



THEMIS ANNUAL JOURNAL 2023

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FOREWORD

INGRID DERVEAUX EJTN SECRETARY GENERAL



I am pleased to introduce the 2023 Themis Annual Journal, our fifth edition, which gives resonance in an academic publication to the prestigious EJTN THEMIS competition. This competition provides young magistrates from all corners of the European Union with a unique platform to test their knowledge of European law and share innovative ideas for its future development.

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Themis has a rich history. Initially organized from 2006 to 2009 by two EJTN member institutions – Portugal's Centre for Judicial Studies (CEJ) and Romania's National Institute of Magistracy (NIM) – it officially became an EJTN activity in 2010. Over the years, it has adapted to meet the evolving needs of new generations of magistrates.

EJTN strongly believes in fostering a shared European judicial culture and mutual trust. THEMIS is a vital part of training for future judges and prosecutors, aiming to help them understand EU law, develop practical skills, and cultivate the right attitudes based on shared European values.

The THEMIS competition serves as a platform for discussing legal topics, connecting their technical aspects to those values, gaining new experiences, exploring fresh perspectives, and acquiring new judicial skills. Each year, it features four semi-final rounds, with up to 11 teams in each round, each guided by a tutor. Distinguished European judges,

prosecutors, and scholars select the top eight teams to compete in the Grand Final. Approximately 200 participants get the chance to deepen their understanding of EU law topics and connect with other European judicial trainees through participation in the THEMIS competition.

Each edition of the THEMIS competition features four semi-final rounds consisting of three stages, with one stage involving the preparation of a paper. Each team is invited to draft a paper related to the semi-final theme. These papers should contain original ideas, thoughtful opinions, or innovative proposals concerning European law and professional ethics.

The jury members meticulously select the best papers, which are then published in this official EJTN publication – the THEMIS Annual Journal. It is published annually after the semi-final rounds and presented by the selected teams at the Grand Final. I would like to express my gratitude to all the teams for their hard work in the THEMIS competition, the jurors for their careful evaluation and selection of the best papers, and the staff members of the EJTN Secretariat for their dedication to managing the THEMIS competition.

I hope you will enjoy reading this special publication!

Ingrid Derveaux
Judge, EJTN Secretary General

FOREWORD

FLAVIO MASTRORILLO &
RASMUS VAN HEDDEGHEM
THEMIS PROJECT MANAGERS



The well-regarded THEMIS competition, open to future EU magistrates in their early training, provides a platform for discussing various aspects of EU law, enhancing soft skills, and perfect judicial abilities in a friendly and collaborative environment. In 2023, the competition addressed the following topics in four semi-finals and one grand final:

- 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 open to judicial trainees from across Europe. Its purpose is to develop the critical thinking and communication skills of future magistrates from different European countries. The competition serves as a forum for discussing various European law topics, including international judicial cooperation in criminal and civil matters, judicial ethics, and human rights.

The enthusiasm for the THEMIS competition continues to grow. Thirty-one teams competed in four semi-finals in 2023. Before the event, each team wrote a paper, and during the competition, they showcased their creativity through engaging presentations. These ranged from

a surprise visit by a time-travelling Cicero to Budapest, over several showcases of the musical talent of future magistrates ('Confiscation dreaming... on such a winter's day') to interactive challenges for the colleagues. The jury expressed confidence in the next generation of the European judiciary at all award ceremonies.

During their deliberations, the jury members assessed various factors, including overall quality, originality, critical thinking, anticipation of future solutions, references to relevant case law, and communication and debating skills. We extend our gratitude to them for undertaking this challenging task. The success of the THEMIS competition is greatly indebted to their sharp minds and kind hearts.

The word 'Taj' means 'crown' in Hindi. It's fitting because this journal features the best publications chosen by the jury members of the 2023 THEMIS competition. Being a judge isn't just about knowing the law; it's a craft that requires ongoing learning and improvement. In this competition, we value new and creative ideas for solving legal problems. For many participants, this is their first experience in the world of judging. EJTN encourages its members to give their trainees a chance to participate in THEMIS.

We would like to thank Judge Ingrid Derveaux, the EJTN Secretary General, and Carmen Domuta, Head of EJTN Programmes Unit, for supporting the idea of the Themis Annual Journal throughout the years.

Our gratitude also goes to Arno Vinkovic, who edited the first Themis Annual Journals. His valuable support and advice helped us maintain the high standards of the THEMIS competition. We would also like to thank all the tutors and national coordinators who motivate new teams year after year to take on the challenge and support them throughout the competition. Finally, we

would also like to extend our thanks to the participants who dedicated their time and effort to the competition.

They took the stage, presented their ideas, and participated in discussions with the jury about the law. THEMIS creates a unique atmosphere for lively legal discussions during the day and more relaxed conversations over drinks in the evening.

All of us hope that you will fondly remember and take pride in your contribution to the 2023 THEMIS competition.



Semi-final A at the Office of the Prosecutor General in Hungary



Semi-final B at Naples' Castel Capuano



Semi-final C at the Academy of Justice in Hungary



Semi-final D at the National School of Judiciary and Public Prosecution in Krakow

SEMI-FINAL A

EU AND EUROPEAN CRIMINAL PROCEDURE

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PARTICIPATING TEAMS:

BULGARIA, FRANCE, GERMANY, GREECE,
HUNGARY, ITALY I, ITALY II

1ST PLACE: ITALY II
2ND PLACE: FRANCE
3RD PLACE: GREECE

Selected papers for the THEMIS Annual Journal:
HUNGARY, ITALY II



16–19 MAY 2023 – BUDAPEST, HUNGARY – OFFICE OF THE PROSECUTOR GENERAL

JURY MEMBERS

PETR KOLBAN (CZ)

Judge at the District Court of Prachatice

I have taken part in Themis as a competitor, tutor and lastly as a juror. I would define the competition itself in a single word as a CHALLENGE. A challenge for any participant, or even a person who was involved, to leave their comfort zone, to prepare a legal text focused on a current cross-border topic and orally present and defend such a paper in public.

And as usually happens, no pain no gain. This effort of every participant is fully rewarded with extensive knowledge in a specific legal area, as well as valuable human networking, which can be used in their personal and professional life, and progress in the ability to use legal and general English in practice.

The participants gain a huge advantage at the beginning of their careers through the ability to communicate and react immediately in a foreign language, which can be beneficial in both personal and professional life, as participation in this competition enables the participants to stand out from their colleagues with the same or similar length of practice.

The competition enables tutors to learn how to teach others (competitors) to present and defend an idea and a legal standpoint, as well as how to move and regulate the tone of their voice, which are important abilities for the day-to-day practice of any judge or public prosecutor who needs to face emotions, fears and other emotional outbursts of 'clients' – people coming into contact with the justice system as such.

Furthermore, the competition offers the opportunity for jurors to read and learn the legal reasoning of their future colleagues and provides a highly beneficial source of know-how and current case law that is applicable in practice. Lastly, Themis is NOT a competition, as it is not primarily focused on combat or on prevailing over the others.

It is rather based on bringing people from different countries and cultures together, it joins rather than divides, it is more like fun and a forum than a competition. Have you not signed up for such an activity yet? What are you waiting for, bro? Write to EJTN to join; it's waiting just for you!

JOSÉ LUÍS LOPES DA MOTA (PT)

Judge at the Supreme Court of Justice of Portugal

For more than 25 years, I have had the privilege and responsibility of participating in various roles and initiatives in the

European area of freedom, security and justice, the creation of which the Treaty of Amsterdam identified as an

objective of the European Union. In my previous capacity as a national member and President of Eurojust, I had the opportunity to contribute to the creation of the European Judicial Training Network.

Training was a great need for the proper functioning of judicial cooperation. European law has expanded extraordinarily and training has been included in the Treaties by the Treaty of Lisbon.

The functioning of the principles of mutual recognition and mutual trust, based on equivalent protection of fundamental rights and direct communication between judicial authorities have given a central role to judges and prosecutors in the European Union, which needs to adequately provide access to law and justice. This is not the first time I have been part of a Themis competition jury. Based on my experience, I have always stressed the importance of this

competition and its contribution to the knowledge and dissemination of European law, to the exchange between young judges and prosecutors and to the deepening of a European judicial culture.

This is a complex world and it is impressive to see the progress that has been made. This year's semi-final on criminal matters saw the participation of very diverse and high quality work. The way in which the young participants presented their work and took part in the discussions highlighted the familiarity with which today's very complex issues are handled.

I congratulate all the participants and, in particular, the Italian team that won the semi-final on criminal matters. I congratulate the EJTN secretariat on its organizational work. It was an honour to be part of this jury. And I wish you all the best of luck and personal and professional success.

JULIJA MURARU-KLUCICA (LV)

Lecturer, Senior Lawyer of the Department of International Cooperation of the Ministry of Justice of the Republic of Latvia

Dear colleagues, I would like to thank EJTN for the opportunity for all participants of the THEMIS competition to gain a great deal of experience in working on criminal matters with a cross border dimension.

I believe the objectives of the THEMIS competitions were achieved. While preparing the written papers and presentation stages, the participants took the opportunity to get closer to the understanding of the main values of the European Union. The aspects of the rule of law and human rights were clearly

discussed during the presentations and the discussion process with the jury members. All teams presented unique approaches to the main issues that are highlighted in the field of criminal justice. As a member of the jury, I was very pleased to work throughout the week in a warm atmosphere, where the participants had the opportunity to enjoy excellent communication, as well as a cultural programme. I hope the THEMIS competition in beautiful Budapest will remain a significant step towards the reinforcement of judicial cooperation in criminal matters.

Team Members:

Zoltán KMETYKÓ
Patrik Roland VIRÁG
Ádám Attila CSÁKI



Tutor: Zoltán PÉTER

Team Hungary

CONFLICTS OF JURISDICTION WITH THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE

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A new era began with the establishment of the European Public Prosecutor's Office, which started to protect the European Union's financial interests. However, not every EU Member State has joined the EPPO, which creates another problem to be solved. Given that, in some cases, the EPPO and a non-participating Member State (or even a third country) can prosecute, the possibility of a jurisdictional conflict can arise. Conflicts of jurisdiction could lead to parallel proceedings, which goes against the EU's basic principles for proper administration of justice. In this paper, we intend to examine how parallel proceedings could be detected, and we draw attention to the importance of the correct application of the relevant EU legislation.

KEYWORDS:

EUROPEAN PUBLIC PROSECUTOR'S OFFICE | PARALLEL PROCEEDINGS
TRANSFER OF PROCEEDINGS | EUROJUST | JURISDICTIONAL CONFLICT

1. INTRODUCTION

The protection of the European Union's (hereinafter: EU) financial interests had become a priority in recent decades, which led to the establishment of the European Public Prosecutor's Office (hereinafter: EPPO). The creation of an independent institution that can protect EU funds with the help of criminal legal instruments was a milestone in the EU's history. The establishment of the EPPO was based on enhanced cooperation in the form of a regulation (hereinafter: EPPO Regulation).¹ However, it should be pointed out that some EU Member States decided to participate, while others decided not to take part (hereinafter: non-participating Member States) in the enhanced cooperation on the establishment of the EPPO.

The material jurisdiction of the EPPO is set out by the so called 'PIF Directive', which lists the criminal offences where the EPPO shall operate.² Since these crimes are also punishable in the non-participating Member States, there could be cases where either the EPPO and the non-participating Member States or even third countries have to simultaneously prosecute under the same facts or for the same offences. In the main body of this paper, we would like to examine how to avoid and solve parallel proceedings based on the current legislation.

Parallel proceedings here refer to cases where both the EPPO and the non-participating Member States or third countries have the competence to act, and they have initiated legal proceedings on the basis of the same facts of the case.

We do believe that, although this problem has yet not appeared, sooner or later it will arise and the current legislation does

not provide a solution for this. This paper highlights this problem by examining the jurisdictional principles, as well as the way in which parallel proceeding are recognized, together with the importance of consultations among Parties and how the states solve this problem. It also presents possible solutions to facilitate the more efficient operation of the EPPO and more transparent and regulated cooperation between the EPPO and non-participating Member States or third countries.

2. THE EPPO

A. Origin of the EPPO

It is a valid expectation from EU citizens that the EU should do everything in its power to ensure that EU funds are spent for their purpose, so Member States can use them for the benefit of their people. EU legislators created several EU agencies and bodies for this purpose, such as the European Anti-Fraud Office (hereinafter: OLAF) and the European Union Agency for Law Enforcement Cooperation (hereinafter: Europol), but not one of them had the right to protect EU funds with criminal legal instruments at EU level.

The need for the protection of the EU's financial interests had already existed since the middle of the 1990s, and this need inspired a group of experts to prepare a project report called *Corpus Juris* in 1997. This document contained penal provisions that are applicable throughout the EU.³ The legal basis of the EPPO was finally provided by the Lisbon Treaty in 2007, stating that the EPPO may be established from European Union Agency for Criminal Justice Cooperation (Eurojust). It also allowed the initiation of the enhanced cooperation procedure. Based on Article 20 of the Treaty on the European Union

¹ Council Regulation (EU) 2017/1939 OJ 2017 L 283.

² Directive (EU) 2017/1371 OJ 2017 L 198/29.

³ M. Delmas-Marty et al., *Corpus Juris: Introducing Penal Provisions for the Purpose of the Financial Interests of the European Union Economica*, Paris, (1997).

(hereinafter: TEU) and Title III of the Treaty on the Functioning of the EU (hereinafter: TFEU) a group of at least nine Member States can seek a Council decision to ‘set up an advanced integration or cooperation’, where the EU’s goal could not be achieved within a reasonable time. This procedure was also initiated in connection with the EPPO.⁴

The European Commission stated that the objective for establishing the EPPO was ‘to correct the deficiencies of the current enforcement regime exclusively based on national efforts and add consistency and coordination to these efforts.’⁵

The Commission presented its proposal for the establishment of the EPPO in 2013 (hereinafter: Proposal). The Commission defined the EPPO as ‘an independent Union with competence to direct, coordinate, and supervise criminal investigations and to prosecute suspects in national courts in accordance with a common prosecution policy.’⁶

However, some Member States initiated the so-called ‘yellow card’ procedure. This procedure was introduced by the Lisbon Treaty, allowing Member States to send their reasoned opinions to the presidents of the European Parliament, the Council and the European Commission, related to any draft legislation acts where a possible breach of principle of subsidiarity is noticed.⁷ The parliaments of 12 EU

Member States submitted a reasoned opinion on the Proposal. The main concern of the objectors was the possible breach of the principles of subsidiarity and proportionality.⁸ The Commission examined all the concerns and decided that the Proposal was in compliance with the TEU, but the opinions of the Member States would be taken into account during the legislative process.⁹

The final text of the EPPO Regulation was adopted in 2017, and the EPPO started to operate on 1 June 2021. The EPPO is seated in Luxembourg. Twenty-two of the 27 EU Member States decided to join the EPPO.¹⁰ In addition to Denmark and Ireland, which have opted-out from the area of freedom, security and justice and subsequently did not take part in the enhanced cooperation, Hungary, Sweden and Poland are also currently non-participating Member States.¹¹

B. Relationship between the EPPO and Hungary

During the yellow card procedure, the Hungarian National Assembly also gave its reasoned opinion on the Proposal, when it declared that the Proposal did not comply with the principle of subsidiarity. The reasons included:

4 Glossary of summaries on enhanced cooperation, available at: https://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=LEGISSUM%63Aenhanced_cooperation&lang1=EL&from=HU&lang3=choose&lang2=choose&_csrf=762ac3a3-4202-40ab-bce2-3974b2d8d8db.

5 Proposal for a Council Regulation on the establishment of the Public Prosecution’s Office (COM(2013) 534 final), at 2.

De Angelis, ‘The European Public Prosecutor’s Office (EPPO) – Past, Present, and Future’, 4 The European Criminal Law Associations’ Forum (eucrim) (2019), 272, at 273.

7 Consolidated version of the Treaty on the Functioning of the European Union – PROTOCOLS – Protocol (No. 2) on the application of the principles of subsidiarity and proportionality, OJ 2008 C 115/206.

8 De Angelis, *supra* note 6, at 274.

9 Communication from the Commission to the European Parliament, the Council and the national parliaments on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office with regard to the principle of subsidiarity, in accordance with Protocol No. 2 (COM(2013) 851 final), at 13.

10 Austria, Bulgaria, Belgium, Cyprus, Czech Republic, Germany, Estonia, Greece, Finland, Spain, France, Croatia, Italy, Lithuania, Luxembourg, Latvia, Malta, Netherlands, Portugal, Romania, Slovenia and Slovakia.

11 Members, available at <https://www.eppo.europa.eu/en/members>.

- the EPPO's exclusive competence would exceed the authorization enshrined in Article 86 of the TFEU;¹²
- the *supra* national model of the EPPO would disproportionately limit the Member State's existing sovereignty in the field of criminal law;
- the exclusive right of instructions of the EPPO would place a question mark over the ability of the delegated prosecutor's system that is integrated into the Member State's prosecutor system to operate;
- the more efficient functioning of the EPPO was not justified by the Proposal; and
- the real added value of the Union level action was not sufficiently supported by the Proposal.¹³

Hungary referred to these objections when deciding not to take part in the enhanced cooperation. The EPPO Regulation contains several provisions on the matter of judicial cooperation between the EPPO and the non-participating Member States.

Article 99 (1) of the EPPO Regulation stipulates that '(...) the EPPO may establish and maintain cooperative relations with institutions, bodies, offices or agencies of the Union in accordance with their respective objectives, and with the authorities of Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO, the authorities of third countries and international organisations' insofar as this is necessary for the performance of its tasks. To achieve this cooperation, paragraph 3 goes on to say that 'the EPPO may conclude working

arrangements with the entities referred to in paragraph 1'. Hungary was the first and so far the only non-participating Member State that has signed a working arrangement with the EPPO.¹⁴ The objective of the working arrangement, which was signed by the European Chief Prosecutor and by the Prosecutor General of Hungary in 2021, is to facilitate the implementation of the existing legal framework regarding judicial cooperation. The preamble of the working arrangement emphasizes that the working arrangement is based on the principle of sincere cooperation.

Article 4 (3) of the TEU lays down the principle of sincere cooperation by saying 'the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.'

The judicial cooperation in criminal matters is one of these obligations, as set out in Articles 82 to 86 of the TFEU.¹⁵ Therefore, even the non-participating Member States will help the EPPO in its work with the existing EU legal instruments on the matter of cooperation in criminal matters. Article 1 (3) of the working arrangement stipulates that the parties shall apply the relevant EU acts on judicial cooperation in criminal matters or other multilateral

¹² Article 86, paragraph 2: The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the regulation provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.

¹³ Reasoned opinion regarding the EPPO of the Hungarian National Assembly (October 2013), available at: <https://secure.ipex.eu/IPEXL-WEB/document/COM-2013-0534/huors>.

¹⁴ Available at https://www.eppo.europa.eu/sites/default/files/2021-04/Working_arrangement_Hungary.pdf

¹⁵ Articles 82 to 86 of the TFEU regulate judicial cooperation in criminal matters and the enhanced cooperation among the EU Member States.

legal instruments wherever applicable for gathering evidence, or for other forms of judicial cooperation. It is clear that these provisions are not too detailed, but it should not be forgotten that, according to Article 99 (3) of the EPPO Regulation, working arrangements ‘shall be of a technical and/or operational nature.’

According to the principle of sincere cooperation and Article 1 (3) of this working arrangement, Hungary already executed 3 European Investigation Orders (hereinafter: EIO)¹⁶ in 2021, which had been issued by the EPPO.¹⁷ Although no further official statistics are available on the EIOs executed by Hungary, according to the EPPO Annual Report 2022, Hungary was involved in 40 EPPO cases in 2022.¹⁸

In our legal practice, we have noticed that Hungary’s cooperation with the EPPO is very close and the Prosecution Service of Hungary performs every request issued by the EPPO. European Chief Prosecutor Laura Codruța Kövesi herself has already complimented Hungary on this approach, while pointing out that Hungary, as a non-EPPO country, has replied to all the EPPO’s requests.¹⁹ We would like to point out that we believe this practice could be problematic. Our arguments in support of this will be unfolded in Section 5.B.3 of this article.

3. CONFLICTS OF JURISDICTION

Every country has its own jurisdiction set out by both national and international legislation. These jurisdictional rules, which will be discussed in more detail below, specify the cases where the state

can or should prosecute for a criminal act. As already mentioned, there could be cases where both a non-participating Member State or a third country and the EPPO have the right to prosecute, which could lead to positive conflicts of jurisdiction. Conflicts of jurisdiction could result in parallel proceedings, meaning that multiple procedures are initiated for the same act. This scenario is problematic for a number of reasons: first, it goes against the EU’s basic principles of the proper administration of justice, since investigative measures are usually executed simultaneously and repeatedly.

It increases the costs and the necessary human resources required for prosecution; furthermore, it also makes the position of the defendant more complicated and expensive; and most importantly, the defendant could hypothetically be punished several times for the same act. According to Recital 66 of the EPPO Regulation, the EPPO is guided by the principle of legality to effectively combat offences affecting the financial interests of the EU.

Article 25 (1) of the EPPO Regulation lays down the basic rule of exercising competence: ‘The EPPO shall exercise its competence either by initiating an investigation under Article 26 or by deciding to use its right of evocation under Article 27. If the EPPO decides to exercise its competence, the competent national authorities shall not exercise their own competence in respect of the same criminal conduct.’ Some states also apply the principle of legality, while others use the

¹⁶ Regulated by Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (hereinafter: EIO Directive) OJ 2014 L 130/1.

¹⁷ Tasks and activities of the Prosecution Service of Hungary in 2021, available at: http://ugyeszseg.hu/wp-content/uploads/2022/10/ogy_beszamolo_2021.pdf, at 104, Translation: ‘The European Public Prosecutor’s Office sent three European Investigation Orders to the Prosecutor General’s Office in 2021 within the framework of operational cooperation.’

¹⁸ EPPO Annual Report 2022, available at https://www.eppo.europa.eu/sites/default/files/2023-02/EPPO_2022_Annual_Report_EN_WEB.pdf, at 96.

¹⁹ Thomas, James, Finance ministers should ‘be losing sleep’ over extent of tax fraud, says chief EU prosecutor (2022), available at <https://www.euronews.com/my-europe/2022/06/01/finance-ministers-should-be-losing-sleep-over-extent-of-tax-fraud-says-chief-eu-prosecutor>.

principle of opportunity, which means that prosecutors have the discretion to decide whether offenders should be prosecuted for the crime committed or not.

Hungary falls under the former group, because Section 4 (1) of the Hungarian Criminal Procedures Code provides that ‘The prosecution service or investigating authority shall launch a criminal proceeding *ex officio* if it becomes aware of a criminal offence subject to public prosecution.’ Based on this, conflicts of jurisdiction and, in turn, parallel proceedings will definitely take place between the EPPO and non-participating Member States or third countries, which also apply the principle of legality.

Conflicts of jurisdiction may also arise between the EPPO and the non-participating Member State or the third country applying the principle of opportunity if the latter exercises its discretionary power to prosecute for the offence.

A. Jurisdictional Rules in Detail

In the following, we shall examine the relevant jurisdictional rules of the EPPO and Hungary to present how the EPPO’s jurisdiction could conflict with the jurisdiction of a non-participating Member State or a third country. Proper jurisdiction in criminal matters means the scope of substantive national law and competence of the criminal authorities, which sets the grounds for and limits a nation’s *ius puniendi*.

The rules of jurisdiction in criminal matters are found in a state’s legislation and are laid down in the criminal codes. The criminal codes usually base jurisdiction on four principles: territorial, personal, state protection and universality. In relation to the EPPO, we intend to examine the first two principles, which are relevant

to our subject. According to Article 23 (a) of the EPPO Regulation ‘The EPPO shall be competent for the offences referred to in Article 22 where such offences were committed in whole or in part within the territory of one or several Member States.’ This Article defines the territorial competence of the EPPO.

The personality principle focuses on nationality and can be divided into active and passive forms. The active personality principle means that the national substantive criminal law is applicable to the state’s nationals irrespective of the place where the crime was committed, while the passive personality principle applies to the defence of the state’s own nationals abroad.

According to the passive personality principle, whenever a perpetrator commits an act against another person who is not a national of the country where the act was committed, the victim’s country also has jurisdiction to prosecute in the case. This jurisdictional rule is also laid down in Article 23 of the EPPO Regulation.

Therefore, the EPPO has competence over offences which were committed by a national of a Member State, provided that the Member State has jurisdiction for such offences when committed outside its territory, or which were committed outside the territories of the Member States by a person who was subject to the Staff Regulations or to the Conditions of Employment at the time of the offence, provided that the Member State has jurisdiction for such offences when committed outside its territory. Just as the EPPO’s jurisdictional rules, the Hungarian Criminal Code contains a territoriality principle in its Section 3 (1) a): ‘Hungarian criminal law shall apply to criminal offences committed in Hungary’. On the other hand, Sections 3 (1) c) and (2) b)

state: ‘Hungarian criminal law shall apply to any act committed by Hungarian citizens abroad if the act constitutes a criminal offence under Hungarian law and to any act committed by non-Hungarian citizens abroad against a Hungarian national or against a legal person or unincorporated business association established under Hungarian law, which are punishable under Hungarian law.’

It is clear that the jurisdiction of the EPPO is not strongly restricted to the territory of the Member States. Consequently, it can be concluded that offences could be committed in such a way as to fall within the jurisdiction of the EPPO and a non-participating Member State or a third country. This could easily lead to parallel proceedings related to the same or directly connected facts, whereby jurisdictional conflicts could arise.

B. Conflicts of Jurisdiction with the EPPO

Firstly, we would like to examine whether conflicts of jurisdictions could arise between the EPPO and a participating Member State. Article 25 (1) of the EPPO Regulation solves positive conflicts of jurisdiction between the EPPO and a participating Member State by stipulating ‘If the EPPO decides to exercise its competence, the competent national authorities shall not exercise their own competence in respect of the same criminal conduct.’ However, the problem is only solved theoretically, since a conflict of competence could even arise between participating Member States and the EPPO, as actually happened in March 2022 between the Spanish prosecution service tasked with investigating corruption offences (Fiscalía Especial contra la Corrupción, hereinafter: FEC) and the EPPO. This case is commonly referred

to as the Ayuso case. In the Ayuso case, the ‘subject of the prosecution was a close relative of one of Spain’s regional presidents. This person was suspected of having received a payment of around €55,000 for his participation in a transaction with a company owned by a family friend. This company was involved in the procurement of medical masks from China worth around €1.5 million during the COVID-19 pandemic.’

According to these allegations, the FEC opened a criminal investigation (regarding corruption), but the EPPO asserted its right of evocation because the offence involved EU funds. However, the Spanish prosecution service did not agree with this interpretation and maintained that the issue was a common offence, which did not justify the EPPO exercising its competence.²⁰ After this disagreement between the EPPO and the Spanish prosecution service on whether the EPPO can exercise its competence, the FEC stated that there was no evidence that the EU budget assets had been used to commit the crime.

Notwithstanding the above, the EPPO stated that ‘The point of any EPPO investigation is to establish the facts in order to conclude whether there is enough evidence of a criminal offence affecting the financial interests of the European Union having been committed. It is to avoid duplication and in the interest of the defence that the EPPO regulation establishes a priority competence for the EPPO to investigate all the facts linked to a possible fraud affecting the financial interests of the European Union.’²¹ The Spanish Prosecutor General divided the competence and continued to investigate the bribery part, while the EPPO continued its own investigation.

20 Balázs, ‘The Conflict of Competence between the EPPO and Spanish Prosecutors – Lessons Learned’ 4 The European Criminal Law Associations’ Forum (eucrim) (2022) 286, at 287.

21 Available at <https://www.epppo.europa.eu/en/news/eppos-statement-competence-adjudication-spain>.

The European Chief Prosecutor expressed her concerns about the procedure, stating that it was problematic that ‘the decision on a conflict of competence between a national body and a European body has been taken by the Fiscal General del Estado [the Spanish Prosecutor General] who is the hierarchical superior of the national body and thus partial to the ongoing proceedings. Furthermore, the decision has been taken without hearing both parties to the conflict of competence during the meeting of the Fiscales de Sala [the Spanish Board of Chamber Prosecutors].’²²

As described above, a conflict of jurisdiction can arise even between the participating Member States and the EPPO. The risk of this is even greater with non-participating Member States and this is the issue to which we are dedicating the following section.

Article 25 (1) of the EPPO Regulation (laying down the basic rule of exercising competence) is not applicable to non-participating Member States, because Recital 110, which states that ‘Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO are not bound by this Regulation.’

The Recital quoted above is in compliance with Article 20 (4) of the TEU, which provides that ‘Acts adopted in the framework of enhanced cooperation shall bind only participating Member States,’ and with Article 327 of the TFEU, which states that ‘Any enhanced cooperation shall respect the competences, rights and obligations of those Member States which do not participate in it. Those Member States shall not impede its implementation by the participating Member States.’

This latter provision is derived from the principle of sincere cooperation.

4. HOW TO DETECT PARALLEL PROCEEDINGS IN TIME

We have already discussed why parallel proceedings could be dangerous, but these problems only arise if none of the prosecuting states knows about the other initiated investigation, or they are aware of it, but cannot handle the situation properly because of the lack of formalized procedure of consultation or if there is no will to hold consultations.

Although the EPPO Regulation is not binding on non-participating Member States, a solution for this problem might be provided by an existing legal document. 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 (hereinafter: Eurojust Regulation), obliges the Member States to exchange information with Eurojust.

Eurojust supports and strengthens ‘coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime (...) where that crime affects two or more Member States, or requires prosecution on common bases.’²³

Article 21 of the Eurojust Regulation contains a detailed obligation for the competent national authorities of the Member States to inform Eurojust about certain crimes. According to Article 21(5), ‘The competent national authorities shall inform their national members without undue delay of any case affecting at least three Member States for which requests

²² Available at <https://www.epppo.europa.eu/en/news/eppos-statement-decision-fiscal-general-del-estado>.

²³ Article 2 (1) of the Eurojust Regulation.

for or decisions on judicial cooperation, including requests and decisions based on instruments giving effect to the principle of mutual recognition, have been transmitted to at least two Member States, where one or more of the following apply:

(a) the offence involved is punishable in the requesting or issuing Member State by a custodial sentence or a detention order, the maximum period of which is at least five or six years, to be decided by the Member State concerned, and is included in the following list:

crime against the financial interests of the Union.’

Moreover, according to Article 21 (6) ‘The competent national authorities shall inform their national members of: (a) cases in which conflicts of jurisdiction have arisen or are likely to arise.’

Paragraph 10 of this Article prescribes that this information is to be provided in a structured way determined by Eurojust. It should be emphasized that every Member State of the European Union is a member of Eurojust, so even those Member States which do not participate in the EPPO are bound by the Eurojust Regulation.

These stipulations become relevant in accordance with Article 100 (3) of the EPPO Regulation, which provides that ‘The EPPO shall have indirect access to information in Eurojust’s case management system on the basis of a hit/no-hit system. Whenever a match is found between data entered into the case management system by the EPPO and data held by Eurojust, the fact that there is a match shall be communicated to both Eurojust and the EPPO, as well as the Member State of the European Union which

provided the data to Eurojust. The EPPO shall take appropriate measures to enable Eurojust to have access to information in its case management system on the basis of a hit/no-hit system.’²⁴

Both entities have indirect access to each other’s case management system, which is the basis of a hit/no-hit system. According to Article 5 of the working arrangement between the European Public Prosecutor’s Office and Eurojust, whenever the EPPO would like to verify whether that information is stored in Eurojust’s case management system, the EPPO issues a request to Eurojust using a template and, if there is a hit, Eurojust informs the EPPO about it. Furthermore, if requested by the EPPO, Eurojust can provide further data on the case after consent from the national authority which provided the information to Eurojust.

It is worth mentioning that the obligation to inform Eurojust about certain cases was already included in Article 13 of the Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (2002/187/JHA) (hereinafter: Eurojust Decision).

When reviewing Eurojust’s annual reports, it can be seen that they have not contained any data on the application of Article 13 of the Eurojust Decision (and later Article 21 of the Eurojust Regulation) since 2015. At the same time, it can also be concluded from the Eurojust Annual Reports from previous years that Member States were always reluctant to fulfil this obligation.²⁵

We would like to draw attention to the fact that, in 2015, of the total number of 219 ‘Article 13 reports’ sent to Eurojust one in five originated from the Prosecution

²⁴ Available at <https://www.eurojust.europa.eu/sites/default/files/2021-02/d210016.pdf>.

²⁵ Eurojust Annual Report 2015, available at: https://www.eurojust.europa.eu/sites/default/files/assets/eurojust_annual_report_2015_en.pdf, at 57.

Service of Hungary.²⁶ The main reason for this high ratio of reports is provided by the internal rules of the Prosecution Service of Hungary: an Instruction of the Prosecutor General regulates how to fulfil the obligation on reporting in cases prescribed by Article 21 of the Eurojust Regulation.²⁷

According to the relevant section of the Instruction, the prosecutor in charge of the case is required to report on the data needed by Eurojust with the use of a Eurojust template. The template must be simultaneously sent to the Eurojust Hungarian Desk and the Eurojust's automated data-processing system by e-mail. According to the currently available information, several EU Member States still do not comply with Article 21 of the Eurojust Regulation in a structured way. This is particularly unfortunate, because the use of the template prepared by Eurojust to facilitate the application of Article 21 would make it much easier to transfer data into the Eurojust Case Management System, since it would be processed automatically.

In our opinion, the correct application of Article 21 of the Eurojust Regulation could provide a solution to the problem of parallel investigations and conflicts of jurisdiction. For this reason, we would encourage participating and non-participating Member States to fulfil their obligation to exchange information with Eurojust using the Eurojust templates.

In such a case, within their working arrangement, the EPPO and Eurojust would be able to easily verify whether proceedings are being duplicated. The precondition of this is that the reporting functions properly, in a structured and uniform manner. Furthermore, the EPPO and Eurojust would

be encouraged to exchange information regularly and frequently, in accordance with Articles 5 and 6 of their working arrangements.

5. HOW TO HANDLE PARALLEL PROCEEDINGS

When a conflict of jurisdiction arises, it needs to be handled properly. In the next part of this paper, we shall look into the possibilities of how this can be done. We shall examine what happens if there is no solution to the parallel procedures (e.g. conciliation does not lead to a result or there is no conciliation) and what the possibilities of conciliation are.

A. Without an Agreement

In our opinion, the worst scenario is when the Parties cannot reach an agreement on which of them should prosecute. In such a case, each Party conducts its own investigation, files an indictment, holds court hearings and tries to reach a final decision. This process can be described as a 'race', which aims to achieve a first and final decision or the *ne bis in idem*. In a similar 'race' for the *ne bis in idem*, multiple jurisdictions try to be the first to prosecute the individual for the same offence.

Therefore, when a Party reaches a final decision, the other Parties cannot continue their procedures. This could lead to uncertainty while undermining the effectiveness of the legal system and mutual trust. In our opinion, this kind of 'race' should be avoided for several reasons: the possible risk that the defendant could be punished twice, unbalanced judgments (one decision may be more severe than the other), or the judgments would be different with regard to the question of criminal liability. We shall now examine what could set the

²⁶ Tasks and activities of the Prosecution Service of Hungary in 2015 (extract from the report to Parliament), available at: http://ugyveszeseg.hu/en/wp-content/uploads/2022/10/ogy_beszamolo_2015.pdf, at 23.

²⁷ Instruction 2/2020 (I.31.) of the Prosecutor General on the prosecutorial activities to Eurojust and to the European Judicial Network, which replaced Instruction 2/2014 (I.31.) of the Prosecutor General.

bar for further proceedings in the case of parallel proceedings between the EPPO and non-participating Member States or third countries.

The *ne bis in idem* principle is a fundamental principle in many national, European and international legal instruments. The *ne bis in idem* principle is addressed in Article 54 of the Convention Implementing the Schengen Agreement (hereinafter: CISA), Article 50 of the Charter of Fundamental Rights of the European Union and Article 4 of Protocol No. 7 to the European Convention on Human Rights.

Article 54 of the CISA defines the essence of the *ne bis in idem* principle, when saying ‘A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.’

In other words, the principle prohibits parallel proceedings and punishment of a criminal nature for the same acts and against the same person. Article 39 of the EPPO Regulation also contains the *ne bis in idem* principle as a basis for dismissal, which means that whenever a final decision is made for an act, it will create an obstacle for the EPPO to proceed further.

On the other hand, not every decision ending a case sets such a bar. The second paragraph of this Article provides that further investigations could be made on the basis of new facts, which were not known to the EPPO at the time the decision was made. In order to achieve *ne bis in idem*, the decision that is reached

has to be deemed to be final. We would like to present some examples from the case law of the Court of Justice of the European Union (hereinafter: CJEU) and the European Court of Human Rights (hereinafter: ECtHR) on what makes a decision final, which sets bar for further prosecution.

According to the *Zolotukhin* judgment (*Zolotukhin v. Russia*, Appl. no. 14939/03, judgment of 10 February 2009) of the ECtHR, ‘a decision is final if, according to the traditional expression, it has acquired the force of *res judicata*, which is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time limit to expire without availing themselves of them.’²⁸ *Res judicata* is traditionally achieved by a court decision, but we intend to examine whether *res judicata* could be achieved by an in-court or out-of-court decision.

The joint cases of *Gözütok and Brügge* (C-187/01 and C-385/01) may be a perfect example for examining whether a decision by a public prosecutor can achieve *res judicata*. In this case, the accused had an out-of-court settlement with the public prosecutors, in which the prosecutor obliged the perpetrators to perform certain acts as punishment for their unlawful conduct.

