sharing and collaboration, and move beyond a culture of judicial isolation' (2019), at 31.

⁹³ Ibid, at 15.

⁹⁴ Ibid, at 12.

to identify those involved in the drafting of a judgment⁹⁵ and mechanisms could be implemented to ensure impartiality.⁹⁶ We endorse the recommendation of the CCJE for judicial assistants to have the duty to reveal conflicts of interest and request authorization to engage in external activities.⁹⁷ This is already the case for *Référendaires*, the judicial assistants at the European Court of Justice.⁹⁸ It follows that they be asked, like judges, to recuse themselves should this be necessary. Parties should also be informed of and be able to challenge their participation. Finally, there could be a list of incompatibilities and restrictions on the extrajudicial functions allowed for judicial assistants.

Nevertheless, the growing recruitment of judicial assistants across Europe is a double-edged sword. On the one hand, it helps judges cope with backlogs, contributes to the training of aspiring judges and improves the quality of adjudication. On the other hand, in the absence of adequate safeguards, the influence that assistants may have on a decision threatens the independence and impartiality of judges and may jeopardize the fairness and transparency of the procedure. The increasing reliance on judicial assistants also has an undeniable impact on the role of judges themselves who need to adapt. Implementing new ethical safeguards and providing adequate training for judges will mitigate these risks.

CONCLUSION

Although frequently promoted as a means to unburden the judge and improve the efficiency of judicial systems, the increasing recourse to judicial assistants should be regarded with caution. Judicial assistants undeniably contribute to the efficiency and quality of decision-making, through their skill as well as their additional or contradictory viewpoints that may challenge a judge's biases. Their status also reduces the cost of administering justice.

⁹⁵ Stephen J. Choi and G. Mitu Gulati, 'Which judges write their opinions (and should we care)?', *Florida State University Law Review*, Vol:32, at 1077-1078.

⁹⁶ Nina Holvast, 'The Power of the judicial assistant/law clerk : looking behind the scenes at courts in the United States, England and Wales, and The Netherlands', *International Journal for Court Administration*, at 10.

⁹⁷ CCJE, Opinion 22 on the role of judicial assistants (2019), *supra* note 16, at 12.

⁹⁸ Article 2, Décision du 12 novembre 2018 portant adoption de règles de bonne conduite des référendaires, available at https://www.amicuria.com/files/ugd/0d5b40_990b6123fbe941efa0ce9e88dd2c930f.pdf.



THE CONCEPT OF TRANSPARENCY IN THE PROPOSED EUROPEAN ARTIFICIAL INTELLIGENCE ACT AND THE CONSEQUENCES FOR THE JUDGE'S ETHICS AND THE ADMINISTRATION OF JUSTICE

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Transparency is a central and significant concept for the rule of law, to guarantee judicial ethical standards and even to prevent judicial corruption. In addition, and increasingly so, the principle of transparency is important in building public confidence. It is, therefore, necessary to find the right balance between established principles of judicial ethics, including transparency, and the new artificial intelligence tools used for the administration of justice.

The main concern when it comes to the use of automated technology in courts is the difficulty for individuals to understand and therefore challenge automated decisions, especially when the decision-making process and the data used is not explainable and therefore transparent.

To tackle the potential problems automated technology, widely talked of as 'Artificial Intelligence' (AI), creates for the judiciary and especially to repose confidence and trust in the judiciary the European Commission introduced the European Ethical Charter on the use of Artificial Intelligence in judicial systems and their environment (Ethical Charter) and the proposed Artificial Intelligence Act (AI Act). There was hope the EU-led proposed new AI Act would contain clear regulations regarding transparency obligations making AI systems in general more trustworthy for impacted individuals especially if such systems are used within the judiciary, but this was not the case. Instead, as this paper will discuss, transparency issues have been left to self-regulation by developers creating a potential disproportion between private companies developing AI technology and courts deploying it.

Notwithstanding this, the Ethical Charter in combination with the AI Act is a good starting point with the potential to become a globally accepted regulatory framework.

KEY WORDS

Transparency • Artificial intelligence • Algorithms • Judicial decision support systems • High-risk systems • Facial recognition

1. INTRODUCTION

Technology has improved the efficiency and accuracy of public and private legal services over the last decades with more and more processes being 'automated' in the day-to-day life of legal professionals in all areas of the law. And now 'Artificial Intelligence' (AI), designed to reduce the burden on humans promises to change the whole economy and the judiciary respectively.

Over the last couple of years, AI has raised very extensive and profound questions of value and human nature triggering a rush to draw up codes of ethics for AI together with technical standards concerning ethics and safety. The most concerning question remains, whether AI might surpass human control and comprehension and what will be the best preparation for such a scenario.¹ This triggered the recent development of many principles and guidelines for legal and ethical AI usage by different organisations and governments around the world, including the OECD's *Principles on AI*,² the *Universal Guidelines for AI*,³ the *European Ethical Charter on the use of AI in judicial systems and their environment* (Ethical Charter)⁴ and the most recent EU Commission Proposal for an AI Act (AI Act).⁵

But because the use of AI systems and their impact does not stop at national borders, global cooperation and coordination of AI regulations is crucial to avoid a focus on global competitiveness.⁶

One of the fundamental principles of the Ethical charter is transparency which the AI Act has to consider and at the same time ensure fundamental rights and legal ethics when finding a balance between social interests in innovation and more efficient delivery of public services and the administration of justice.