The CJEU held that the *ne bis in idem* principle ‘also applies to procedures whereby further prosecution is barred, such as the procedures at issue in the main actions, by which the Public Prosecutor of a Member State discontinues criminal proceedings brought in that State, without the involvement of a court, once the accused has fulfilled certain obligations

²⁸ Eurojust overview of Case law by the Court of Justice of the European Union on the principle of *ne bis in idem* in criminal matters, April 2020, available at <https://www.eurojust.europa.eu/publication/case-law-court-justice-european-union-principle-nebis-idem-criminal-matters-december-2021> at 24.

and, in particular, has paid a certain sum of money determined by the Public Prosecutor.’ In other words, a decision by the public prosecutor which closes the case and also contains penal provisions can set a bar for further proceedings.

A further question arises as to whether a closing decision which does not have penal provisions could create *ne bis in idem*. In the *Kossowski* case (C-486/14), the CJEU examined whether a decision of the public prosecutor ending criminal proceedings and finally closing the investigation procedure against a person, albeit with the possibility of reopening or cancelling it if previously unknown significant circumstances come to light, without any penalties being imposed, could be considered a final decision at the time when that procedure was closed without a detailed investigation having been carried out.

The CJEU held that, if a second prosecutor wanted to reopen a case that had been previously investigated, he would have to consider whether the previous investigation ‘constituted a final decision including a determination as to the merits of the case’ and whether the investigation undertaken was detailed. It would be possible to reopen the case if either or both criteria are not satisfied.²⁹ In paragraph 39 of the CJEU’s decision, the court notes that ‘Article 54 of the CISA is also applicable where an authority responsible for administering criminal justice in the national legal system concerned, such as the Kołobrzeg District Public Prosecutor’s Office, issues decisions definitively discontinuing criminal proceedings in a Member State although such decisions are adopted without the involvement of a court and do not take the form of a judicial decision.’ On this basis, it can

be concluded that, as a general rule, the decision of a public prosecution office can also create *ne bis in idem*. Another question that should be addressed in this context is whether the police could also make a decision that would activate *ne bis in idem*. In the joint cases of *OG and PI* (C-508/18 and C-82/19 PPU), the CJEU outlined in paragraph 50 of the decision that ministries or police services are separate from the administration of criminal justice; they are a part of the executive.

In this respect, it can be stated that the police cannot end a case in a way that would activate the *ne bis in idem* principle. Based on the above, it can be concluded that a parallel investigation without proper consultation between the Parties could result in a ‘race’ for a final decision. In this case, even a prosecutorial decision could finally block the other Party’s criminal procedure.

B. Consultation

In the foregoing section, we have examined the possible outcomes of parallel proceedings where there was no consultation between the Parties. In this section, we shall analyse the solutions that could surface if the EPPO and a non-participating Member State or a third country consult each other in the event of a jurisdictional conflict. According to our current knowledge, the EPPO has not developed a formalized procedure in this field to date. In our opinion, a similar procedure needs to be regulated, in which Eurojust coordination meetings could be a good model for regulating this matter.

1. Splitting the Case

If the EPPO and the non-participating Member State or the third country were to consult each other, two scenarios could arise, which would be based on whether

²⁹ Caianiello, ‘The decision to drop the case in the new EPPO’s regulation: Res Iudicata or transfer of competence’, 10 New Journal of European Criminal Law (NJECL) (2019) 186, at 195.

the criminal procedure can be split or not. Let us present these two scenarios. As already explained above, in the case of a conflict of jurisdiction, an EPPO coordination meeting could be the best forum to discuss who, what and how has to prosecute. In the optimal scenario, the acts, facts and offences can be divided, while the competence of each state can be clearly defined. In such a case, both the EPPO and the other party can exercise its jurisdiction and conduct its criminal procedure.

However, it may also be that the procedure cannot be split or the competence cannot be divided. In our opinion, a criminal offence that could perfectly demonstrate this problem is carousel fraud.³⁰ Several Member States are involved in such cases, and the facts and offences are usually inextricably linked, so the procedure cannot be split. Therefore, if both the EPPO and the non-participating Member State or the third country have jurisdiction over the case, a different solution is needed to resolve the conflict.

2. Transfer of Proceedings

If the procedure cannot be split, the EPPO and the non-participating Member State or the third country should assess whether the transfer of proceedings could be used. This procedure will be explained in greater detail below.

Transfer of criminal proceedings takes place when a state decides to refrain from pursuing a criminal procedure for an offence, because it believes that the administration of justice is better served in another state and, in turn, it requests the

other state, which accepts the request, to take over the responsibility for bringing the case to court. This, without doubt, presupposes close cooperation between states, because the states concerned need to assess which is best suited to conduct the investigation, prosecute the perpetrator and deliver a final judgment.

We have examined the relevant legal instruments in this context below.

The objective of the 1972 European Convention on the Transfer of Proceedings in Criminal Matters (hereinafter: 1972 Convention) was to regulate the details of the transfer of proceedings. This Convention provides the legal basis for the contracting states to transfer criminal proceedings to another contracting state as long as the act constituting the subject of the criminal procedure also constitutes a criminal offence in the other contracting state, in accordance with Article 7.

Even though the 1972 Convention thoroughly regulates the transfer of proceedings, the Convention was only ratified by 25 Member States of the Council of Europe, 13 of which are part of the European Union.³¹ The small number of ratifications of the 1972 Convention mean that EU Member States usually use Article 21 of the 1959 European Convention on Mutual Assistance in Criminal Matters (hereinafter: Strasbourg Convention) as the legal basis for transferring proceedings. However, the transfer of proceedings is not explicitly regulated in this Article, because Article 21 of the Strasbourg Convention stipulates that 'Information laid by one Contracting Party with a view to

³⁰ A carousel fraud starts with a company, commonly referred to as the missing trader, which purchases goods from a supplier in another EU Member State. This purchase is free of Value Added Tax (hereinafter VAT). The missing trader then sells the goods to a company which is located in the same EU Member State as the missing trader. This transaction means that the missing trader is required to pay VAT to the tax office. However, it does not pay this VAT and, disappears shortly after the transaction. The goods are then sold through multiple 'buffer' companies and, ultimately, a buffer company exports the goods to another EU Member State, and receives a VAT refund. The refunded VAT is the amount that is not paid by the missing trader.

³¹ The 13 EU Member States which have ratified the 1972 European Convention on the Transfer of Proceedings in Criminal Matters are Austria, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Latvia, Lithuania, Netherlands, Romania, Slovakia, Spain, Sweden. Available at <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=073> (As of 17 April of 2023).

proceedings in the courts of another Party shall be transmitted between the Ministries of Justice concerned.’

Article 6 (1) of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union (hereinafter: 2000 Mutual Assistance Convention) also serves as a legal basis for EU Member States, as it provides that ‘Any information laid by a Member State with a view to proceedings before the courts of another Member State within the meaning of Article 21 of the European Mutual Assistance Convention and Article 42 of the Benelux Treaty may be the subject of direct communications between the competent judicial authorities.’

The problem that arises from the use of the Strasbourg Convention and the 2000 Mutual Assistance Convention as the legal basis enabling the transfer of proceedings is that the specific details of the transfer are not regulated. This leads to legal uncertainty regarding several issues. How detailed should the procedural documentation transmitted to the other state be? The decision on whether to transfer a case or not could greatly depend on whether the state receives only a summary of the case, the important information or the whole case file.³²

Furthermore, there are no time limits in place regarding when the requested state should provide an answer to the request. And ultimately, there is no guiding principle on the grounds on which a state can accept or refuse the other state’s request to transfer the case. If a transfer of proceedings takes place, the clarification of which of the documents should be

translated and who will bear the costs of the translation is also a valid expectation.³³

For this reason, we believe that rather than relying on broad interpretations of conventions, a new EU legal instrument would be needed to regulate transfers of proceedings. It is worth noting that an EU-level legal instrument was already considered when a proposal for a Framework Decision was tabled back in 2009.³⁴ The idea was not received positively by a number of Member States, and the proposal was shelved after the adoption of the Lisbon Treaty.³⁵

3. Can the EPPO be a Party Related to Transfer of Proceedings?

After examining the current legal landscape regarding the transfer of proceedings, we would like to share the reasons as to why we feel the use of transfer of proceedings could be problematic for the EPPO.

As we have already pointed out, we believe that one of the possible solutions to positive conflicts of jurisdiction between the EPPO and the non-participating Member States or third countries could be the transfer of proceedings. However, in our opinion, the current legal situation does not allow for the direct transfer of criminal procedures between the two Parties for the following reasons.

To understand the problem, we need to analyse several issues. **Do Hungarian rules allow criminal proceedings to be transferred to the EPPO? Furthermore, can the EPPO transfer proceedings to a non-participating Member State or a third country?** Since Hungary has not ratified the 1972 Convention, Hungary usually refers to Article 21 of the Strasbourg Convention as the legal basis for the transfer of

32 Eurojust, Report on the Transfer of Proceedings in the European Union, January 2023.

33 de Jonge, ‘Transfer of criminal proceedings: from stumbling block to cornerstone of cooperation in criminal matters in the EU’, ERA Forum. (2020) 449, at 462.

34 Council Initiative OJ 2009 C 219/7.

35 de Jonge, *supra* note 33, at 454.

proceedings. Act XXXVIII of 1996 on International Legal Assistance in Criminal Matters (hereinafter: MLA Act), contains detailed rules of transfer of proceedings for Hungarian authorities. According to Section 37 (1) of the MLA Act 'Criminal proceedings may be surrendered if it is advisable for the authorities of a different state to conduct such proceedings.'

Furthermore, according to Section 43 of the same Act, 'Criminal proceedings by judicial authorities of a foreign state may be accepted upon request by the aforementioned authorities if the accused is a Hungarian citizen or an immigrant to Hungary who is not a Hungarian citizen.' It can be concluded from these provisions that transfers of proceedings are conducted between the judicial authorities of states (or Member States).

Since the EPPO is not a state, the question is whether it can be considered a judicial authority of a Member State. As already mentioned, Hungary, as a non-participating Member State, closely cooperates with the EPPO on the basis of the principle of sincere cooperation and the relevant EU legal instrument. However, if we take a closer look at the preconditions of the cooperation of a non-participating Member State or a third country with the EPPO, we realize that these preconditions are not satisfied.

The EPPO has already been operating for almost two years and it can be noticed that participating Member States have still not taken the necessary steps or made the required notifications to enable the EPPO to perform its tasks properly. In our opinion, this can lead to serious problems and the procedure of the EPPO could be compromised. First, we would like to draw attention to two provisions of the EPPO Regulation which oblige participating Member States to notify the EPPO as a competent authority with regard to

cooperation in criminal matters. As far as non-participating Member States are concerned, according to Article 105 (3) of the EPPO Regulation

'In the absence of a legal instrument relating to cooperation in criminal matters and surrender between the EPPO and the competent authorities of the Member States of the European Union which do not participate in the enhanced cooperation on the establishment of the EPPO, **the Member States shall notify the EPPO as a competent authority for the purpose of implementation of the applicable Union acts on judicial cooperation in criminal matters** in respect of cases falling within the competence of the EPPO, in their relations with Member States of the European Union which do not participate in the enhanced cooperation on the establishment of the EPPO.' With regard to third countries, Article 104 (4) provides 'the Member States shall, if permitted under the relevant multilateral international agreement and subject to the third country's acceptance, recognise and, where applicable, **notify the EPPO as a competent authority for the purpose of the implementation of multilateral international agreements on legal assistance in criminal matters** concluded by them, including, where necessary and possible, by way of an amendment to those agreements.'

However, the notifications show that, in connection with the Strasbourg

Convention, only 17 participating Member States have made such a declaration, which means that the remaining five participating Member States the EPPO cannot be considered judicial authorities for matters related to the Convention.³⁶

Based on the above, the answer to our first question of ‘do Hungarian rules allow for the transfer of criminal proceedings to the EPPO’ is yes (based on the principle of sincere cooperation and the broad interpretation of the term of judicial authority of a foreign state). Nevertheless, in the absence of appropriate notifications, even this positive approach fails in the transfer of proceedings in relation to some participating Member States. In our opinion, where appropriate notifications are not made, non participating Member States and third countries cannot enter into a consultation procedure with the EPPO on the possible transfer of proceedings.

The failure of a participating Member State to notify the EPPO as a judicial authority seriously impedes the operation of the EPPO. We would also like to point out that the lack of such a notification can also be identified as being applicable to other EU instruments. It should be pointed out that the application of the most frequently used EU criminal cooperation tool, the EIO, can also be problematic.

As mentioned above, EIOs received from the EPPO are always executed by Hungary on the basis of the principle of sincere cooperation and Article 1 (3) of the working arrangement. Nevertheless, the EIO must be issued or validated by a judicial authority of a Member State according to Article 1 (1) of the EIO Directive. Article

33 (1)(a) of the same Directive provides that the ‘Member State shall notify the Commission of the authority or authorities which, in accordance with its national law, are competent according to Article 2(c) and (d) when this Member State is the issuing State or the executing State.’ As explained above, the EPPO must be notified as a competent authority with regard to the EIO; otherwise it cannot be considered an issuing authority. The Presidency of the Council of the European Union (hereinafter: Council) published a report on 23 November 2020, which interpreted the previously mentioned provisions in a similar way:

‘When notified in accordance with Article 105 (3) of the EPPO Regulation, the EPPO may act as ‘issuing authority’ as defined in Article 2(c)(i) of the EIO Directive and as referred to in numerous provisions of the EIO Directive.’³⁷ This report also raises the attention of the participating Member States to updating their notification to the Commission according to Article 33 (3) of the EIO Directive. The General Secretariat of the Council published a document on 21 February 2023 on ‘Notifications in relation to Article 105 of the EPPO Regulation’. It can be concluded from this document that until then, only six participating Member States (Estonia, France, Germany, the Netherlands, Malta and Lithuania) notified the EPPO as a competent issuing and executing authority regarding the EIO.³⁸ Therefore, the EPPO cannot be considered a competent authority regarding the EIO in the majority of the participating Member States.

Our experience shows that Hungary has already received several EIOs on behalf

36 The EU Member States, which have not declared that the EPPO is a judicial authority with regard to the Strasbourg Convention are Croatia, Cyprus, Estonia, Greece and Spain (as of 17 April 2023).

37 Council of the European Union, Presidency report on the relations of the EPPO with the Member States which do not participate in the enhanced cooperation, 23/11/2020., available at: <https://data.consilium.europa.eu/doc/document/ST-13147-2020-REV-1/en/pdf>, at 8.

38 Council of the European Union, Notifications in relation to Article 105 of the EPPO Regulation, 21/02/2023., available at <https://data.consilium.europa.eu/doc/document/ST-10644-2021-REV-7/en/pdf>.

of the EPPO from a European (Delegated) Prosecutor, whose country had not notified the EPPO as a judicial authority. Even so, a non-participating Member State may execute the EIO. For example, Hungary executes EIOs based on the principle of sincere cooperation and, as mentioned above, Hungary accepts a broad interpretation of the Strasbourg Convention. In this way, the EIO can be considered a request for mutual assistance. Therefore the notification regarding the Strasbourg Convention and the 2000 Mutual Assistance Convention is accepted.

On the other hand, the question arises as to whether the evidence gathered via this EIO, which is issued by the EPPO on behalf of a non-notified authority of a participating Member State, and therefore one that is not competent, would be admissible during a trial if the defence counsel objects to the way the evidence was obtained. The defence counsel would ask whether the EPPO had the competence to issue an EIO, because the EIO Directive and the EPPO Regulation require the Member States to notify the EPPO as a competent authority. The use of this kind of evidence in court remains questionable.

We have presented that the cooperation between the EPPO and non-participating Member States and third countries currently cannot function properly without the appropriate notifications. For this reason, the legal background of the operation of the EPPO is completely fragmented which could result in the evidence gathered by the EPPO possibly being compromised. The only way to overcome this problem is to further encourage the participating Member States to take the necessary steps to notify the EPPO with regard to international and EU legal instruments. Otherwise, the main goal of the EPPO, the protection of the EU's financial interests, cannot be guaranteed.

After this brief digression, we return to our second question of the chapter, namely 'can the EPPO transfer proceedings to a non-participating Member State or a third country?' First, the EPPO Regulation does not contain provisions regarding the transfer of proceedings to a non-participating Member State or a third country and so there is no clear indication that the EPPO is able to transfer criminal proceedings to another state which is better positioned to prosecute the case.

As explained above, based on the legality principle, the EPPO must proceed if a case falls within its competence. Once the EPPO recognizes that it has no more competence over the case, according to Article 34 of the EPPO Regulation, the case must be referred to the competent national authority. The question arises as to whether the EPPO can decide to transfer criminal proceedings to a non-participating Member State or a third country if it still has jurisdiction in the case? Analysing the provisions of the EPPO Regulation, it appears that the EPPO has to refer the case back to the Member State if it considers that another state is better positioned for prosecution.

In short, in our opinion, the EPPO is not entitled to transfer a criminal procedure to another state where the prosecution could be faster and easier. For the above reasons, we believe that the transfer of proceedings is currently a two-step procedure.

Hungary can transfer a case to the competent participating Member State, after which the latter can transfer it to the EPPO. If the EPPO wants to transfer a case to Hungary, the EPPO can transfer it to a Member State, which could transfer it to Hungary. This is a time-consuming process, and is neither ideal nor properly regulated. We believe every Member State should make the required notification in connection with the Strasbourg Convention and the other EU legal instruments,

because the current legislation raises issues such as the use of evidence in criminal proceedings.

6. CLOSING REMARKS

As discussed in this paper, the protection of the EU's financial interests has developed over the last few decades, resulting in the establishment of the EPPO based on enhanced cooperation. Even though not every Member State has joined it, the EPPO has changed the EU criminal law cooperation at its core.

The main issue we wanted to address is that the EPPO would be able to exercise its jurisdiction in cases where a non-participating Member State or a third country also has jurisdiction, which leads to conflicts of jurisdiction and parallel proceedings. We have assessed in this paper that the first step to resolving conflicts of jurisdiction is to become aware that parallel proceedings regarding the same criminal offence exist. This could be easily achieved in the EU if the Member States send their formalized notification to Eurojust in accordance with the Eurojust Regulation.

After the recognition of parallel proceedings, we recommend the EPPO and the non-participating Member State or third country to hold consultations, preferably in the form of a consultation procedure. The consultations should lead to the examination of whether the procedure can be split. Parties should also examine the transfer of the proceedings as a feasible option. However, we do feel that the lack of declaration of the EPPO as being a judicial authority by all the participating

the same applies to the EIO Directive (and other EU legal instruments), so the

admissibility of evidence obtained through EIOs by the EPPO and used before a participating Member State's criminal court is questionable. Even so, it is our firm belief that the adoption of an EU-level law regulating the transfer of procedures cannot be delayed any longer. Fortunately, there is hope that such an EU legal instrument will be adopted in the foreseeable future, since a new initiative started in 2021.³⁹

As the closing thoughts of our paper, we would like to present some recommendations as to the content of this future legal instrument related to the transfer of proceedings. In our opinion, just as the other legal instruments regarding freedom, security and justice, it should be based on the principle of mutual recognition.

Furthermore, we feel its scope should not be limited: the transfer of proceedings from traffic offences to terrorism and PIF crimes could all contribute to the efficient administration of justice throughout the European Union. It would be important for the legal instrument to contain an exhaustive and limited list of grounds for refusal. Lastly, special attention should be paid to the relationship between the EPPO and the non-participating Member States. This will ensure that the transfer of proceedings could provide a solution to conflicts of jurisdiction within the European Union.

Member States could be an obstacle in the transfer of the proceedings. Similarly,

39 C.-C. Cirlig, 'Legislative initiative on transfer of criminal proceedings' in A New Push for European Democracy 20/03/2023, available at <https://www.europarl.europa.eu/legislative-train/theme-a-new-push-for-european-democracy/file-new-legislative-file-transfer-of-criminal-proceedings-njk8ulh7>.

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CONFISCATION DREAMIN' PROPOSAL FOR A COMMON EUROPEAN MODEL OF NON- CONVICTION BASED CONFISCATION

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The path towards a common European model of non-conviction based confiscation (NCBC) is currently underway. Starting from the reasons that make a greater European commitment to the fight against illicit assets urgent, this paper analyses the progressive rise – first in national law and then, shyly, in European law (Directive 2014/42/EU) – of the NCBC instrument, evaluated by European states and courts as a promising evolution of the current (insufficient) conviction based confiscation systems, which are capable of combining the efficiency of the response to crime at the economic level with the need to ensure a high level of guarantees.

The objective of this paper is to develop a draft common European NCBC model based on six pillars, which could serve as a basis for a productive discussion among states and within the European institutions, which – furthermore – are currently analysing the Commission's recent proposals to innovate European confiscation law. Indeed, we believe the harmonization of European law, the fight against criminal financing and the respect of guarantees are objectives that can only be fully achieved with a common NCBC model adopted by each Member State.

This is the reason why we drafted a possible model in accordance with the guidelines of the European Court of Justice and the European Court of Human Rights, as an exclusively restorative (not punitive) instrument intended to be applied to serious and typically lucrative crimes on the basis of autonomous evidentiary and procedural rules for facilitating the collection of evidence by law enforcement authorities, while enabling the given person to fully defend his or her right to property, in the perspective of a confiscation with subsidiary application and reliable mechanisms for mutual recognition and enforcement among Member States.

This paper is also a wish that our confiscation dream may soon become reality.

KEYWORDS:

CRIMINAL PROCEEDINGS | CRIME MUST NOT PAY | CONFISCATION | NON-CONVICTION BASED
CONFISCATION | COMMON MODEL | EFFECTIVENESS | GUARANTEES | HARMONIZATION



All the leaves are brown and the sky is grey
California Dreamin',
The Mamas & The Papas (1965)

INTRODUCTION

'Confiscation Dreaming'

We could have said it with Martin Luther King ('We have a dream'), but it seemed too much to bother certain characters from history. So, we chose a more modest version, taken from the famous song by The Mamas & The Papas, California Dreamin'. We will indeed illustrate a dream of ours on the following pages, not a utopia, but a very concrete dream: we are about to present the idea of a European model of non-conviction based confiscation.

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8. Appendix

‘CRIME MUST NOT PAY (...)’ BUT IT STILL DOES!

Ensuring that crime, especially organized crime, is not profitable must be (and is) a priority for European action in the near future. In fact, an effective response to organized criminality can only be based on attacking criminal finance, since it is only by reducing its economic attractiveness that it will be possible to combat (and even prevent) organized crime, which is a profitable but also extremely costly crime due to its increasing structural complexity and operational scale.¹

In its report of 6 June 2020,² the European Commission outlines the panorama of the infiltration of organized crime into the economic circuit, stating that (i) illicit assets generated by organized crime amount to approximately €110 billion, i.e. about 1% of the EU’s GDP,³ (ii) about 5,000 criminal organizations are operating in the EU, having members from more than 180 countries,⁴ (iii) the infiltration of the economy by organized criminality is widespread in all Member States, with different sectors and players involved depending on the country.⁵

Despite the efforts already made at all levels, the results achieved so far in the economic fight against organized crime are clearly ‘not in line with the expectations

of law enforcement authorities or of the public,⁶ with negative consequences for the credibility of national and European institutions.

Although demoralizing, the truth is that, in Europe, *crime still pays*⁷

2. THE CRISIS OF CONVICTION-BASED CONFISCATION IN THE FIGHT AGAINST ORGANIZED CRIME

The search for the causes of this inefficiency in the fight against organized criminality has therefore attracted the attention of the European institutions, which have identified the main reason for this as the inadequacy of the traditional instruments for confiscating illicit assets based on the need for a prior criminal conviction, which may be lacking – even if the existence of illicit assets is obvious – for several reasons, including (in particular) the difficulty of establishing a specific link between the availability of certain sums or goods and a specific criminal act.⁸

Speaking in the House of Lords on 15 June 2002, Lord Zac Goldsmith, arguing for the introduction of a form of non-conviction based confiscation into the English legal system (*civil recovery*: see below, 4.E), described the reasons for the crisis of conviction based confiscation as the main

1 ‘In order to detect criminal activity, deter crime and prevent its infiltration into the legitimate economy and society, the fight against illicit financial flows is crucial’: Eurojust – Italian Desk, *Relazione del Membro Nazionale* (2022), at 29, translation from Italian by the authors, available at <https://www.sistemapenale.it/it/documenti/relazione-attivita-deskitaliano-eurojust-anno-2022>.

2 Commission Report COM(2020) 217 final, *Asset Recovery and Confiscation. Ensuring that Crime Does not Pay*, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0217>.

3 Transcrime – Joint Research Centre on Innovation and Crime, *From Illegal Markets to Legitimate Businesses. The Portfolio of Organised Crime in Europe* (2015), at 1, available at <https://www.transcrime.it/en/publications/from-illegalmarkets-to-legitimate-businesses-the-portfolio-of-organised-crime-in-europe/>.

4 Europol, *European Union Serious and Organised Crime Threat Assessment. Crime in the Age of Technology* (2017), at 14, available at <https://www.europol.europa.eu/publications-events/main-reports/european-union-serious-and-organised-crime-threat-assessment-2017>.

5 Transcrime – Joint Research Centre on Innovation and Crime, *Mapping the Risk of Serious and Organised Crime Infiltration in Europe. Final Report of the MORE Project* (2018), at 222, available at https://www.transcrime.it/wpcontent/uploads/2018/12/MORE_FinalReport.pdf.

6 Commission Report COM(2020) 217 final, *supra* note 2, at 16 (emphasis added). The Commission emphasizes that ‘only about 2% of criminal proceeds are frozen and 1% confiscated in the EU’ (at 2).

7 Eurojust – Italian Desk, *supra* note 1, at 29 (emphasis added).

8 The traditional tool for confiscating criminal profits is post-conviction confiscation, i.e. a ‘court order’ issued ‘after the crime itself has been proven in a criminal court to the criminal standard’: Council of Europe – Economic Crime and Cooperation Division, *The Use of Non-Conviction Based Seizure and Confiscation* (2020), at 6, available at <https://rm.coe.int/the-use-of-non-conviction-based-seizure-and-confiscation-2020/1680a0b9d3>.

measure for dissipating illicit wealth as follows:

‘Someone at the centre of a criminal organisation may succeed in distancing himself sufficiently from the criminal acts themselves so that there is not sufficient evidence to demonstrate actual criminal participation on his part.’ Nevertheless, ‘there may be strong evidence that the luxury house (...), the yachts and the fast motor cars have not been acquired by any lawful activity because none is apparent, (...) if, in a criminal trial, the prosecution cannot prove that the person before the court is in fact guilty (...), then he is entitled to be acquitted’, yet it may be ‘as plain as a pikestaff that his money has been acquired as the proceeds of crime.’⁹

The European Commission itself recently stated that the non-conviction based confiscation tool has been developed by national jurisdictions precisely as a common reaction to the common problem of the inefficiency of traditional forms of confiscation based on previous criminal convictions.

‘Traditional – conviction based – confiscation did not equip law enforcement authorities and judicial authorities with the necessary and effective tools that enable the confiscation of a satisfactory percentage of the proceeds of organized criminal activity.’¹⁰

3. A COMMON SOLUTION TO A COMMON PROBLEM: NON-CONVICTION BASED CONFISCATION

The solution to the criticisms of the current system of confiscation is now widely seen as the adoption of a general non-conviction based confiscation (hereinafter: NCBC) regime at EU level. Indeed, for several years, European Institutions have been particularly interested in analysing national NCBC models as a means of overcoming the flaws of traditional postconviction confiscation and making significant progress against criminal economies.

Following an analysis launched in 2014, the European Commission recently concluded that ‘the introduction of further measures in the area of non-conviction based confiscation [i.e. further common rules] is feasible and has potential benefits to increase the level of freezing and confiscation of criminal assets.’¹¹

Even the Council of Europe, while noting the absence (with some limited exceptions: see below, 5.A) of common European rules on NCBC, considers non-conviction based confiscation to be highly attractive as an effective tool in the fight against illicit wealth (as evidenced by its increasing use at national level, even in the absence of a European framework), mainly due to some of its interesting features, such as a less stringent standard of proof than that required in criminal cases (BARD standard), a more favourable distribution of the burden of proof for the investigating authorities and the possibility of using a less complex application procedure than

⁹ Volume 683 of the House of Lords Parliamentary Debates, 25 June 2002, columns 1270-1271, available at https://publications.parliament.uk/pa/ld200102/ldhansrd/vo020625/text/20625-19.htm#column_1269.

¹⁰ Commission Report SWD(2019) 1050 final, *Analysis of Non-Conviction Based Confiscation Measures in the European Union* (2019), at 2, available at <https://data.consilium.europa.eu/doc/document/ST-8627-2019-INIT/en/pdf>. This Commission Report was a response to a specific joint question from the co-legislators on the possible benefits of introducing non-conviction based confiscation models in the European landscape: Council doc. 7329/1/14, Rev. 1 Add. 1, 31 March 2014.

¹¹ Commission Report COM(2020) 217 final, *supra* note 2, at 16 (emphasis added).

criminal proceedings.¹²

Already widely used at national level, NCBC is now seen by both ‘small’ and ‘big’ Europe as the most viable tool to fulfil the common imperative that *crime must not pay*.

4. NCBC MODELS IN THE NATIONAL LEGAL SYSTEMS

When the NCBC model begins to attract the attention of European legislators, it is already widespread at the level of national legislation in Member States (and outside the Union). In fact, the approach of European Institutions to this instrument has been based on the study of national models. Recurring patterns, differences and critiques have been identified as a result of their analysis and comparison.

Indeed, in the 2019 Report, the European Commission notes that most Member States (16 out of 27) have advanced NCBC systems. However, although loosely based on certain general models, these systems are highly heterogeneous.¹³ The spread of NCBC models among Member States (well beyond the limited obligations under the 2014 Directive: see below, 5.A) has also been aided by the case law of the ECtHR, which has repeatedly held that national NCBC regimes, even if they are *far-reaching and solid*, are not abstractly incompatible with the provisions of the ECHR:¹⁴ ‘the cases reveal that, as a matter of principle, an NCB confiscation system can be introduced and used (...) in a manner that aligns with the Convention’¹⁵ and that prevents it from turning into

a *de facto* expropriation.¹⁶ Therefore, when designing the features of a future European NCBC regime, the fundamental aspects of some national NCBC models, both European and non-European, need to be analysed.

A. Italy

The Italian *confisca di prevenzione*, introduced in 1982 and now subject to Article 16 *et seq.* of Anti-Mafia Code (i) is a system based on the fact that the person belongs to one of the legally defined social danger categories (e.g. members of Mafia-type or terrorist organizations; persons ‘living off the proceeds of crime’; even stalkers and domestic abusers); (ii) relies on a debated standard of proof, but certainly lower than the BARD standard; (iii) the confiscation affects the availability (*de jure* or even only *de facto*) of assets which are disproportionate to the person’s declared income (or which are otherwise suspected to be of illicit origin), even by equivalent, provided that these assets were acquired while the person belonged to the socially dangerous category (time-correlation requirement) and that the person cannot prove the legitimate origin of the goods; (iv) the enforcement procedure is judicial in nature and constitutes an autonomous procedure with its own rules, which, on the whole, offer fewer guarantees than those applicable to criminal proceedings.

¹² Council of Europe – Economic Crime and Cooperation Division, *supra* note 8, at 14 *et seq.* and 33.

¹³ Commission Report SWD(2019) 1050 final, *supra* note 10, at 6.

¹⁴ Commission Report COM(2020) 217 final, *supra* note 2, at 14.

¹⁵ Council of Europe – Economic Crime and Cooperation Division, *supra* note 8, at 19.

¹⁶ The ECtHR emphasized that, in order to determine whether there has been a deprivation of ‘possession’, there is a need not only to examine the existence of a formal expropriation or dispossession, but also to look behind appearances and investigate the reality of the situation that is subject to the complaint (among others, ECtHR, *Schembri and Others v. Malta*, Appl. no. 42583/06, Judgment of 28 September 2010; ECtHR, *Brumărescu v. Romania*, Appl. no. 28342/95, Judgment of 28 October 1999). In a case concerning the continuing detention of gold coins confiscated before Protocol No. 1 entered into force, the Court considers that the loss of the entire ability to use the property, together with the failure of the attempts made to remedy the situation, entailed sufficiently serious consequences for the applicant to constitute a *de facto* confiscation (ECtHR, *Vasilescu v. Romania*, Appl. no. 53/1997, Judgment of 22 May 1998). All ECtHR decisions are available at <http://hudoc.echr.coe.int/>.

B. Germany

The German *selbständige Einziehung* (§ 76a, para. 4 StGB): (i) is a system based on two conditions: the commitment of one of the serious predicate offences listed therein (drugs, terrorism, organized crime, child pornography, tax offences, etc.) and the illicit origin of assets found among the person's possessions (regardless of whether or not there is a link between these assets and the predicate offence) and the illicit origin of the assets found among the person's possessions, which have been frozen in the respective criminal proceedings; (ii) these conditions are subject to different standards of proof: the commitment of the predicate offence can be established on the basis of suspicion, while the origin of the confiscated assets from a previous criminal activity is established on the basis of a criminal standard of proof (beyond reasonable doubt);¹⁷ (iii) only assets, the illicit origin of which is proven, are confiscated if the criminal origin can also be established on the basis of a 'gross imbalance [grobes Missverhältnis] between the value of the object and the legitimate income of the person concerned';¹⁸ independent seizure is also applicable by equivalence;¹⁹ (iv) the application of *selbständige Einziehung* constitutes an autonomous procedure that follows the criminal procedure.

C. Spain and France

In Spain, the *decomiso sin sentencia de condena* (Article 127 ter *Código penal*, added in 2015) (i) is a much more limited preventive confiscation regime than that envisaged in Italy or Germany: it is not an autonomous system designed to deal

with disproportionate wealth or assets connected to the commitment of a crime, but rather an instrument designed to be applied only in very specific situations (sickness, death or abscondence of a given person; prescription of the offence, etc.), following the model specified in the 2014 Directive (see below, 5.A); (ii) it can only be used against people who have been formally accused and on the reasonable suspicion that they have committed a criminal act (lower standard than BARD); (iii) the object of non-conviction confiscation is what would have been the object of post-conviction seizure under Articles 127 and 127 bis (which also provide for seizure by equivalent) had the criminal proceedings taken place; (iv) the procedural forms follow the civil procedures (so that failing to contest is tantamount to accepting confiscation), but the judge is a criminal judge.²⁰

In France, as in Spain, the NCBC instrument does not go beyond the minimum required by the 2014 Directive, as it is only envisaged in cases of sickness or abscondence (or death) of the person.²¹

D. Latvia

In Latvia, a 2017 reform (as part of the general anti-money laundering restructuring of the financial system) introduced an NCBC system (*mantas īpašās konfiskācija*: special confiscation of property) in Chapter VIII-2, Sections 70-10 *et seq.* of the General Part of Criminal Law. Of particular interest is the analysis of Section 70-11, entitled 'Confiscation of Criminally Acquired Property' (hereinafter: CAP): (i) this is a mixed NCBC system,

17 T. Bettels, 'La Repressione della Criminalità Organizzata in Germania. Recenti Sviluppi Sostanziali e Processuali', in S. Orlando, T. Bettels (ed.), *I Traffici Illeciti nel Mediterraneo. Persone, Stupefacenti, Tabacco. Report Germania* (2019), at 132, available at <https://www.unipa.it/dipartimenti/di.gi./content/documenti/nesmes-pmi/report-germania.pdf>; A. Costantini, *La Confisca nel Diritto di Prevenzione. Ibridazione di Modelli e Limiti di Legittimità* (2022), at 279.

18 § 437 StPO ('Special provisions governing independent confiscation proceedings'). See T. Bettels, *supra* note 17, 134.

19 As follows from § 76 StGB, which is a general provision on confiscation by equivalent assets, as well as from § 76b, para. 1 StGB: 'The limitation period for (...) the independent confiscation of the proceeds of crime or the value of the proceeds of crime pursuant to section ... 76a is 30 years' (emphasis added; translation from German by the authors).

20 J. Nieva Fenoll, 'El Procedimiento de Decomiso Autónomo. En especial, sus Problemas Probatorios', *Diario La Ley*, no. 8601, Sección Doctrina, Ref. D-322 (2015), at 6.

21 Commission Report SWD(2019) 1050 final, *supra* note 10, at 13 and 18.

providing for both an *in rem* and an *in personam* measure: first, any economic benefit obtained by a person from the commitment of an offence is defined as CAP (and may therefore be seized), in accordance with the model of the NCBC *in rem* (paras. 1 and 1-1); CAP is also considered to be any property, the value of which does not correspond to the lawful income of the person who owns it, provided that the given person committed (according to the standard of proof to be discussed immediately) crimes for profit or terrorist crimes, or is a member of a criminal organization and provided that the given person cannot prove its lawful origin; (ii) in 2019, the Latvian legislator specifically defined (in Section 124 of Criminal Procedures Law) the standard of proof to be applied in determining the nature of property: ‘in proceedings concerning criminally acquired property’, the requirements related to the nature of given property being criminally acquired ‘shall be considered proven if there are grounds for recognizing (...) that a property is most likely of criminal rather than lawful origin’. Therefore, the Latvian legislator has also adopted a more lenient standard of proof regarding NCBC; (iii) the CAP may also be confiscated by equivalence, as expressly provided for in Section 70-14; (iv) the procedure for enforcing the confiscation of the CAP is judicial and is governed by specific provisions of the Criminal Procedures Law (Chapter 59, Sections 626 *et seq.*).

E. United Kingdom and USA

In the UK and USA, NCBC has adopted the name of *civil recovery* (UK) and *civil*

forfeiture (USA), an instrument regulated in a similar way in both countries (at least in terms of the general features of interest here), which suggests that the two systems should be examined together. In terms of legislative sources, the English *civil recovery* is governed by Part 5 of the Proceeds of Crime Act 2002, Sections 240 *et seq.* In the U.S. system, by contrast, there is no single general federal provision on *civil forfeiture*, but rather as many provisions as there are offences, for which the legislature (federal or state) intended to provide for NCBC forfeiture.²²

Civil recovery/forfeiture (i) is an *in rem* system designed to target assets linked to criminal activity, even if the offence from which the property originates is not specified (UK), or assets connected with the commitment of one of the predicate offences for which the federal or state system envisages such a measure, although it should be noted that the list has been extended over the years to include most federal offences and many state offences (USA);²³ (ii) *the balance of probabilities* (UK)²⁴ or *the preponderance of evidence* (USA)²⁵ standard is used to prove criminal activity and a connection to the property; (iii) the specific assets that are proved to have been connected the criminal activity are seized without the possibility of confiscation by equivalence (UK)²⁶ or even through the seizure of substitute assets, albeit only in certain limited cases (USA);²⁷ (iv) the procedure follows the forms of the civil trial, but in the peculiar form of the ‘trial against the estate’, based on the theory of guilty property (or personification theory),

22 D.R. Edgeworth, *Asset Forfeiture. Practice and Procedures in State and Federal Courts* (2014); S. Finocchiaro, *Confisca di tenibile di Confisca senza Condanna* (2022), at 274–275.

23 S. Finocchiaro, *supra* note 22, at 274. S. D. Cassella, ‘An Overview of Asset Forfeiture in the United States’, in S.N.M Young (ed.), *Civil Forfeiture of Criminal Property. Legal Measures for Targeting the Proceeds of Crimes* (2009), at 28.

24 Commission Report SWD(2019) 1050 final, *supra* note 10, at 17.

25 See, *ex multis*, D. Pimentel, ‘Forfeitures Revisited: Bringing Principle to Practice in Federal Court’, 13 *Nevada Law Journal* (2012) 1, at 16; S. Finocchiaro, *supra* note 22, at 294–296.

26 A. Costantini, *supra* note 17, at 284.

27 See, *inter alia*, T. G. Reed, ‘On the Importance of Being Civil: Constitutional Limitations on *Civil Forfeiture*’, 39 *New York Law School Law Review* (1994) 255, at 276; S. Finocchiaro, *supra* note 22, at 285.

a contrivance that allows the state to confront the property that is subject to seizure in court (with the resultant curious names of the proceedings: *United States v. One 1992 Ford Mustang GT or United States v. \$ 577,993.89, More or Less, in U.S. Funds*).²⁸

F. Conclusion

The above analysis shows that the development of national NCBC systems – both within and outside the EU – has not followed clear patterns, giving rise to instruments and disciplines specifically tailored to the particularities (both social and political) of each state.

‘A wider review of NCB recovery around the world further confirms that there is not a one size fits all approach to capturing ill-gotten gains’; models (...), in both common law and civil law jurisdictions, are continuing to evolve at varying paces’.²⁹

5. THE MINIMUM MODEL ACCORDING TO DIRECTIVE 2014/42/EU AND THE NEW 2022 PROPOSAL

A. Inadequacy of the European Regulatory Framework for NCB Confiscation

Despite the spread of NCBC systems at national level, the EU has not yet adopted a general instrument for confiscation that is not based on a conviction, as it has always maintained – in its legislation on confiscation – a marked attitude of self-restraint. The EU’s interest in confiscation tools in general has been evident since the adoption in 1998 of the Joint Action 98/699/JHA on money laundering and confiscation of instrumentalities and proceeds from crime, which was later

replaced – in 2001 – by Framework Decision 2001/500/JHA, followed by Framework Decisions 2003/577/JHA, 2005/212/JHA and 2006/783/JHA. As the legal framework set out in these instruments was not satisfactory, the European Parliament called on the Commission to submit a proposal for a Directive containing rules on the ‘effective use of instruments such as (...) non-conviction based confiscation’.³⁰ This request soon resulted in the proposal of 12 March 2012, which then led to the adoption of Directive 2014/42/EU.

As anticipated, the Directive does not require Member States to adopt a general model of NCBC. As the proposed amendments on this point (which would have introduced a general system of NCBC *in rem*) were not adopted, the Directive – while leaving Member States the freedom to adopt other, more effective forms of confiscation – provides for NCBC of instrumentalities and profits from crime only in cases where the suspect is unable to be prosecuted because of illness or flight, and provided that ‘criminal proceedings have been initiated regarding a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, and such proceedings could have led to a criminal conviction if the suspected or accused person had been able to stand trial’ (Article 4(2) of Directive 2014/42/EU).

It can therefore be said that, at present, the European legal system gives NCB confiscation a very marginal role, limited to exceptional cases, in sharp contrast to the widespread (albeit heterogeneous) use of NCBC at national level.

28 S. Finocchiaro, *supra* note 22, at 266; S. D. Cassella, ‘Asset Forfeiture in the United States’ (2013), at 15.

29 Council of Europe – Economic Crime and Cooperation Division, *supra* note 8, at 15 (emphasis added).

30 European Parliament, *Resolution of 25 October 2011 on organised crime in the European Union* (2010/2309(INI)), at point 8 (emphasis added).

However, the continued attraction of the European legal system for NCBC measures can still be seen in the subsequent Regulation (EU) 2018/1085 on the mutual recognition of all freezing and confiscation orders issued in connection with a criminal offence. Indeed, the Regulation expressly requires Member States to recognize all ‘confiscation orders’ issued by the authorities of other Member States, on condition that they are ‘issued in the framework of proceedings in criminal matters’, and explicitly provides that mutual recognition should include not only ‘orders covered by Directive 2014/42/EU’, but also ‘other types of orders issued without a final conviction’ (Recital 13, emphasis added): in fact, ‘while such [NCBC] orders may not exist in the legal system of a Member State [as the 2014 Directive only provides for exceptional cases of NCBC], the Member State concerned should be able to recognize and enforce such an order issued by another Member State’ (Recital 13).

B. Reasons for the EU’s Uncertainty about Adopting a Common Mandatory NCBC Model

To summarize: (i) existing instruments for fighting organized economic crime have not led to satisfactory results; (ii) the majority of Member States, as well as many non-EU countries, have developed heterogeneous and effective forms of NCBC to fight criminal infiltration of the economy; (iii) the ECtHR itself has been largely lenient towards national NCBC models that have been brought to its attention; (iv) even so, European legislation is currently at a standstill and does not dare to outline a single NCBC model at European level in a binding manner.

The reasons for this stalemate lie in the understandable questions and perplexity about the legal sustainability of these powerful tools, which can have a very serious impact on personal assets without the need for a conviction.³¹

‘The absence of a criminal conviction raises issues relating to the right to fair trial, effective judicial remedy, the presumption of innocence as well as the right to property.’³²

C. The Innovative Perspective Offered by the 2022 Proposal for a New Directive

However, a step has recently been taken to end this stalemate. The Commission’s proposal for the adoption of a new directive on asset recovery and confiscation brought the issue of NCBC and the need for further European legislation in this area back to the centre of the European debate in May 2022.³³ Indeed, the text of the new draft directive contains two provisions of particular interest.

On the one hand, Article 15 (entitled ‘Confiscation not based on a conviction’), which is a further development of what is currently provided for in Article 4(2) of Directive 2014/42/EU, should be considered. The new discipline includes the following features: (i) the requirement for criminal proceedings to be initiated is maintained; (ii) a number of hypotheses for the applicability of the NCBC, which are not included in the current Directive, are being added (in particular, the death of the suspect, his immunity, the award of amnesty and, albeit in restricted cases, the expiration of the time limit prescribed

³¹ These concerns, implicit in the cautious evolution of European legislation, are also stated explicitly in the Commission’s 2019 report, which defines *respect for fundamental rights* as the real ‘key challenge for the introduction of nonconviction based confiscation legislation’: Commission Report SWD(2019) 1050 final, *supra* note 10, at 8.

³² Commission Report SWD(2019) 1050 final, *supra* note 10, at 8.

³³ Commission Proposal COM/2022/245 final, dated 25 May 2022, available at <https://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=CELEX%3A52022PC0245>.

by national law); (iii) the applicable standard of proof is softened by replacing the current rule ('such proceedings could have led to a criminal conviction', which means something very similar to the BARD rule) with a more lenient rule ('as long as the national court is satisfied that all the elements of the offence are present' and that a connection is established between the given property and the offence). On the other hand, the main innovation lies in Article 16, which introduces a new hypothesis of NCBC ('confiscation of unexplained wealth linked to criminal activities'), marking an ambitious step forward in EU legislation. In fact, this new model of confiscation offers some interesting features: i) one of the criminal offences referred to in Article 2 of the Proposal must have been 'committed in the framework of a criminal organization' and the freezing of the given assets has been ordered; (ii) it is subsidiary to the conviction-based confiscation and to the NCBC provided for in Article 15; (iii) the standard of proof is – as in Article 15 – lower than that required for a criminal conviction, although it is still not well clarified: according to the proposed provision, national courts must be 'satisfied' that the frozen property comes from criminal offences committed within the framework of a criminal organization; (iv) a connection can be established between the property and the offence (which is also required under this NCBC hypothesis), in particular by assessing the 'substantial disproportion' between the value of the property that is subject to the proceedings and the 'legitimate income' of the given person, according to an evidentiary mechanism closely resembling that already employed in the German NCBC legislation and based on the 'gross imbalance' criterion (see *supra*, 4.E).

In its first reading (May 2023), after considering the opinions of three different committees, the European Parliament proposed – with regard to both forms of NCBC (Articles 15 and 16) – that the burden of proof regarding the commitment of the criminal offence and the connection between the crime and the assets that are subject to the proceedings 'shall lie with the prosecution'.³⁴

When adopting the General Approach (June 2023) that will govern the negotiations with the European Parliament, the Council proposed some interesting changes:³⁵ (i) with regard to the NCBC provided for in Article 15, on the one hand, it proposed a general change in the situations on which the measure can be based, eliminating certain hypotheses (immunity and amnesty) but extending others (the expiration of the limitation periods prescribed by national law) and, on the other hand, it proposed a return to the previous standard of proof ('such proceedings could have led to a criminal conviction'); (ii) with respect to the NCBC in Article 16, the Council's proposal of amendments includes these main aspects: a) the conditions for the applicability of the measure regarding subsidiarity (with respect to other cases of confiscation) and the need for the given property to be previously frozen are made optional and are therefore left to the discretion of the Member States; b) a reference is added to the requirement that the confiscation does not prejudice the rights of bona fide third parties; c) the circumstances to be taken into account include the fact that there is no plausible legal source of the property and that the person is connected to people who are linked to a criminal organization.

34 European Parliament Report (First Reading) A9-0199/2023 – 2022/0167(COD), dated 26 May 2023, available at: https://www.europarl.europa.eu/doceo/document/A-9-2023-0199_EN.html.

35 35 Council of the European Union General Approach, document 10347/23, dated 9 June 2023, available at: https://eurlex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_10347_2023_INIT.

In conclusion, the Commission's proposal for a new directive contains some important innovations regarding NCBC; it should also be noted that the relevant initiatives taken so far by the European Parliament and the Council demonstrate the valuable attention of the European institutions to the most controversial aspects of the discipline associated with this particular form of confiscation.

6. DREAMING (NON-CONVICTION BASED) CONFISCATION: OUR SIX-POINT EUROPEAN NCBC MODEL

Since this scenario is not entirely reassuring and, given the need to take account of the legitimate concerns that hamper the process of European harmonization in such a key area, we have decided to present the non-conviction based confiscation model of our dreams.

We believe the time has come to develop the essential features of an NCBC that could be a common model in Europe and which can truly pursue the common imperative of ensuring that 'crime does not pay'. Such a model should balance the legitimate need for the instrument to be effective in the fight against economic crime at a transnational level and the need to respect fundamental human rights. To achieve this balance, our dream confiscation should rest on the following six pillars.

A. Restorative (rather than Punitive) Nature

1. Function

The backbone of our NCBC model is the identification of the precise function that this measure should serve. Three possibilities can be seen abstractly: (i) preventive function,³⁶ (ii) punitive function,³⁷ (iii) restorative function.³⁸ The measure could, at least partially, fulfil all three of these functions simultaneously, but it is important to determine the main one, because only this determines the legal nature of the confiscation. For example: imprisonment also has a preventive function, but its main function, and therefore its nature, is punitive. Damage compensation may also serve a punitive purpose, but its main function is restorative.

What about confiscation?

The ECtHR has always held that the Italian NCBC is of a preventive nature. It reached this conclusion not so much by the analytical application of the Engel criteria, but by focusing exclusively on its usefulness in preventing the commitment of serious crimes.³⁹ In particular, the Court notes that confiscation is intended 'to prevent the unlawful use, in a way dangerous to society, of possessions whose lawful origin has not been established: this measure would form part of a "crime-prevention policy".'

36 ECtHR, *Boccellari and Rizza v. Italy*, Appl. no. 399/02, Judgment of 28 October 2004; ECtHR, *Balsamo v. San Marino*, Appl. 20319/17, 21414/17, Judgment of 8 October 2019.

37 ECtHR, *Welch v. United Kingdom*, Appl. no. 17440/90, Judgment of 9 February 1995, at 30.

38 ECtHR, *Gogitidze and others v. Georgia*, Appl. no. 36862/05, Judgment of 12 May 2015, at 101 and 124; ECtHR, *Ulemek v. Serbia*, Appl. no. 21613/16, Decision of 2 February 2021, at 50.

39 For example, ECtHR, *Raimondo v. Italy*, Appl. no. 12954/87, Judgment of 22 February 1994, at 30; ECtHR, *Bongiorno e altri v. Italy*, Appl. no. 4514/07, Judgment of 5 January 2010, at 45.

The Court has therefore always considered forms of NCBC to be legitimate, in view of the need to prevent the spread of very serious criminal phenomena, such as the Mafia.⁴⁰ However, in our opinion, confiscation cannot be considered preventive, even if it has an indirect preventive effect. If it were preventive, the conditions for its application would have to be future-oriented, i.e. the issuing authority would have to determine the future use of the confiscated property, whether there is a risk of distorting the economy, of money laundering or other illicit use. Instead, confiscation does not look forward but backwards. The source and not the destination of the asset needs to be demonstrated in the confiscation proceedings.

Confiscation can also have a preventive effect, but it is not of a preventive nature. So, the true nature of confiscation can only be either punitive or restorative.

In our view, the criterion for distinguishing the function of this measure cannot be inferred from the Engel judgment, which, in fact, the European Court itself does not always use in confiscation cases. The criterion should be the economic value of the confiscated asset. However, this value should not be considered in absolute terms, but rather in relative terms: reference should be made to the relationship between the economic value of the unlawful enrichment and to the economic value of the property to be confiscated, whether direct or equivalent.

For example, if a person owns 100 and earns 50 through criminal activity, his wealth is 150. If 50 were to be confiscated, the person returns to the same position he was in before the crime, and the measure only has a restorative function. If 70 is confiscated instead of 50, then the confiscation impoverishes the person more than neutralizes the illicit enrichment, so it punishes him.

In summary:

1. Original value of the asset [100]
 2. Lucrative criminal conduct [+ 50]
 3. Value of asset after criminal conduct [150]
- confiscation of 50 = **merely restorative effect**
 - confiscation of 70 = **(also) punitive effect**

Which of these two functions, restorative or punitive, should our confiscation model have?

Definitely the first, for at least two reasons.

1. Purely restorative confiscation sends out a message that crime does not pay, which is the intended objective.⁴¹ Punitive confiscation sends out a different message: crime has a cost, it makes people poorer (i.e., crime is punished), but this is the task of criminal sanctions applied in a criminal process.

2. Only a merely restorative confiscation can be legitimately applied in the absence of a judgment establishing the person's criminal liability. This could not be possible if the NCBC were punitive, because the presumption of innocence provided for in Article 6(2) ECHR would be breached.⁴²

⁴⁰ In *ECtHR, Raimondo v. Italy*, Appl. no. 12954/87, Judgment of 22 February 1994, the Court states: 'The Court is fully aware of the difficulties encountered by the Italian State in the fight against the Mafia. As a result of its unlawful activities, in particular drug-trafficking, and its international connections, this "organization" has an enormous turnover that is subsequently invested, inter alia, in the real property sector. Confiscation, which is designed to block these movements of suspect capital, is an effective and necessary weapon in the combat against this cancer. It therefore appears proportionate to the aim pursued, all the more so because it in fact entails no additional restriction in relation to seizure.'

⁴¹ *ECtHR, Gogitidze and others v. Georgia*, *supra* note 38, which confirms the legitimacy of the Georgian NCBC as a non-punitive measure preventing illicit enrichment, while sending a clear message to public officials that their misconduct cannot be rewarded economically even if it goes unpunished.

⁴² *ECtHR, Geerings v. The Netherlands*, Appl. no. 30810/03, Judgment of 1 March 2007, at 4.

The NCBC should be purely restorative, not punitive: it should deprive the person of assets that are never more valuable than the net amount of unlawful income.

After all, crime is not a legitimate way of acquiring property in any country in the world. Depriving a person of his illegal gains is therefore a normal consequence of the fact that he does not have a valid title to the property in his possession.

2. Guarantees

The ‘non-punitive’ confiscation of our dreams would not be subject to the guarantees of criminal law – Article 6(2) and 7 ECHR, 4 Prot. No. 7 ECHR, 49 EUCFR – but to those of the fundamental right to property: Article 1 Prot. No. 1. ECHR and Article 17 EUCFR.

The scope of the guarantee of Article 1 Prot. No. 1. ECHR comprises three distinct rules.⁴³ Any interference by a public authority with the peaceful enjoyment of possessions can only be justified if: a) it is lawful; b) it serves a legitimate public (or general) interest; c) it is reasonably proportionate to the aim sought to be realized.

a) The *law* must regulate the conditions of application of confiscation in such a way that ‘accessible’ and ‘precise’ rules are laid down, so that the individual is

able to ‘foresee’ the consequences of his behaviour.⁴⁴

b) The *legitimate interest* served by the confiscation should be the fight against serious crimes, returning wrongfully acquired property either to its previous lawful owner or, in the absence of such, to the State.⁴⁵

c) *Proportionality* then involves several factors: i) the non-excessive severity of the measure in relation to what is necessary to pursue a public interest;⁴⁶ ii) the respect of procedural safeguards provided by Article 6(1) ECHR, including the right of defence,⁴⁷ the duration of proceedings,⁴⁸ the rules on evidence and the allocation of the burden of proof;⁴⁹ and iii) the protection of innocent third parties.⁵⁰

In the EU framework – where the Court of Justice recently found the Bulgarian NCBC to be compliant with Framework Decision 2005/212/JHA⁵¹ – the same guarantees recognized by the Strasbourg Court in the ECHR framework should apply. Indeed, in EU law, the CFR, which protects the right to property in Article 17, has the same value as treaties – Article 6(1) TEU – and ‘contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention’ (Article 52 EUCFR).

43 See ECtHR, *Sporrong and Lönnroth v. Sweden*, Appl. no. 7151/75, Judgment of 23 September 1981; cf. also, more recently, ECtHR, *Gogitidze and others v. Georgia*, *supra* note 38, at 92–104.

44 ECtHR, *Lelas v. Croatia*, Appl. no. 55555/08, Judgment of 20 May 2010, at 76–78; ECtHR, *Beyeler v. Italy*, Appl. no. 33202/96, Judgment of 5 January 2000, at 109; ECtHR, *Baklanov v. Russia*, Appl. no. 68443/01, Judgment of 9 June 2005, at 41 *et seq.*; ECtHR, *Sun v. Russia*, Appl. no. 31004/02, Judgment of 5 February 2009.

45 Cf. ECtHR, *Gogitidze and others v. Georgia*, *supra* note 38, at 102. With regard to the ‘public interest’ requirement see also D. Harris, M. O’Boyle, C. Warbrick, *Law of the European Convention on Human Rights*, (2014), at 876; L.M. Padelletti, ‘sub Article 1 Prot. Add.’, in S. Bartole, P. De Sena, V. Zagrebelsky (ed.), *Commentario Breve alla Convenzione Europea dei Diritti dell’Uomo* (2012), at 796.

46 ECtHR, *Ismayilov v. Russia*, Appl. no. 30352/03, Judgment of 6 November 2008; ECtHR, *Paulet v. United Kingdom*, Appl. no. 6219/08, Judgment of 13 May 2014; ECtHR, *Džinić v. Croatia*, Appl. no. 38359/13, Judgment of 17 May 2016.

47 ECtHR, *Unsped Paket Servisi SaN. Ve TIC. A.Ş. v. Bulgaria*, Appl. no. 3503/08, Judgment of 13 October 2015, at 45.

48 ECtHR, *Jucys v. Lithuania*, Appl. no. 5457/03, Judgment of 8 January 2008, at 36; ECtHR, *Salamov v. Russia*, Appl. no. 5063/05, Judgment of 12 January 2016, at 34 *et seq.*

49 *Infra*, at 6.C.

50 ECtHR, *Andonovski v. the former Yugoslav Republic of Macedonia*, Appl. no. 16225/08, Judgment of 17 September 2015, at 37–41; ECtHR, *Unsped Paket Servisi SaN. Ve TIC. A.Ş. v. Bulgaria*, Appl. no. 3503/08, Judgment of 13 October 2015, at 46.

51 C-234/18, *Komisja za protivodejstvije na koruptsiyata i za otnemane na nezakonno pridobito imushchestvo v. BP et al.* (Eu.C: 2020:221); see also Trinchera, ‘Confisca senza Condanna e Diritto dell’Unione Europea. Nessun Vincolo per il Legislatore Nazionale’, 3 *Rivista Italiana di Diritto e Procedura Penale (RIDPP)* (2020) 1637, at 1640.

By combining these provisions, the above principles formulated by the Strasbourg Court could be ‘directly’ applicable in the Member States.

B. Conditions for Implementation

Building a European NCBC model also means setting out the conditions on which confiscation could be applied, in a manner that is consistent with both its function of avoiding unlawful enrichment and the above guarantees. Four requirements can be identified.

1. The Commitment of Criminal Offences that Typically Result in Illicit Gains.

In accordance with the principle of legality *sub specie* of precision and determinacy, it is important to explicitly identify the types of crimes that can result in confiscation.

In accordance with the principle of proportionality, they should only include serious crimes that produce illicit profits, such as organized crime, drug trafficking, corruption, money laundering and tax fraud.⁵² the new 2022 Proposal for a Directive is also heading in this direction.⁵³ Indeed, NCBC should not apply to single criminal episodes (in which criminal trial and ordinary confiscation are viable), but to multiple criminal behaviours resulting in serious criminal activity over time (and, in particular, over the time corresponding to the period during which the disproportionately valuable assets to be confiscated were acquired: see also below the *time link requirement*).

2. Disproportionality of Assets.

This is the main feature that distinguishes NCBC from ordinary criminal confiscation and unites it with ‘extended confiscation’ (as also described in Article 4(2) of Directive 42/2014/EU, as well as Articles

15 and 16 of the new 2022 Proposal for a Directive). This is an important feature, as it allows assets to be confiscated, even if there is no ‘direct’ evidence of their criminal origin. Nevertheless, it can be a dangerous requirement since confiscation can become a punishment if it is interpreted incorrectly.

Let us take an example. Suppose we establish that a person committed a series of minor extortions of modest value, earning him a few thousand euros, but then we find a disproportionate amount of millions of euros in his assets. If we confiscate all these millions, which are presumably of illicit origin but which almost certainly do not come, at least partially, from criminal activity (the minor extortions) constituting the subject of the proceedings, it will be impossible to establish whether the seizure only has a restorative effect or also a punitive effect, because – according to the criterion explained above – it will be impossible to establish whether the value of the seized assets matches the value of the enrichment of criminal origin.

So there is a risk that the confiscation will have an excessive and disproportionate effect on the assets of the given person.

In other words, the finding that a person is suspected of having been involved in some criminal activity must not act as a switch that turns on the spotlight on all of that person’s assets: in order to maintain a restorative effect, confiscation should target assets of a value that is reasonably

⁵² ECtHR, *Todorov and Others v. Bulgaria*, Appl. no. 50705/11, Judgment of 13 July 2021.

⁵³ See Article 16 of the Proposal: the new model of NCBC provided by that Article aims to confiscate proceeds originating from criminal offences committed in the framework of a criminal organization, when these offences are liable to give rise, directly or indirectly, to substantial economic benefit. Furthermore, the Commission proposed that the notion of ‘criminal offence’ is to include the offences referred to in Article 2 of the Directive itself when punishable by imprisonment for a maximum of at least four years.

comparable to the profits generated by the predicate criminal activity.

Therefore, not everything that is disproportionate to a person's income can be confiscated. Disproportionality can then play a procedural/probative role, i.e. to make it easier to prove that certain assets originate from the crimes that have been established. The advantage for law enforcement purposes, however, is that these crimes do not have to be established by the standards of the criminal justice system (to be discussed below).

3. Time Link Requirement (between the Disproportionate Enrichment and the Established Criminal Activity).

To make the presumption sufficiently well-founded, the disproportionately valuable assets to be directly confiscated must have been acquired by the person – except for extraordinary situations – in a period that corresponds to the period in which the criminal activities from which the profit apparently originates have been committed.

For example, if the person committed crimes between 2015 and 2018, assets acquired in 2010 cannot be directly confiscated, even if the purchase was disproportionate to the person's income.

This additional requirement is already used in some jurisdictions, such as Italy, where this has been addressed in the case law of the Court of Cassation and subsequently confirmed by the Constitutional Court.⁵⁴

4. Failure to Justify the Lawful Origin of the Property.

Lastly, is essential that the person targeted by the measure should always be given the opportunity to defend himself fully and to prove the lawful origin of his assets.⁵⁵ All the presumptions used in the procedure must be relative and therefore capable of being rebutted by evidence to the contrary.⁵⁶ The main problem here is the role of tax evasion. Can the origin of assets be justified on the grounds that they are income from work that is legal but not declared to the tax authorities?

We believe that, in the current historical context, tax evasion is one of the most serious crimes and should therefore be included among the types of crimes that are subject to the NCBC, but with two clarifications: i) the tax evasion must be the subject of the proceedings: the requesting authority must therefore provide objective evidence that tax evasion is likely to have been committed, allowing for cross-examination and the right of defence; ii) the confiscation must target assets corresponding to the net benefit obtained by the evasion, not total income from undeclared work.⁵⁷

All these four requirements should be proved in the NCBC process in order to demonstrate the criminal origin of the person's assets.

According to our NCBC model, these conditions must be demonstrated in accordance with precise rules on evidence, as explained below.

⁵⁴ Italian Constitutional Court, Judgment no. 33/2018 and no. 24/2019.

⁵⁵ ECtHR, *Butler v. The United Kingdom*, Appl. no. 1661/98, Decision of 27 June 2002; ECtHR, *Webb v. The United Kingdom* Appl. no. 28103/02, Decision of 10 February 2004; ECtHR, *Rummi v. Estonia*, Appl. no. 63362/09, Judgment of 15 January 2015, at 101.

⁵⁶ ECtHR, *Phillips v. The United Kingdom*, Appl. no. 41087/98, Judgment of 5 July 2001, at 27; ECtHR, *Van Offeren v. The Netherlands*, Appl. no. 19581/04, Decision of 5 July 2005; ECtHR, *Grayson and Barnham v. The United Kingdom*, Appl. no. 19955/05 15085/06, Judgment of 23 December 2008, at 37.

⁵⁷ M. Di Lello Finioli, *La Confisca Ante Delictum e il Principio di Proporzionalità* (2021); S. Finocchiaro, *supra* note 22.

C. Rules on Evidence

The European NCBC model we envisage should have a procedural discipline that is consistent with its legal nature. This means that, if non-conviction based confiscation has a purely restorative and non-punitive scope, a different burden (and a lower standard of proof than the criminal scope) can be applied.

1. Burden of Proof

Assuming that it would not be conceivable to relocate the entire burden of proof from the authorities to the person affected by the measure, a partially reversed burden could facilitate the process of recovering illicit gains. In fact, when property is suspected of having an illegal source or there is a disparity between property and identified legal income, in some NCBC systems, the burden shifts to the holder of the alleged criminal property to prove that the funds or property in question do not originate from illegal sources. This eliminates the need for the authorities to delve into the intricacies of sources of wealth and complex structures that facilitate the accumulation of large funds, instead requiring the person affected by the measure to explain his or her position.⁵⁸

This approach is extremely useful in cases of fraud and financial crime, where great efforts are likely to have been made to conceal transactions, and it has already been endorsed by both the ECtHR and by the EU legislator. In fact, the analysis of European case law repeatedly shows that the Court considers the mechanisms for reversing the burden of proof arising from the application of legal presumptions to be conventionally legitimate, since ‘there can be nothing arbitrary, for the purpose of “civil” limb of Article 6(1) of

the Convention, in the reversal of the burden of proof onto the respondents in the forfeiture proceedings *in rem* after the public prosecutor had submitted a substantiated claim.’⁵⁹

Furthermore, the reference to the disproportion provided for in Article 5(1) of Directive 2014/42/EU between personal assets and the given person’s lawful income as a relevant element suggests that, even in the view of the EU legislator (and the European Parliament in particular), the burden of proof could (partially) lie with the latter.⁶⁰

With this in mind, we believe that the European NCBC model should present the following distribution of the burden of proof:

- (i) *commitment of a predicate offence* – **national authorities;**
- (ii) *disproportionality of assets* – **national authorities;**
- (iii) *time link requirement* – **national authorities;**
- (iv) *justification of the lawful origin of property* – **the person affected by the measure.**

2. Standard of Proof

As for the standard of proof, the first option, such as those adopted in the United Kingdom and in the U.S. federal legislation regarding *civil recovery* and *civil forfeiture* (see *supra*, 4.E), might be to apply the well-known standard of ‘more likely than not’ (or preponderance of evidence), under which the fact is considered proven with a probability of at least 51%.

The ECtHR has considered this standard conventionally legitimate, as it ‘did not require proof “beyond reasonable doubt”

⁵⁸ Council of Europe – Economic Crime and Cooperation Division, *supra* note 8, at 14–15.

⁵⁹ ECtHR, *Gogitidze and Others v. Georgia*, *supra* note 38, at 122.

⁶⁰ J.A.E. Vervaele and W.S. De Zanger, ‘Procedural Aspects of Confiscation’, in A. Bernardi (ed.), *Improving Confiscation Procedures in the European Union* (2019), at 514.

of the illicit origins of the property in such proceedings' given that 'proof on a balance of probabilities or a high probability of illicit origins, combined with the inability of the owner to prove the contrary, was found to suffice for the purposes of the proportionality test under Article 1 of Protocol No. 1'.⁶¹

However, the significance of the interests at stake and the need to safeguard the rights of the person affected by the measure⁶² make it preferable to adopt a higher standard that falls somewhere between the preponderance of evidence and the BARD rule.⁶³ This conclusion also seems to be reflected in Article 5(1) of Directive 2014/42/EU, which, in relation to the so-called extended confiscation, allows for the application of such a measure where the judicial authority, based on the circumstances of the case, 'is satisfied'⁶⁴ that the property in question originates from criminal conduct.⁶⁵

The meaning of this expression is clarified in Recital 21 of the same Directive, which specifies that 'this does not mean that it must be established that the property in question is derived from criminal conduct', but rather that 'Member States may provide that it could, for example, be sufficient for the court to consider on the balance of probabilities, or to reasonably presume that it is substantially more probable, that the property in question has been obtained from criminal conduct than from other activities'.⁶⁶ It would therefore seem that the evidentiary standard required by the Directive is one of weighing probability, so that confiscation may be ordered when, even using presumptions

(such as disproportion), it is deemed 'substantially more probable' that the assets are of criminal rather than lawful origin. In other words, it is a civil law standard of 'more likely than not' reinforced by an adverb ('substantially'), which seems 'something more' than the normal civil law standard, but certainly 'something less' than the standard proper to the criminal trial.⁶⁷ In this sense, it is possible to recognize a similarity with the 'clear and convincing evidence' standard already pioneered, in *civil forfeiture* matters, in various U.S. states, which decided to aggravate the government's evidentiary burden over the one provided by the federal legislation.⁶⁸

In summary, the experience observed in various European and non-European countries (see *supra*, 4), as well as the non-punitive nature of our NCBC model (see *supra*, 6.A), leads to the conclusion that it is preferable to adopt a European model of NCBC with more lenient evidentiary rules than those stipulated for criminal proceedings.

This conclusion also seems to be shared by the new 2022 Proposed Directive (see *supra*, 5.C). However, the lower the standard of proof, the more important it is for the NCBC system to be equipped with a strong range of safeguards, especially the procedural safeguards provided by Article 6 ECHR ('Right to a fair trial') (see below, 7.D).⁶⁹

D. NCBC Proceedings:

Non-Criminal Nature and Procedural Safeguards Our European NCBC model cannot be designed strictly as a criminal

61 ECtHR, *Balsamo v. San Marino*, Appl. Nos. 20319/17 and 21414/17, Judgment of 8 October 2019, at 91.

62 C. Grandi, 'Non-Conviction-based Confiscation in the EU Legal Framework', in A. Bernardi (ed.), *supra* note 60, at 33.

63 S. Finocchiaro, *supra* note 22, at 509.

64 Emphasis added.

65 J.A.E. Vervaele and W.S. De Zanger, *supra* note 60, at 515.

66 A.M. Maugeri, *La Direttiva 2014/42/UE relativa alla confisca degli strumenti e dei proventi da reato nell'Unione europea tra garanzie ed efficienza: un 'work in progress'* (2014), at 316 et seq.

67 S. Finocchiaro, *supra* note 22, at 279.

68 *Ibid.*, Chapter IV.

69 See also Council of Europe, *Guide on Article 6 of the European Convention on Human Rights*, updated to 31 August 2022, available at https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf.

procedure, given its lighter evidentiary rules and its *in rem* rather than *in personam* nature. Nor is the use of criminal proceedings required by EU law, which, on the contrary, ‘cannot be interpreted (...) as meaning that the Member States are deprived of the possibility of commencing confiscation proceedings other than criminal proceedings’.⁷⁰ Indeed, a criminal trial does not seem to be the most appropriate venue to conduct the complex asset assessments that this confiscation requires, which might instead be better conducted at a civil or administrative level.⁷¹ If the NCBC is not criminal in nature (see *supra*, 6.A), the more stringent criminal due process rights enshrined in Article 6(2) cannot apply.⁷²

However, this does not mean depriving the person subject to the measure of safeguards, as it still falls within the scope of Article 6(1), which encompasses both civil and criminal proceedings. In this regard, the Italian system (see *supra*, 4.A) has been considered to be in compliance with the procedural safeguards of Article 6(1) ECHR, as the ECtHR found that the proceedings (i) ‘were conducted in the presence of both parties in three successive courts – the District Court, the Court of Appeal and the Court of Cassation’ and (ii) ‘the applicants, instructing the lawyer of their choice, were able to raise the objections and adduce the evidence which they considered necessary to protect their interests, which

shows that the rights of the defence were respected’, with the result that the Italian courts (iii) did not base their decisions on mere suspicions, but (iv) established ‘objectively the facts submitted by the parties and there is nothing in the file which suggests that they assessed the evidence put before them arbitrarily’.⁷³ Furthermore, the most recent trends in the European jurisprudence regarding forms of extended confiscation, which are similar to the NCBC form, is the evaluation of their conventional compatibility under Article 1 of Protocol No. 1 to the ECHR, excluding submission to the guarantees of criminal matters.⁷⁴ In particular, the requirement of the need/proportion of the seizure which is necessary for assessing the legitimacy of interference in the peaceful enjoyment of one’s own assets is interpreted less strictly, as a very wide ‘margin of appreciation’ is granted to each state.⁷⁵

This means that, although our European NCBC model cannot be designed strictly as a criminal trial, it should respect *effective procedural safeguards*⁷⁶ to comply with both Article 6(1) ECHR and Article 1 of Protocol No. 1 to the ECHR, with particular regard to the following.

1. Judicial Oversight

The confiscation procedure should be supervised by the judicial authority, which must be an independent and impartial tribunal established by law.⁷⁷ Indeed, the absence of judicial review would be in

⁷⁰ C-234/18, *Komisja za protivodeystvie na koruptsiyata i za otnemane na nezakanno pridobitoto imushtestvo v. BP et al.*, *supra* note 51, at 59.

⁷¹ S. Finocchiaro, *supra* note 22, at 499–450.

⁷² This position is nuanced: ‘there is an argument that voicing suspicions following an acquittal about an accused’s innocence of the offences he or she was charged with on a subsequent application is not permissible and is in breach of Art. 6(2) of the Convention. Grounding a civil case on an allegation that the individual has a disparity between his lawful income and assets when he or she has been acquitted in a criminal court of that very same matter’ could be in breach of Article 6(2) protection: Council of Europe – Economic Crime and Cooperation Division, *supra* note 8, at 24.

⁷³ ECtHR, *Arcuri v. Italy*, Appl. No. 52024/99, Judgment of 5 July 2001, at 6.

⁷⁴ ECtHR, *Dimitrovi v. Bulgaria*, App. No. 12655/09, Judgment of 3 June 2015; ECtHR, *Gogitidze et al v. Georgia*, *supra* note 38.

⁷⁵ A. Bernardi (ed.), *supra* note 60, at XX (Introduction).

⁷⁶ Commission Report SWD(2022) 245 final, *Impact Assessing Report. Accompanying the document Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation*, at Annex 6, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022SC0245> (emphasis added).

⁷⁷ The concept of ‘an independent and impartial tribunal established by law’ stipulated by Article 6(1) ECHR is well-known.