This paper provides a brief overview of the ethical and legal challenges the use of AI technology brings for the judiciary and governmental agencies. The paper starts with describing how AI technology is affected by data acquisition and algorithm transparency. This will be followed by an analysis of the consequences for the judiciary. A special focus will be on the regulations proposed in the AI Act, especially in regards to the rights of citizens. The last part of the paper focuses on criminal law practice and the example of surveillance and facial recognition technology. The conclusion underlines the importance of transparency and analyses the effects of the AI Act.

¹ Boddington, Paula 'Normative Modes: Codes and Standards', in Markus D. Dubber, Frank Pasquale, and Sunit Das (eds.), *The Oxford Handbook of Ethics of AI* (2020) 125, at 126.

² OECD, *Recommendation of the Council on AI* (adopted 22.05.2019), available at <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449>.

³ The Public Voice Org, *Universal Guidelines for AI*, (2018), available at <https://thepublicvoice.org/ai-universal-guidelines/>.

⁴ European Commission for the Efficiency of Justice (CEPEJ), *European Ethical Charter on the use of AI (AI) in judicial systems and their environment*, available from <https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c>.

⁵ European Commission COM (2021) 206 final 2021/0106(COD).

⁶ Ulnicane, Inga et al., 'Good governance as a response to discontents? Déjà vu, or lesson for AI from other emerging technologies' 46 *Interdisciplinary Science Reviews* (2021), 71, at 81.

2. AUTOMATION OF JUDICIAL PROCEEDINGS AND ITS IMPACT ON JUDICIAL ETHICS AND TRANSPARENCY

High ethical standards are crucial to ensure an independent judiciary and maintain the public's trust. Especially in view of the increased use of AI technology in and outside court rooms, the concept of transparency gains ever more importance when it comes to the explainability of decisions made with the help of technology. Transparency in regards to the decision-making process, with or without the help of AI technology, would be the key to more trust in the judiciary and even prevent corruption within.

A. THE CONCEPT OF AI APPLIED TO ETHICS AND TRANSPARENCY

AI is a wide field and as a discipline within computer science, depending on the usage it can be many things and has been described as: 'cross-disciplinary approach to understanding, modelling and replicating intelligence and cognitive processes by invoking various computational, mathematical, logical, mechanical, and even biological principles and devices.'⁷

Therefore, AI technology discussed in this paper will focus only on such tools that can be or that are already used for the automation of judicial proceedings, more specifically, any existing knowledge-based AI systems, machine learning systems and combinations of the two able to adjudicate unassisted or judicial decision support systems (JDSS).

A more legal definition of AI systems including the above mentioned was attempted by the European Commission in the Ethical Charter and the AI Act, the latter defining AI systems in Article 3 (1a) and Annex I as meaning

[...]software that is developed with one or more of the techniques and approaches listed in Annex I and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with' [...]
(a) Machine learning approaches, including supervised, unsupervised and reinforcement learning, using a wide variety of methods including deep learning;

(b) Logic- and knowledge-based approaches, including knowledge representation, inductive (logic) programming, knowledge bases, inference and deductive engines, (symbolic) reasoning and expert systems;

(c) Statistical approaches, Bayesian estimation, search and optimization methods.

⁷ Frankish, Keith and Ramsey, William M. (eds.) *The Cambridge Handbook of Artificial Intelligence* (2014), at 1.

This rather broad definition allows for flexibility in view of the rapid technical progress in AI systems, but it has been criticized due to potential legal uncertainty for developers, operators, and users of AI systems.⁸ One reason for the criticism is that the definition does not acknowledge that AI technology is an intangible product or more likely a service which learns and changes along the way depending on the algorithm it was based upon and the use it was created for.⁹

If the definition in the AI Act is read in conjunction with the definition in the glossary of the Ethical Charter, defining AI as:

-‘A set of scientific methods, theories and techniques whose aim is to reproduce, by a machine, the cognitive abilities of human beings. Current developments seek to have machines perform complex tasks previously carried out by humans. However, the term artificial intelligence is criticized by experts who distinguish between ‘strong’ AIs (yet able to contextualize specialized and varied problems in a completely autonomous manner) and ‘weak’ or ‘moderate’ AIs (high performance in their field of training).’

- the recognition of AI technology as a tangible product could be assumed. Both definitions leave room for a wide

range of new technologies neither going into detail of what is involved in making AI technology intelligent and comparable to human cognition, nor the limits of it.

B. JUDICIAL DECISION MAKING BY OR WITH THE ASSISTANCE OF AI

The judicial authority can be described as the manifestation and application of equality before the law, impartiality, the rights of parties to respond to disputes and allegations against them, and the fair and correct determination of fact and law.¹⁰ When incorporating technology the question arises, how to digitize features like the human ability to evaluate complex evidence and apply nuanced legal reasoning to cases reducing it to algorithms embodying the foundation of AI tools.

Algorithms are the ‘heart’ of any AI system and human judgment is unavoidably exercised in designing such systems and programming the algorithm software.¹¹ Algorithms are understood as being ‘strictly rational concerns, marrying the certainties of mathematics with the objectives of technology.’¹²

The glossary of the Ethical Charter defines algorithms as a ‘*finite sequence of formal rules (logical operations and instructions) making it possible to obtain a*

⁸ Bomhard, D. and Merkle, M., ‘Europäische KI-Verordnung. Der aktuelle Kommissionsentwurf und praktische Auswirkungen’, 6 *Recht Digit.* (2021), 276, at 278.

⁹ Edwards, L., *Regulating AI in Europe: four problems and four solutions* (2022), available from Ada Lovelace Institute <https://www.adalovelaceinstitute.org/report/regulatingai-in-europe/>.

¹⁰ Justice J Allsop, ‘Technology and the future of the courts’ (2019), 38 *University of Queensland Law Journal* 1, 2.

¹¹ Spaulding, Norman W., ‘Is Human Judgment Necessary?’ *Artificial Intelligence, Algorithmic Governance, and the Law* in Markus D. Dubber, Frank Pasquale, and Sunit Das (eds.), *The Oxford Handbook of Ethics of AI* (2020).

¹² Kitchin, Rob, ‘Thinking Critically About and Researching Algorithms’ 20 *Information, Communication and Society* (2017), at 17.

result from the initial input of information. This sequence may be part of an automated execution process and draw on models designed through machine learning.¹³

But in reality, algorithms embody a wide range of judgment at the level of design and '[...] a great deal of expertise, judgment, choice, and constraints are exercised in producing algorithms.'¹⁴ The big seven judgments that have to be made when creating AI decision making systems set out by *Kitchin* include - amongst other administrative decisions - the characterization of the relevant task, the translation of the task or problem into a structured formula with an appropriate rule set, the translation of the formula into a source code that will perform the task or solve the problem and the choice and quality of training data.¹⁵

Simply put, AI technology is based on the idea that if certain conditions are met, the values are either true or false. The required rules that control the structure of symbols, punctuation, and words of a programming language, are called algorithm syntax. Typically, software engineers will set thresholds choosing the value that seems reasonable, but users might not have knowledge of those thresholds or might not even be aware that such thresholds exist.¹⁶ For value and respectively ethical judgments, there would be a certain elevated need to transparently communicate such

thresholds as they are the starting point when it comes to explanations on how AI automated-decisions were made. The choices made when designing AI systems are reflected in its decision-making but what is known so far suggests that many such systems process information differently from what humans would usually do, even though the data on hand is the same.¹⁷ The idea behind machine learning is that the machine uses source data in a way humans use experience and knowledge, to reason.¹⁸ But judicial reasoning is a complicated construct of assessment and interpretation of particular facts relating to a case and the applicable rules of law and subjective interpretation of concepts like equity which machine learning cannot do.¹⁹

In order to produce quality results AI tools, require a vast amount of quality data in order to test and refine its algorithms to come to the desired conclusion. This creates problems on many levels, especially when it comes to data and the rights on algorithm.

It could be difficult to incorporating new legislation that rescinds or changes existing rules were there is no precedent or equivalent data available the algorithm could base a conclusion on. In respect of algorithms, the question of who owns the code embedded in them could potentially trigger intellectual property concerns and the potential of biases em-

13 European Commission for the Efficiency of Justice (CEPEJ), *European Ethical Charter on the use of AI (AI) in judicial systems and their environment*, available from <https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c>.

14 Kitchin, at 18.

15 Kitchin, at 17.

16 Spaulding, at 6.

17 Selbst, Andrew D. and Barocas, Solon, 'The Intuitive Appeal of Explainable Machines' 87 *Fordham Law Review* (2018) 1085, at 1089–1090.

18 Allsop, 5.

19 Xavier Linant de Bellefonds (1994), 'L'utilisation des systèmes experts en droit comparé', *Revue internationale de droit comparé*, Vol. 46, No. 2, p (pp.) 703–718.

bedded in algorithms potentially lead to violation of fundamental rights and liberties.²⁰ With respects to intellectual property rights and trade secrets transparency of the decision-making process of AI tools must be guaranteed to identify flaws in the decision-making process and verify that neither algorithms nor data sets were erroneous or biased.²¹

This adds to the problems of implementing technology in courts while maintaining public trust and confidence in the judiciary. A solution could be greater transparency within the judiciary and especially in regards to the decision making process, to guarantee explainability of such decisions made with or without the assistance of technology.

C. ETHICAL ASPECTS OF THE AUTOMATION OF JUDICIAL PROCEEDINGS AND THE FUNDAMENTAL PRINCIPLE OF TRANSPARENCY

To improve the efficiency and quality of justice AI applications most considerable for the automation of judicial proceedings are such that adjudicate unassisted or so-called JDSS.

JDSS are already used in a variety of ways especially in the operation of the court, like digital stamping and filing of court documents as well as presenting digitally in the court room or digitally engaging with the court via digital remote hearings.

Using technology in court has great potential but due to the varying nature of cases technology needs to be flexible and might not be deployable under a one-fits all approach. Technology for the judiciary needs to reflect chaos and changes of life and has to be designed to adapt to social, legal and technological change.

But most importantly, technology needs to be transparent in regards to its decision making and users of such technology need to be trained appropriately to avoid risks like being too trusting and compliant when using technology as research shows, that computer systems are used to reduce the effort of the decision-making process rather than enhance the quality of their decision.²²

Transparency is one of the key fundamental principles of the Ethical Charter which is intended for all public and private developers, designers and deployers of AI systems and services involving the processing of judicial decisions and data. The Charter adopts five fundamental principles, the respect for fundamental rights, non-discrimination, quality and security, transparency, impartiality, and fairness and under user control. It states that it is essential for any assisting system that the processing is carried out with transparency, impartiality, and equity, certified by an external and independent expert assessment. Principle 4 of the Ethical Charter includes transparency, impartiality and fairness and states that data processing methods of AI technol-

²⁰ Allsop, 5.

²¹ Varošanec, Ida (2022): 'On the path to the future: mapping the notion of transparency in the EU regulatory framework for AI' International Review of Law, Computers & Technology (2020) published online available from <https://doi.org/10.1080/13600869.2022.2060471> at 3.