Here, we simply recall that the Grand Chamber recently had the opportunity to refine and clarify the meaning to be given to the concept of a ‘tribunal established by law’ and to analyse its relationship with the other ‘institutional requirements’, namely, those of independence and impartiality; see, ECtHR, *Guðmundur Andri Ástráðsson v. Iceland*, Appl. No. 26374/18, Judgment of 1 December 2020, at 218 et seq.

conflict with Article 1 of Protocol No. 1, given that, as highlighted in *Arcuri v. Italy*, the right of the claimants to peacefully enjoy their property implies the existence of an effective judicial guarantee.⁷⁸

If this is reasonably uncontroversial, the question is rather whether judicial oversight should exist from the very beginning of the implementation of the measure or whether it can intervene at a later stage. It seems preferable to stick to the first solution, also given that Article 2 of Directive 2014/42/EU and Article 1 of the Convention of 1990 of the Council of Europe⁷⁹ define confiscation as a measure ‘ordered by a court’, thereby implicitly recognizing the intervention of the judge from the very moment of its application.

2. Setting out the Case

The subject of the measure must be made aware of the case against him/her. For instance, it is insufficient for the authorities to simply say that there is no identifiable income giving rise to the property, the confiscation of which is being sought, but the enforcement authority must set out the facts that allegedly constitute the unlawful conduct by or in return for which the property was obtained.⁸⁰ The topic is clearly related to the rules on evidence analysed above.

3. Participation of the Persons Affected by the Measure

The holders of property (but consideration should also be given to anyone else who is affected, such as the creditors of the owners) have the right to participate fully and effectively in adversarial proceedings, through a legal representative if they so wish, and to present all evidence to the

court. Such proceedings must be public, except in the special circumstances provided for by Article 6(1),⁸¹ while the domestic court should, in turn, follow predetermined evidentiary rules and procedures and give equal consideration to the arguments of the parties in a written judgment linking the findings of fact with the relevant law. Such rights of participation should apply not only at first instance but also to any appeal proceedings.⁸² It is worth noting that Chapter V of the new 2022 Proposed Directive is expressly titled ‘Safeguards’ and focuses precisely on the obligation to inform the affected persons of the legal remedies available to them (Articles 22 and 23).

E. Subsidiarity of NCBC

Again, given the purely restorative and non-punitive nature of NCBC, our model of confiscation should be subsidiary in nature.⁸³ This means that priority must be given to the economic claims of other parties, primarily private parties (e.g., compensation for damages from crime), with the result being that there may be nothing left for the state to confiscate.

If the economic claims of other parties are satisfied, these should be deducted from the amounts that could be confiscated, so as not to duplicate, which would otherwise reconfigure confiscation as punishment. Furthermore, the subsidiary nature of the NCBC also manifests itself in the reference to the criminal matter, where the prohibition of duplication of the confiscation of profit requires coordination of various criminal proceedings involving the same income (e.g., confiscation by conviction).

⁷⁸ ECtHR, *Arcuri v. Italy*, *supra* note 73.

⁷⁹ Council of Europe, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, 1990, Article 1, available at <https://rm.coe.int/168007bd23>.

⁸⁰ Council of Europe – Economic Crime and Cooperation Division, *supra* note 8, at 22.

⁸¹ ECtHR, *Saccoccia v. Austria*, App. No. 699176/01, Judgment of 18 December 2008.

⁸² Council of Europe – Economic Crime and Cooperation Division, *supra* note 8, at 24 and 28 *et seq.*

⁸³ S. Finocchiaro, *supra* note 22, at 511 *et seq.*

F. Mutual Recognition and Enforcement

Provisions for the mutual recognition of NCB confiscation orders are an important component of any NCB system.

Indeed, there are many experiences of assets located abroad and enforcement authorities having difficulty securing recognition of an NCB order obtained in their national courts, where the other country does not have an NCB regime.⁸⁴

In some cases, even when one country does have an NCB regime, it may not recognize an NCB order from another country, instead only recognizing foreign orders that are issued in criminal proceedings or by a criminal court.⁸⁵ As mentioned above (see supra, 5.A), Recital 13 of Regulation (UE) 2018/1805 emphasizes that its provisions apply to ‘all freezing orders and to all confiscation orders issued within the framework of proceedings in criminal matters’, including not only ‘orders covered by Directive 2014/42/UE’ but also ‘other types of order issued without a final conviction’ and that, even if such orders might not exist in the legal system of a Member State, ‘the Member State concerned should be able to recognize and execute such an order issued by another [one]’.

However, the uncertainty noted in the expression ‘within the framework of proceedings in criminal matters’⁸⁶ and the following Article 1, para. 4 which provides that ‘this Regulation does not apply to freezing orders and confiscation orders issued within the framework of proceedings in civil or administrative matters’, leave room for doubt as to

whether the Regulation can be applied to the NCBCs and thus to the model of NCBC outlined here.⁸⁷

It follows that our European NCBC model necessarily also requires an explicit extension of mutual recognition and enforcement to all NCBC hypothesis.

7. CONCLUSIONS

The NCBC model outlined here appears capable of achieving the objective of striking a delicate balance between national and international needs in fighting economic crime and simultaneously protecting individual rights. As a matter of fact, confiscation with a purely restorative effect would increase the guarantees while enhancing the effectiveness of this patrimonial measure in terms of its criminal policy objectives.

A. Effectiveness of Crime-Fighting

First of all, the usefulness and effectiveness of this measure must be noted, as it would be applied with a less stringent standard of proof than in criminal proceedings.

This NCBC model has the real added value of establishing the predicate offence not according to the standard of the BARD rule, but instead according to a lower standard.

This is justified by the fact that it is an *actio in rem* and not an *actio in personam*: it is not necessary to prove that the person is criminally liable, because the objective of this confiscation is not to punish him,

⁸⁴ Eurojust, *Report on Eurojust's Casework in Asset Recovery* (2019), at 17.

⁸⁵ Eurojust, *Report on non-conviction-based confiscation* (2013), at 13.

⁸⁶ C. King, ‘EU Developments in Non-Conviction-Based Confiscation’, in L. Heffernan (ed.), *Criminal Law and Justice in the European Union*, 2022, at 112.

⁸⁷ In fact, it is no coincidence that – when assessing the application of the Regulation – Eurojust identified ‘difficulties caused due to different styles of preventive measures utilized in some national legislation in the pursuit of criminal assets, such as unexplained wealth, non-conviction-based orders or civil confiscation orders. The difficulty becomes acute if national legislation in the requesting/issuing State is not reflected in the requested/executing State’: Eurojust, *Report on Eurojust's Casework in Asset Recovery* (2019), at 17. Another example, but in the opposite direction, is the ministerial circular of the Italian Ministry of Justice of 18 February 2021, which states that the Regulation also applies – ‘undoubtedly’ – to preventive confiscation (part II, point 7; translation from Italian by the authors).

but purely to deprive him of the gains he has made unlawfully. The recovery of illegal proceeds is essential because: i) it weakens organized crime; ii) it deters such crimes from being committed, as they are motivated by profit; iii) it prevents distortions of economic competition, protecting workers and entrepreneurs; and iv) it serves the entire democratic system and the community, since the recovered proceeds are used by the state for the social good.

B. Positive Impact in Terms of Guarantees

At the same time, the proposed model of a future European NCBC system can deliver significant results in ensuring a high level of protection of the fundamental rights (property) that are subject to seizure, in compliance with Article 1 of Protocol No. 1 to the ECHR and Article 17 of the Charter of Fundamental Rights of the European Union, since it: (i) requires the precise identification of the offences the commitment of which determines the applicability of the NCBC (predicate offences); (ii) restricts the list of predicate offences to serious, serial and typically profit-making crimes, such as mafia-type crimes, extortion, drug and human trafficking, illegal exploitation of prostitution, tax offences, money laundering, etc.; (iii) limits the amount that can be seized, which is to be measured by the net profit obtained from the individual predicate offence under investigation, while avoiding the indiscriminate extension of confiscation to all disproportionate assets held by the person at the time the measure is applied; (iv) establishes the non-solidary nature of the measure where there are several participants in the predicate offence: each participant will be subject to confiscation only with regard to his or

her actual personal benefit obtained from the predicate crime (as set out in point (iii) above), regardless of the benefit obtained by the others.

The last two points (iii and iv) especially emphasize the restorative rather than punitive nature of our NCBC model.

C. Positive Impact in Terms of Harmonization and Joint Battle against Transnational Crime

Last but not least, our European NCBC model might have a positive impact in terms of harmonization, given that, ‘while in general a greater degree of harmonization can be observed following legislative changes introduced in the Member States in recent years, important differences persist regarding non-conviction-based confiscation.’⁸⁸

Such differences create a risk of making judicial cooperation, mutual recognition of judgments and decisions less effective and, more generally, undermining the respective trust between Member States in these matters.

Therefore, a common confiscation model would overcome differences and, in so doing, would strengthen the common battle against transnational crime. Indeed, confiscation of assets has been described as the ‘most important legal tool for depriving criminals of illegal profits’⁸⁹ and, at EU level, is regarded as a strategic priority. This is further confirmed in the EU strategy to tackle Organized Crime 2021–2025,⁹⁰ which includes among its objectives the revision of Directive 2014/42/EU, in the direction of which the new 2022 Proposed Directive appears to be taking its first steps, as well as the introduction

⁸⁸ Commission Report SWD(2019) 1050 final, *supra* note 10, at 7.

⁸⁹ G. Stessens, *Money Laundering: A New International Law Enforcement Model*, 2000, at 29.

⁹⁰ European Commission, *EU Strategy to tackle Organised Crime 2021-2025* (2021), at 19, available at <https://eurlex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021DC0170>.

of more effective rules on non-conviction-based confiscation.

We hope our confiscation dreaming model will be a valuable starting point for further reflection and the development of a future common European NCBC system.

8. APPENDIX

Finally, a brief outline of the different models of confiscation envisaged at European level.

| MODEL | NAMES | PROVISIONS |
|-------|---|---|
| A | Traditional conviction-based confiscation | Article 4 (1) Directive 42/2014 Article 12 Proposed Directive 2022 |
| B | Extended confiscation (conviction-based) | Article 5 Directive 42/2014 Article 14 Proposed Directive 2022 |
| C | Traditional NCBC | Article 4 (2) Directive 42/2014 Article 15 Proposed Directive 2022 |
| D | New NCBC | Article 16 Proposed Directive 2022 |
| E | Our NCBC | Dreaming soon... |

SEMI-FINAL B

EU AND EUROPEAN FAMILY LAW

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PARTICIPATING TEAMS:

ALBANIA, CZECHIA, FRANCE, ITALY, THE NETHERLANDS I,
POLAND I, ROMANIA, SERBIA

1ST PLACE: ROMANIA

2ND PLACE: ITALY

3RD PLACE: FRANCE

Selected papers for the THEMIS Annual Journal:
FRANCE, ITALY, ROMANIA



6-9 JUNE 2023 – NAPLES, ITALY – SCHOOL FOR THE JUDICIARY (SSM)

JURY MEMBERS

STYLIANOS BIOS (GR),

Judge, Seconded National Expert at Eurojust

Themis is a unique project, which requires young magistrates to demonstrate both, academic excellence and practical skills. The competition offers an excellent opportunity for any future judge or prosecutor to assess their analytical skills and become involved in a critical aspect of their future roles: the ability to think quickly and address legal challenges adeptly, while being under the focused scrutiny of others.

views and legal opinions smoothly. I would also like to take this opportunity to publicly thank Rasmus Van Heddeghem from the EJTN secretariat for his constant help and support before, during and after the semi-final.

Europe is our common continent; law is our common passion. The European Judicial Training Network builds bridges and networks among colleagues and emphasizes the importance of the European Union and the high value of implementation of European Regulations and Directives. All the participants forever remember the revealing moments that show them that they are European judges and prosecutors and not only magistrates of a national area of jurisdiction.

Finally, I would like to take this opportunity to encourage those who have not yet participated in EJTN's Themis competition to consider joining in the forthcoming years. This competition offers a remarkable chance to deepen the understanding of European law, while improving the ability to handle stressful situations and respond to challenging questions posed by the Jury.

Furthermore, in addition to the valuable learning experience, the competition provides a unique opportunity to establish contacts with colleagues from various European regions, fostering a network of trust that forms the bedrock of European law and the Union itself!

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It therefore was an honour and a privilege to be a member of the Jury for Semi Final B: 'EU and European Family Law' which took place at the Italian Superior School of Magistracy in Naples. 9 Teams from 8 different countries, hungry for knowledge and self-development, presented papers and discussed their topics. It has been incredibly enriching to read, hear and have discussions with young judges about various topics regarding European family law.

Contrary to initial expectations, the 'fight' between teams actually unites rather than divides them. All teams worked hard, all teams gave their best. I admit that, as a juror and as a European judge, I am proud of them and their work. The future of justice is secure in the hands of such dedicated jurists.

I had the pleasure of working with Judge Ilse Couwenberg and Professor Boriana Musseva. Our cooperation was excellent and we had the opportunity to exchange

ILSE COUWENBERG (BE)

Judge at the Supreme Court of Belgium

I had the honour of presiding over the jury at this year's THEMIS European family law semi-final, which took place in the beautiful Castel Capuano in Naples. Alongside the nine competing teams, we discovered that European family law is not the easiest field of law.

Because it involves so many competing and sometimes conflicting interests, it often falls upon the judge, as a wise King Solomon (as one of the teams indicated) to make a decision with the hope that it will be just and not result in a tragedy, as the one described by one of the others teams.

It was inspiring to witness how all the teams managed to find interesting and relevant topics for judicial practice. This allowed all of us to expand our knowledge, not only regarding European rules and jurisprudence but also on the various national legislations. Through this, we learned that our national rules are, in fact, not as different as we may have thought.

We share common values and are eager to find workable European solutions to actual problems, such as the recognition of parenthood in rainbow families.

The creative presentations were truly impressive, as they introduced tailor-made movies, polls and moot courts, as well as the ability of the team members to respond to the jury's questions, which were not always easy. In my personal experience, many of the lawyers I encounter in my court are not as well-prepared.

Even though there can only be one official winning team, I am convinced that all participating young judges will never forget this THEMIS experience, nor the nice colleagues from all over Europe they had the opportunity to meet. Because, at the end of the day, this is what THEMIS is all about. It creates a network between European judges, building one European judicial community.

JURY MEMBERS

BORIANA MUSSEVA (BG)

Associate Professor of Private International Law at Sofia University 'St. Kliment Ohridski', Attorney-at-law, Chair of the Bulgarian Attorney's Training Centre

Being a jury member in the eThemis competition in EU and European Family Law semi-final B is a wonderful and unforgettable experience that will last a lifetime. This is because the competition brings together bright minds, brave, honest and worthy people from various countries, all striving for excellence and knowledge.

They share the same values, speak the same language and look in the same direction: to become judges and contribute to making their country a country governed by the rule of law. This year, the competition took place in Italy, in the colourful and charming city of Naples, under the roof of History and Law – the Castel Capuano.

I had the privilege of being in the jury team again with my wonderful colleague, Ms Ilse Couwenberg, a judge at the

Supreme Court of Belgium, and to meet and become friends with the first instance judge and Seconded National Expert at EUROJUST from Greece – Mr Stylianos Bios.

The experience with them was enriching, both emotionally and intellectually, and the feeling that we are a team, that we complement and supplement each other, unforgettable. Dear colleagues, thank you! I will never forget the warm, collegial atmosphere, full of lightness and beauty of human communication.

The competition is a unique EJTN initiative, because it contributes not only to bringing these young people together, but also challenges them intellectually to represent themselves, but more importantly, to delve deeper into what their peers have created and

be able to polemicize with them. This intense intellectual process connects all participants in the competition, creates trust between them and builds bridges. These are the bridges that allow mutual trust – the fundamental principle of judicial cooperation in civil matters in the EU – to be fulfilled in a genuine and time-transferred way.

Dear EJTN, thank you! Be proud of the eThemis competition and continue to promote the pursuit of knowledge, the experience of sharing common values and the creation of future active participants in judicial cooperation within the EU. Personally, I can again say that, as a member of the jury, I learned a lot from my young colleagues from Romania, Albania, the Czech Republic, France, the Netherlands, Portugal, Italy and Poland. I was fascinated by their artistry, I was

moved by the role-playing, the videos, the music, the drawings, the polls and all the other tools they used to convey their messages more clearly and convincingly. Very often our questions coincided with the questions of the teams.

This clearly shows that we all have common reference points not only with regard to the topics in which we are interested, but also the way we work with what is unclear, untouched or problematic – theoretically, but especially in practice. Dear participants, thank you! Respect and keep going bravely onwards and upwards!

Team Members:

Frédéric Breger,
Laura Buffart,
Aymeric Dervillers-De-Terves



Tutor: Myriam Saunier

Team France

SHOULD I STAY OR SHOULD I RETURN?

AN ATTEMPT TO OVERCOME THE CLASH BETWEEN THE 1980 HAGUE CHILD ABDUCTION CONVENTION AND THE 1951 GENEVA CONVENTION ON THE STATUS OF REFUGEES

The Hague Child Abduction Convention of 25 October 1980 establishes a cooperation procedure for the prompt return of wrongfully removed children across borders. The Geneva Convention of 28 July 1951 relating to the Status of Refugees protects all refugees who apply for or are granted asylum against deportation from the country where their application is filed. Therefore, the two instruments clash in the case where the abducting parent files an asylum application in the country to which he or she has removed (or is retaining) the child.

European courts are struggling to provide a harmonized response to this emerging problem. This article discusses the procedural and substantive issues arising from the coexistence of these two proceedings, as well as the solutions that have already been provided at domestic level. It also purports to explore possible avenues for globally harmonizing court practice in this area.

KEYWORDS:

HAGUE CONVENTION OF 1980 | GENEVA CONVENTION OF 1951 | INTERNATIONAL CHILD ABDUCTION
ASYLUM PROCEEDINGS | NON-REFOULEMENT | RETURN PRINCIPLE | CHILD'S BEST INTEREST

1. INTRODUCTION

In the autumn of 2015, Jose and Andrea, both citizens of Venezuela, had the delight of becoming parents of little Ernesto. Alas, the couple's situation soon deteriorated, leading to their separation in 2017. The child is at the heart of their dispute, and a court ruling provides that custody will be shared every other week between the two parents. Andrea is worried about the situation in her native country and furthermore remains convinced that her ex-husband is neglecting his duties as a father.

In 2023, following more than four million Venezuelans who have fled the country since 2013,¹ she flies to Spain with Ernesto, without telling Jose. The latter, furious, files an application with the Venezuelan Central Authority for the return of his son to Venezuela in accordance with the provisions of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

The application is forwarded to the corresponding Spanish Central Authority and then to the competent Spanish court, in accordance with the said Convention, to which both states are party.² The Spanish judge finds that wrongful removal, in the meaning of this treaty, is relevant, thereby allowing a return order to be considered.

However, a difficulty arises: upon arrival, Andrea filed an asylum application on behalf of herself and Ernesto with the Spanish police, who have jurisdiction in this matter.³ She claims that the political situation in Venezuela puts both of them

at risk of persecution, thereby enabling the 1951 Convention relating to the status of Refugees, which was ratified by Spain, to apply. Two proceedings then coexist: the first, before the civil judge, aims to ensure the prompt return of the child to his country of origin; the second, on the other hand, before an executive authority, which tends to secure his refuge in the host country and prevent Ernesto's return to Venezuela.

Both arise from international agreements ratified by Spain. This example is fictional; however, it illustrates an emerging issue in family law facing Europe. According to Eurostat, minors accounted for 30.5% of the 612,700 asylum applications filed in the European Union in 2019. Eighty-three percent of them were accompanied by at least one of their parents.⁴ Cases where these children are separated from their other parent, who has remained in the country of origin, are bound to be frequent.

These situations may involve two international conventions to which all EU Member States are party. The first, which will be referred to as the Hague Convention in this article, establishes a judicial procedure to promptly remedy the international abduction of a child by one of its parents. To date, 103 States have joined the Hague Convention.⁵ The second, hereafter referred to as the Geneva Convention,⁶ drafted in 1951 and completed by the 1967 Protocol, is one of the cornerstones of public international law: it sets out a definition of a refugee and provides for all rights attached to

¹ According to the UN Refugee Agency, most of them seek refuge in Latin or South America, although we chose a European country in this fictional example.

² Ratified by Spain on 6 June 1987 and by Venezuela on 16 October 1996.

³ *Ley Reguladora del derecho de asilo y de la protección subsidiaria* (Spanish Act of 30 October 2009), available at <https://www.boe.es/buscar/doc.php?id=BOE-A-2009-17242>.

⁴ <https://ec.europa.eu/eurostat.com> <https://ec.europa.eu/eurostat/en/web/migration-asylum/asylum/database>.

⁵ The complete list of state-parties to the Hague Convention is available under the 'Child Abduction section' of the HCCH website at: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24>.

⁶ Not to be confused with the other Geneva conventions, in particular those drafted in 1949 and related to the treatment of prisoners and civilians in wartime.

this status, which the state-parties pledge to guarantee. It has been ratified by 145 states, including almost all state-parties to the Hague Convention.⁷

The objective of this article will be to explore the possible interaction between the Geneva and the Hague Conventions, illustrated by the above example. Firstly, we shall provide a comparative assessment of the two treaties, highlighting their different objectives and the means they respectively use to achieve them. Secondly, we shall review the specific responses provided by European and foreign jurisdictions having to deal with a conflicting situation between the right to asylum and the wrongful removal of a child.

Finally, we shall look into possible remedies to address the issues arising from conflicting asylum and child abduction proceedings.

1. LINES OF CONVERGENCE AND SINGULARITIES

Not only do the two instruments differ in their objectives and understanding regarding the child's best interests; the Hague Convention is also based on a principle of expediency, which is unknown to the Geneva Convention.

A. Divergences in the Specific Protection of the Child

Both the Hague Convention and the Geneva Convention precede the United Nations Convention on the Rights of the Child adopted in 1989. While the Geneva Convention provides protection to each individual against persecution regardless of age, the Hague Convention specifically

addresses the protection of children, relying on a restrictive understanding of the best interests of the child.

1. Looking after the Child's Best Interests in the Geneva Convention

The Convention Relating to the Status of Refugees was drafted in 1951. With the notable exception of the 1948 Universal Declaration of Human Rights,⁸ which contains two different articles addressing children as a specific category,⁹ most of the international legal corpus did not consider children as subjects of the law at the time.

It did not grant them any substantive rights and the notion of the child's best interests had not emerged. In this context, it comes as no surprise that the Geneva Convention does not contain provisions targeting children, except in relation to their parents' rights or freedoms (for example, their 'freedom as regards the religious education of their children'¹⁰).

However, the Geneva Convention does apply to children. Article 1(a)(2) of the Convention defines a refugee as a person who 'has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'; it does not discriminate on grounds of age. Therefore, the Geneva Convention provides for the protection of children falling within its

⁷ A few countries, such as Cuba and Iraq, ratified the Hague Convention but not the Geneva Convention. Some state-parties to the Hague Convention only ratified the 1967 protocol of the Geneva Convention: this is notably the case of the United States of America.

⁸ United Nations, Universal Declaration of Human Rights, 10 December 1948, General Assembly Resolution 217 A, available at <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.

⁹ Specifically, Article 16(2) which states that 'Motherhood and childhood are entitled to special care and assistance'.

¹⁰ See Article 4 of the Geneva Convention.

scope from persecution and physical harm. Nevertheless, the preamble recommends that specific provisions regarding the protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption, should be adopted by governments.

This recommendation aims to ensure the ‘principle of unity of the family’, which also means that governments must take ‘the necessary measures for the protection of the refugee’s family especially with a view to ... ensuring that the unity of the refugee’s family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country’. This has been interpreted in the established French case law as extending protection of a refugee to their spouse of the same nationality and minor children, without them having to prove any risk of persecution in their country of origin.¹¹

2. The Restrictive Understanding of the Child’s Best Interests under the Hague Convention

The Hague Convention aims to protect children from the harmful effects of their wrongful removal or retention by one of their parents and establishes a procedure for the prompt return of children to their state of habitual residence. By asserting that the signatory states are ‘firmly convinced that the interests of children are of paramount importance in matters relating to their custody’,¹² the Hague Convention promotes a specific understanding of the child’s best interest, which equates to the immediate integration of the child back into its habitual environment. This specific

approach stands out in the Explanatory Report on the Hague Convention, which states that divergent views on what constitutes the best interest of a child have led domestic courts to award custody of a child to the taking parent.

The report underlines the subjective aspect of the notion and the risk that local authorities might promote cultural or social particularities.¹³ While the Convention rests on the principle that returning the child is in line with his/her best interests, it nevertheless provides for exceptions in its Articles 12, 13 and 20.

Most exceptions are not related to any danger with which the child is threatened: Article 12 provides for an exception when the child is settled in his or her new environment, Article 13(1)(a) questions the behaviour of the person petitioning for the return of the child, and Article 13(2) deals with the need to take the child’s views into account, depending on the level of maturity.

However, Article 13(1)(b) explicitly contemplates the possibility of a grave risk that a return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. According to Article 20, the authority adjudicating on the return may also refuse to order the return of the child if such a return were not permitted by the fundamental principles of the requested state regarding the protection of human rights and fundamental freedoms.

B. The Principle of Expediency: a Need for Speed Exclusively to Return Proceedings

The divergence in purpose between the

11 Conseil d’Etat (France), Assemblée, 2 December 1994, 112842, *Recueil Lebon*.

12 See the Preamble of the Hague Convention, at para. 2.

13 E. Pérez-Vera, ‘Explanatory Report on the 1980 Hague Child Abduction Convention’ (hereinafter, the ‘Explanatory Report’), in *Actes et documents de la Quatorzième session* (1980), Tome III, Child abduction, The Hague, Imprimerie Nationale, 1982, pp. 426–473, at para. 22.

Hague and Geneva Conventions has led to different requirements regarding the timeframe in which a decision on return or asylum, respectively, must be taken and enforced. While the Hague Convention emphasizes the need for a prompt return of the child to alleviate the harm arising from wrongful removal, upheld by the Brussels IIb Regulation,¹⁴ no such requirement exists regarding asylum, since the applicant's stay in the requested country is protected during the proceedings, by the non-refoulement principle.

1. Promptness: A Driving Principle of the Hague Convention

The very preamble of the Hague Convention proclaims that the treaty is founded on the shared will of the signatory states 'to establish procedures to ensure the prompt return [of the abducted children] to the State of their habitual residence'. Its first Article immediately reiterates this idea, stating that one of the two main objectives of the Convention is 'to secure the prompt return of children wrongfully removed to or retained in any Contracting State'. Subsequently, Article 2 requires states to 'use the most expeditious procedures available' to achieve these objectives. Therefore, promptness of proceedings is strongly asserted as a key tenet of the Convention.

This arises from the idea that the best interest of the child should prevail over any other consideration; it is unacceptable for a child who has been abducted from his or her home environment, often in brutal circumstances, not to be returned as soon as possible. In a decision handed down in 2018,¹⁵ the Supreme Court of Canada emphatically asserted this idea: 'Complacency towards judicial delay is objectionable in all contexts, but some

disputes can better tolerate it. Hague Convention cases cannot.' This principle is not merely declarative. After recalling that 'the judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children', Article 11 sets out a concrete guarantee to ensure the effectiveness of this principle.

It provides that 'if the [competent] authority has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State (...), shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.'

Therefore, this provision allows the state of the child's current residence to monitor the authority responsible for ordering the return and enquire about a possible delay. Although not binding, it may be particularly relevant to allow the executive authority to exercise such control over the judicial authority, or any authority that is otherwise independent. Most importantly, this may be required by the Central Authority of the state of habitual residence, often at the initiative of the parent who has remained in that state.

¹⁴ Council Regulation (EU) 2019/1111 of 25 June 2019 on *jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)*, OJ 2019 L 178/1.

¹⁵ *Office of the Children's Lawyer v. Balev* (Canada), 2018 SCC 16, Judgment of 20 April 2018.

2. Enhanced Guarantees of Promptness within the EU: The Brussels IIb Regulation

Adopted on 25 June 2019, the Brussels IIb Regulation entered into force on 1 August 2022.¹⁶ It overrides the Brussels IIa Regulation, thus completing and strengthening it. Like the former regulation, it applies and reinforces the provisions of the Hague Convention in the context of child abduction cases between EU Member States. To this end, in addition to reaffirming the principle of expediency (Article 23(1) for the Central Authority, and 24(1) for the Judicial Authority), it provides for concrete guarantees in this regard, which are more binding than those laid down in the Convention.

Therefore, when the Central Authority of the requested Member State is seized of a return application, it must acknowledge receipt within five days to the requesting Central Authority or the applicant. It must also, ‘without undue delay, inform [them] what initial steps have been or will be taken to deal with the application, and may request any further necessary documents and information’ (Article 23(2)).

Furthermore, Article 24 provides that when a judicial authority is seized of a return application, the decision must be issued within six weeks (Article 24(2)). Similarly, a decision on appeal must be made within the same period after it has been filed (Article 24(3)). In both cases, only exceptional circumstances that make this impossible can justify a longer time to reach a decision.

Finally, with regard to the enforcement of a decision, Article 28(2) points out that, at

the end of the six weeks from the date on which the decision is made, the applicant or the requesting state has the right to be given a statement of reasons for the late enforcement of the return decision. A specificity of this regulation lies in the promotion of amicable mediation in order to reach the earliest possible resolution of a conflict; therefore, it is the responsibility of the competent authorities to encourage parents in this way at all stages of the proceedings (Article 25). In conclusion, child abductions within the EU are subject to reinforced guarantees of promptness.

It is possible, albeit rather exceptional that an asylum-related issue could interfere with return proceedings under the Brussels IIb Regulation. Indeed, no text in principle prohibits a citizen from one Member State filing an asylum application in another Member State; this situation arises in practice, but is rare: according to Eurostat, 350 asylum requests from citizens of one Member State were filed in other EU Member States in 2022.¹⁷ In 2019, 365 such requests were filed, of which around 40% were granted.¹⁸

3. The Absence of a Similar Principle in Asylum Proceedings

The Geneva Convention sets out the criteria for qualifying as a refugee, as well as the rights that the signatory states must guarantee to those who benefit from it. However, it is silent on procedural matters; specifically, it does not provide a time limit within which a decision must be reached after the asylum application is filed. As for the European Court of Human Rights (hereinafter ECtHR), it has stated that an asylum application does not fall within the scope of Article 6, guaranteeing a

¹⁶ It should be emphasized that the CJEU case law quoted in this article refers only to the Brussels IIa Regulation because of the lack of relevant case law on the Brussels IIb Regulation at this stage. This is because of the relatively recent entry into force of the Brussels IIb Regulation, considering that it ‘shall apply only to legal proceedings instituted (...) on or after 1 August 2022’ (Article 100(1) of the Regulation).

¹⁷ <https://ec.europa.eu/eurostat/databrowser>.

¹⁸ <https://www.forumrefugees.org>.

reasonable time of proceedings.¹⁹ Indeed, this Article only applies to trials regarding civil rights and obligations, or criminal charges, neither of which, according to the Court, are at stake in the case of an asylum application.

Therefore, no international norm imposes a prompt procedure; it is rather up to the states to define the procedural rules affecting the asylum application, as well as the subsequent decision. This could appear detrimental to asylum seekers, who may remain in a position of uncertainty for a long time. However, states are prompted to enact quick proceedings by the principle of non-refoulement. Indeed, while Article 33 of the Geneva Convention prohibits states from expelling a person who has been granted refugee status, customary law has extended this rule to asylum seekers.

They are therefore guaranteed the right to stay in the state and benefit from temporary refugee status until a decision is made (notwithstanding the specific rules contained in Regulation 604/2013²⁰ – hereinafter ‘Dublin III Regulation’ – when an application is filed in different Member States). In conclusion, it is in the interest of the applicant to obtain a decision as soon as possible when child abduction is at stake, whereas this cannot be said (at least to the same extent) of the asylum seeker.

Besides, given the huge number of asylum applications which European states are currently facing,²¹ it seems unlikely that the six-week time limit provided for in The Hague Convention could be met. Here, the specific logic of the two instruments appears to conflict.

The significant differences between the two texts laid out in the first part of this article create difficulties when the Conventions are invoked simultaneously.

2. OVERLAP OF THE HAGUE CONVENTION AND ASYLUM LAW IN PRACTICE

The existence of a pending asylum claim may be taken into account by a judge deciding on a return when interpreting and applying the Hague Convention; furthermore, consideration must be given to whether a decision granting asylum should constitute an obstacle to the child’s return.

A. Influence of the Asylum Claim on the Hague Convention: Interpretative Issues

The existence of an asylum claim can influence the interpretation of the Hague Convention, specifically regarding the integration of the child, as well as the child’s wrongful removal.

1. Asylum Claim and Integration of the Child

In particular, the existence of an asylum claim may be taken into account by a Hague judge with regard to the matter of a child’s integration. The question of whether a child is integrated in a Contracting State can arise at two stages of the return proceedings under the Hague Convention.

¹⁹ European Commission of Human Rights, *Kareem v. Sweden*, Application no. 32025/96, DR 87-A.

²⁰ Regulation 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ 2013 L180/31. According to Article 1, the objective of the Dublin III Regulation is to ‘[lay] down the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person’.

²¹ According to Eurostat, 630,890 applications were filed in the EU in 2021.

Namely, to establish whether a child was habitually resident in the state at the time of the wrongful removal – since this is a decisive factor in triggering the application of the Convention²² – and whether the child had become integrated in the state where the taking parent raises the exception set out under Article 12(2) of the Hague Convention.²³

(a) Habitual residence in the state of origin

While the concept of habitual residence is central to the Hague Convention, the document does not give a definition. Neither does the Brussels IIb Regulation. Case law, however, provides some indications as to how this concept should be construed. According to the case law of the Court of Justice of the European Union (hereinafter CJEU), habitual residence is a factual concept which requires 'some degree of integration in a social and family environment'.²⁴ A pending asylum claim for the parent and/or child may undermine the child's integration since his/her legal status is uncertain.

In a case ruled upon by the Swiss Supreme Court,²⁵ a family had acquired refugee status in Greece before moving to Finland, where they filed an asylum claim. This was denied and the mother flew to Switzerland with the child. The father, who had meanwhile returned to Greece, filed a return application for the child under the Hague Convention.

The defendant mother and the child's guardian argued that the return to Greece could not be ordered since the child's last habitual residence was in Finland.

However, notwithstanding the fact that the intention of the parents to settle in Finland had been established, the Swiss Federal Court was not satisfied that the child had acquired habitual residence in Finland. The fact that the asylum claim filed by the parents had been rejected by the Finnish authorities was decisive in this respect and so the Court acknowledged that Greece was still the child's state of habitual residence at the time of the alleged wrongful removal.

(b) Settlement of the child in the state of refuge (Article 12(2) of the Hague Convention)

The French *Cour de cassation* was required to rule on the case²⁶ of a girl who had been abducted in Ukraine and removed to France by her mother. To oppose the return application lodged by the prosecutor, the mother claimed that a one-year period had elapsed since their arrival and that the child had settled in her new environment.

The first instance court, as well as the Court of Appeal, rejected this defence on the basis that the mother did not speak French, was unemployed and that her request for asylum was still pending. These factors led the judge to consider that the mother was not settled in France and therefore her daughter was not settled either.

The *Cour de cassation* overruled the appeal decision and instead considered the mother's situation to be irrelevant in establishing whether the child was settled, which is the actual focus of the defence set out under Article 12(2) of the Hague

22 Article 4 of the Hague Convention: 'The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. (...)':

23 According to this provision, the judge may refuse to order the return where 'the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph' and where 'it is demonstrated that the child is now settled in its new environment'.

24 C-523/07, A (EU:C:2009:225), Judgment of 2 April 2009.

25 Tribunal fédéral (Switzerland), II^e Cour de droit civil, arrêt du 23 mai 2018, 5A 121/2018.

26 *Cour de cassation*, 1st Civil Chamber, 13 July 2017, 17-11.927: <https://www.legifrance.gouv.fr/juri/id/JURITEXT000035200188/>.

Convention. One may, nevertheless, wonder whether the solution adopted by the *Cour de cassation* would have been different had the child herself – and not the mother – filed a claim for asylum.

Arguably, the existence of an asylum claim is a relevant consideration in establishing whether a child is settled in a state of refuge since the minor's legal situation in that state is not stable as long as no decision has been made in the asylum claim. U.S. courts have often inferred that the child was not settled in the new environment from the fact that his/her immigration status was uncertain.²⁷

The Hague judge would, however, take this element into consideration as part of a more comprehensive approach, including other factors, such as the duration of the child's stay in the state of refuge, whether the child speaks the local language, whether he/she goes to school, etc. Therefore, the existence of an asylum claim taken from a factual rather than from a purely legal point of view may be relevant in assessing the child's integration under Article 12(2) of the Hague Convention.

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2. Interpretation of 'Wrongful Removal' in the Context of the 'Dublin III' Regulation

The matter of whether the removal of a child is deemed wrongful within the scope of the Hague Convention has gained new relevance in the context of migration law and more specifically in the light of a recent ruling issued by the CJEU,²⁸ which has shed some light on the connection between the Hague Convention and the Dublin III Regulation.

In the case at hand, a third-country couple residing in Finland moved to Sweden, where the mother gave birth to a child. The Swedish authorities placed the mother and child in a women's refuge because of the father's violent behaviour. The mother then applied for asylum in Sweden, but the Finnish authorities claimed jurisdiction on the basis of the Dublin III Regulation (EU). The Swedish authorities rejected the asylum application filed by the mother and child and ordered their transfer to Finland. The mother voluntarily executed the decision and then applied for asylum for herself and her child in Finland. The father, who had meanwhile obtained an annulment of the Swedish transfer order, filed a return application with the Finnish court under the Hague Convention.

27 C. Harnois, '1980 Hague Convention on the Civil Aspects of International Child Abduction: The Impact of a Refugee Claim or the Grant of Refugee Status on a Hague Return Application', *Canadian Family Law Quarterly*, 38.2 (2021), 121, at 131.