²² Todd, Benbasat, The influence of Decision Aids on Choice Strategies: An Experimental Analyses of the role of cognitive Effort, organizational Behavior and Human Decision Processes (1994), Vol. 60, Issue 1, 36-74.

ogy that could have legal consequences or affect people's lives need to be accessible and understandable and should be monitored by authorized external audits. Therefore, transparency includes the need for access not only to the design process but the whole development chain due to the influence the selection process, organization and quality of data has on the learning process of the respective AI technology. When it comes to technical transparency, intellectual property rights of certain processing methods have to be respected. For the intended purpose of complying with transparency explaining the nature of the respective system or service and the process leading to the corresponding result including the performance and risk of error in a clear and comprehensive language should be just as effective.

sions surrounding the used data and thresholds and value judgments but not so much details of the technical development process and coding. Full transparency of the latter would enable 'those who know enough about the technology [to] obtain goods or services unfairly' or even enable them to corrupt or misuse data.²⁴

But a lack of transparency and especially algorithmic and data transparency would make it difficult for involved parties to identify errors, to contest and potentially demand correction of, and to ultimately receive compensation for erroneous decisions.²⁵ This would have the potential to affect fundamental rights like fair trial and due process, effective remedies, social rights, and access to public services.²⁶

What each group needs to know in regards to transparency is depending on their rights and obligations regulators require a short non-technical description of the algorithmic tool and the reason for its use together with an explanation how the tool works and the data it uses (threshold, value judgments) to minimize the risk of erroneous decisions.²³

In regards to AI technology, transparency requirements should focus on making the knowledge available that is necessary for each group to understand the decision-making process the AI system was designed for, especially the deci-

The challenge that arises is to make AI technology more trustworthy by finding the right balance without creating uncertainty that would ultimately hamper new innovations. The key to trust is transparency. Especially when used in judicial settings, decisions considered legitimate must be explainable to guarantee their appealability due to the duty to give reason, requiring governmental institutions and other public bodies to make transparent and comprehensive decisions.²⁷

Judicial ethics and the concept of transparency regarding AI technology are

²³ Kingsman, N. *et al.*, 'Public Sector AI Transparency Standard' (2021) available from SSRN 3986213 <http://dx.doi.org/10.2139/ssrn.3986213>.

²⁴ Diakopoulos, N. 'Accountability in Algorithmic Decision Making' 59 2 *Communications of the ACM* (2016), 56, at 56–62.

²⁵ Varošanec, at 3.

²⁶ Rodrigues, Rowana 'Legal and human rights issues of AI: Gaps, challenges and vulnerabilities' *Journal of Responsible Technology* (2020) 4, at 8.

²⁷ Završnik, A. 'Criminal justice, artificial intelligence systems, and human rights' 20 *ERA Forum* (2020), 567–583, available at <https://doi.org/10.1007/s12027-020-00602-0>.

inextricably linked and it is crucial to ensure the 'explainability' of the decision-making process. The introduction of technology which has the potential to impact the decision-making-process has created new awareness and sparked discussions about trust and even questioned the impartiality of an AI influenced judiciary.

For this very reason, it does not matter if a decision was reached with or without the help of AI technology as long as such a decision is explainable and judicial conduct and ethical standards have been followed. It is the judiciary that has to be trustworthy and transparent not 'just' the tools.

3. EUROPEAN REGULATORY FRAMEWORK: REQUIREMENTS OF THE PRINCIPLE OF TRANSPARENCY FOR THE ETHICAL USE OF AI

The EU institutions have progressively concretized the EU's AI agenda through a series of strategic documents. The Commission's work on AI has been reflected in the AI Strategy for Europe 2018,²⁸ the

2020 White Paper on AI,²⁹ and a recently updated Coordinated Plan for AI.³⁰ Ultimately in April 2021, the Commission presented the legislative proposal for an AI law, following a risk-based approach. The AI Act follows a horizontal approach and, as a measure for the approximation of the laws, regulations, and administrative provisions of the Member States, is based on Article 114 TFEU in conjunction with Article 26 TFEU.

This paragraph first explains the division of the AI Act into four risk classes and states in which the judicial practice is regularly classified. In the following, it analyses how transparency control systems have been implemented in the AI Act. Finally, the chapter ends with a brief statement on the consequences of the AI Act's regulatory framework for the judiciary.

A. THE CLASSIFICATION OF THE RISKS OF THE USE OF AI

The AI Act is divided into four different risk classes (minimal, limited, high and unacceptable), setting different transparency obligations for providers of AI systems. The judicial practice regularly falls under high-risk AI systems.³¹ Moreover, the judge needs to guarantee the use of AI does not create an unacceptable risk. Further, we will explain how high-risk and unacceptable-risk systems are defined in the AI Act.

²⁸ Commission Communication of 25.4.2018, Artificial Intelligence for Europe, COM(2018) 237 final, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0237&from=EN>.

²⁹ Commission White Paper of 19.2.2020 COM (2020) 65 final, available at https://ec.europa.eu/info/sites/default/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf.

³⁰ European Commission, *Coordinated Plan on Artificial Intelligence 2021 Review* (2020), available at <https://digital-strategy.ec.europa.eu/en/policies/plan-ai>.

³¹ Title III of the AI Act is dedicated to high-risk AI systems.

1. HIGH-RISK SYSTEMS

The 'High-Risk Systems' are regulated in Article 6 AI Act in conjunction with Annex III.

In Article 6 (1) AI Act an abstract definition of such high-risk systems can be found. Furthermore, 'AI systems referred to in Annex III shall be considered high-risk'.³⁸ There is a specific list of high-risk systems in this Annex: These systems contain among others critical infrastructure (e.g., transport), where the lives and health of citizens could be put at risk. Education or vocational training, where a person's access to education and professional life could be affected (e.g., assessment of exams) is also covered by high-risk systems. The list also includes employment, human resource management and access to self-employment (e.g., software to evaluate CVs for recruitment processes) as well as essential private and public services (e.g. credit scoring, denying loans to citizens).³²

Especially the 'biometric identification and categorization of natural persons' (no. 1), 'law enforcement' (no. 6), 'migration, asylum and border control' (no.7), 'administration of justice and democratic processes' (no.8) could be relevant for the practice of a judge. Law enforcement is relevant when it interferes with people's fundamental rights. An example for 'migration, asylum and border control' is the verification of the authenticity of travel documents. Regarding the administration of justice and democratic processes the application of legislation to specific facts is the usual case of use.³³

A pilot project in Estonia might be considered under Article 6 (2) in conjunction with Annex III no. 8 AI Act. In this project an AI-based program is to autonomously decide on civil contract disputes with a value in dispute of less than 7,000 euros, thereby relieving the judiciary. In the process, the relevant documents are uploaded by the parties and the AI decides based on the available information. However, these decisions can be challenged before a human judge.³⁴

2. UNACCEPTABLE RISK SYSTEMS

At the top of the 'Risk Pyramid', the AI Act (Title II) establishes an explicit list of prohibited AI practices which create an 'Unacceptable Risk'³⁵ as they contravene EU values. It explicitly prohibits AI-based social-scoring for general purposes done by public authorities and the use of 'real time' remote biometric identification systems in publicly accessible spaces for the purpose of law enforcement. In general, the prohibitions cover AI systems that have a huge potential to 'manipulate persons through subliminal techniques beyond their consciousness or exploit the susceptibilities of specific vulnerable groups in a manner that could cause them or others physical or psychological harm'.³⁶ So this risk class can be important for the practice of judges, too.

Later on, the paper will discuss the potential use of biometric identification systems in the criminal law practice.

³² Art. 6 with Annex III AI Act; see also EU-Kommission, *supra* note 34.

³³ *Ibid.*

³⁴ Deutscher Bundestag, Künstliche Intelligenz in der Justiz (2021), available at [WD-7-017-21-pdf-data.pdf](https://www.bundestag.de/WD-7-017-21-pdf-data.pdf) (bundestag.de).

³⁵ Art. 5 AI Act.

³⁶ Recital 5.2.2. AI Act.

B. PRIOR AND POST CONTROL OF AI SYSTEMS

In the context of an AI-supported decision-making process the judge needs to guarantee the reasoning of the judgement is transparent. Due to the 'black-box' of AI systems developed by private companies, it is important that the used systems are subject to a control system.

AI systems can be regulated *ex ante* and *ex post*. Through prior transparency checks on AI systems, information on data processing and the functioning of systems is already explored in advance. As a result of *ex-post* control, explanations and justifications are required from AI systems, which can then be verified.³⁷ This reveals how and why a particular decision was made. Because of the benefits of this dual control, a legal framework for AI should include prior and *ex-post* control.³⁸

1. EX ANTE-CONTROL

According to the EU proposal for an AI Act³⁹ high-risk AI systems must meet several requirements to be allowed on the market at all. Among a wide array of different obligations, the AI system's data sets must be of high quality⁴⁰ in order to minimize overall risks and in particular discriminatory outcomes.⁴¹ Data quality requires that training, validation and testing data are relevant, representative, error-free and complete.⁴²

However, high quality of data will not guarantee the absence of discrimination and bias. Rather, data can be flawed.⁴³ As we all know, humans - who feed the AI applications with data - can also be biased.

The relevance of this point is illustrated by an example from the US. In numerous states of the US, the software 'COMPAS' (Correctional Offender Management Profiling for Alternative Sanctions) is used to assess the likelihood of recidivism of offenders, for example, when sentencing or applying for early release. The system automates this risk assessment by asking questions based on an interview with the person concerned and their criminal record. From this, it calculates scores that make statements about the risk of recidivism. Since 'COMPAS' is a private development, details of the algorithm are protected as a trade secret and remain hidden from the parties involved in the proceedings. But, based on empirical studies, the program is accused of discrimination against black people.⁴⁴

2. EX POST-CONTROL

An important aspect for the fulfilment of the transparency obligation after the market launch is human supervision according to Article 14 AI Act. 'Human oversight shall aim at preventing or minimizing the risks to health, safety or fundamental rights [...]'.⁴⁵ Natural persons overseeing the use of AI systems should be able to 'fully understand the capacities

³⁷ Zerilli, J. *et al.*, 'Transparency in Algorithmic and Human Decision-Making: Is There a Double Standard?', 32 *4 Philosophy & Technology* (2019), 661–683, at 670; Varošaneć (2022), 5.

³⁸ Varošaneć, at 5.

³⁹ See Title III Chapter 2.

⁴⁰ See Art. 10 AI Act.

⁴¹ See Art. 10 (2) AI Act.

⁴² See Art. 10 (3) AI Act.

⁴³ Varošaneć, at 8.

⁴⁴ Deutscher Bundestag, *supra* note 41.

⁴⁵ Art. 14 (2) AI Act.

and limitations of the system and be able to duly monitor its operation [...].⁴⁶ Additionally the user shall 'remain aware of the possible tendency of automatically relying or over-relying on the output produced by a high-risk AI system ('automation bias') [...].'⁴⁷

Regarding the judiciary this article confirms that any result of the AI application must be supervised by the judge. This is in line with the right to a lawful judge (Article 6 (1) ECHR and Article 47 (2) ECFR), which includes the right to a human judge. In the case of overseeing, the judge must make sure not automatically rely or over-rely on the AI system.