28 C-262/21, *A v. B* (EU:C:2021:640), 2 August 2021.

The application was rejected on the grounds that the child could not be considered to have been wrongfully removed. The father appealed to the Finnish Supreme Court, which referred a series of questions to the Court of Justice for a preliminary ruling, in particular on whether or not the child's transfer was wrongful.

The CJEU had thus to decide whether the removal of a child to another EU Member State could be regarded as wrongful if such a removal was actually a consequence of a transfer ordered by an administrative authority under the Dublin III Regulation mechanism. It ruled that in such an instance, the removal of the child to Finland, in line with the administrative order, was not deemed to be wrongful, even though the decision ordering the transfer of the applicant mother had been annulled in the meantime by the Swedish courts.

With this resolution, the Luxembourg Court established primacy of the Dublin system over Hague return proceedings. Indeed, from a pure Hague perspective, it is hardly doubtful that the removal of the child was indeed wrongful. Pursuant to Article 3(a) of the Hague Convention, the removal (or retention) of a child is deemed wrongful when 'it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention'. The mother did move to Finland without the father's consent and, as a result, a breach of the father's custody rights was established.

Arguably, the fact that the removal of the child to another state was initially imposed on the mother by an administrative order

did not necessarily mean that it could not be regarded as wrongful under the Convention. The focus of Article 3 of the Hague Convention is whether the custody rights of the parent who remained have been breached, regardless of how this breach arose.

While this specific case had most certainly not been anticipated by the drafters of the Hague Convention, attention should be drawn to the fact that the Hague Convention seeks to address the civil aspects of international child abduction and primarily to restore the *status quo ante*, i.e. the child's situation before the wrongful removal (or retention). As further pointed out by S. Corneloup, the Luxembourg Court may have decided the other way round and obliged the Finnish authorities to take back the applicant mother and the child and review their asylum claim had return been ordered under the Hague Convention.²⁹

B. Parallel Proceedings

Where asylum and child abduction proceedings run in parallel, consideration should be given to whether Hague return proceedings should be suspended until the asylum claim has been determined. Furthermore, where a decision granting asylum is issued, how such a decision would affect the return proceedings would need to be considered.

1. Should an Asylum Claim Stop a Hague Return Application?

The answer to that question may be found in public international law rules and in the domestic case law on treaty interpretation.

(a) Treaty relationship and public international law rules

How the two Conventions should interact with each other is not addressed in either

²⁹ S. Corneloup, 'Demande de retour d'un enfant enlevé et principe de non-refoulement des réfugiés: lorsque la Convention de La Haye de 1980 rencontre la Convention de Genève de 1951', *Revue Critique de droit international privé* (2021), p. 773, at para. 2.

the Geneva Convention or the Hague Convention. In particular, suspending Hague proceedings while the asylum claim is under review can contradict the objective to secure the prompt return of wrongfully removed children as set out in Article 1(a) of the Hague Convention.

The issue of treaty relationships is addressed by public international law rules, and specifically Article 30 of the 1969 Vienna Convention on the Law of Treaties which provides that 'the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.' While nothing in the Hague Convention addresses the issue of interaction with the Geneva Convention, it may be argued that their respective provisions are not *per se* incompatible.

This may be the case insofar as the Hague Convention (pursuant to Article 13(1)(b) or to Article 20) provides for the possibility of not ordering the return of a child where he/she would face a risk of persecution within the scope of Article 1 of the Geneva Convention.

(b) How has the issue been addressed under domestic case law?

In *FE v. YE*,³⁰ the High Court of England and Wales was given the opportunity to decide whether an asylum claim by the subject children should stop an application under the Hague Convention. In this case, the family was habitually resident in Israel until June 2016. The mother and their two children fled to Thailand with the father's consent. While they were supposed to return to Israel, the mother took the children to the UK instead, where she filed a claim for asylum, both for her and for the children.

The Home Secretary argued on the basis of Article 20 of the Hague Convention that a return order could not be enforced and that such an order could only be made, or take effect, if the asylum claim is refused and where all appeal rights are exhausted. The High Court ruled: 'There will be temporal disturbance, for sure, but this is of its nature curable and can be mitigated by access/contact in the meantime (as has happened in this case). The potential harm that may arise as a result of the breach of the expedition command is of an entirely different scale and nature to that which may arise from a breach of the principle of non-refoulement. It is this difference that is, in my judgment, decisive of the matter.'³¹

The decision further highlights the quintessential difference between the Hague Convention and the Geneva Convention. Where the Hague Convention provides for a mechanism that is essentially procedural, the Geneva Convention provides for 'substantive relief'. The Hague Convention aims at the restoration of the status quo, by means of 'the prompt return of children wrongfully removed to or retained in any Contracting State'.³²

The Hague Convention does not, however, purport to address the merits of a custody issue that is at the heart of a wrongful removal or retention. In contrast, the Geneva Convention does look into the merits of the alleged risk of persecution to make a decision with long-term effects: 'The relief that is granted under the 1951 Convention (...) in favour of a persecuted claimant is of a substantive nature. Essentially, it allows the claimant to live here indefinitely with a guarantee that he will not be returned to the place

30 *FE v. YE*, EWHC 2165 (Fam), High Court of England and Wales, 25 August 2017.

31 *Ibid.*, at para. 16.

32 See Explanatory Report, *supra* note 13, at para. 16.

of persecution.³³ Interestingly, in *G v. G*,³⁴ the Supreme Court of the United Kingdom noted that, notwithstanding a pending asylum claim, the court, seized of a Hague Return Application, could make a decision on the child's return. The Court, however, emphasized that the return order could not be enforced as long as the asylum claim was pending.

This decision confirms the primacy of the principle of non-refoulement over the principle of prompt return on the one hand and that, on the other, Hague proceedings and asylum proceedings do not rely on similar considerations. As a result, neither of the decisions needs to be aligned. While both Conventions are independent of each other, they should operate 'hand in hand' so as not to compromise their respective objectives.

Conversely, Canadian courts decided in *A.M.R.I. v. K.E.R.*³⁵ that 'the Hague court could make a return order, notwithstanding the existence of the grant of asylum', arguing that the grant of asylum solely provides the child with a *prima facie* entitlement to protection against refoulement – that the grant of asylum gave rise to a 'rebuttable presumption' of the existence of the risk of harm'. Although, in this case, asylum had already been granted, it arises from the court's reasoning that an asylum claim should not stop the return proceedings because the Hague judge can order the child's return regardless of whether or not asylum has been granted.

Therefore, the case law implicitly raises the issue as to who would be in the better position to assess the risk to the child upon return: as critically highlighted by the

High Court in *FE v. YE*, it is highly doubtful that the Hague judge 'could validly substitute the view of the duly designated decision-maker that there existed a risk of persecution with its own view'.³⁶

Considering that the Hague Convention provides for summary proceedings, the judge deciding on the return should not conduct a comprehensive assessment of the grave risk upon return. Conversely, the authority ruling on asylum is not time-bound and is not therefore in a position to conduct a fully-fledged assessment of the risk of persecution. More importantly, the case law raises the question of whether the grant of asylum would stop the Hague proceedings or would merely establish a rebuttable presumption that returning the child could expose him/her to a grave risk of harm within the scope of Article 13(1)(b) of the Hague Convention.³⁷

2. Principle of Return v. Principle of 'Non-refoulement': How does Granting Asylum Affect the Duty to Return the Child?

After having looked into the issue of whether return proceedings should be stopped pending the outcome of an asylum claim, the case should be considered where a decision granting asylum to the abducting parent or to the child him/herself has actually been issued: should such a decision influence the outcome of the return proceedings and if so, to what extent?

In the light of the respective objectives and procedures set out under the Geneva and Hague Conventions 'asylum claims and return claims are different in respect to their requirements and legal consequences and therefore the findings

³³ See *FE v. YE*, *supra* note 30, at para. 10.

³⁴ *G v. G*, UKSC 9, Supreme Court of the United Kingdom, 19 March 2021.

³⁵ *A.M.R.I. v. K.E.R.*, 2011 ONCA 417, Court of Appeal of Ontario, 2 June 2011.

³⁶ See *FE v. YE*, *supra* note 30, at para. 23.

³⁷ *Ibid.*, at para. 22.

of the administrative court cannot be taken as a basis for the judgment in the return proceedings.’³⁸

The Oberlandesgericht Stuttgart³⁹ highlighted that the two proceedings differed as regards the evidence and the facts that were submitted to the respective courts and as regards the burden of proof. In the context of an asylum claim filed by the abducting mother, the German administrative court (Verwaltungsgericht Stuttgart) considered that it could not be ascertained whether the mother and the child would be faced with extreme hardship upon return to Italy. In this light, asylum was granted to both mother and child.

In contrast, under the Hague Convention, the establishment of grave risk is incumbent on the defendant, i.e. the abducting parent, because the whole Convention rests on the assumption that the return of the child is in his/her best interests. The presumption can be rebutted if there is evidence that the child may (with a high degree of certainty) be exposed to a grave risk of harm upon return:

‘On the question of the existence of a “situation of extreme material hardship”, the Administrative Court stated that it was “not certain that the parties (...) would immediately be provided with the necessary child- and family-friendly accommodation upon their return to Italy.” In proceedings under the Hague Child Abduction Convention, when considering the requirements of Art. 13 of the Hague Convention,

it should be noted that in the case of uncertainty as to the facts, the burden of proof lies with the abducting parent.’⁴⁰

In conclusion, the answers given by the courts differ greatly, but they all face difficulties in making the two conventions work together. It would be desirable for the competent authorities to be able to rely on the advice of an external arbiter.

3. CALLING FOR AN EXTERNAL ARBITRATOR TO SETTLE HAGUE V. GENEVA DISPUTES

As has been shown, the authorities responsible for granting asylum to a child or ordering his/her return are different, independent of each other, and refer to different texts; most importantly, each of them is competent in its specific field. It therefore appears difficult to entrust one of them with the task of determining the effects of a parallel procedure. As such, it seems necessary for an external authority to adjudicate on the potential conflict. Three options might be conceivable.

A. Domestic Authorities as an Arbitrator: Inspiration from outside the EU

National lawmakers appear to be the natural authority to resolve conflicts between the international conventions which they are obliged to implement. They are, without doubt, bound to respect international treaties; but while resolving such conflicts is a way to guarantee their effectiveness. This solution has a limited application in New Zealand. Indeed, in 1991 the country adopted the Guardianship Amendment Act, the objective of which was

38 Questionnaire concerning the Practical Operation of the 1980 Child Abduction Convention, Prel. Doc. N° 4 of January 2023, 8th Meeting of the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention. See the response of Germany to Question 39, available at <https://www.hcch.net/en/publications-and-studies/details4/?pid=8520&dtid=33>.

39 Oberlandesgericht Stuttgart (Germany), 27 December 2021, Case No. 17 UF 282/21: <https://openjur.de/u/2454173.html>.

40 Ibid., at para. 77 – ‘Das Verwaltungsgericht hat zur Frage des Vorliegens einer “Situation extremer materieller Not” ausgeführt, es sei “nicht gesichert, dass den Klägern, einer alleinstehenden Mutter mit einem dreijährigen Kleinkind, ... für eine angemessene Unterkunft nach der Rückkehr nach Italien unmittelbar die notwendige kind- und familiengerechte Unterkunft zur Verfügung stehen wird.” In Verfahren nach dem HKÜ ist bei der Prüfung der Voraussetzungen des Art. 13 HKÜ zu beachten, dass im Fall einer Ungewissheit in tatsächlicher Hinsicht die Beweislast bei dem entführenden Elternteil liegt.’ (translation of the authors).

to adapt previous legislation⁴¹ in the light of the newly ratified Hague Convention. As for international child abduction proceedings, it largely implements and specifies the principles of the Convention. Article 13 of the above Act mirrors Article 13 of the Hague Convention by setting out the exceptions that can justify the refusal of a return order. However, the specific and perhaps precursory feature of the New Zealand Act is that it explicitly mentions the hypothesis where a child has been granted asylum.

Its section 2 provides that ‘in determining whether [the return of the child would be conflicting with the fundamental principles of New Zealand law relating to the protection of human rights and fundamental freedoms], the Court may consider, among other things, (a) whether or not the return of the child would be inconsistent with any rights that the child, or any other person, has under the law of New Zealand relating to political refugees or political asylum...’

Therefore, the legislator states that the decision on the return should be consistent with that regarding asylum. However, the wording of the text seems to indicate that the judge must take asylum into account, whether granted or simply required, without being constrained by it.⁴² Ultimately, it is up to the judge to make the best decision by considering the circumstances that justify the asylum application, as well as the imperative of consistency, should it be granted. The clarifications of New Zealand law are limited, as many questions remain unanswered.

It may nevertheless be an example to follow and improve upon for states facing this emerging issue. The United Kingdom has also adopted specific legislation to address the issue of parallel asylum and child abduction proceedings.⁴³ Additionally, the UK judiciary has drawn up good practice guidance in order ‘to ensure that the case management of the child abduction proceedings (...) is conducted in a manner that will enhance decision-making in both jurisdictions where there are related applications.’⁴⁴

In particular, the judge deciding on the return application should be made aware of the pending asylum claim. Where necessary, the Secretary of State responsible for adjudicating on the asylum claim should be invited to intervene in the child abduction proceedings. Overall, the guidelines promote timely communication between the administrative authority deciding on the asylum claim and the court adjudicating on the return.

Furthermore, the practice guidance addresses one particular procedural issue regarding the disclosure of information. While some of the information contained in asylum proceedings may be of relevance in the context of return proceedings, it might not be appropriate to disclose it where this would damage the abducting parent’s or the child’s interests. It is thus recommended for courts ‘to balance the systemic importance of maintaining confidentiality in the asylum process, together with the respondent parent’s and the child’s particular right to confidentiality in that process against the applicant parent’s rights under Articles 6 and 8 of the

41 Guardianship Amendment Act (1991, No. 19), amending the Guardianship Act 1968 (1968, No. 63), available at: http://www.nzlii.org/nz/legis/hist_act/gaa19911991n19243/.

42 According to our research, it seems that the issue has never been raised before a New Zealand court.

43 Part 12, Chapter 6A of the Family Procedure Rules 2010 (FPR), adopted on 1 October 2022 makes special provision regarding return proceedings, including under the 1980 Hague Convention in proceedings with links to asylum claims.

44 *Practice Guidance: Case Management and Mediation of International Child Abduction Proceedings, Appendix 2 – Cases Involving a Protection Claim or Protection Status*, issued 9 March 2023 by the President of the Family Division of the High Court together with guidance from the Senior President of Tribunals (SPT): <https://www.judiciary.uk/wpcontent/uploads/2023/03/Presidents-Practice-Guidance-on-Case-Management-and-Mediation-of-International-Child-Abduction-Proceedings.pdf>.

ECHR and the child's rights under Articles 6 and 8 of the ECHR.⁷

B. European Courts as an Arbitrator: a Promising Prospect for Europe?

Since all EU Member States are also members of the Council of Europe, it is worth taking a look at how the issue of parallel return and asylum proceedings has been or may be addressed by both the ECtHR and the CJEU.

1. Assessing the Child's Best Interest in the Light of the European Convention on Human Rights

So far, the ECtHR has never ruled on a state's decision to prioritize asylum over the right for the abducted child to be returned, or vice versa. However, it would seem that this is a particularly appropriate authority for doing this, both because of its independence of judges and national executives, and due to its historical contribution to the promotion of the best interests of the child in Europe.

Indeed, while this concept comes from international treaties that go beyond the European framework,⁴⁵ the ECtHR has granted it real binding force by integrating it into the right to family life enshrined in Article 8.⁴⁶ On these grounds, the ECtHR now operates double supervision of state application of the Hague Convention.

There is firstly the substantive supervision: the Court examines whether the decision made by a judicial authority is consistent with the child's best interests. This was set out in *Neulinger v. Switzerland*,⁴⁷ in which the Court decided that the return order issued by the Swiss judicial authority breached Article 8, as a return to Israel was clearly not in the child's best interests, based on the information available to the Court. In such a situation, the Court assessed that, even though states are obliged to apply the Hague Convention, this must be interpreted in the light of the guarantees provided by Article 8 of the ECHR.⁴⁸

In addition, the Court has initiated procedural supervision, with regard to the reasons for a decision in the light of the elements provided by the parties, as well as the steps taken by the authorities to investigate them. This was introduced in *X. v. Latvia*,⁴⁹ in which the Court blamed the Latvian judicial authority for ordering such measures without conducting a detailed examination of the allegations regarding the threats to which the child would be exposed in its country of origin, Australia, without making a substantive statement on whether the return was justified.⁵⁰

45 First mentioned in the UN Declaration on the rights of the Child of 1959, it was defined and consolidated by the UN Convention on the rights of the Child (referred to as the New-York Convention) of 1989.

46 See for example ECtHR, *Gnahoré v. France*, Appl. no. 40031/98, Judgment of 19 September 2000, in which the Court notoriously tried to provide a definition of this notion (§59): On the one hand, the interest clearly entails ensuring that the child develops in a sound environment (...); on the other hand, it is clear that it is equally in the child's interest for its ties with its family to be maintained, except in cases where the family has proved particularly unfit. All ECtHR decisions are available at <http://hudoc.echr.coe.int/>.

47 ECtHR, *Neulinger and Shuruk v. Switzerland*, Appl. No. 41615/07, Judgment of 6 July 2010.

48 Ibid., at para. 132: 'In matters of international child abduction, the obligations that Article 8 imposes on the Contracting States must therefore be interpreted taking into account, in particular, the Hague Convention. (...) §133: However, the Court is competent to review the procedure followed by domestic courts, in particular to ascertain whether the domestic courts, in applying and interpreting the provisions of the Hague Convention, have secured the guarantees of the Convention and especially those of Article. 8.'

49 ECtHR, *X. v. Latvia*, Appl. no. 27853/09, Judgment of 26 November 2013.

50 Ibid., at para. 115: 'Article 8 of the Convention imposed a procedural obligation on the Latvian authorities, requiring that an arguable allegation of "grave risk" to the child in the event of return be effectively examined by the courts and their findings set out in a reasoned court decision'

It is worth noting that this ruling was issued by the Grand Chamber with nine votes against eight, with seven judges stating in a dissenting opinion that the Latvian court's investigation, although not thorough, was sufficient to dismiss the claim of a grave risk incurred by the child.⁵¹ On the contrary, in his own dissenting opinion, one judge considered that the Court should not only have held in favour of a breach of Article 8, but should have stated clearly, as in *Neulinger*, that the return was not in the child's interests.

Finally, while the very principle of supervision by the ECtHR on the basis of Article 8 is not discussed, its extent remains subject to debate. The general rules on the connection between Article 8 and the Hague Convention have yet to be clarified, while their specific application to the issue of asylum remains to be defined in whole.

2. Relying on the CJEU to Resolve Conflicts between the Two Conventions

An answer may also emerge at EU level, especially with regard to the European Charter of Fundamental Rights adopted on 7 December 2000. Article 18 of the Charter reiterates the commitment of Member States to guarantee the right to asylum in accordance with the Geneva Convention, while Article 19 establishes the corollary principle of non-refoulement.

Unlike the latter convention, it also contains specific provisions regarding the child's interests: Article 24 stipulates that 'Children shall have the right to such protection and care as is necessary for their well-being'. In particular, Article 24(3) stipulates that 'Every child shall have the right to maintain on a regular basis a personal relationship and direct contact

with both his or her parents, unless that is contrary to his or her interests.'

These provisions stipulate that the child's interests are one of the fundamental legal standards allowing Member States to exceptionally depart from specific EU legislation, although this would not be permitted under the strict application of this legislation. This reasoning was demonstrated in matters of asylum. In *MA* and others,⁵² the Court held that the best interest of the child held primacy over the strict application of the Dublin Regulation system. In principle, a refugee who has moved to another Member State must return to the one where he/she first applied for asylum, but the Court held that such a return must not be ordered against a minor refugee if it is contrary to his/her interest.

This exception, which originated in the case law, was then translated into the latest version of the Dublin Regulation⁵³ adopted several weeks after this ruling. This further highlights the role played by the CJEU in harmonizing the interpretation of EU law. In the light of the above, the CJEU seems particularly well suited to lay down guidelines on the issue at hand, for two reasons.

Firstly, it is the supreme authority in charge of interpreting EU law, including asylum law and the Brussels IIb Regulation (which makes explicit reference to the Hague Convention): it is its prerogative to coordinate the regulations from these two acts of law. Secondly, the preliminary ruling procedure allows any court of a Member State to immediately refer the case to the CJEU, without waiting, as in the case of the ECtHR, for an alleged breach of

⁵¹ *Ibid.*, at para. 11: 'While the reasons given by the Latvian courts for ordering the return of [the child] were succinctly expressed, we consider, contrary to the view of the majority, that they adequately responded to the applicant's arguments and that the examination of the claims made by the applicant satisfied the procedural requirements imposed on them by Article 8 of the Convention.'

⁵² C-648/11, *MA and Others v. Secretary of State for the Home Department* (EU:C:2013:367), Judgment of 6 June 2013.

⁵³ Regulation (EU) No 604/2013 of 26 June 2013, see *supra* note 20.

fundamental rights and the exhaustion of domestic remedies.

4. CONCLUSION: HARMONIZING GUIDANCE FOR COURTS?

A. Some Good Practices for Consideration

The contradicting objectives of the two instruments as well as their procedural nuances make it very difficult, if not impossible to come up with a one-fit-for-all solution that would be suitable in all cases where return and asylum proceedings run in parallel. The specificity of such cases makes it rather advisable to look for case-by-case, practical solutions. Developing guidance for courts, as the UK judiciary has done,⁵⁴ would provide for the adequate flexibility with which such cases should be handled.

As a first good practice, it might be suggested that the asylum claim should be reviewed on a priority basis where it is determined that both an asylum claim and a return application have been submitted with regard to the same child. Giving procedural precedence to the asylum claim would acknowledge the primacy of the asylum right while ensuring that the objective of promptness set out under the Hague Convention is duly taken into consideration, thereby preventing a stay in return proceedings for an unreasonable time.

Considering further the influence of the grant of asylum to a parent on the outcome of return proceedings, it should be recommended that such priority treatment be extended to cases where an asylum claim is filed on behalf of the taking parent only (and not on the minor's behalf). Some guidance should also be provided to the court deciding on the return once asylum has been granted

to the child and/or to the taking parent. In such cases, it is highly probable that a grave risk of exposing the child to harm pursuant to Article 13(b) of the Hague Convention would be raised before the Hague judge.

While granting asylum under the Geneva Convention may not necessarily feature a grave risk of harm under the Hague Convention, it is advisable to consider that granting asylum to the child should give rise to a rebuttable presumption that a grave risk of exposure of the child to harm is established, following the solution identified by the Canadian courts in *A.M.R.I. v. K.E.R.*⁵⁵

The presumption could be rebutted by establishing that adequate protective measures have been put in place in the state of origin. This solution allows the judge to take into account the non-refoulement principle when applying Article 13(b) of the Hague Convention in accordance with the principles set out in the 1969 Vienna Convention. This is not, however, beyond any criticism, since it might be seen as contradicting the presumption set out in the Hague Convention itself according to which the burden of proof lies with the applicant (i.e., usually the parent who remains behind).

B. Finding a Relevant Framework for Establishing Good Practices

The implementation of the above good practice for courts could be considered at international and regional levels. At international level, the Hague Conference on Private International Law (under the auspices of which the Hague Convention was concluded) appears to be suited to establish guidance on the operation of the Hague Convention.

⁵⁴ See *supra* note 44.

⁵⁵ See *supra* note 35.

Enhancing the operation of its core conventions is one of the organization's tasks which can be achieved through various soft-law instruments. In addition, the operation of the core Hague Conference on Private International Law (HCCH) conventions is reviewed regularly in the context of meetings of the Special Commission, where specific recommendations ('Conclusions and Recommendations') are adopted by contracting states and members of the HCCH.⁵⁶ Given the specific nature and scope of the issue at hand, the latter approach seems more realistic for issuing appropriate guidance to courts in such cases.

At regional level, the European Judicial Network ('EJN') through its contact points, including the Central Authorities

designated under the Brussels IIb Regulation, could be an appropriate forum to establish guidelines on case management in child abduction cases where there is an overlap with an asylum claim.⁵⁷ The informal framework provided by the EJN could therefore be used to discuss operational issues such as the one at hand in this article and identify and promote good practices for courts. While considering the feasibility of such a proposal, due regard should be given to the fact that EJN stakeholders are not usually those having jurisdiction over asylum policy issues.

There might therefore be a need for prior coordination between the judiciary and the asylum authorities at domestic level to reach a common ground on potential good practices.

⁵⁶ See Article 8 of the Status of the Hague Conference on Private International Law, available at: <https://www.hcch.net/en/instruments/conventions/full-text/>.

⁵⁷ This possibility is explicitly mentioned under Article 84 of the Brussels IIb Regulation.

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DOMESTIC VIOLENCE ACROSS BORDERS: THE IMPACT ON PARENTAL RIGHTS

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Victims of domestic violence need effective and timely protection, irrespective of the institution of criminal proceedings and regardless of any separation or divorce proceedings. Frightened by the risk of further contacts with the abuser and eager to cut ties with the past, abused people may, in fact, be reluctant not only to apply for separation and divorce but primarily to file criminal reports. In addition, feeling unsafe and exposed to psychological or physical violence in their own homes, victims may feel the 'natural' instinct to get as far away as possible from their violent partners. Especially when family origins are rooted in different countries, the first way out of a context of domestic violence is to flee the country of residence in the hope of finding a safe haven for them and their children in another state, usually that of their origin.

This paper analyses the Council of Europe and EU legal framework that is applicable to these situations. More specifically, it addresses the procedural and substantive law regarding the adoption and circulation of protective measures and their interaction with the provisions of the 1980 Hague Convention on international child abduction and with the rules on separation and divorce proceedings, especially when custody and visitation rights are involved. Special attention is also devoted to the case law of the ECtHR and, in cases of domestic violence, its effort to reconcile the need for protection of the abused family members with the need to safeguard family ties. Finally, the paper offers some suggestions to improve the effectiveness of the current legislation in its interpretation and application and to amend it in the future.

KEYWORDS:

BEST INTERESTS OF THE CHILD | CO-PARENTING | CUSTODY RIGHTS | DIVORCE | DOMESTIC VIOLENCE
INTERNATIONAL CHILD ABDUCTION | JURISDICTION | PARENTAL ALIENATION PROTECTIVE MEASURES
SEPARATION | VISITATION RIGHTS | SECONDARY VICTIMIZATION | STATE OF REFUGE | STATE OF RESIDENCE

1. INTRODUCTION

Marie is a French citizen. In 2009, she married Giovanni, who is Italian and, since then, they have been living in Milan. Their relationship seemed steady and happy. But after the birth of their daughter, Anne, Giovanni changed, becoming increasingly irritable and aggressive. During the last four years, he has been beating, insulting and threatening Marie. He has endangered her physical integrity and offended her freedom of self-determination and moral freedom.

Following yet another fight, Marie decides to run away from home, taking Anne with her. She is totally upset. But she has heard that there is a shelter for abused women nearby. Perhaps somebody there could offer her and her daughter protection. At the shelter, Marie and Anne are received by a social worker who offers them refreshments and advice about the next steps that she could take.

She tells her that she needs to report Giovanni to the police. And she has to contact a lawyer to initiate separation proceedings and ask for exclusive custody of Anne. It seems she can also obtain a restraining order against Giovanni to prevent him from approaching her and Anne. But what is she supposed to do while waiting for a decision? Judicial proceedings are always so lengthy... Where will she live? How? Can she move back to France to her parents' house? And, above all, can she take Anne with her? The social worker has no answers. 'That depends on the judge', she says. 'And on the evidence.' 'Do you have any evidence?' she asks.

Marie thinks back to the threats and offences Giovanni texted her. She

remembers the time she went to the emergency room at the hospital because he had held her so strongly that he broke her wrist. But she said to the doctor that it was an accident. And the medical report states that it was an accident. Would that be enough? Would the judge trust her?

Should she say that her husband was violent with respect to Anne too? Actually, Giovanni never behaved violently with respect to his daughter. During his outbursts of anger, he always took it out on her, never on Anne. Of course, the child was scared and cried desperately. But Giovanni seemed not to see or hear her. The only object of his senseless rage was his wife. But, perhaps, if she exaggerates a little, the judge would be more benevolent... And, anyway, perhaps she should return to France and initiate proceedings before a French judge? At least she and Anne would be hundreds of kilometres away from danger.

2. RELEVANT LEGAL SOURCES

The protection of both individual integrity and family ties is, needless to say, a cornerstone of the European legal system. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)¹ enshrines it in Article 8 on the right to respect for private and family life. In interpreting this provision, the European Court of Human Rights (ECtHR) has often reiterated that the important ingredient of family life is the right to live together so that family relationships can develop normally and members of the family can enjoy each other's company.²

Regard for family unity and for family reunification in the event of separation are inherent considerations in the right to

1 The European Convention for the Protection of Human Rights and Fundamental Freedoms is available at: https://www.echr.coe.int/documents/d/echr/Convention_ENG.

2 ECtHR, *Marckx v. Belgium*, Appl. no. 6833/74, Judgment of 13 June 1979, § 31; ECtHR, *Olsson v. Sweden* (no. 1), Appl. no. 10465/83, Judgment of 24 March 1988, § 59.

respect for family life under Article 8.³ But Article 8 also protects private life and, according to the ECtHR, this notion includes the person's physical and moral integrity.⁴ Therefore, states also have the duty to protect individuals from moral and physical violence by third parties, not only public authorities but also private individuals.

Although breaches of Articles 2 and 3 often take place in such cases,⁵ Article 8 becomes of fundamental importance in the case of domestic violence, imposing the requirement on states to put in place and enforce an adequate legal framework to protect anyone against acts of violence committed by private individuals.⁶

Such measures should not only aim to sanction and redress but, before that, to prevent and deter abuse. Similar principles are contained in the Charter of Fundamental Rights of the European Union.⁷ Article 6 protects the right of every individual to liberty and security, while Article 7 mirrors the aforementioned Article 8 ECHR, protecting private and family life.⁸

In addition, the Charter specifically takes children's interests into consideration. Under Article 24, Member States have a general duty to apply and interpret EU and national law according to the principle of the child's best interests. Therefore, this principle is the criterion that has to guide the judiciary in the adoption of measures regarding children. Article 24(3) then

stipulates that a personal relationship and direct contact between children and their parents is instrumental to the best interest of the child. Therefore, unless there is evidence to the contrary, co-parenting is also protected under this provision.

Both the Council of Europe (CoE) and the European Union (EU) have implemented the above principles in more specific instruments regarding domestic violence, trying to find a balance between the opposing needs to protect family ties, on the one hand, and personal integrity against violence within the family, on the other. Of crucial importance is, first of all, the Istanbul Convention on domestic violence of 11 May 2011⁹ which addresses the problem of violence against women and domestic violence¹⁰ from a global perspective, designing a comprehensive framework of policies and measures for the protection of and assistance to victims.

Following a holistic approach, its provisions are focused on criminal, administrative and civil aspects. From this last point of view, in particular, they deal with the effect of domestic violence on parental rights. Article 31 requires States to ensure that the exercise of any visitation and custody right does not jeopardize the rights and safety of the victim and children. The withdrawal of parental rights can also be established if the child's best interest, which may include the safety of the victim, cannot be guaranteed in any other way (Article 45). Moreover, Articles 52 and 53 provide for the adoption of emergency

³ ECtHR, *Strand Lobben and Others v. Norway* [GC], Appl. 37283/13, Judgment of 10 September 2019, § 204

⁴ ECtHR, *Paradiso and Campanelli v. Italy* (GC), Appl. no. 25358/12, Judgment of 24 January 2017

⁵ While Article 2 protects the right to life, Article 3 prohibits torture and inhuman or degrading treatment. They have both been applied to cases of domestic violence. See, among others, *Tkheldize v. Georgia*, Appl. no. 33065/17, Judgment of 8 July 2021, and *T.M. and C.M. v. Republic of Moldova*, Appl. no. 26608/11, Judgment of 28 January 2014.

⁶ ECtHR, *Buturugă v. Romania*, Appl. no. 56867/15, Judgment of 11 June 2020.

⁷ The Charter of Fundamental Rights of the European Union is available at: <https://www.europarl.europa.eu/charter/pdf/texten.pdf>

⁸ Both provisions must be read in the light of Article 3 of the Charter, on the right to physical and mental integrity.

⁹ Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210), available at <https://rm.coe.int/168008482e>

¹⁰ According to Article 3(b), indeed, 'domestic violence shall mean all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim'.

barring, restraining or protection orders. From a more general perspective, the Convention enshrines the need for training of professionals dealing with such cases, cooperation between public authorities and non-governmental organizations to ensure immediate intervention and effective protection and assistance, treatment programmes for perpetrators of violence, as well as protection and support for child witnesses.

The EU ratified the Istanbul Convention on 28 June 2023.¹¹ But it also enacted specific instruments in addition to that treaty, to address cross-border cases of domestic violence. In particular, Directive 2011/99/EU on the European protection order (hereinafter the EPO Directive)¹² and Regulation 606/2013/EU on mutual recognition of protection measures in civil matters¹³ have been adopted with the aim of ensuring mutual recognition and enforcement of judicial measures issued to protect physical and psychological integrity of people, especially in cases of gender-based violence or violence in close relationships.

The issue has also been addressed in specific provisions of Regulation 2019/1111/EU (the Brussels IIter Regulation) of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction.¹⁴ The effectiveness of this overall legal framework in cases such as that of Marie and Giovanni will be analysed below.

3. CIRCULATION OF PROTECTIVE MEASURES

A. Application for a Protective Order

The most direct reaction offered by European Legislators to victims of domestic violence is the so-called ‘protection order’, i.e. a measure imposing obligations or restrictions on the person causing danger to another person with a view to protecting the latter against a criminal act which may endanger his life, physical or psychological integrity, dignity, personal liberty or sexual integrity.¹⁵

According to Article 53 of the Istanbul Convention, this measure must be immediately available; irrespective of, or in addition to, other legal proceedings, where necessary on an *ex parte* basis, and without undue financial or administrative burdens placed on the victim.

Furthermore, its breach must be subject to criminal or other legal sanctions. Protective orders can be criminal, administrative or civil. In this regard, the Istanbul Convention leaves the choice of the appropriate legal regime to the Parties.¹⁶ The EU, on its part, has developed instruments to ensure cross-border circulation in all sectors, in particular considering criminal orders within the scope of the EPO Directive and civil and administrative measures under Regulation 606/2013/EU.¹⁷ Domestic implementation, however, does not affect the content of protection orders which, according to both the EPO Directive and the Regulation 606/2013/EU, are measures imposing ‘(a) a prohibition or regulation on entering the place where the protected

11 The full list of States and International Organisations that have ratified the Convention is available at: <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=210>.

12 Council and European Parliament Directive 2011/99/EU, OJ L 338, 21.12.2011, pp. 2–18.

13 Council and European Parliament Regulation (EU) No 606/2013, OJ L 181, 29.6.2013, pp. 4–12.

14 Council Regulation (EU) 2019/1111, OJ L 178, 2.7.2019, p. 1–115.

15 See Recital no. 6 of Regulation 606/2013/EU of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters and Article 2(2) of the Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order, *supra* note 13.

16 See paragraph 269 of the Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence available at <https://rm.coe.int/1680a48903>.

17 According to Recital no. 10 ‘the notion of civil matters should be interpreted autonomously.’

Recital no. 13 adds that ‘this Regulation should apply to decisions of both judicial authorities and administrative authorities.’

person resides, works or stays regularly;
(b) a prohibition or regulation of contact with the protected person in any form; including by telephone, electronic or ordinary mail, fax or any other means;
(c) a prohibition or regulation to bring the nearest protected person within a prescribed distance.’¹⁸

Furthermore, in addition to criminal measures, most EU Member States also provide for administrative and, what is more relevant here, civil measures.¹⁹ In accordance with the rules of the Istanbul Convention, civil protection orders can be generally issued irrespective of whether or not a criminal complaint is filed against the offender, as well as independently of separation or divorce proceedings. Nevertheless, their impact on the conduct of criminal and family proceedings is self-evident.

Therefore, referring to the case at hand, the first and immediate judicial intervention that Marie could seek to prevent her exposure to further abuse is a civil protection order based on the assumption that her husband is endangering her physical and mental integrity. Given Marie’s intention to return to France, she should consider whether to apply for a protection order there or in Italy.

B. Jurisdiction to Apply for a Protective Order

The question of which judge is competent to issue a protective order, is not dealt with by Regulation 606/2013/EU. Although this instrument is expressly devoted to

‘protection measures in civil matters’, it does not face questions of jurisdiction and cannot be directly invoked by the judge to decide on his jurisdiction.²⁰

To address the problem, it would be necessary to focus on the fact that the important element for issuing a protective measure, being the violence and/or risk to the victim’s safety, in cases of domestic violence interacts with a further key condition, which is the affective context in which the violence takes place.

The weight given to each of these two aspects, affects the determination of the jurisdiction. On the one hand, it is possible to evaluate the formal autonomy of the precautionary proceedings in both criminal and family-related proceedings.

Indeed, in the civil law regime, acts of domestic violence, considered regardless of their familiar implications, can be defined as wrongful acts which fall within the scope of national law on tort. In this perspective, jurisdiction should be defined in accordance with Article 7(2) of Regulation 1215/2012/EU (the Brussels Ibis Regulation) and, therefore, attributed to the judge of the place where the violence took place or could take place.²¹

According to academics, the criterion of the place where the harmful event took place or may take place appears sufficiently flexible to allow for the exercise of (full) jurisdiction irrespective of where the potential victim usually resides and where both the victim and the potential

¹⁸ See Article 3(1) of Regulation 606/2013/EU and Article 5 of the EPO Directive.