In this context, the already mentioned US example 'COMPAS' can be an example for over-relying on an AI system. Another concrete practical example for this issue: 'In England and Wales, a simple calculation error embedded in the official form used in divorce cases led to the wrong calculation of alimonies in 3,600 cases over a period of nineteen months. The problem is not the error per se, but the reasons why the Ministry of Justice and the form users did not detect the error for such a long time. Technology users tend to focus on the interfaces and on the tools, that enable the use of technological systems and not on their internal functioning.'⁴⁸

Especially in the context of workload, it is important the judge does not blindly rely on the outcome of the AI system. Additionally, it is important to identify biases in AI algorithms and to erase them as far as possible. At least, the judge needs to make sure the judgement is not influenced by such biases.

In this context, the explicit transparency obligation⁴⁹ is also of enormous importance. Pursuant to Article 13 AI Act information should be provided for users. Developers will be instructed to 'design and develop AI systems in a way that ensures that their operation is sufficiently transparent to enable users to interpret the system's output and use it appropriately'⁵⁰. According to Article 13 (2) AI Act, AI systems 'shall be accompanied by instructions for use [...] that include concise, complete, correct and clear information that is relevant, accessible and comprehensible to users'. Only because of transparent operation and the instructions for use can a natural person fully understand the capabilities and, in particular, the limitations of an AI system and thereby also assess its decision.⁵¹

C. MAIN CONCLUSIONS ON THE USE OF AI TO ENSURE TRANSPARENCY AND JUDICIAL ETHICS

Firstly, it is not clear when data is of high quality. Moreover, it has been criticized that the quality of data cannot ensure a lack of discrimination and bias.⁵² In this

⁴⁶ Art. 14 (4a) AI Act.

⁴⁷ Art. 14 (4b) AI Act.

⁴⁸ UNODC, Artificial Intelligence: A New Trojan Horse for Undue Influence on Judiciaries? (2018), available at Artificial Intelligence: A New Trojan Horse for Undue Influence on Judiciaries? (unodc.org).

⁴⁹ See Art. 13 AI Act.

⁵⁰ Art. 13 (1) AI Act.

⁵¹ See Art. 14 (4a) AI Act.

⁵² Varošanec, at 9.

context, the judge must oversee the outcome of the AI application and guarantee the judgement is not influenced by any biases.

Secondly, regarding the obliged providers and users, developers are instructed to 'design and develop AI systems in a way that ensures that their operation is sufficiently transparent to enable users to interpret the system's output and use it appropriately'⁵³ and therefore provide 'instructions for use'.⁵⁴ In this context, it remains to be seen, what information would guarantee sufficient transparency. As well, it is yet unclear, who is to decide whether the 'instruction for use' qualifies user to analyse and apply the AI systems results appropriately.⁵⁵ As a result of the self-regulation practices, which are passed with obligation onto the users (e.g. judges) in form of an 'instructions for use' the proposal factually binds and lays the 'reliance of the public sector on the private sector which holds the power over public authorities by setting rules for how to use AI systems'.⁵⁶ This is of great concern due to the fact that the vast majority of AI developments and all associated elements, like development platforms, data, knowledge and expertise is dominated by the 'big 5' technology companies in the field.⁵⁷

To remain competitive, these companies have a strong interest in protecting their Intellectual Property Rights. So far, only the private sector has been entrusted with the task of finding a balance for this conflict of interest.

This is a risk to judicial ethics because judges probably cannot guarantee sufficient transparency in their AI supported decision-making process when they cannot fully understand and access information about the used AI applications. When judges pass judgements on citizens, they are responsible for ensuring that they can understand the decision. If the decisions are not transparent enough, citizens do not have any reason to trust the judiciary. At the same time the right to a fair trial (Article 6 ECHR) is evidently affected.

There was hope the AI Act would contain clear regulations regarding transparency obligations specially for judicial processes, making AI systems more trustworthy for impacted individuals. However, this was not the case and transparency issues have been left to self-regulation.⁵⁸ Thereby, the AI Act fails to address the fundamental power imbalance between developer and deployer of AI systems and those affected by it.⁵⁹ If we wish to manage how public authorities use AI systems, ethics cannot substitute hard law.⁶⁰

⁵³ Art. 13 (1) AI Act.

⁵⁴ Art. 13 (2) AI Act.

⁵⁵ Varošanec, at 12.

⁵⁶ Varošanec, at 12.

⁵⁷ Ulnicane, at 83.

⁵⁸ Varošanec, at 17.

⁵⁹ Varošanec, at 17.

⁶⁰ Varošanec, at 9.

4. AI AND CRIMINAL LAW PROCEEDINGS

A. APPLICATION OF AI FOR THE PROSECUTION OF CRIMINAL OFFENSES

A world where crime rates are dropping rapidly and the few crimes that are left are solved with 100 % certainty, in a fair and fast trial – could this be the future? With AI technology, crimes could be predicted, prevented and when they occur better and faster investigated, making the decision-making process better for everyone affected.

One of the beneficial aspects is that the use of AI could lead to eliminating human error and the reduction of time-consuming tasks. Therefore, this would leave time for more urgent matters. Judges would be able to make better use of their valuable time and could concentrate on the essential and critical problems instead of, for example, the time-consuming analysis of data. They could evaluate their cases supported by AI, get a quicker understanding, and draw parallels to similar cases. AI can provide support on many more levels. From simple tasks, such as the categorization of files to detecting crime that typically takes place on the Internet. This includes terrorist propaganda, suspicious transactions when selling stolen goods or even identify dangerous objects or illegal substances and products.⁶¹

But AI's rapid progress raises challenges regarding benefits and risks for the

criminal justice system. The use of AI can cause serious harm if malfunctioning, not only for law enforcement, but also for the courts of law. Fundamental rights must not be undermined and compliance with them must be ensured. On the one hand the impartiality and independence of the judiciary must be preserved. On the other hand, the rights of the citizen must not be neglected or forfeited. The use of AI could lead to ethical dilemmas concerning security and privacy. Infringement of the right to liberty, the right to a fair trial and the presumption of innocence are at stake.⁶² Access to justice must be guaranteed and not hastily be dismissed due to the use of AI.