¹⁹ According to the POEMS Mapping of Protection Order Legislation in 27 EU Member States, available at <http://poemsproject.com/results/country-data/>, except for Latvia and Poland, all others EU Members States provide for civil protection orders. In Bulgaria, Cyprus, Malta and Sweden, they are only available as part of marriage-related proceedings. However, in other countries, civil protection orders can be issued irrespective of separation or divorce proceedings.

²⁰ Indeed, the Commission had proposed to confer jurisdiction on the authorities of the Member State in which a person’s physical or psychological integrity was at risk, but this provision was removed during the negotiations. See M. Wilderspin, ‘The Potential Role of Regulation 606/2013 in Protecting the Abducting Parent in Return Proceedings’ in K. Trimmings, A. Dutta, C. Honorati and M. Župan (eds.), *Domestic Violence and Parental Child Abduction*, Intersentia Online, 2022, available at <https://www.intersentiaonline.com/permalink/b43d669831eb7bf8f05020586c4c0410>.

²¹ Regulation 1215/2012/EU of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

offender currently are.²² In particular, it would not be necessary for the latter to be physically present at the forum, since the measure can also be requested in the 'refuge' state where the potential victim has moved, for example when he or she has been reached there by threats or intimidation by telephone or other information technology.

In line with this reasoning, the French judicial authorities could deal with Marie's application for protection orders once she moves there regardless of whether or not her husband remains in Italy. As mentioned above, however, a different understanding of EU law which applies to protection orders in cases of domestic violence is also possible.

By enhancing the familiar context where the violence took place, protection orders could fall within the scope of Regulation 1111/2019/EU (the so-called Brussels IIter Regulation).²³ In fact, according to the CJEU case law developed with reference to the Brussels Convention of 1968,²⁴ 'as provisional or protective measures may serve to safeguard a variety of rights, their inclusion in the scope of the Convention is determined not by their own nature but by the nature of the rights which they serve to protect.'²⁵

From this perspective, academics point out that a protection order against domestic violence, being requested in the context of a family relationship, cannot be classified as relating to a 'civil' or 'commercial' relationship, as defined in the Brussels I-regime, but falls within the scope of the Brussels Regulation IIter Regulation.²⁶

Therefore, jurisdiction should be defined pursuant to Article 3, which refers to the courts of the Member State a) in the territory of which: '(i) the spouses are habitually resident, (ii) the spouses were last habitually resident, insofar as one of them still resides there, (iii) the respondent is habitually resident, (iv) in the event of a joint application, either of the spouses is habitually resident, (v) the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or (vi) the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is a national of the Member State in question; or (b) of the nationality of both spouses'.

In our case, this means that Marie should seek a protective measure in Italy. The conclusion would possibly be different when resorting to the competence criterion for the provisional measures provided for by Article 15 of this Regulation. In urgent cases, indeed, 'even if the court of another Member State has jurisdiction as to the substance of the matter, the courts of a Member State shall have jurisdiction to take provisional, including protective, measures which may be available under the law of that Member State in respect of: (a) a child who is present in that Member State; or (b) property belonging to a child which is located in that Member State.' By referring to the simple 'presence' rather than 'residence' of the applicant, the provision seems to identify a more flexible condition for establishing jurisdiction.

22 C. Honorati, G. Ricciardi, 'Violenza domestica e protezione cross-border', 2 *Rivista di diritto internazionale privato e processuale*, 2022, 225, at 238.

23 Council Regulation 2019/1111/EU of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, *supra* note 14.

24 The Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters was first replaced by Regulation 44/2001/EU and then by Regulation 1215/2012/EU *supra* note 21.

25 C-261/90, *Reichert and Kockler*, (EU:C:1992:149), at para. 32.

26 C. Honorati, G. Ricciardi, *supra* note 16, at 239.

Nonetheless, its scope appears more restricted than in the past,²⁷ being limited to the protection of children. The case at hand applies to domestic violence against a mother who can offer some evidence to the judge in this regard, but where there is no proof of the father mistreating his child.

Consequently, there is no certainty regarding whether or not the French courts have jurisdiction. Unless, as maintained by scholars, Article 15 is given a wider scope, including among the measures that are in favour of the child, including those intended to protect the parent who is a victim of domestic violence, on the shareable assumption that every case of witnessed abuse is a direct psychological violence against the minor himself.²⁸

However, the uncertainty in question puts the effectiveness of Regulation 606/2013/EU at risk in cases of domestic violence and possibly hinders its objective to promote the freedom of movement in respect of one of the most widespread categories of victims in Europe.²⁹ The safeguarding of the freedom of movement of persons within the EU, as guaranteed by Article 21(1) of the Treaty on the Functioning of the EU and Article 3(2) of the EU Treaty, is the main objective of the above Regulation, as emphasized in recital no. 3.

This means that anyone benefiting from measures of protection will not be prevented from moving freely within the EU out of their fear of losing protection,

because of a lack of any cross-border recognition and enforcement of those measures.³⁰ In the light of the above, Marie should have the right to enforce the protection order obtained in France or Italy in all EU Member States. This conclusion cannot be questioned by the wording of Article 2(3) of Regulation 606/2013/EU which provides that it 'shall not apply to protection measures falling within the scope of Regulation 2201/2003/EU [as replaced by Regulation 1111/2019/EU].'

Although this provision could be construed as ruling out the measures of protection of physical integrity in all cases *sensu lato* of family law, the most preferable approach should be in the sense of admitting the circulation of the protective measure pursuant to Regulation 606/2013/EU, whenever this is not possible pursuant to, and with the methods envisaged by, the Brussels IIter Regulation.

This conclusion seems more consistent with Recital no. 6 of Regulation 606/2013/EU, emphasizing that it 'applies to all victims, regardless of whether they are victims of gender-based violence'. In other words, the intention is for the Regulation to be applied to the widest possible audience. In this sense, then, if the objective of the European legislator is to be the easiest application of protective measures, in order to allow freedom of movement for citizens in safety, a broad interpretation should also be admitted with regard to jurisdiction, which allows for the protection of the person as such.

27 Article 15 of the Brussels IIter Regulation has replaced Article 20 of Regulation (EU) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, which provided for the adoption of provisional measures in urgent cases in respect of any person or asset who was present in that state, not only to children.

28 C. Honorati, G. Ricciardi, *supra* note 16, at 242; C. Momoh, 'The Need for Cross-Border Protective Measures in Return Proceedings', in K. Trimmings, A. Dutta, C. Honorati and M. Župan (eds.), *Domestic Violence and Parental Child Abduction*, Intersentia Online, 2022, available at <https://www.intersentiaonline.com/permalink/b43d669831eb7bf8f05020586c4c0410>.

29 According to a survey conducted in 2015 by the European Union Agency for Fundamental Rights (https://fra.europa.eu/sites/default/files/fra_uploads/fra-2014-vaw-survey-main-results-apr14_en.pdf), an average of one in three women in Europe claim to have been a victim of abuse (33%), i.e. almost 62 million women. The percentage drops to 22% and therefore one in five in the case of only domestic violence.

30 A. Dutta, 'The Cross-Border Circulation of Protection Measures Under Regulation 606/2013' in K. Trimmings, A. Dutta, C. Honorati and M. Župan (eds.), *Domestic Violence and Parental Child Abduction*, Intersentia Online, 2022, available at <https://www.intersentiaonline.com/permalink/b43d669831eb7bf8f05020586c4c0410>.

4. DOMESTIC VIOLENCE AND INTERNATIONAL CHILD ABDUCTION

A. The Principle of the Prompt Return of the Child

According to Italian law, the decision to transfer a minor abroad rests with both parents if they both have parental responsibility. Therefore, a mother's unilateral decision to take her daughter to France could be deemed to be a case of international child abduction falling under the provisions of the 1980 Hague Convention.³¹ According to Article 3 of the Convention, indeed, 'international child abduction' is a situation in which a child is removed or retained across national borders in breach of existing custody arrangements.

To counteract such conduct, this Convention provides measures intended to restore the *status quo ante*, ensuring the prompt return of the child to the State where he or she was habitually resident immediately before the removal or retention (state of habitual residence). In fact, Article 12(1) requires the authorities of the state where the child was taken (state of refuge) to order the child's return if proceedings are initiated within one year of the date of the wrongful event, in order not to allow the abducting parent to take advantage of his or her *contra legem* act by crystallizing the situation subsequent to it.

Therefore, the 1980 Hague Convention appears to be an expeditious remedy, potentially enabling Giovanni to force Marie to bring their daughter back to Italy. The principle of the prompt return of the child is based on the fundamental assumption underlying the Convention

that abduction is typically conducted by frustrated fathers who have been prevented from exercising a primary care role. In this sense, the objective of the order of the prompt return is to allow the child to return not only to the family environment of origin, but also to the primary care provider, in the best interests of the individual child, as well as of children generally.³²

However, this underlying assumption is not in compliance with reality since, in the vast majority of cases, the abductor parent is not the dissatisfied father without custodial rights, but the mother having custody of the child, who decides to leave the state of habitual residence to return to her home country, quite often claiming to flee from domestic violence contexts.

Therefore, a connection emerges between international child abduction and domestic violence that requires revisiting the scope of the 1980 Hague Convention in the light of the modern profile of the abducting parent. It is quite obvious, indeed, that when allegations of acts of domestic violence in the state of habitual residence are made, rather than being in the child's best interests, an order for the prompt return to that country could prove potentially harmful and counterproductive.³³

However, the Convention does present a certain amount of flexibility, providing for a number of exceptions allowing the authorities of the state of refuge to refuse the return of the child in the specific cases provided for in Articles 12, 13 and 20.³⁴

31 Hague Conference on Private International Law, Convention on the Civil Aspects of International Child Abduction, 25 October 1980 available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=24>, in force in all EU Member States.

32 M. Freeman, N. Taylor, 'Domestic Violence as an Aspect of 1980 Hague Child Abduction Convention Return Proceedings', in K. Trimmings, A. Dutta, C. Honorati and M. Župan (eds.), *Domestic Violence and Parental Child Abduction*, Intersentia Online, 2022, available at <https://www.intersentiaonline.com/permalink/b43d669831eb7bf8f05020586c4c0410>.

33 *Ibid.*, at 42.

34 M.C. Baruffi, 'La sottrazione internazionale di minori: un fenomeno ancora troppo frequente', in *Famiglia e Diritto*, 2022, 472, at 461.

B. Grave Risk of Physical or Psychological Harm

Within this framework, the exception to the principle of prompt return in case of 'grave risk of physical or psychological harm' enshrined in Article 13(b) is of fundamental relevance to our case. In fact, if the left-behind father initiates return proceedings as a consequence of the abduction, the 'taking' mother may invoke the exception of the grave risk of physical or psychological harm to which the child would be exposed in the state of habitual residence through allegations of domestic violence.

More specifically, she may infer the serious risk of direct harm to the child from the fact that the child has been physically or psychologically abused by the father. It should be emphasized, however, that some courts have applied this clause even in cases where there was a serious risk of the child's exposure to acts of domestic violence perpetrated by the left-behind parent against the taking parent.³⁵ This broader approach has also been recommended by the Permanent Bureau of the Hague Conference on Private International Law in its 'Guide to Good Practice'.³⁶

If such allegations are made, it becomes important to assess the effects of domestic violence on the child in the event of return and, more importantly, whether such effects exceed the threshold of the 'grave risk' exception of Article 13(b), taking into account the nature, frequency and intensity of the violence, as well as all other circumstances.³⁷

Significantly, the ECtHR has ruled that when the 'grave risk' exception is invoked with regard to allegations of domestic violence within the state of habitual residence, the authorities of the state of refuge responsible for the return decision are subject to precise procedural obligations: they are called upon to specifically analyse and evaluate the allegations underlying the 'grave risk' exception, in the light of all the circumstances of the specific case.³⁸

Therefore, 'both a refusal to take account of objections to the return capable of falling within the scope of Articles 12, 13 and 20 of the Hague Convention and insufficient reasoning in the ruling dismissing such objections would be contrary to the requirements of Article 8 ECHR and also to the aim and purpose of the Hague Convention. Due consideration of such allegations, demonstrated by reasoning of the domestic courts that is not automatic and stereotyped, but sufficiently detailed in the light of the exceptions set out in the Hague Convention (...) is necessary'.³⁹

In other words, according to the ECtHR, the failure of the national authorities responsible for the return decision to examine the allegations of domestic violence inferred by the taking parent under the exception of Article 13(b) of the 1980 Hague Convention constitutes a breach of the right to respect for private and family life under Article 8 ECHR in the same way as a superficial and general examination.

35 *Taylor v. Taylor*, 502 Fed. Appx. 854, 2012 WL 6631395 (C.A.11 (Fla.)) (11th Cir. 2012), 20 December 2012, United States Court of Appeals for the Eleventh Circuit (the US) [INCADAT Reference: HC/E/US 1184]; *Gomez v. Fuenmayor*, No 15-12075, United States Court of Appeal (11th Circuit), 5 February 2016 (the US) [INCADAT Reference: HC/E/US 1407].

36 Hague Conference on Private International Law, 'Guide to Good Practice under the HCCG Convention of 25 October 1980 on the civil aspects of International Child Abduction – Part VI – Article 13(b)' (2020), 13, at 38.

37 K. Trimmings, O. Momoh, 'Intersection between Domestic Violence and International Parental Child Abduction: Protection of Abducting Mothers in Return Proceedings', *International Journal of Law, Policy and The Family*, 2021, 00, 1–19, at 6.

38 *ECtHR, X v. Latvia*, Appl. No. 27853/09, Judgment of 26 November 2013.

39 *ECtHR, G.K. v. Cyprus*, Appl. No. 16205/21, Judgment of 21 February 2023.

C. Evidentiary Rules

Nonetheless, in this type of situation, there is still an objective difficulty of achieving an adequate level of evidence to determine the judge's assessment, given the nature of the facts of domestic violence, which, in general, take place in secret, behind closed doors.⁴⁰

In the light of this evidentiary difficulty, two different methods of analysing domestic violence allegations regarding the 'grave risk' exception have been developed: (1) the 'assessment of allegation approach', whereby the judge is required to scrupulously ascertain all relevant facts with respect to the allegation of domestic violence, taking into account all available documentary and oral evidence; and (2) the 'protective measures approach', according to which the judge is not called upon to verify the veracity of the facts underlying the accusation of domestic violence, but must simply consider them to be true, and then decide whether protective measures can be taken to avert the 'grave risk'.⁴¹

From this perspective, ascertaining the veracity of the allegations is considered a task for the judicial authority of the requesting state; therefore, the courts responsible for the return decision should only seek to resolve the disputed factual issue if the protection measures are unable to mitigate the risk.⁴² Thus, while the first method is based on the assumption that, in order to assess the risk, the disputed allegations must be ascertained, the latter is based on the assumption that the

existence of adequate protective measures in the particular case counts as a substitute for fact-finding.⁴³ Admittedly, both of the above methods seem to be in compliance with the ECtHR case law since they do not ignore domestic violence allegations with regard to the right arising from Article 8 ECHR. Indeed, the first requires an in-depth assessment of those allegations, whereas the latter assumes that they are true. Nevertheless, the 'assessment of allegation approach' should be preferred, since, without demonstrating the veracity of domestic violence allegations, it is very challenging to evaluate the 'grave risk' and, therefore, to determine what kind of protective measures are applicable for preventing it.

In other words, the 'protective measures approach' seems to be illogical⁴⁴ as it requires an assessment of the adequacy of the protective measures to avert the risk of serious harm, even before the actual existence of such a risk in the specific case has been established.⁴⁵

Certainly, given the need to assess the truth of domestic violence allegations, the 'assessment of allegations approach' may be problematic in terms of the duration of the return proceedings, which is a summary judgment, with the scope of cognition limited to verifying the conditions for the safe return of the child, which must take place within an extremely short time frame of six weeks.⁴⁶ In order to strike a balance between the opposing needs of, on the one hand, the assessment of the domestic violence allegations and,

⁴⁰ C. Honorati, 'Il ritorno del minore sottratto e il rischio grave di pregiudizio ai sensi dell'art. 13 par. 1 lett. b della Convenzione dell'Aja del 1980', *Rivista di diritto internazionale privato*, 2020, 796, at 815.

⁴¹ K. Trimmings et al., 'Best Practice Guide – Protection of Abducting Mothers in Return Proceedings: intersection between Domestic Violence and Parental Child Abduction' in Trimmings et al. (eds), *Domestic Violence and Parental Child Abduction*, 2022, 215, at 255.

⁴² K. Trimmings, O. Momoh, *supra* note 31, at 7.

⁴³ *Ibid.*, at 7.

⁴⁴ K. Trimmings, O. Momoh, *supra* note 31, at 9.

⁴⁵ K. Trimmings et al., 'Best Practice Guide – Protection of Abducting Mothers in Return Proceedings: intersection between Domestic Violence and Parental Child Abduction' in Trimmings et al. (eds), *Domestic Violence and Parental Child Abduction*, 2022, 215, at 255, 257.

⁴⁶ C. Honorati, *supra* note 33, at 815.

on the other, the expeditiousness of the return proceedings, the very summary judgment nature of these proceedings may be appropriate. From this perspective, the judge's inquiry – which, however, remains essential – should not be directed towards ascertaining whether there really was violence with respect to the child or the mother, or, even less, towards the parental capacity of the parents in question.⁴⁷

In other words, in a summary judgment, it is not necessary for the judge to gain proof that violence took place, but instead, the judge must be convinced 'in the light of the circumstances of the case'⁴⁸ of the mere likelihood that the facts set out have indeed taken place and are likely to recur and that the violence reaches a level that significantly affects the child's welfare.⁴⁹

Furthermore, although this is a proceeding inspired by the dispositive principle – accordingly, the burden of proof of the risk of domestic violence rests with the mother – it is still a proceeding intended to safeguard the child's welfare. Consequently, the judge will still be required to use his powers *ex officio* to verify that the child is not being exposed to a serious risk.⁵⁰

As pointed out above, the existence of a context of domestic violence can constitute a cause of 'grave risk' to the child, which, according to Article 13(b) of the 1980 Hague Convention, justifies a refusal of return. Nonetheless, in many cases there are just hints of violence, which do not exceed the threshold of the 'grave risk' according to Article 13(b), so

as to justify the refusal of return.⁵¹ In such situations, it is possible that the court in the state of refuge will still order the return of the child, assuming that the risk of harm could be mitigated or controlled through appropriate protective measures.⁵²

In the light of the above, the adoption of protection measures becomes crucial in the context of the EU, given that the Brussels IIter Regulation (as well as the previous Brussels IIbis Regulation) implements an even stricter child return policy.⁵³ Indeed, the Regulation further limits the court's discretion with respect to the 1980 Hague Convention providing that the return of the child may not be refused if adequate measures are applied to ensure his or her protection.⁵⁴

Article 27(3) of the Brussels IIter Regulation (as well as Article 11(a) of the Brussels IIbis Regulation) prevents the courts of the state of refuge from refusing the return of a child solely on the basis of Article 13(1) of the 1980 Hague Convention when the courts are 'otherwise satisfied, that adequate arrangements have been made to secure the protection of the child after his or her return.'⁵⁵

Nevertheless, unlike the Brussels IIbis Regulation, the Brussels IIter Regulation gives the courts of the state of refuge the additional power to 'take provisional, including protective, measures (...) in order to protect the child from the grave risk referred to in point (b) of Article 13(1) of the 1980 Hague Convention' (Article 27(5)). The protection measures referred to in Article 27(5) are clearly measures under

47 Ibid., at 815.

48 ECtHR, *X v. Latvia*, Appl. No. 27853/09, Judgment of 26 November 2013.

49 C. Honorati, *supra* note 33, at 815.

50 Ibid., at 815.

51 C. Honorati, 'Jurisdiction to Take Protective Measures in the State of Refugee in Child Abduction Cases', in Trimmings et al. (eds), *Domestic Violence and Parental Child Abduction*, Intersentia Online (2022), 139.

52 C. Honorati, G. Ricciardi, *supra* note 16, 225, 250.

53 C. Honorati, *supra* note 44, 139.

54 C. Honorati, G. Ricciardi, *supra* note 16, 225, at 251.

55 K. Trimmings, O. Momoh, *supra* note 31, at 10.

the law of the state of refuge, which may be recognized and enforced in the state of habitual residence, provided that the other party has been summoned to appear or at least the decision containing the measure was served on him/her before enforcement.⁵⁶ In addition, according to Article 2(1)(b), those measures may be recognized and enforced in all other Member States, if necessary.

Therefore, in the system outlined by the Brussels IIter Regulation, the court of the state of refuge, while not having jurisdiction in matters of parental responsibility, is empowered to take measures to protect the child with extraterritorial effect. Obviously, the measures taken by the court of the state of refuge under Article 27(5) are provisional and will cease to apply as soon as the court with jurisdiction on the merits has issued further measures.⁵⁷

Therefore, in the case at hand, if the mother returns to France taking her daughter with her, she might oppose the father's request to take their daughter back to Italy alleging the existence of a grave risk to her safety. Alternatively, she might ask for (further) protective measures intended to protect the minor.

As seen above in paragraph 3, however, since protection measures based on Articles 27(5) and 15 only apply to the child and, since in this case there is no evidence of abuse of the child, the mother's request could only be granted by broadening the scope of the latter provisions to include the assumption that every act of violence against the parent who has primary care over the minor inevitably affects the child.⁵⁸

5. MEASURES ISSUED IN SEPARATION AND DIVORCE PROCEEDINGS

According to Article 3(a)(ii) or (iii) of the Brussels IIter Regulation, in general, jurisdiction regarding separation proceedings between the spouses lies in the country of their residence, in this case Italy. The seized judge is, however, in any case required to assess whether exercising jurisdiction is in accordance with the child's best interests. In other words, the discretionary power of judges is envisaged in the light of all the circumstances of the specific case.

According to Article 12 of the Regulation, dealing with 'Transfer of jurisdiction to the jurisdiction of another Member State', in exceptional circumstances, the court of a Member State with jurisdiction over the merits may, in essence, 'transfer' the dispute to the court of another Member State, on the basis of a discretionary assessment regarding the greater suitability of this other authority to rule on the matter.

If, therefore, the Italian judge dealing with the separation procedure believes that the judicial authority of the country in which the child resides is more suitable for assessing his or her best interests in the specific case, he will order a stay of the proceedings (or part thereof), being able, alternatively: a) to establish a time limit within which one or more parties can inform the court of the alternative forum of the pending proceedings and of the possibility of a transfer of jurisdiction and submit an application to that court; or b) ask a court of the other Member State to assume jurisdiction.

⁵⁶ European Commission, Directorate-General for Justice, 'Practice guide for the application of the Brussels IIb Regulation', Publications Office, 2022, 126.

⁵⁷ C. Honorati, *supra* at note 44, 139.

⁵⁸ B. Hale, 'Taking flight Domestic Violence and International Child Abduction', CLP, 2017, 3.

The requested court may accept jurisdiction at that point, if this reflects the child's best interests because of the particular circumstances of the case, within six weeks: a) of the moment in which it is seized by at least one of the interested parties; or b) from the moment of receipt of the request from the judge initially seized. If the 'alternative' court accepts the transfer of jurisdiction in its favour, the judge previously seized may decline jurisdiction.

The Brussels IIter Regulation also enables the courts of the requested state to activate the procedure of the transfer of jurisdiction in exceptional circumstances. According to Article 13, if the judicial authority of a Member State, which does not have jurisdiction under the Regulation, considers it to be more suitable to evaluate the child's best interests in the specific case, because of the particular bond with him or her, it can request a transfer of jurisdiction from the court of the state of origin (regardless of whether proceedings related to parental responsibility regarding that child are already pending in that state).

The court may agree to transfer its jurisdiction within six weeks of receiving such a request if, in the specific circumstances of the case, it considers such a transfer to be in the child's best interests.

Furthermore, pursuant to Article 10(1) (b) of the Regulation, the parties have a limited possibility of 'choosing' the forum in matters of parental responsibility. Given the conflictual nature of the relationship in the case at hand, it would certainly be hard to imagine that the father would be willing

to accept the jurisdiction of another state, namely France.

Therefore, the said provision could become relevant only in cases where there is agreement before the partners separate or in the case where, the mother files for separation before the French courts and the father does not challenge this choice.⁵⁹ Jurisdiction established under Article 10 cannot be questioned by the seized court (see Article 12(5)). Article 10 is the only provision which remains applicable in the case of the wrongful removal of the minor abroad. To deter parental child abduction between Member States, Article 9 ensures that the courts of the Member State of origin remain competent to decide on the substance of the case.⁶⁰

The provision allows some exception. Nonetheless, in our case, without the father's agreement, French courts cannot deal with issues regarding parental responsibility with respect to the minor within one year of the unlawful removal. Therefore, the separation proceedings, and with it all requests involving parental responsibility, will be dealt with by the Italian court.

However, the Brussels IIter Regulation will allow Marie to enforce any decision on matrimonial matters and parental responsibility in France, should she remain there lawfully with her daughter at the end of the proceedings. Italy has recently introduced specific rules for family-related proceedings in which domestic violence is involved. The new provisions aim, on the one hand, to reduce the duration of the proceedings and, on the other, to balance the victim's need for protection with the necessity to safeguard the relationship

⁵⁹ Pursuant to Article 10(2) of the Brussels IIter Regulation 'persons who become parties to the proceedings after the court was seized may express their agreement after the court was seized. In the absence of their opposition, their agreement shall be regarded as implicit'.

⁶⁰ European Commission, Directorate-General for Justice, 'Practice guide for the application of the Brussels IIb Regulation', Publications Office, 2022,

between the abusive parent and the child. To this effect, protection orders against the abusive partner or parent can also be adopted in separation and divorce proceedings, pursuant to Article 473-bis.43(1) of the Italian code of civil procedure (c.p.c.). Furthermore, in the renewed awareness that the battle against domestic violence is not only conducted through criminal laws, but also in family and juvenile proceedings, the Italian legislator has introduced a section entitled to 'Domestic or gender-based violence' in the c.p.c., to regulate proceedings in which one of the parties alleges that he/she is the victim of violence applied by his/her partner or former partner, or alleges that the victim of violence – including in the form of witnessing violence – is the minor child of the parties themselves.

In such cases, family related proceedings must be characterized by: (a) priority treatment; (b) a tendency toward concentration and avoidance of multiple examination of the mother; (c) the possibility of placement in a sheltered facility; (d) possibility of non-recourse to mediation in cases of allegations of violence. From a substantive point of view, judges are required to protect victims of domestic violence as well as the child's right to co-parenting.

For this reason, the new Article 473-bis.46(1) c.p.c. provides that, in the outcome of the investigation, the judge may, on the one hand, adopt the most appropriate measures to protect the victim and the child and, on the other, regulate the child's visits with the abusive parent in a manner that does not compromise the safety of the victim.

6. VICTIM OR OFFENDER? ABUSED PARENTS AND ABUSIVE PARENTS IN THE ECTHR CASE LAW

A. Ensuring Protection for the Abused Parent. The Risk of Secondary Victimization

The judge dealing with Marie's and Giovanni's separation will have to face a highly conflictual case. In evaluating the most suitable measures to regulate parental relationships, he/she will have to take into account two important elements: on the one hand, the need for Marie's and Anne's protection; on the other, the implementation of the principle of co-parenting, which is generally considered as that which better reflects the child's best interest, and therefore the protection of the father-child relationship.

As seen above, to fulfil the obligations under European law, the Italian legal system recently introduced several provisions to protect victims of domestic violence. These provisions aim to prevent the appearance of phenomena of secondary victimization in family and juvenile proceedings.⁶¹ The term 'secondary victimization' appears in the Istanbul Convention as well as in Articles 12, 18 and 22 of Directive 2012/29/EU on the rights, support and protection of victims of crime.⁶²

Both instruments oblige Member States to take measures to ensure the protection of victims from secondary victimization,⁶³ but neither provides a definition of the phenomenon. This can, however, be inferred from the Recommendation of the CoE Committee of Ministers of

⁶¹ This aim is expressly pointed out in the Explanatory Report of the Italian Court of Cassation on the reform of the code of civil procedure, available at https://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/Rel113-2022_NOV_NORMATIVA.pdf, at 148.

⁶² Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ 2012 L 315.

⁶³ See in particular Article 12 of Directive 2012/29/EU.

2006⁶⁴ and is commonly referred to as a phenomenon which takes place when ‘the same authorities called and repressing the phenomenon of violence, by not recognizing or underestimating it, do not adopt towards the victim the necessary safeguards to protect him or her from possible conditioning and reiteration of violence.’⁶⁵

The lack of attention to the issue of secondary victimization in previous legislation had been the subject of specific remarks against the Italian institutions in the GREVIO report submitted in 2019.⁶⁶ Indeed, as also pointed out by the Joint Sections of the Italian Court of Cassation, secondary victimization is often an underestimated consequence in cases where women are victims of gender-based crimes, the main effect of which is to discourage the victim themselves from filing a complaint.⁶⁷

The rationale for this behaviour is explained by the theory of Parental Alienation Syndrome (so-called PAS) developed in 1985 by Richard Gardner.⁶⁸ This syndrome was attributed to those mothers who, by means of allegations of domestic violence, adopt an overprotective behaviour towards their children and distance them from their father, sometimes even in breach of the prescriptions provided by the judicial authority. According to the PAS theory, these mothers appear hostile, as they resort to manipulative behaviour towards

the children, leading them to repeatedly refuse to build a bond with the father. Consequently, they must be considered unqualified to exercise the parental function.

The most recent psychological and legal doctrine has however clearly taken a stand against this theory,⁶⁹ as clearly explained by the ECtHR in *I.M. and Others v. Italy*.⁷⁰ The ECtHR agreed with the concerns expressed by GREVIO about the practice of considering women who invoked domestic violence as a reason for refusing to take part in their children’s meetings with their ex-spouses and to oppose shared custody or access to them as uncooperative parents and, ultimately, inappropriate mothers deserving of punishment. In that respect, GREVIO emphasized Italy’s failure to enforce Article 31 of the Istanbul Convention, which requires due consideration of the incidence of violence when determining custody and visitation rights of children.

The Court reiterated that the decision to sever bonds between a child and a parent constitutes a very exceptional case, applicable only in the event of proved impossibility of maintaining a relationship inspired by the child’s interests. In this respect, national courts are required to carry out a thorough assessment of the family context, so as to ensure a reasonable balancing of the interests expressed by each family member, in accordance with the principle of the

64 See Article 1, no 4, of Recommendation CM/Rec(2023)2 of the Committee of Ministers to Member States on rights, services and support for victims of crime adopted on 15 March 2023, available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680aa8263, which sets out the definition already offered by Article 1.3, of Recommendation CM/Rec(2006)8 of the Committee of Ministers to Member States on assistance to crime victims adopted on 14 June 2006.

65 See on secondary victimization, *ECtHR, J. L. v. Italy*, Appl. no. 5671/16, 27 May 2021.

66 Group of Experts on Action against Violence against Women and Domestic Violence, available at: <https://www.coe.int/en/web/istanbul-convention/italy/>

67 Italian Court of Cassation, Joint Sections, Judgment of 17 November 2021, no. 35110.

68 R. Gardner, ‘Recent Trends in Divorce and Custody Litigation’, *Academy Forum*, 1985, 29 (2), at 3–7; R. Gardner, ‘Parental Alienation Syndrome (PAS): Sixteen Years Later’, *Academy Forum*, 2001, 45 (1), at 10–12.

69 See M. Renna, ‘Violenza domestica, alienazione parentale e regolazione dell’affidamento minorile’, *Famiglia e Diritto*, 2023, IV, 318. According to the World Health Organization, ‘Parental alienation is an issue relevant to specific judicial contexts (...) There are no evidence-based health care interventions specifically for parental alienation’: see FAQ on Parental Alienation, available at <https://www.who.int/standards/classifications/frequently-asked-questions/parental-alienation>.

70 ECtHR, *I.M. and Others v. Italy*, Application no. 25426/20, Judgment of 10 November 2022.

child's best interests. In the case before it, however, the ECtHR emphasized that the children were significantly exposed to their father's aggressive and contemptuous behaviour during contact sessions: overall, the children's well-being and safety were endangered and yet the risk was culpably ignored by the court adjudicating on the matter.

Therefore, the ECtHR found a breach of Article 8 with respect to children: indeed, to ensure their adequate protection, the competent authorities should have acknowledged their right not to participate in such contact sessions. The Court also found a breach of the right provided for in Article 8 with respect to the mother, whose parental responsibility had been suspended because she had decided to no longer take her children to contact sessions with the father.

Such a measure appeared inconsistent with the need for effective protection of the children, as it was not preceded by the necessary balancing of the different interests at stake and, ultimately, was applied solely on the basis of her allegedly hostile behaviour towards the father, without taking into account all the relevant aspects of the case.

B. The Role of the Abusive Parent. Fostering Parental Responsibility.

If the incidence of violence on custody and visitation rights cannot be neglected and can lead to the restriction and even denial of such rights when there is evidence of ill-treatment, the position of the alleged abusive parent cannot be overlooked.

In this regard, the ECtHR has, on several occasions, reiterated that 'while Article 8 is essentially concerned with the protection of the individual from arbitrary interference by public authorities, it is not limited to ordering the State to refrain from such interference. To this negative obligation may be added positive obligations pertaining to effective respect for private or family life.'⁷¹ They may involve the adoption of measures aimed at ensuring the development of mutual relations between individuals, as well as compliance with judicial decisions.⁷²

In particular, states must take measures to reunite parent and child, even when there are conflicts between the parents.⁷³ Indeed, positive obligations do not only imply that vigilance is applied to ensure that the child can reach the parent or maintain contact with him or her, but also include all preparatory measures must be taken to achieve that result.⁷⁴ The ECtHR has emphasized the importance of protecting the parent-child relationship by means of the non-custodial parent's right of visitation, even in the face of allegations of violence by the said parent against the child, with the clarification that the relevant criminal proceedings were dismissed.⁷⁵

In particular, in the case of *R.B. and M. v. Italy*, the Court noted that, even in difficult situations, due to tensions between the child's parents and because of the custodial parent's (namely the mother's) refusal to allow counterpart visitation rights, the competent authorities are duty-bound to implement any

71 ECtHR, *A.V. v. Italy*, App. no. 36936/18, Judgment of 10 December 2020.

72 ECtHR, *Zawadka v. Poland*, Appl. no. 48542/99, Judgment of 23 June 2005.

73 ECtHR, *Ignaccolo-Zenide v. Romania*, Appl. no. 31679/96, Judgment of 25 January 2020; *Sylvester v. Austria*, Appl. nos. 36812/97 and 40104/98, Judgment of 24 April 2003; *Zaviel v. Czech Republic*, Appl. no. 14044/05, 18 January 2007; *Mihailova v. Bulgaria*, Appl. no. 35978/02, Judgment of 12 January 2006.

74 ECtHR, *Kosmopoulou v. Greece*, Appl. no. 60457/00, Judgment of 5 February 2004; ECtHR, *Amanalachioai v. Romania*, Appl. no. 4023/04, 26 May 2009, *Ignaccolo-Zenide v. Romania*, cited above; *Sylvester v. Austria*, cited above.

75 See Reale, 'Le giravolte della CEDU. Il diritto di visita del padre contro il diritto delle vittime di violenza', in *Persona & Danno*, 27.2.2023, available at <https://www.personaedanno.it>

appropriate means to enable the family bond to be maintained.⁷⁶ In the particular circumstances of the case, where there was no contact between the father and the child over five years, the Court emphasized that a quick reaction would have been necessary given the impact of the passage of time in a case of this type, which can hinder the given parent from re-establishing a relationship with the child who does not live with him.

Therefore, the ECtHR considered that the domestic courts had failed to take concrete and useful measures intended to establish actual contacts and tolerated the mother preventing the establishment of a real relationship between father and child by her behaviour. To this end, the ECtHR emphasized that conducting proceedings before domestic courts rather evidenced a series of automatic and stereotypical measures which, furthermore, remained unexecuted in breach of Article 8 ECHR.

C. Searching for an Equitable Solution

In the case at hand, as Giovanni never directly abused his daughter, his parental rights to her should not be restricted. Quite the opposite, if it were to be assumed that the mother is to be the custodial parent, the break-up of family life should be counterbalanced with measures intended to preserve and possibly strengthen the bond between father and child. This does not imply that Giovanni's attitude to Marie should be disregarded.

On the contrary, some caution is advisable, especially at the beginning, for example, by ensuring the presence of a third party, such as a relative or a social worker, during Giovanni's visitations. Furthermore, the authorities and professionals involved should prepare a plan to help him understand

his mistakes and to control his behaviour in order to improve his parental attitude. Therapy could also be helpful for Marie, to overcome the effects of the mistreatments suffered, especially if she were to falsely accuse Giovanni of abusing his daughter.

In view of the above, this conduct should not be automatically qualified as a symptom of a manipulative and non-collaborative personality but as a reaction to the abuses and an attempt to defend herself. Therefore, Marie should not be punished with a limitation of her parental rights but rather helped to overcome her difficulties and regain confidence.

Simultaneously, pending the proceedings, allegations of abuse which are not supported by some hints of evidence, while not ignored, should not lead to the adoption of disqualifying measures against the accused parent. It is quite clear, however, that, in the context of family litigation, the line between useful precaution and excessive restraint is often difficult to distinguish.

Additionally, in both hypotheses, the child will be the actual defenceless, injured party. Indeed, restrictive measures of parental rights will affect her life and psycho-physical development just like exposure to acts of domestic violence. Judges and professionals in general, should therefore bear in mind that co-parenting is not only a right of the parents, but primarily their duty and a right of the children. This means that the child's right to maintain a bond with both parents is not an absolute postulate, nor the final objective. It is rather a means of ensuring the balanced development of the child which, however, presupposes that the parents have adequate parenting skills. Of course, such skills are seriously impaired in the case of abusive parents, regardless

⁷⁶ ECtHR, *R.B. and M. v. Italy*, Application no. 41382/19, Judgment of 22 April 2021.

of whether they abuse their spouse or they manipulate their child.

In any case, the parent's conduct will not be relevant itself, but as a source of harm to the child. Consequently, the assessment of that harm must be made on a case-by-case, child-by-child basis. As pointed out by the ECtHR, domestic judges should avoid any form of automatism and standardized solutions, taking into account the guiding criterion of the child's best interests, in the light of all the circumstances of the specific case.

Arguably, in certain cases of domestic violence, the implementation of the right of co-parenting may not reflect the child's best interests. Especially when the child is the target of the violence, his/her best interests may require that the bond with the abusive parent be loosened or even severed. Nonetheless, measures aimed at the deprivation of parental responsibility must be considered an *extrema ratio*.

Other than cases of direct violence with respect to children, the exercise of right of visitation should be deemed to be of fundamental importance to the development of the noncustodial parent-child relationship and should be enforced with due precautions, including in cases where abusive conduct is alleged. The nature and extensions of a precautionary measure in such cases are highly dependent on the circumstances of the case and must be tailored to them.

A thorough and careful assessment of evidence must be conducted while preparing the most suitable plan to recover the parental ability of the alleged abusive spouse. Among them, a professional approach to the words and feelings expressed by the children appears to be

of fundamental importance, including in order to ascertain whether certain attitudes are symptomatic of manipulative conduct on the part of the mother or are a sign of the father's abusive behaviour.

7. PERSPECTIVES

The above paragraphs are an attempt to describe the variety of sensitive needs involved in cases of domestic violence. It is the judge's task to make balanced decisions which take into account, on the one hand, the need to safeguard or recover the relationship between the minor child and the abusive parent and, on the other, the need to ensure adequate protection of the abused parent.

To this end, however, domestic legislators need to provide legal professionals with procedural and substantive rules enabling them to intervene effectively. Judicial decisions are of little use if their enforcement is not ensured. Family plans normally prepared in judicial rulings must be executable by the administrative authorities, who must therefore be equipped with specialized operators and appropriate tools. State investments in this sector are therefore essential.

In this sense, further clear indications are offered by the proposal of a new directive on violence against women and domestic violence.⁷⁷ Chapter IV of this Directive, in particular, contains a series of provisions imposing the duty on Member States to provide medical care and emotional, psychosocial, psychological and educational support to victims and children, helplines, shelters and other interim accommodation.

Also, some improvements can be made to legislative instruments that are already in place, although the efforts to fight

⁷⁷ Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence of 8.3.2022, COM(2022) 105 final, available at https://eur-lex.europa.eu/procedure/EN/2022_66.

domestic violence have been and still are precise and extensive. The primary need appears to be the introduction of a rule that clearly resolves issues of jurisdiction in cases of cross-border domestic violence.

As noted in paragraph 4, the authorities of the state of refuge do not seem to have the power to take provisional measures in favour of the parent when only the latter, and not the child, is a direct victim of the violence. Additionally, all cases where international child abduction is not involved because, for example, the couple experiencing acts of domestic violence has no child, remain outside the scope of the protective measures considered by Article 27(5) of the Brussels IIter Regulation.

In the light of the above, it would therefore be useful for the EU legislator to intervene in a two directions: 1) adding a reference in Article 27(5) of the Brussels IIter Regulation to the need for protection of the abused mother as well, so as to ensure effective protection in all cases where a connection emerges between international child abduction and domestic violence; and 2) introducing a rule specifically empowering the court of the state where the victim of domestic violence is currently located to provisionally adopt civil protective measures that are enforceable outside that state's borders, by way of a regulation, possibly by amending Regulation 606/2013/EU.

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CROSSING BORDERS, CROSSING FINGERS: THE PLIGHT OF RAINBOW FAMILIES IN THE EU

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This paper explores the recognition of parenthood for same-sex parents, known as rainbow families, between Member States of the European Union ('EU'). It analyses the legal hurdles faced by these families when moving between EU countries with varying levels of recognition. Key court cases, such as *Buhuceanu, K.S.*, and *V.M.A.*, from the European Court of Human Rights and the European Court of Justice are examined, shedding light on the complex legal dynamics involved.

The paper also discusses a proposal currently under consideration by EU institutions to harmonize the recognition of parenthood among Member States. This proposal aims to address disparities in the legal recognition of rainbow families and establish a framework for the consistent recognition of parental rights across EU borders. In addition, pending the adoption of a regulation, potential solutions are being explored to manage the recognition of parenthood and stop the breach of the fundamental rights of parents and children forming rainbow families.

KEYWORDS:

FREE MOVEMENT RIGHT | FAMILY LAW | CROSS-BORDER SITUATIONS | LEGAL OBSTACLES | RECOGNITION OF PARENTHOOD | CONSEQUENCES OF NON-RECOGNITION | RAINBOW FAMILIES | SAME-SEX PARENTS | PROPOSAL OF A REGULATION ON THE RECOGNITION OF PARENTHOOD BETWEEN MEMBER STATES | REGULATION VS. ENHANCED COOPERATION | JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE EUROPEAN COURT OF JUSTICE | BUHUCEANU CASE | KS CASE, V.M.A. CASE | PRELIMINARY RULINGS | ACCEPTANCE OF RAINBOW FAMILIES | NATIONAL JUDGES

‘If you are a parent in one country, you are of course a parent in every country.’¹ **Commission President Ursula von der Leyen**

1. INTRODUCTION

Because family matters are strongly tied to the identity and culture of a Member State, national legislation is often based on them. Therefore, there are Member States, the national legislation of which contains provisions about rainbow families and Member States which do not legally recognize them. When rainbow families travel or move to another Member State which has a traditional ideology, there is a risk that their parenthood, as established in the initial Member State, will not be recognized.

The consequences have a major impact on the family’s life and on each of its members. Their fundamental rights, such as the right to an identity, to non-discrimination and to a private and family life, to freely reside and move within the European Union (‘EU’), may be hampered.

The rights arising from parenthood, as regulated under national law, may be denied. This entails, for example, the inability to legally represent children by each of the same-sex parents or the inability of the parents to make any decision regarding their children; they cannot benefit from child support, social security or other financial benefits in relation to their parents; they cannot benefit from succession rights; in the case of divorce, the non-biological parent cannot benefit from the state’s protection so as to maintain relations with his/her child.

An estimated two million children could be currently facing a situation in which the recognition of their parenthood, as established in one Member State, is not recognized for all purposes in another Member State.² This paper focuses on the analysis of the obstacles faced by rainbow families who find themselves in cross-border situations where the destination Member State does not recognize the relationship between the same-sex parents and their child. Our objective is to identify the differences between the national law of the Member States, the importance of the recognition of parenthood and the consequences of its denial.

We also considered it important to point out the recent European jurisprudence on this matter together with the endeavours of European institutions to close the existing gap in EU law regarding the recognition of parenthood by all Member States. Consequently, we set ourselves the task of presenting a view of the current status of this issue regarding rainbow families in cross-border situations and suggesting several proposals to settle the differences in the approach between Member States.

2. BACKGROUND AND CONTEXT

A. The EU Legal Framework regarding the Position on Same-Sex Couples and the Position of the Children of Same-Sex Couples

In the EU, marriage or partnerships between two people of the same sex are legally recognized in 21 Member States, as follows:

a. Fourteen countries have regulated the right of same-sex couples to marry: Austria, Belgium, Denmark, Finland, France,

¹ https://ec.europa.eu/commission/presscorner/detail/ov/SPEECH_20_1655.

² Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood, 2022/0402 (NLE), p. 1, available at https://eur-lex.europa.eu/resource.html?uri=cellar:01d08890-76e7-11ed-9887-01aa75ed71a1.0001.02/DOC_1&format=PDF.

Germany, Ireland, Luxembourg, Malta, the Netherlands, Portugal, Spain, Sweden, and Slovenia;

b. Seven Member States have regulated a form of registered partnership for same-sex couples: Croatia, Cyprus, Czech Republic, Estonia, Greece, Hungary, and Italy; and

c. Six Member States do not regulate any form of legal union for same-sex couples: Bulgaria, Latvia, Lithuania, Poland, Romania, and Slovakia.³ The regulation of the right to marry for same-sex couples significantly influences their family situation, especially when they want to have a child together. In countries that allow same-sex marriage, rainbow families are usually granted the same rights and the same level of legal protection as heterosexual families.

However, in the absence of such comprehensive regulation, which should encompass not only marriage but also matters related to parentage and other associated issues, same-sex couples can face discrimination and legal concerns in terms of the recognition of their parental rights and the parentage of their children. With regard to the ways in which same-sex couples can become parents, it is already known that several methods are available to them, namely: through assisted reproduction, through surrogacy, through the adoption of a child from a previous relationship of one of the members of the couples or through full adoption.

Obviously, in some situations, one member of the couple will have a biological link to the child, while in the other situations the child will have no line to either member of the couple. As for the legal situation of children of rainbow couples, this varies by EU Member State.

In some countries, same-sex couples can be recognized as legal parents of their children, while in others they cannot.

This creates numerous difficulties when a rainbow family with full rights recognized in one Member State moves to another Member State where the marriage is not recognized and therefore parental rights are not acknowledged for one of the parents or, in certain situations, even for both. For example, Poland does not recognize a same-sex couple as being legal parents of a child. A common problem faced by rainbow families in Poland is the refusal of the Polish authorities to register foreign birth certificates of children with same-sex parents.

A problematic situation also exists in Greece, where, although a form of registered partnership for same-sex couples is regulated, in matters of lineage, only one of the same-sex parents of a child will be legally recognized as a parent. The same situation is faced in Italy, where same-sex couples are not legally recognized as joint parents of a child and although adoption by one parent is not expressly authorized by law, it has been permitted by the courts. Hungary and Croatia do not legally recognize two parents of the same sex as joint legal parents of a child.

In other Member States, such as Austria, Cyprus, Estonia, Finland, Ireland, Slovenia, and Spain, children of same-sex couples have the same legal status as children of opposite-sex couples.⁴

3 Alina Tryfonidou and Robert Wintemute, *Obstacles to the Free Movement of Rainbow Families in the EU* (2021), available at [https://www.europarl.europa.eu/cmsdata/257913/IPOL_STU\(2021\)671505_EN.pdf](https://www.europarl.europa.eu/cmsdata/257913/IPOL_STU(2021)671505_EN.pdf).

4 Ibid., at 2.

B. Legal Recognition of Same-Sex Couples and Legal Recognition of Familial Ties among Members of Rainbow Families in Romania

The situation regarding the filiation of children of rainbow couples in Romania is equally complicated. A family consisting of a same-sex couple and their children is not legally recognized because, under Romanian law, only a person with biological ties to the child or a person who has adopted the child through legal procedures can be registered as a parent.

For this reason, in the case of rainbow families, one of the parents will not be recognized as the child's legal parent. There are different opinions on why same-sex couples are not recognized in Romania. The biggest obstacle to the recognition of same-sex unions and, further, to that of parentage is that the majority of the Romanian population is still culturally and religiously conservative, and their opinion is reflected in government attitudes and policies.⁵

Also, the Orthodox Church in Romania has a strong influence on society and has pushed to maintain a traditional definition of marriage. In addition, some conservative political parties also strongly oppose the recognition of same-sex couples and parental rights for rainbow families.⁶ Therefore, given the variety of regulations at EU level regarding such unions, but also the legal problems that can arise when a same-sex family wishes to move with their child from a country where they have been married and their filiation to the child has been legally established to another country where neither their marriage nor their parental rights are recognized, there is a great risk that the national law of the

Member States will conflict with EU law.

C. The Relationship between EU Law and National Law

EU law has a principle that, whenever there is a conflict between EU law and national law, the former will prevail. This principle, also referred to as the principle of the supremacy of EU law, states that, when there is a conflict, the national provision must not be applied in situations that fall within the scope of EU law and there is a conflict between the said provisions.

By applying this principle to the situations of rainbow families when they move from one Member State to another, it is worth noting that EU law requires the Member State to refrain from resorting to national provisions that infringe upon the rights of rainbow families in situations that fall within the scope of EU law – for example when they exercise their rights to free movement.

It should also be emphasized that Member States cannot hide behind a constitutional ban on same-sex marriage or constitutional protection of 'morality' or 'public policy' to deny the rights of rainbow families transiting their territory in exercising their rights of free movement within the EU.

Article 5(2) of the Treaty on European Union ('TEU') states that 'under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.' Articles 2 to 6 of the

5 INSCOP, Neîncrederea publică: *Vest v. Est*, ascensiunea curentului naționalist în era dezinformării și fenomenului știrilor false – Ediția a III-a (2021), available at <https://www.caleaeuropeana.ro/sondaj-inscop-pest-60-dintre-romani-prefer-valorile-traditionale-in-locul-drepturilor-si-libertatilor-moderne-iar-pest-doua-treimi-ar-vota-un-partid-nationalist/>.

6 Biroul Electoral Central, Referendum național pentru revizuirea Constituției (2018), available at http://referendum2018.bec.ro/wp-content/uploads/2018/10/pv_final_bec.pdf.

Treaty on the Functioning of the European Union ('TFEU') list the categories and areas of competence of the EU. Discrimination against LGBTIQ individuals is particularly felt in areas that fall within the exclusive competence of Member States, such as family law. It is important to emphasize that, according to the rights conferred by the TEU, the EU may adopt rules to remove the obstacles to free movement which are contrary to the relevant provisions of the Treaty, provided that – in accordance with the principle of subsidiarity laid down in Article 5(3) of the TEU – it does so 'only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member State (...) but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.'⁷

Therefore, to the extent that this legislative diversity that exists in the Member States generates deterrents to the free movement of citizens of the EU who constitute rainbow families, the EU may intervene legislatively to standardize the situation, according to Article 81(3) TFEU. Such an initiative has already been launched and it is to be analysed in Chapter 5 of this paper.

In this respect, it is important to emphasize that, even in areas where Member States have exclusive competence, such as family law, their actions are not completely isolated from the effects of EU law. The Court of Justice of the European Union ('CJEU') has emphasized over time that, even in areas where Member States retain full competence, they must ensure that the exercise of that competence conforms to EU law.⁸

In conclusion, even if, under EU law, EU Member States are free to decide whether or not to allow marriages or registered partnerships for same-sex couples on their territory, and whether or not to allow rainbow families onto their territory to establish parental rights between same-sex parents and their children, they are not allowed to apply their laws in situations when doing so would result in a breach of EU law, thereby creating, for example, an obstacle to the free movement of EU citizens.

Although the EU has so far failed to regulate on this matter, the obstacles encountered by rainbow families when applying for recognition of parental rights in a Member State other than the one in which they were previously legally established, as well as the evolving case law of the CJEU and the European Court of Human Rights ('ECTHR') on this matter, have sent strong signals to the European institutions that there is a real problem and that legislative intervention is necessary.

3. THE IMPORTANCE OF LEGAL RECOGNITION OF THE PARENT-CHILD RELATIONSHIP IN CASES OF RAINBOW COUPLES

A. Voice of Rainbow Families

Numerous petitions have been registered at EU level⁹ calling for the recognition of the rights of parents from rainbow families in their relationship with their children. Several have been submitted since 2016, pointing out that there is a problem in the EU regarding the establishment of filiation of parents who form a same-sex couple in relation to their child or even its recognition and the effects arising from a filiation already established in

⁷ Ibid., at 1.

⁸ See Case C-673/16, *Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* (ECLI:EU:C:2018:385).

⁹ Article 227 TFEU provides 'Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have the right to address, individually or in association with other citizens or persons, a petition to the European Parliament on a matter which comes within the Union's fields of activity and which affects him, her or it directly.'

another Member State. In this regard, petitions number 0513/2016¹⁰ and number 0712/2020¹¹ addressed to the European Parliament clearly illustrate the problems faced by parents in rainbow families when their rights in relation to their children are not recognized throughout the EU and highlights that rainbow families do not have the same rights throughout the Union. In neither of these cases were the petitioners granted the right to obtain a passport for their children or their parentage was not recognized and, in this way, their right to free movement was denied.

The two examples of petitions presented above apply to the situation in which parents are married and want their child's parentage to be accepted in any Member State. But inevitably the issue arises regarding what happens to same-sex parents whose rights regarding their child have been upheld in one Member State and, after a while, they want to divorce? What should be protected in such a case? The child's best interests or the interests of the parent who files for divorce in a state that does not recognize the parent-child relationship in the case of rainbow couples?

In petition number 1038/2020,¹² a Danish woman married the child's biological mother, who is of Bulgarian nationality. Their marriage was recognized in Denmark and so was the custody of the child, which they exercised together. After the divorce, the biological mother took the child to Bulgaria, where the courts ruled out 'joint motherhood' on the grounds that Bulgarian law does not contain provisions on the rights of same-sex parents in relation to their child. The Danish mother

was unable to exercise the right of custody of the child and her visiting rights were not permitted. It can be noted that the objective of the petitions is to apply unitary treatment to same-sex parents in any Member State of the Union, not just certain states.

The refusal to acknowledge the establishment of filiation in relationships between parents of same-sex couples with their child can lead to restrictions on the free movement of children. Furthermore, if parents, whose filiation has been established in one Member State end up in another Member State and their filiation is not accepted there, the question that inevitably arises is: what will happen if parental consent is needed for a medical intervention? Or what if parental consent is required for a particular educational programme?

If one of the parents leaves the Member State where their filiation is recognized for another where there are no regulations regarding children from rainbow couples and their relationship, this could result in the denial of family reunification rights. This refusal will affect the parent-child relationship.

Therefore, whatever the situation, it can be emphasized that there is a problem with parents from rainbow couples whose rights established in a relationship with their children in one Member State are not recognized throughout the EU. These issues need to be resolved as soon as possible because, whatever the circumstances, they remain the parents of the children. And a parent whose rights have been legally validated with respect to the child in one country should enjoy

¹⁰ Petition No. 0513/2016 by Eleni Maravelia (Greek) on the non-recognition of LGBT families in the European Union.

¹¹ Petition No. 0712/2020 by R.A.P. (Spanish) on the fundamental right of rainbow families and free movement within the EU.

¹² Petition No. 1038/2020 by Björn Sieverding (German), on behalf of the Network of European LGBTIQ* Families Associations, signed by one other person, on the mutual recognition of legal guardians in LGBTIQ families in the EU.

the same treatment in every country. Furthermore, in many countries, same-sex parents have the same rights as opposite-sex parents. By not recognizing the rights of parents from rainbow couples equally in all EU Member States, discrimination arises between same-sex parents and opposite-sex parents. In such a case, the right to a family life and the child's best interests are affected.

B. Ensure the Protection of Family Life **One of the rights recognized and guaranteed by the European Convention on Human Rights**

(‘ECHR’) is enshrined in Article 8 ECHR¹³ and provides that everyone has the right to respect for his private and family life. Article 8 ECHR refers to family life as an autonomous concept. Therefore, in order to determine whether or not family life exists, the ECtHR has analysed the meaning of family ties and the establishment of *de facto* family ties in its cases. In conclusion, essentially, family life actually means the existence of close personal ties between the people who make it up.¹⁴

An example that can be given applies to the ECtHR's decision (*Gas and Dubois v. France*, (dec.), 2010¹⁵) which established that ‘The relationship between two women who were living together and had entered into a civil partnership, with a child conceived by one of them by means of assisted reproduction but who was being brought up by both of them, also constituted “family life” within the meaning of Article 8 of the Convention.’¹⁶ The ECtHR

has stated that, specifically, the family ties must be analysed to establish whether or not family life exists. So, ‘family life’ can include the relationship between an unmarried couple, an adopted child and the adoptive parent, and a foster parent and fostered child¹⁷ and all ways in which a family can be created.

Closely related to this concept is the child's best interest. Therefore, in any case involving a child, such as the one who was presented, his or her best interests are the most important. Any decision made by parents or by authorities or institutions must take into account the child's best interests.

Based on what family life entails and the importance of these best interests, it should be noted that, even when discussing same-sex parents and their rights in relation to their child, the child's best interests must be always taken into consideration. When applying EU law, any such reference must be interpreted in the light of the articles of the Charter of Fundamental Rights of the European Union (‘the Charter’) and the conventions and treaties governing the rights of the child. In the United Nations Convention on the Rights of the Child of 20 November 1989 (‘UN Convention on the Rights of the Child’) Article 2 provides that ‘1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language,

13 Article 8 ECHR – Right to respect for private and family life.

‘1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing 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.’

14 Guide on the case-law of the European Convention on Human Rights, p. 41, available at https://www.echr.coe.int/Documents/Guide_LGBTI_rights_ENG.pdf.

15 ECtHR, *Valerie Gas and Nathalie DUBOIS v. France*, Application no. 25951/07, judgment 15 March 2012. All ECtHR decisions are available at <http://hudoc.echr.coe.int/>.

16 Ibid., at 15.

17 <https://www.equalityhumanrights.com/en/human-rights-act/article-8-respect-your-private-and-family-life>.

religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.' Furthermore, Article 3 of the same Convention clearly states that 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

In addition, Article 3(3) TEU,¹⁸ Article 21 of the Charter (Non-discrimination), Article 24 of the Charter (The rights of the child) and Article 7 of the Charter (Respect for private and family life)¹⁹ all have the same scope, namely equality and non-discrimination of children for any reason. Although there are so many legal texts governing the best interests of the child and non-discrimination, the fact that not every Member State recognizes the parental rights of people from rainbow families can lead to the fundamental rights of children being denied and, in general, the reasons for discrimination include the sexual orientation of the parents.²⁰ The non-recognition of legally established parental rights with respect to a child affects the

right to family life,²¹ while this right is one of everyone's fundamental rights, including children's rights.

Its breach results in the emergence of a discriminatory situation for the child because of the sexual orientation of his/her parents. In *Paradisio and Campanelli v. Italy*,²² the ECtHR set out two considerations which must be taken into account in order to identify the best interests of the child in any case: 'first, it is in the child's best interests that his ties with his family be maintained except in cases where the family has proved particularly unfit; and second, it is in the child's best interests to ensure his development in a safe and secure environment.'²³

C. The Situation when Parental Rights are Breaches by Non-Recognition

In order to identify these rights, the first step is to establish which children's rights arise from the parent-child relationship. Therefore, all children, regardless of whether they have parents of the opposite sex or same sex, have the right to an identity, a name, nationality, custody and access rights by their parents, maintenance rights, succession rights and the right to be legally represented by their parents.²⁴ If the paternity of same-sex parents is not uniformly recognized in each Member State, this could lead to situations which could affect the fundamental rights of parents and children arising from the family relationship, thereby harming the

18 Article 2(3) TEU provides: 'The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.'

19 Article 7 of the European Union Charter of Fundamental Rights of the European Union – Respect for private and family life provides: 'Everyone has the right to respect for his or her private and family life, home and communications.'

20 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions empty. EU strategy on the rights of the child, available at <https://eur-lex.europa.eu/legalcontent/en/TXT/?uri=CELEX%3A52021DC0142>.

21 https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/civil-justice/family-law/recognitionparenthood-between-member-states_ro.

22 ECtHR, *Paradisio and Campanelli v. Italy*, Application no. 25358/12, Judgment of 24 January 2017.

23 Ibid.

24 Ibid., at (11).

child's best interests. An example of a situation in which the rights of parents are blocked by non-recognition is their impossibility to travel with their child to another Member State. The blocking of the right to free movement arises from the fact that some families are discouraged from moving to or visiting certain Member States because their legislation does not recognize the relationship between same-sex parents and their child.²⁵

Another situation where parental rights are blocked is the right to succession. One question must be asked: what will happen with a child whose parentage has been legally established in relation to both parents and one of them dies? Furthermore, what legal steps are to be taken should one decide to notify a court in a Member State which does not have legal provisions on lineage in rainbow families? In this situation, the child is at risk of being deprived of the right of inheritance and also of becoming a *de facto* orphan if that court does not recognize the parental rights of the parent who is not biologically related to the child.

In the event of divorce in rainbow families, one parent may be deprived of visiting rights. If the divorce takes place in a Member State which does not recognize paternity, or if one of the parents with respect to whom paternity has been established settles in such a state with the child, the other parent may be deprived of the right of access to the child. In the absence of a legal provision, national courts cannot recognize the right of access of a person who they consider not to be related.

4. CASE LAW

In the past years, some aspects of the recognition of parental rights for same-sex

couples and same-sex marriages have been under intense debate in Europe. In the context of a changing society, where the idea of a traditional family is subject to reinterpretation and argument, the issue of recognition of parental rights for same-sex couples and same-sex marriages has become a matter of public and political concern.

In this context, the case law of the ECtHR and the CJEU is particularly important, as they are key institutions in the interpretation and application of law, as the ECtHR interprets the European

Convention on Human Rights to safeguard individual rights, while the CJEU interprets and enforces EU laws, thereby ensuring consistent application across Member States. In recent years, both the CJEU and the ECtHR have analysed various cases regarding the recognition of same-sex marriages and same-sex parental authority for their children and have expressed their own opinions and solutions.

In this chapter, we shall analyse some of the most relevant cases considered by the CJEU and the ECtHR in these matters and compare the views and solutions adopted by the two courts. In doing so, we shall try to highlight the main trends and perspectives regarding the recognition of same-sex marriages and parental authority of same-sex persons over their children in the European context.

A. V.M.A. v. Stolichna obshtina, rayon 'Pancharevo'²⁶

V.M.A., a Bulgarian national, and K.D.K., a UK national, were married in 2018 in Gibraltar and have been living in Spain since 2015. In December 2019, V.M.A. and K.D.K. had a daughter, S.D.K.A., who lived with both parents in Spain. The child's

²⁵ Ibid.

²⁶ C-490/20, *V.M.A. v Stolichna obshtina, rayon 'Pancharevo'* (ECLI:EU:C:2021:1008).

birth certificate, which was issued by the Spanish authorities, refers to V.M.A. as ‘Mother A’ and K.D.K. as ‘Mother’ of the child.

On 29 January 2020, V.M.A. requested the Sofia Municipality to issue a birth certificate for S.D.K.A., which was necessary, in particular, for her to receive a Bulgarian identity document. In its decision of 5 March 2020, the Sofia Municipality rejected V.M.A.’s application because the disclosure of two female parents on a birth certificate was contrary to the public policy of the Republic of Bulgaria, which does not allow marriages between two people of the same sex. The case was brought before the CJEU which ruled as follows:

‘The rights which nationals of Member States enjoy under Article 21(1) TFEU include the right to lead a normal family life, together with their family members, both in their host Member State and in the Member State of which they are nationals when they return to the territory of that Member State.’²⁷

Therefore, as long as the Spanish authorities establish a legal parent-child relationship between S.D.K.A. and her parents, V.M.A. and K.D.K., which is certified in the child’s birth certificate in accordance with Article 21 TFEU and Directive 2004/38, of V.M.A.’s and K.D.K.’s rights as parents of a minor Union citizen should be acknowledged by all Member States. This grants them the right to accompany the child in exercising her right to travel and reside freely within the EU territory.

Furthermore, the CJEU asserts that the Bulgarian authorities, like those of other Member States, are obliged to recognize this parent-child relationship, allowing

S.D.K.A. to exercise her right to move and reside freely under Article 21(1) TFEU.

However, it is important to note that the CJEU specified that Bulgaria’s recognition extends to permitting travel and residence rights but without the need for a Bulgarian birth certificate. However, this recognition remains partial and only applies to travel and residency, but not broader aspects, such as the parental relationship for issues such as succession and other matters.

B. The K.S. case²⁸

Another case regarding the cross-border recognition of the parent-child relationship in a rainbow family, very similar to that presented above, is the case of K.S., in which K.S., a Polish national, and S.V.D., an Irish national, were married in Ireland in 2018 and requested a transcription of the birth certificate issued by the Spanish authorities to S.R.S. – D., who was born in Spain in 2018 and who had Polish nationality, in the Polish civil status register. Her birth was registered by the Spanish civil registry office based on a joint declaration by the child’s mother, K.S., and her wife, S.V.D.

This birth certificate designated K.S. and S.V.D. as ‘mother A’ and ‘mother B’ respectively. In a decision of 16 April 2019, this application was rejected by the Head of the Civil Registry Office because such a transcription would be contrary to the fundamental principles of the legal order of the Republic of Poland. The CJEU held that it was clear that, in the main proceedings, the Spanish authorities had lawfully established the existence of a biological or legal parent-child relationship between S.R.S.- D. and her two parents, K.S. and S.V.D., and had certified this in the birth certificate issued for their child.

²⁷ Ibid. at para. 47.

²⁸ Case C-2/21, K.S., (ECLI:EU:C:2022:502).

Consequently, under Article 21 TFEU, K.S. and S.V.D., as parents of a minor Union citizen to whom they effectively have parental authority, must be recognized by all the Member States as having the right to accompany her in the exercise of her right to move and reside freely within the territory of the Member States.

CJEU also decided that, in addition, to effectively allow S.R.S.-D. to exercise her right to move and reside freely within the territory of the Member States with each of his parents, K.S. and S.V.D. must be able to hold a document stating that they are entitled to travel with that child.

C. *Buhuceanu and Others v. Romania*²⁹

The European Court of Human Rights considered the situation of applicants in same-sex relationships in Romania in this case. The applicants sought legal recognition and protection for their relationships, including the right to marry and access to health insurance benefits. However, their requests were rejected by the authorities and they faced exclusion from the legal protection available to opposite-sex couples.

The Court emphasized that Member States have a positive obligation under Article 8 of the Convention to provide a legal framework that recognizes and protects same-sex couples. It noted that this obligation is particularly important given the personal and social identity at stake and the growing trend towards legal recognition of same-sex couples in Europe. While states have some discretion in determining the specific form of recognition, such as civil unions or registered partnerships, they must ensure that the core needs of same-sex couples in stable and committed relationships are met.

The Court rejected the argument that the disapproval of same-sex unions by the majority should be a basis for denying recognition and protection to same-sex couples. It emphasized that the interests of the applicants in having their relationships legally recognized and protected should not be overshadowed by societal attitudes. In conclusion, the Court found that the Romanian legal framework had failed to provide adequate recognition and protection for same-sex couples. It emphasized the positive obligation of states to address this issue, reduce discrimination and ensure equal treatment for all couples, regardless of their sexual orientation.

D. Comparative Analysis of CJEU and ECtHR case law

Observing the recent case law of the two courts, including the judgments presented above, it can be seen that there are similarities in the approach to the issues raised by this paper, namely:

- both courts uphold the principle of non-discrimination based on sexual orientation;
- both courts recognize the importance of the right to family life and the best interests of the child;
- while both courts have contributed to advancing the legal recognition of rainbow families, it is important to note that the CJEU's role is specifically focused on the recognition of parenthood for the purpose of facilitating free movement.

However, there are also differences in approach, as follows:

- CJEU case law focuses on EU law, in particular freedom of movement and the rights of EU citizens, while ECtHR case law is based on the ECHR;
- the CJEU has a more limited jurisdiction than the ECtHR, as it can

29 ECtHR, *Buhuceanu and Others v. Romania*, Appl. no. 20081/19, 20108/19, 20155/19, Judgment of 23 May 2023.

only deal with issues of EU law;

- ECtHR case law has a broader scope, covering a wider range of issues related to rainbow families, such as adoption, surrogacy and assisted reproductive technologies. It is also important to point out that, to date, the ECtHR has not ruled in any case regarding the recognition of parentage by a Member State legally established in another Member State, while the CJEU's judgment in *V.M.A. v. Stolichna obshtina, rayon 'Pancharevo'* is a landmark decision on this.

5. ALL ABOARD: DEPARTURE OF A REGULATION ON THE RECOGNITION OF PARENTHOOD BETWEEN MEMBER STATES

A. Preliminary considerations

The proposal of a Regulation on the recognition of parenthood between Member States was pushed by Commission President Ursula von der Leyen who, in her State of the Union speech, in September 2020, made a strong statement making the assurance that the EU's agenda will deal with the subject of mutual recognition of all types of family relations in the EU:

'I will not rest when it comes to building a Union of equality. A Union where you can be who you are and love who you want – without fear of recrimination or discrimination. (...) If you are parent in one country, you are of course a parent in every country.'³⁰

A year later, in the conclusions on the EU Strategy on the rights of the child,³¹ the Council emphasized that children's rights are fundamental rights and, as such, need to be embedded in all relevant policies and legislation, both at national and EU level, in compliance with the principles of subsidiarity and proportionality; that the child's best interest must be the primary consideration in all actions relating to children, whether taken by public authorities or by private institutions.

In accordance with these political statements, the European Commission adopted a proposal on 7 December 2022 of a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of

Parenthood ('proposal of a Regulation').³²

The Regulation on the recognition of parenthood between Member States was identified as a key action in the EU Strategy on the rights of the child³³ and EU LGBTIQ Equality Strategy 2020–2025³⁴ and as a solution to close the existing gap in EU law regarding the recognition of parenthood by all Member States.³⁵ Under the Union Treaties, substantive law on family matters falls within the competence of the Member States. However, pursuant to Article 81(3) TFEU, the Union can adopt measures concerning family matters and rights of the child with cross-border implications.

30 https://ec.europa.eu/commission/presscorner/detail/ov/SPEECH_20_1655.

31 Council conclusions on the EU Strategy on the rights of the child, 9 June 2022, 100024/22, available at <https://data.consilium.europa.eu/doc/document/ST-10024-2022-IN17/en/pdf>.

32 Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood, 2022/0402 (NLE) available at https://eur-lex.europa.eu/resource.html?uri=cellar:01d08890-76e7-11ed-9887-01aa75ed71a1.0001.02/DOC_1&format=PDF.

33 EU Strategy on the rights of the child, COM (2021) 142 final, available at https://eurlex.europa.eu/resource.html?uri=cellar:e769a102-8d88-11eb-b85c-01aa75ed71a1.0002.02/DOC_1&format=PDF.

34 Union of Equality: LGBTIQ Equality Strategy 2020–2025, COM (2020) 698 final, available at <https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:52020DC0698>.

35 According to the Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies PE 746.632, Study requested by PETI committee on Cross-border Legal Recognition of Parenthood in the EU, April 2023, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2023/746632/IPOL_STU\(2023\)746632_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/746632/IPOL_STU(2023)746632_EN.pdf), the proposal of the Regulation appears to constitute the only real prospect of filling the gap in legal protection regarding the issue of cross-border recognition of parenthood in the EU.

B. Objectives

The objective of the Regulation on the recognition of parenthood between Member States is to facilitate the recognition of the parent-child relationship which is legally established between a child and both of her/his (same-sex) parents in another Member State. Using this instrument, the EU aims to ensure the continuity of parenthood status within the EU,³⁶ with all responsibilities arising from the quality of being a parent, and to protect the fundamental rights of children in cross-border situations, namely the rights to non-discrimination, to an identity and to a private life.³⁷

To achieve this goal, the Commission is proposing the adoption of Union rules on international jurisdiction on parenthood (determining which Member State's courts are competent for dealing with parenthood matters, including its establishment, in cross-border situations) and the applicable law (designating national law which should apply to matters of parenthood, including its establishment, in cross-border situations), so as to then facilitate the recognition by a Member State of the parenthood established in another Member State.³⁸

The Commission is also proposing the creation of an optional European Certificate of Parenthood that can be issued by the Member State which established the parenthood to parents and/or children in order to provide proof of this in another Member State. This type of certificate is to be issued on application by the child or a legal representative using a specific form stipulated by the Regulation on the recognition of parenthood between Member States. Documents which prove

lineage are to be attached, together with a declaration stating that, to the applicant's best knowledge, no dispute is pending with regard to the elements that are to be certified.

If the procedure is followed up in accordance with Articles 48 to 51 as provided in the proposal of the Regulation, the competent authority will issue the certificate which is to be considered sufficient proof of the parenthood relationship. Given that the certificate must present all information that can be inferred from other instruments regarding parenthood, and that the child itself can request the issuance of the certificate, we consider that the European Certificate of Parenthood guarantees that the best interest of the child will be satisfied. However, obtaining it will and should remain an option for the given people, and no authority is to oblige them to present it together with their civil status documents.

Under the Regulation on the recognition of parenthood between Member States, parenthood may be proved with:

- a European Certificate of Parenthood;
- a court judgment or an authentic instrument with binding legal effect issued in another Member State (such as notary deeds in the case of adoption, administrative decisions after acknowledgment of paternity), as well as with
- an authentic instrument without binding legal effect, but which provides evidence of parenthood established by other means (such as a birth certificate, an extract from a population or civil status register) or evidence of other facts (a notarial or administrative document recording acknowledgement

³⁶ Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood, 2022/0402 (NLE), p. 9, available at https://eur-lex.europa.eu/resource.html?uri=cellar:01d08890-76e7-11ed-9887-01aa75ed71a1.0001.02/DOC_1&format=PDF.

³⁷ *Ibid.*, at 19.

³⁸ *Ibid.*, at 3.

of paternity or the consent to the use of assisted reproductive technology).³⁹

Last but not least, the objective of the Regulation is only to govern the cross-border situations which apply to families who relocate to a different Member State than that in which parenthood was established, focusing on recognition the same-sex partners as being the parents of the given child, since in most cases this type of relationship might be the reason for the lack of recognition of parenthood.⁴⁰

The Regulation will not go beyond what is necessary to achieve its objectives: it will not interfere with substantive national law on the definition of a family; it will not affect national law on the recognition of marriages or registered partnerships concluded abroad; the rules on jurisdiction and applicable law will only govern the establishment of parenthood in cross-border situations; it will require Member States to recognize parenthood only where it has been established in a Member State and not when it has been established in a third state; it will not affect the competence of the authorities of the Member States to deal with matters of parenthood; it will not lead to the harmonization of the substantive law of Member States on the definition of the family or on the establishment of parenthood in domestic situations, while the European Certificate of Parenthood is optional for children (or their legal representatives) and will not replace equivalent national documents providing evidence of parenthood.⁴¹

C. Advantages for Rainbow Families

In accordance with the proposal of the Regulation, once parenthood is established in one Member State under its national law, the destination Member State is obliged to recognize the relationship between the child and each of the same-sex parents. This instrument is extremely important nowadays, as no Member State will be able to question the parenthood of a parent (or, in some cases, of both parents), regardless of how the child was conceived or born, and regardless of their type of family. Therefore, in cross-border situations, each parent will be able to exercise their parental rights and responsibilities, and each child will be recognized as having the rights arising from the parent-child relationship.