Furthermore, discrimination and bias in both the development and use of AI must be prevented. AI should always be monitored by humans which leads us to believe that the (right to a lawful) human judge should not be replaced as of now. AI should perform supporting but not replacing tasks.

While criminal law is generally based on the principle that authorities respond to a crime after it has been committed and does not assume that all people are dangerous and must be permanently monitored to prevent potential misconduct, AI carries the risk of being used preemptively when used for law enforcement purposes. Preventive measures increase the risk of, for example, a surveillance state and thus the violation of fundamental rights.

⁶¹ UNICRI, Artificial Intelligence and Robotics for Law Enforcement (2019) at 11 et seq., available at <https://unicri.it/artificial-intelligence-and-robotics-law-enforcement>.

⁶² For this reason, Fair Trials, European Digital Rights (EDRI) and 43 other civil society organizations launched a collective statement to call on the EU to ban predictive policing systems in the AI Act, available at <https://www.fairtrials.org/articles/news/ai-act-eu-must-ban-predictive-ai-systems-in-policing-and-criminal-justice/>.

B. THE TENSION BETWEEN FUNDAMENTAL RIGHTS AND ETHICAL STANDARDS FOR THE PREVENTION OF CRIMES

Fundamental rights may be violated when AI is involved in decisions which affect individuals due to the nature of AI. AI is simply not a human being and thus a foreign body in our legal system. It bears noting that AI can theoretically be used in any field and consequently both during the investigation as well as court proceedings. This increases the possibility of violations of various fundamental rights, depending on the use of AI and the effect it entails. Therefore, it is necessary for legislators to act when it comes to how and where AI technology is used to ensure legal certainty and respect fundamental rights.

Currently, AI for prevention of crimes is currently more common in Europe than tools that assist judges.⁶³ When AI is used in judicial processes, judges must be aware of how AI affects their work to maintain their judicial independence and benefit from the use of AI. Judges must understand on what basis AI reached what conclusion and be left the possibility to make their own, if necessary, deviating decision. However, this is where the ethical dilemma begins, because to what extent should AI have a binding effect and whom does AI bind? AI cannot and must by no means dictate judges the way to do their job.

Concrete powers of intervention must explicitly lay down the basis and limits for the use of AI. This would also make the use of AI comprehensible for the affected parties, promote acceptance among the public and not interfere with fundamental rights as guaranteed in the European Union by the *Charter of Fundamental Rights of the European Union*, the *European Convention on Human Rights*⁶⁴ and the *Fundamental Freedoms of the European Union*⁶⁵, as well as in the constitutions of the various EU member states.

Measures could be, for example, surveillance instruments, video and image analytics, facial recognition, mass profiling or the detection of suspicious activities. These could substantially improve crowd surveillance results, as it could help detect patterns and anomalous behaviour, even predicting solitary or crowd behaviour. AI facial recognition abilities can establish the identity and whereabouts of an individual. Human trafficking, money laundering, fraud and sexual abuse could be detected earlier and even potentially be prevented, as could criminal networks be uncovered. Though this poses security risks, as AI can be the target of cyberattacks and can be abused by criminals for malicious purposes. Criminals themselves also take advantage of the progress of AI, as they use AI for their own purposes, for example AI-supported password guessing, hacking and ransomware and cybercrimes in general.⁶⁶

⁶³ Završnik, A. (ed.), *Big Data, crime and social control* (2019), at 194 et seq., lists in detail a series of instruments used by police services in Europe.

⁶⁴ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: <https://www.refworld.org/docid/3ae6b3b04.html>.

⁶⁵ European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 26 October 2012, OJ L. 326/47-326/390; 26.10.2012, available at: <https://www.refworld.org/docid/52303e8d4.html>.

⁶⁶ UNICRI 'Malicious Uses and Abuses of Artificial Intelligence' (2020) at 12 et e (seq.), available at https://documents.trendmicro.com/assets/white_papers/wp-malicious-uses-and-abuses-of-artificial-intelligence.pdf

The use of AI potentially leads to a broader mass of people being affected by invasive measures, which could result in discrimination based on religious beliefs or political opinions. Especially human dignity, namely the right to the free development of the personality, the right to privacy or protection of personal data are at stake. Surveillance measures always run the risk of restricting other fundamental rights. Individuals could feel restricted in their freedom of expression and/or assembly by foregoing the exercise of their rights out of fear of surveillance. Facial recognition measures can be prone to error, depending on the data and algorithms used to develop the respective AI tool. The impact of such measures on affected parties and the consequences of erroneous evaluations and decisions are incalculable.

C. PRACTICAL ISSUE: THE TREATMENT OF BIOMETRIC IDENTIFICATION SYSTEMS AND CRIMINAL LAW AS A HIGH RISK TO FUNDAMENTAL RIGHTS AND ETHICAL STANDARDS

In terms of criminal law, the high-risk systems of the AI Act and the prohibited AI practices should be highlighted. For this reason, the controversial topic of biometric identification systems is to be taken into closer consideration.

A distinction regarding biometric identification systems in publicly accessible spaces is made in the AI Act. There are 'real time' biometric systems, in which the system runs the process (nearly) live and instantaneously⁶⁷ and 'post' biometric systems for law enforcement purposes in public spaces⁶⁸. Post remote biometric identification systems stand for any other type of remote identification system besides 'real time' biometric systems. Prohibited as a matter of principle is only the use of 'real time' biometric systems⁶⁹, except for three situations where its use is deemed justified for reasons of substantial public interest:

1. Search for victims of crime, including missing children;
2. Threat to life or physical integrity or because of terrorism;
3. Serious crime (EU arrest warrant).⁷⁰

The reason for the distinction between the two types of biometric systems, is that, 'real time' biometric systems are 'considered particularly intrusive in the rights and freedoms of the concerned persons, to the extent that it may affect the private life of a large part of the population, evoke a feeling of constant surveillance and indirectly dissuade the exercise of the freedom of assembly and other fundamental rights'⁷¹ In a first reaction, the 'European Civil Rights Organization' (EDRi) called on the Parliament to improve the Commission's proposals. EDRi criticized that they did not go far enough in excluding 'biometric

⁶⁷ Art. 3 (37) AI Act.

⁶⁸ Art. 3 (38) AI Act.

⁶⁹ Art. 5 (d) AI Act.

⁷⁰ Art. 5 (d) i-iii; Recital 19 AI Act.

⁷¹ Recital 18 AI Act.

mass surveillance’ while the exceptions were too far-reaching.⁷² The demand was also supported by 116 members of the European Parliament in an open letter to President von der Leyen.⁷³ Meanwhile, more than 78,000 European citizens have signed a petition for a ban on biometric mass surveillance practices as part of the ‘Reclaim Your Face’ campaign, and the number continues to grow.⁷⁴

Accordingly, ‘post’ and also ‘real time’ remote biometric identification systems are classified as high-risk.⁷⁵ Furthermore law enforcement falls under high risk.⁷⁶ The European Parliament acknowledges that ‘given the role and responsibility of police and judicial authorities and the impact of decisions they take for the purpose of preventing, investigating, detecting or prosecuting crime or enforcing criminal sanctions, the use of AI applications must be considered high-risk when there is a possibility that it will have a significant impact on the lives of individuals.’⁷⁷

5. CONCLUSION

Transparency is a central and significant concept for the rule of law, to guarantee judicial ethical standards and even to prevent judicial corruption. In addition, and increasingly so, the principle of transparency is important in building public confidence. It is therefore necessary to find the right balance between established principles of judicial ethics, including transparency, and the new AI tools used for the administration of justice.

One of the main concerns of the AI Act is, that it leaves transparency issues to self-regulation and does not provide safeguards concerning the review of new AI technology. Leaving it to developers to choose, acquire and use data, algorithms are based upon, which leaves a risk of abuse in a competitive field of the global market.⁷⁸ This creates not only dependency, but leads to an imbalance between AI developers and judges using such technology.⁷⁹

⁷² EdRi, *Open letter: Civil society call for the introduction of red lines in the upcoming European Commission proposal on Artificial Intelligence* (2021), available at <https://edri.org/wp-content/uploads/2021/01/EDRi-open-letter-AI-red-lines.pdf>; see also EdRi, *Seeking your support for a specific ban on biometric mass surveillance practices on fundamental rights grounds* (2021), available at <https://edri.org/wp-content/uploads/2021/04/Letter-from-51-civil-society-organisations-seeking-your-support-for-a-ban-on-biometric-mass-surveillance-practices.pdf>.

⁷³ EdRi, *Open Letter* (2020), available at <https://edri.org/wp-content/uploads/2021/03/MEP-Letter-on-AI-and-fundamental-rights-1.pdf>.

⁷⁴ European Citizens’ Initiative (ECI) ‘Reclaim Your Face’ campaign, as of September 15th, <https://reclaimyourface.eu/>.

⁷⁵ Recital 33 AI Act.

⁷⁶ Art. 6 (2) in conjunction with Annex III 6 AI Act.

⁷⁷ EP Report *On AI in criminal law and its use by the police and judicial authorities in criminal matters* (2020/2016(INI)) (2020), available at www.europarl.europa.eu/doceo/document/A-9-2021-0232_DE.html.

⁷⁸ Varošanec, at 17.

⁷⁹ Ibid.

Having uncertain regulations could have consequences contrary to what is desired, especially when AI technology is used in judicial processes. Therefore, it is crucial to safeguard the right to a human judge for the administration of justice, as well as to respect the principle of fair trial and guarantees for access to justice and other fundamental rights. To conclude, judges using AI-based technology must ensure that it respects ethical standards and that their decisions can be comparable in terms of transparency to those of a human being.

Creating a legal framework that regulates the ethical use of AI for the administration of justice is never easy and usually leads to cumbersome normative, not always satisfying all stakeholders involved in justice processes.

There are multiple ways to regulate AI for the administration of justice and the proposal made by the European Union and reviewed in this document seems to follow the right direction to ensure transparency and standards of judicial ethics.

The law should and must move with time by preparing for new challenges created by advancing technologies. The AI Act in combination with the Ethical Charter is a first step in the right direction and could set a global standard for regulating AI technology internationally. This goes hand in hand with the Global Judicial Integrity Network UNODC or UNESCO's *First draft of the Recommendation on the Ethics of Artificial Intelligence*⁸⁰ installing transparency and explainability as one of ten principles underlining once more the importance and the link between the two.

⁸⁰ Ad Hoc Expert Group (AHEG) for the preparation of a draft text of a recommendation on the ethics of artificial intelligence, SHS/BIO/AHEG-AI/2020/4 REV.2Paris, 7 September 2020 available at unesdoc.unesco.org/ark:/48223/pf0000373434.



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