Under these circumstances, the Regulation will ensure legal certainty, predictability and continuity of parenthood, meaning that all Member States will confer the premises of rainbow families to live a life as they would have lived in the Member State which recognized their relationship and parenthood with respect to their child.

The grounds for refusal of recognition are expressly provided by the Regulation,⁴² which also stipulates that Member States would not be able to refuse the recognition of parenthood by invoking public policy grounds that would lead to a breach of the principles laid down in the Charter, in particular Article 21 on non-discrimination. Therefore, the refusal of recognition merely on the grounds that the parents are of the same sex would not be admissible.

³⁹ Ibid., at 13.

⁴⁰ Obstacles to the Free Movement of Rainbow Families in the EU, Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies PE 671.505- March 2021, at 78, available at [https://www.europarl.europa.eu/cmsdata/257913/IPOL_STU\(2021\)671505_EN.pdf](https://www.europarl.europa.eu/cmsdata/257913/IPOL_STU(2021)671505_EN.pdf).

⁴¹ Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood, 2022/0402 (NLE), at 6, available at https://eur-lex.europa.eu/resource.html?uri=cellar:01d08890-76e7-11ed-9887-01aa75ed71a1.0001.02/DOC_1&format=PDF.

⁴² Articles 31 and 39 as provided by the proposal of the Regulation.

The use of the European Certificate of Parenthood would have advantages as it would have identical content and effects regardless of the Member State of issue. The costs would be kept to a minimum, as the Certificate would be issued in a universal form in all official EU languages.

Since the child's parenthood is a preliminary issue that has to be resolved before applying existing EU rules on parental responsibility, maintenance and succession, the Regulation complements current EU legislation on family law and succession and facilitates its application. In terms of economic and time-efficiency benefits, the adoption of uniform Union rules on international jurisdiction and applicable law, as well as the recognition of parenthood without any specific procedure being required, would lead to significant savings in terms of cost, time and burden for both families that face problems with the recognition of parenthood and the public authorities of the Member States.⁴³

D. This is not the First Attempt

According to the Action Plan Implementing the Stockholm Programme adopted in 2010, the European Commission submitted a package of measures to the Member States intended to facilitate the fulfilment of the cross-border formalities so that a family who moves within EU may be recognized by the destination Member State as well as it is by the Member State of origin.⁴⁴

These measures were provided by the 2010 Green Paper entitled 'Less bureaucracy

for citizens: promoting free movement of public documents and recognition of the effects of civil status records' (the 'Green Paper') and applied, among others, to the free movement of public documents and the recognition of the effects of certain civil status records (e.g., those relating to marriage and registered partnerships, parenthood, filiation, adoption and name).

The European Commission even proposed the adoption of a European Civil Status Certificate, which would have meant automatic recognition of civil status situations established in a Member State, as a measure based on mutual trust; in particular, this anticipated the recognition not only of the authenticity of the civil document (as provided by Regulation 2016/1191), but also the effects of such documents. Even though the European legislator did not expressly address the cases of rainbow families, such an approach would have obliged the Member States to accept them as valid relationships legally formed in another Member State without applying the national rules of private international law and perhaps against the fundamental legal concepts of each Member State.⁴⁵

Perhaps, at that time, the Member States were not prepared for the effects of such an international instrument; irrespective of the grounds, the Green Paper on the recognition of the effects of civil status documents was rejected. In 2016, the Union legislator adopted Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by

⁴³ According to ICF S.A., *Study to support the preparation of an impact assessment on a possible Union legislative initiative on the recognition of parenthood between Member States Final report*, March 2022, at 82, available at <https://commission.europa.eu/system/files/2023-01/ICF%20Final%20Report%20-%20Recognition%20of%20parenthood%20between%20MSs%20-%20FINAL.pdf>.

⁴⁴ *European Commission, Green Paper on less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records*, 2010, at 10–11, available at <https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:52010DC0747>.

⁴⁵ Chrysafio Tsouka, 'Simplifying the Circulation of Public Documents in the European Union — Present and Future Solutions', *Elte Law Journal*, Budapest, 2015/2, at 44.

simplifying the requirements for presenting certain public documents in the EU,⁴⁶ including documents on birth, parenthood and adoption.

However, this did not solve the problem of recognition of parenthood as the Regulation (EU) 2016/1191 addresses the authenticity of public documents in certain areas, but does not cover the recognition of the content of such public documents. E. Next steps. Will all Member States be on board?

The Regulation is an important step forward in EU law, a need that has been awaited for many years, especially by people who are forming/willing to form a rainbow family and are finding/will find themselves in cross-borders situations, but also by organizations and institutions representing both children and LGBTIQ rights. However, it can be seen that it is also a key step for some Member States, as the adoption of the Regulation implies the automatic recognition of non-traditional families, even if this is contrary to their public interest.

Some Member States have already taken a stance. For example, Poland and Hungary announced that would veto the initiative within the Council of the EU⁴⁷ on the grounds that this matter must remain under the jurisdiction of national law. Also, the Italian Senate voted against the Regulation within the internal legislature procedure, invoking the same reasons.⁴⁸

The Federation of Catholic Family Associations in Europe also reacted publicly after the European Commission published the proposal of the Regulation

inviting the European legislators to respect both the principle of subsidiarity and the principle of proportionality.⁴⁹ Until that moment, Romania has not taken an official position, but, given that its public policy is similar to that of Poland's and Hungary's, we expect it to oppose the Regulation.

Considering that, according to Article 81(3) TFEU, unanimity is a condition for adopting the Regulation, we expect the European institutions to hold serious negotiations with the Member States which are less receptive to such an international instrument. We believe that, during the negotiations, the European institutions:

- should emphasize that the EU is not willing to challenge their identity and beliefs with this Regulation, but to respect the principle of legal certainty;
- should not hide the potential internal challenges involved by adopting the Regulation; however, they should assure the Member States of their full support in taking this step forward by means of public awareness of the need to finally acknowledge parenthood, regardless of the type of family, of their fundamental rights that are to be safeguarded alongside the values of EU;
- should encourage Member States to weight up all the benefits of adopting the Regulation, also taking into consideration that this problem regarding the non-recognition of parenthood in the case of rainbow families can no longer be ignored, since their fundamental rights are constantly being breached and that being part of the EU implies a great responsibility to promote its values in matters that involve cross-border situations;
- should guarantee that the process

⁴⁶ Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012 (OJ L 200, 26.7.2016, p. 1).

⁴⁷ <https://www.fafce.org/press-release-the-dangers-of-a-european-parenthood-certificate/>.

⁴⁸ <https://www.euronews.com/my-europe/2023/03/17/italys-lgbtq-community-decries-governments-attacks-on-same-sex-parentalrights>.

⁴⁹ <https://www.fafce.org/press-release-the-dangers-of-a-european-parenthood-certificate/>.

will take place in small but firm steps, leaving room for acceptance and highlighting the gains, which is likely to convince them that it is worth continuing and strengthening the process of acceptance of non-traditional families, even though they cannot be legally formed under national law of the given Member State.

Hopefully, all Member States will finally get on board!

6. CONCLUSION AND SOLUTIONS

The recognition of legal parenthood established for same-sex couples in another Member State remains a major problem in the EU. Despite progress in some Member States, there are still significant disparities within the EU. This can create difficulties for same-sex couples who move from one Member State to another and wish to exercise their rights as legal parents.

The Regulation aims to address the problem we have identified in this paper, but this legislative initiative also seems likely to encounter its own obstacles, for example, obtaining the unanimous approval of all Member States; the instrument will not apply to Denmark; it is not clear if Ireland will exercise its opt-in; it has a limited territorial scope in that it excludes all situations where parenthood is established in a third country; it includes no safeguards for protecting the child's right to know his/her origins.⁵⁰

Although we understand the potential breach of exclusive state competence and despite the risk of further requests for domestic regulation, Member States should prioritize balancing fundamental EU rights with national ideology on the

family to achieve a fair compromise. Nevertheless, until the Regulation is adopted, there are still small steps that need to be taken and we have identified several solutions which may be taken into consideration by each pawn on the European board.

A. From the EU's perspective

Given the limited applicability of the V.M.A. case, the CJEU could advance and clarify the extent to which parenthood is to be recognized for the purpose of free movement. Such an approach is necessary because in the V.M.A. case, the CJEU did not state that parents should be recognized for all purposes, but solely for the purpose of accompanying the child in another country, which is mainly the problem why some answers to questions currently arising from day-to-day family situations are needed.

Although it is understandable why the CJEU only partially addressed the issue in 2018, now, when so many steps have been taken in acknowledging rainbow families (e.g. EU Strategy of the Rights of the Child, the LGBTIQ Equality Strategy 2020–2025), we hope to see that all rights and obligations arising from family law are enabled in future judgments and that a rainbow family will also exercise the right to free movement. The premise behind this ruling applies to a preliminary reference from a national court dealing with a dispute regarding the recognition of parenthood or other aspects arising from it, which have already been established in a Member State. National courts should take this issue seriously and give the CJEU the opportunity to address it.

Meanwhile, the EU bodies should take further measures based on the strategies on the protection of children's rights

⁵⁰ Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies PE 746.632, Study requested by PETI committee on Cross-border Legal Recognition of Parenthood in the EU, April 2023, p. 17, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2023/746632/IPOL_STU\(2023\)746632_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/746632/IPOL_STU(2023)746632_EN.pdf).

and the rights of the LGBTIQ community and work together with Member States to promote a common approach to the recognition of legal parenthood for same sex couples in order to ensure better protection of their rights.

And, of course, we expect that the EU bodies will hold effective negotiations with the Member States, which will eventually lead to success in adopting a proper regulation. To achieve this goal, we have identified three objectives: (i) to hold negotiations on the draft as proposed, so that all Member States accept it as it is; or (ii) the EU legislation bodies should be flexible and adapt the draft after carefully considering the proposals of the Member States during the negotiations; as a last resort (iii) to adopt the Regulation within the framework of enhanced cooperation, which is to be applied by the participating Member States only.

We believe the ideal situation would require all Member States to vote in favour of the Regulation in whichever form it will be drafted after the negotiations, as long as the scope of this instrument remains similar. However, if this *desideratum* proves unattainable, we believe enhanced cooperation will be an important solution. The Member States that choose not to apply the Regulation will be given the chance to see the benefits and prepare their citizens for accepting it in the future.

B. From the Perspective of the Member States

A potential answer which could currently prove reliable and solve the problem of recognizing and establishing the parenthood of same-sex couples involves allowing national courts to embrace the

ECtHR standards related to same-sex families. The common denominator of *Oliari and Others v. Italy*,⁵¹ *Fedotova and Others v. Russia*⁵² and *Buhuceanu and Others v. Romania*⁵³ is, essentially, that the fact that same-sex couples *de facto* live in a stable partnership falls within the notion of ‘family life’, so they should be able to live a normal life and benefit from the legal recognition and protection of their relationship.

In para. 81 of *Buhuceanu and others v. Romania*, the ECtHR expressly states that same-sex couples must have ‘the right to express their personality within those relationships and to benefit, in time and through the means provided by law, from the legal and judicial recognition of the corresponding rights and duties.’⁵⁴

The right to family life⁵⁵ is fundamental. One of its elements involves the possibility of embracing parenthood. The corresponding rights and duties are inferred from family law and are those that rainbow families are deprived of because of the non-recognition of their right to a family life. This type of argumentation is embraced in our summarized proposal.

However, we are aware that it is a challenge for such a line of reasoning to currently be adopted in the Member States that do not legally recognize rainbow families or their possibility of having children, given that the national judge comes from a state with such principles; he or she would have to provide a strong justification for passing judgment in favour of the recognition of parenthood over the ‘public interest’. Meanwhile, national bodies should promote rainbow families to raise acceptance and should

51 ECtHR, *Oliari and Others v. Italy*, Appl. no. 18766/11 and 36030/11, Judgment of 21 July 2025.

52 ECtHR, *Fedotova and Others v. Russia*, Appl. no. 40792/10, 30538/14, and 43439/14, Judgment of 13 July 2021.

53 ECtHR, *Buhuceanu and Others v. Romania*, Appl. no. 20081/19, 20108/19, 20155/19, Judgment of 23 May 2023.

54 Id.

55 A right enshrined in Articles 7, 9 and 33 of the Charter of Fundamental Rights of the European Union and Article 8 ECHR

support children's rights by talking about the injustice they face based on the sexual orientation of their parents. We find this task extremely important, since one of the reasons why people are reluctant to accept rainbow families is because they are not accustomed to families other than the traditional type.

Therefore, it is essential to start addressing the issue publicly and ensure that people understand that human rights are for everyone, that respect for private life is essential in a democratic state, a member of the EU, even if his/her/their way of living differs from that of the majority of the population. It is also important to emphasize that, regardless of the circumstances, children must not be treated differently purely because they are born into same-sex marriages.

C. From the Perspective of Non-Governmental Organizations

The solution is to continue to struggle for the rights of rainbow families, while focusing on the importance of acknowledging universal parenthood and the consequences of denying it. This requires a joint effort: EU bodies and Member States should continue to work closely with non-governmental organizations and support groups working for the good of the LGBTIQ community to improve the protection and recognition of the rights of rainbow families.

We would like to think that this paper joins the efforts of EU citizens, organizations and institutions in creating a space where every parent is recognized as a parent of his/her child regardless of the type of family they form; where human rights, equality and freedom does not encounter any borders; and where the law is created and updated to the current needs of the people.

SEMI-FINAL C

EU AND EUROPEAN CIVIL PROCEDURE

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PARTICIPATING TEAMS:

FRANCE, GERMANY, GREECE, ROMANIA, SPAIN

1ST PLACE: GERMANY

2ND PLACE: FRANCE

3RD PLACE: ROMANIA

**Selected papers for the THEMIS Annual Journal:
GERMANY, FRANCE, ROMANIA**



14–16 JUNE 2023 – BUDAPEST, HUNGARY – NATIONAL OFFICE FOR THE JUDICIARY

JURY MEMBERS

MILAN BAJIĆ (RS)

Court Jurisprudence Harmonization Specialist at the President's Office of the Supreme Court of Serbia

It was my professional and personal pleasure to work with Professor Aleš Galič from Slovenia and Judge Rosanna Giannaccari from the peer Court of Cassation from Rome, Italy.

The Panel was both diverse and compatible, with which panels of judges are not often blessed. We were in a position to trust each other, as well as to receive support from each other, learning from each other.

As a person coordinating the South-East European Regional Moot Court Competition before the European Court of Human Rights since 2006 (for 17 academic seasons), I have had plenty of experience with competitions of this kind, its dynamics, procedural aspects and their atmosphere.

Therefore, I was very excited and curious when I accepted the EJTN's request to act as a juror in this year's THEMIS European Civil Procedure Semi-Final C. Being part of the jury of the THEMIS competition was a remarkable professional and personal experience as well as privilege of working creatively with such a great panel and such devoted participants. The Budai Judicial Academy of Hungary premises gave us peace and quiet for the trials, and simultaneously the 'smell' of the big city for

the competitors (from France, Germany, Spain, Romania and Greece) to 'breathe' upon completing their duties. We posed plenty of questions.

Many of the participants responded not just satisfactorily, but even in a creatively inspiring way, demonstrating that they are capable of standing alone, exposed to an examination by the Jury, and to prove their understanding and views or to sometimes adapt them, enriching them with novel aspects obtained through satisfactory and long discussions. Those often reached their maximum of 45 minutes provided for by the procedural rules. It is worth saying that the topics which the competitors chose and 'brought' to Budapest were, in practically all cases, very current, or as the jurisprudence would say, recent.

So we discussed novel pieces of European legislation with the teams in several cases, immediately upon their entry into force, on patents, environmental protection through private law, leading human rights issues, or the fine distinction between contract and tort in pieces of EU legislation, further developed through CJEU jurisprudence, as well as consumer protection. We sometimes saw a confrontation between economic and social aspects, where a more profound sense of justice and

responsibility was needed for their proper assessment. As for the procedure itself, it was at this point (the semi-finals stage) that it became somewhat eclectic, between user-friendly (selection of topic, presentations) and Moot Court aspects (discussion with the jury, but not directly with a counter-party).

This resulted in very creative, comprehensive, 'topical' presentations, but with adversary aspects, which were not represented as much as in typical moot courts. I would like to point out that the introduction of certain further enhancements to the procedure might be considered in this area.

We had very good, continuous and timely support provided by Ms Monica Ramos, the EJTN official who assisted us throughout the entire process of the

THEMIS competition. All teams deserved strong feedback and support, which they received, at least to a certain degree, through discussions with us. Two teams assessed as the best made it to the final and I am happy to mention that the panel was unanimous in both cases, voting independently of each other.

This is of great value for the decision-making process, and gives us greater satisfaction arising from the responsibility of decision-making (especially as we are jury members or judges in practice).

Apart from the official part, sharing almost a week with jurists from various European countries was an enriching cultural experience, including through various languages heard and spoken in the amazing capital of Budapest, which lies on the banks of the Danube.

ALEŠ GALIČ (SI)

Professor of International Private Law at the University of Ljubljana

It is always both an honour and a pleasure to accept the EJTN's request to act as a juror in the Themis competition. This year, it was for the European Civil Procedure semi-finals held in the Judicial training centre of the Hungarian Academy of Justice in Budapest. My sincere words of gratitude first go to our Hungarian hosts for the superb organization of the whole event and its accompanying activities and for their warm reception and excellent hospitality.

I have participated in numerous moot courts and similar competitions, in various capacities: as a law student, as a tutor and

as a juror. Comparing all these events, I can, without the slightest exaggeration, say that – for a juror at least – the THEMIS format is by far the most interesting and rewarding. The reason is that, in other competitions all teams deal with the same topic and the same legal problems, based on the same underlying facts and, therefore, from the point of view of a juror, after reading all the papers, there is a great deal of repetition.

In the THEMIS format, however, each team conducts research on a topic of its own choice. This guarantees that a juror will have a great opportunity to learn a great

JURY MEMBERS

deal and to significantly broaden his or her horizons. The topics presented in the Competition were indeed quite diverse. 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 prepare the final ranking. It is much easier objectively to compare – and rank – papers and presentations, all of which examine the same case.

However, it is extremely difficult to compare and rank excellent papers, dealing with various topics – of which some are novel, some are ‘evergreen’ (but therefore probably also highly important in practice), some are written in an area of law where there is already a huge body of case law and scholarly research, while some are written by a team that is almost pioneering a research, some deal with topics which fall within the main academic/professional interest and expertise of a juror and some address topics which are novel for the jurors as well. It is unavoidable that there might be some disappointment among some teams

after the announcement of the results. I can make the assurance that, together with my dear colleagues, Rossana – an excellent chair of the jury indeed – and Milan, we did this final part of our work with diligence, after a thorough assessment and discussion, in good faith and striving for fair results.

The diversity and originality of the chosen topics, already in itself demonstrates the tremendous amount of scholarly knowledge accumulated in the papers and presentations. With such promising young (future) judges, one can be confident that the future of the judiciary and the rule of law in the European Union is in good hands indeed.

All participating teams, together with their tutors, should be proud of their outstanding and inspiring performance, their critical thinking and communication skills and their in-depth knowledge of EU law, international law and (comparative) national laws, which they displayed during the competition, as well as the weeks or months of research, writing and preparation leading up to it.

ROSSANA GIANNACCARI (IT)

Judge at the Supreme Court of Cassation of Italy

It was an honour and a privilege to be a Jury Member of the THEMIS EU and European Civil Procedure Semi-Final C in Budapest. I am grateful to the EJTN for this opportunity, to the hosting institution, the Hungarian Academy of Justice, for the perfect organization and to my fellow members of the jury, who supported me as the chair of the jury.

I was impressed by the brilliant, competent and motivated participants. All the teams demonstrated in-depth knowledge and insight into their chosen topic.

All the papers covered unexplored, relevant and controversial issues related to the EU and the EU Civil Procedure, such as the rights of LGBTI, geo-blocking, the unified patent, contracts and torts and the potential of the Climate Directive to strengthen climate protection.

The participants took the stage, presented their ideas in an original and creative way, making reference to various legal

instruments and case law. The EU must be proud of its future judges and prosecutors. But, above all, the most impressive aspect of the THEMIS competition is the unique atmosphere; the participants were concentrating intensely and everyone felt a great deal of tension but also a pervasive enthusiasm during the competition.

THEMIS is not only a competition but also a high-quality forum for exploring a wide range of topics. Trainee judges and prosecutors, tutors and jurors shared reflections on a wide range of topics and various fields of law, which will contribute to the shape of the future of European law and culture.

At the beginning of the competition, each team ate breakfast at their own tables; on the last day, they walked and ate dinner together in Budapest. A competition like THEMIS is the starting point for mutual trust and mutual cooperation in the UE.

Team Members:

Louise Carliez
Alexandre Orts
Erwan Smith



Tutor: Emmanuelle Lajus-Thizon

Team France

THE UNIFIED PATENT COURT AND THE UNITARY PATENT: PROMISING HOPES FOR EUROPE'S GLOBAL INFLUENCE OR ONLY SMOKE AND MIRRORS?

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The creation of the Unified Patent Court and the Unitary Patent are the results of decades of negotiation in the European Union and are intended to bring fundamental changes in European patent law. In the long term and provided that the Unified Patent Court becomes a success, which is very likely, a single litigation forum would deal with European patents, instead of national courts.

Given the sensitivity of determining harmonized civil procedure rules, the Unified Patent Court Agreement, Regulation (EU) No 1257/2012, Regulation (EU) No 1260/2012, as well as the relevant Rules of Procedure, try to tackle the most important issues head-on. Nonetheless, there may still be holes in the racket that practice should fill in the upcoming years. This article tries to provide a forward-looking vision of the Unified Patent Court and the Unitary Patent and, until the practice provides some solutions to the pending questions and anticipated issues, its aim is to analyse the key aspects of such an important reform.

KEYWORDS:

UNITARY PATENT | EUROPEAN PATENT | UNIFIED PATENT COURT | UNIFIED PATENT COURT AGREEMENT | REGULATION (EU) NO 1257/2012 | REGULATION (EU) NO 1260/2012 | RULES OF PROCEDURE | FORUM SHOPPING | PATENT MEDIATION AND ARBITRATION CENTRE

INTRODUCTION

2023 is a year of great change for European patent law. After decades of discussions and unsuccessful attempts, the unitary patent (hereinafter referred to as the ‘UP’) and the Unified Patent Court (hereinafter referred to as the ‘UPC’) will opened on 1 June 2023. This system allows companies to protect their inventions and patents in 17 European Union (hereinafter ‘EU’) Member States and possibly more in the future.

These states have a new supranational court, which is independent of the Court of Justice of the European Union (hereinafter ‘CJEU’), dedicated to patent law. This represents a breakthrough for European civil procedure and could incite a boost in innovation in Europe. Discussions about the creation of a common patent that is applicable throughout the EU have been held since the 1960s.

The Munich Convention was signed in 1973, which created the European patent (hereinafter referred to as the ‘EP’) and the European Patent Office (hereinafter referred to as the ‘EPO’). Some discussions led to the drafting of a Community Patent Convention in 1975,¹ but this Convention was never ratified. Negotiations resumed in the early 2000s but stumbled due to language issues² and, when an agreement was finally drafted, the CJEU rendered a negative opinion on it, considering that ‘the envisaged agreement creating a unified patent litigation system (currently called “European and Community Patents Court”) is not compatible with the provisions of the EU Treaty and the FEU Treaty.’³

The European Council made a decision on 10 March 2011 authorizing enhanced cooperation for the creation of unitary

patent protection.⁴ This led to the adoption of Regulation (EU) No 1257/2012 creating the EP with unitary effect, Regulation (EU) No 1260/2012 defining the translations required, and the Agreement on a Unified Patent Court (hereinafter referred to as ‘UPCA’), signed on 20 June 2013 by 24 states (i.e. all EU members, except Spain, Croatia and Poland). This agreement entered into force on 1 June 2023.

Before the UP, EPs granted by the EPO merely provided a common legal framework for patent application, in one of the three official languages (English, French or German), and could be subject to two unified post-grant procedures before the EPO: (i) opposition, and (ii) limitation or revocation. However, once granted, the EP would not be a unitary instrument: it became a national patent in each state where it was filed. Therefore, if a problem of infringement or validity of the EP arose, parallel litigation in every national court where the EP was filed would be necessary.

This situation was considered unsatisfactory for a long time: not only did it not match the logic of a single market, but it did not entice companies in the EU to increase their investments in research and development. In fact, if a patent proprietor wished their invention to be protected across Europe, they would have to face considerable costs (national annual fees and the possible cost of multiple parallel litigations) while not benefitting from unitary protection throughout the EU.

The project of a UP across the EU aims to harmonize patent law on a European level – not unifying it, as it is not an EU scheme, but a transnational one that does not involve all EU Member States – and

1 The objective of which was similar to the one followed for the implementation of the UP and UPC.

2 Which will be recurrent because patents are a nationally sensitive matter.

3 Opinion 1/09 of the Court of Justice of the European Union (Full Court) of 8 March 2011.

4 Council Decision of 10 March 2011, 2011/167/EU.

favouring free movement of patented products within the EU.

The UP and UPC's stated targets reflect the highly awaited harmonization of patent law across the EU (Part I). Therefore, the UPCA and Rules of Procedure (hereinafter referred to as 'RoP') have been subject to long-lasting discussions between participating Member States that have led to the implementation of a new litigation system for EPs and UPs (Part II).

However, the UPC will necessarily face some challenges in the future, which opens a window to thinking about potential remedies to ensure the efficiency and durability of this new system (Part III).

1. THE UNITARY PATENT AND UNIFIED PATENT COURT'S STATED TARGETS: OFFERING PATENT PROPRIETORS A COST-EFFECTIVE OPTION FOR PATENT PROTECTION AND DISPUTE RESOLUTION ACROSS EUROPE

To date, a UP will provide protection across 17 EU Member States⁵ and more countries are expected to ratify it over time.⁶ Hopefully, in the long run, all EU Member States will be part of the UP system and will fall under the UPC's jurisdiction.⁷ Technically, a UP will be a single patent based on an EP that has been granted, which will take effect within the territories of the countries that had ratified the UPCA as at the date of registration of the unitary effect.

It will not be possible to allow a UP to selectively lapse in one or more territories while retaining protection in others

(otherwise this would deprive the UP of its unitary effect). The EP system presents several drawbacks that its UP counterpart is supposed to alleviate, the first being that a UP will confer rights on its owner which are supposed to be the same for all participating Member States. The UPCA indeed provides that the UP will be governed in its entirety by the law of one of the participating Member States (e.g. conditions of co-ownership, transfer of ownership and priority rights) and that the applicable law will be determined by reference to the law governing the UP 'as an object of property'.⁸

This will be the law of the participating Member State where (a) the place of residence or principal place of business of the applicant, or, in absence of this, any place of the applicant's business, (b) for joint applicants (co-owners), the first listed applicant is decisive, or (c) if none of the applicants matches these conditions, then, by default, German law will apply.⁹

This is supposed to help give more predictability to the UPC's future rulings, in order to gain the trust of companies – which is necessary for this scheme to succeed. Besides, the EP system is based on a 'bundle patent' system, meaning that, once the EP has been granted by the EPO, it becomes several national patents (as many national patents as requested in the EP application). Consequently, the patent proprietor is to pay fees to the local national patent office in each country where the patent is sought.

Such fees are to be paid for renewal each year in each state under consideration, which can become hard to handle, especially for small and medium-sized

5 Austria, Belgium, Bulgaria, Denmark, Estonia, Finland, France, Germany, Italy, Latvia, Lithuania, Luxemburg, Malta, the Netherlands, Portugal, Slovenia and Sweden have ratified the UPC Agreement.

6 Cyprus, the Czech Republic, Greece, Hungary, Ireland, Romania and Slovakia have already signed the UPC Agreement.

7 Croatia, Poland and Spain remain – to date – outside the scheme.

8 Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection.

9 Article 7 of Regulation (EU) No 1257/2012.

enterprises (SMEs).¹⁰ This usually also involves (i) a local representative (attorney or European patent attorney) taking the necessary steps with the national patent office and (ii) translation of the patent into the local language for countries which did not sign the Agreement on the application of Article 65 of the Convention on the Grant of European Patents¹¹ (hereinafter referred to as the ‘London Agreement’).

This may, of course, lead to significant additional costs. With this in mind, the Committee on Industry, Research and Energy of the European Parliament stated in a working document in November 2011 that ‘it is not acceptable that the costs of a patent in Europe may be tenfold the cost of the same patent in the USA or Japan.’¹²

Therefore, some European SMEs decided to protect their inventions in the United States, as seeking patent protection in Europe was considered ‘too fragmented, too expensive, too complicated. Simply out of reach for an SME’s finances.’¹³

Meanwhile, the UP will lead to the acknowledgement of a single patent across several states by paying renewal fees at EPO level. As summarized by the EPO, ‘the renewal fees have been set at a very business-friendly level, corresponding to the combined renewal fees due in the four countries where European patents were most often validated in 2015.’¹⁴

Therefore, a UP will be less expensive than an EP validated and upheld in four of the 24 Member States participating in the UP system. This means that significant cost savings are possible to ensure coverage of an EP in up to 24 countries. This target is clearly announced in the EPO’s Unitary Patent Guide:¹⁵ ‘the aim of the reform of the European patent system through the creation of Unitary Patent protection is to offer businesses a simpler alternative to the existing system and introduce a more cost-effective route to patent protection and dispute resolution.’

Furthermore, where the EP often had to be translated into several languages, depending on the country where protection was sought,¹⁶ the UP should be translated only once: (i) into English if the proceedings before the EPO were in French or in German or (ii) into ‘any other official language of the (European) Union’ if proceedings were in English.¹⁷ This should also help reduce the costs of patent registration.

Indeed, according to a study from 2012, the EPO assessed the overall cost of a patent to be between €25,000 and €35,000, of which approximately €5,000 was spent on filing procedures and prior art search and examination, and €5,500 on an average of eight years’ protection in seven to eight countries. The remainder (i.e. between €15,000 and €25,000) is related to costs of legal advice, administration and

10 ‘Nuno Correia, who supervises work on composite materials at a Portuguese research laboratory (Inegi), sums up the financial headache of such a situation by referring to one of the companies that has patented technologies developed with Inegi in Europe: “One day you get an invoice from Austria and Luxembourg. The next month you have to pay for the Netherlands and Finland. Every month there is a new bill.” Gabriel Gresillon, ‘Intellectual property : Europe says yes to the unitary patent’, *Les Echos Entrepreneurs*, 20 April 2023, available at: <https://business.lesechos.fr/entrepreneurs/juridique/0703677001054-propriete-intellectuelle-l-europe-dit-oui-au-brevetunitaire-351685.php>

11 Each country has a different translation requirement.

12 European Parliament working document on Innovation Union: *Transforming Europe for a post-crisis world*, Committee on Industry, Research and Energy. Rapporteur: Judith A. Merkies.

13 Gabriel Gresillon, *supra* note 11.

14 Namely: Germany, France, the Netherlands and Italy (after Brexit).

15 Unitary Patent Guide from the EPO – IV. *The Unitary Patent: an additional option enhancing the European patent system*.

16 According to the London Agreement, signatory states agree to waive the requirement to translate European patents into their own language, or require the translation of only the most important parts of the documents.

17 Article 6 of Council Regulation (EU) No 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements.

translation of patents.¹⁸ In parallel with the UP itself, the UPC¹⁹ will also contribute to the harmonization of patent law across the EU, as, in the long run – i.e. upon the lapse of the transition period²⁰ – it is supposed to become the main court with competence for enforcement and litigation relating to UPs and EPs (if the patent proprietor has not opted out).

The creation of the UPC implies that an EP (not opted-out) or a UP may be enforced in multiple countries via a single infringement action brought before the UPC. Not only will this allow patent proprietors to reduce the costs of protecting their inventions (because national patents or EPs require separate infringement actions to be brought before courts in each country where the patent was registered); it should primarily prevent situations in which different courts would rule in different ways, passing different judgments.²¹

Therefore, contrary to the multi-jurisdictional approach to litigation, where each state has its own national specificities and concepts that can differ from one state to another, it is contemplated that UPC judges will understand that their practice should be conducted differently and adapted to this new legal and procedural environment. Hopefully, UPC judges will adopt rulings based on the best outcome each country offers to develop harmonized case law for patent litigation across participating states.

This would be the main way of (i) providing more legal certainty for patent proprietors and (ii) preventing the risk of forum shopping, which involves a patent proprietor filing infringement claims before one national court rather than another because local case law is more patent proprietor friendly (e.g. a shorter timeframe is required to obtain a ruling in the Netherlands than in France).

The UPC has been designed with the sole purpose of dealing with patent litigation.²² A procedure that is specific to the UPC has been laid out via the UPCA and the RoP, which were both subject to many discussions between 2013 and July 2022 (when the 19th draft of the RoP was adopted) and combines different tools from the laws of the participating states.

It can be reasonably expected that these rules prove to be in favour of the patent proprietors looking for patent enforcement. For example, several actions have been filed to preserve evidence – the equivalent of a ‘saisie-contrefaçon’ in France – as well as the mechanism of the protective letter, i.e. a pre-emptive statement of defence which contains the reasons why the (future) defendant believes the provisional measures requested by the applicant will be groundless. Also, the RoP provide that a first instance decision should be reached within 12–15 months, whereas timeframes for litigation at national level can vary significantly from one state to another. For instance, in Italy, ‘the average timeline of ordinary infringement and revocation

18 Coralie Donas, ‘Reducing translation costs of patents’, *Les Echos*, 28 June 2012, available at: <https://www.lesechos.fr/2012/06/reduire-les-couts-de-traduction-des-brevets-377037>.

19 The UPC is not a single court, but a court system organized around a two-tier court: a first instance court and a court of appeal (in Luxembourg). At the very least, case law from the UPC’s Court of Appeal should lead to the harmonization of patents between the participating states.

20 A seven-year period that will start running from 1 June 2023 and may be renewed once for another seven years.

21 For a concrete example of discrepancies between judgments passed by national courts, in a case about contact lenses, between *Novartis* and *Johnson & Johnson*, the patent was declared valid and the infringement upheld in France (TGI Paris, 25 March 2009) and in the Netherlands (Rechtbank Den Haag, 11 Feb 2009), whereas it was declared invalid in the UK (for a lack of description, High Court, 10 July 2009) and in Germany (for a lack of novelty, *Bundesgerichtshof*, 10 Dec 2009) – Pierre Véron and Nicolas Bouche, ‘La Juridiction unifiée du brevet, Une révolution dans le contentieux européen’, *Cahiers de droit de l’entreprise* no. 2, March 2014, 10.

22 With a special focus on infringement and validity claims.

proceedings can be identified in no less than two years,²³ ‘proceedings take around two years in France, but are substantially faster in the other three jurisdictions.

Median durations for infringement cases are nine months in Germany, 10 months in the Netherlands, and 11 months in the UK.²⁴ Therefore, patent proprietors holding patents in France and Italy may prefer to act before the UPC as procedures should be shorter than before French or Italian courts. In addition, the UPC also has the advantage of being composed of judges who are qualified both legally and technically, and may be appointed to be members of the benches according to the field covered by the patent in dispute.

This should help (i) contribute to fostering trust in the system, as the involvement of technical judges should instil confidence in the full understanding by the UPC of the issues at stake and (ii) to create unified high quality case law,²⁵ both from a legal and technical standpoint.

The Court of Justice of the European Union will not be totally estranged from the UPC system. Article 21²⁶ of the UPC Agreement provides that the UPC will be able to make requests to the CJEU for preliminary rulings.²⁷ Since a judgment on a referral for interpretation has the general authority of *res judicata*, it is binding on the court that made the referral and asked for the preliminary ruling. This should contribute to the development of predictable and unified case law at UPC level (especially between its various divisions). It should,

however, be emphasized that, even though the UPCA opens with a preamble recalling the importance of EU law and the CJEU’s key role in its application, core issues that will be brought before the UPC do not involve questions of EU law *per se*.

This being stated, the CJEU is especially supposed to ensure the judicial protection of individuals’ rights under EU law, so it can reasonably be expected that the CJEU will receive preliminary questions arising from procedural difficulties before the UPC (e.g. the right to a fair trial with respect to tight procedural deadlines, the use of a foreign language that can affect these deadlines if translations are to be prepared, the impartiality of technical judges, etc.).

Finally, it is also expected that the UPC could at least help limit – if not prevent – the risk of companies being attacked by ‘patent trolls’²⁸ before several national courts in the EU. As mentioned above, the rules that are applicable before the UPC have the objective of reducing the risk of forum shopping when determining the relevant division. Its divisions are composed of an international panel of professional and technical judges who should apply the same rules everywhere.

In addition, the RoP provide for a swift procedure: patent trolls may not continually try to increase pressure on the defendant by suggesting a quick settlement to avoid long-lasting trial costs. Also, an application fee will be applicable for an infringement claim and

23 ‘Italy: Patent Litigation Q&A’, *The Legal 500*, 2023, available at: <https://www.legal500.com/guides/chapter/italy/patentlitigation/>.

24 Centre for European Economic Research, Discussion Paper No. 13-072, *Patent Litigation in Europe*, 2013.

25 First instance UPC cases will be heard by a panel of three experienced and specialist intellectual property judges. At least one of the first instance UPC judges will be an IP specialist judge from the existing national courts. The Court of Appeal will sit as a bench of five experienced appeal judges.

26 ‘As a court common to the Contracting Member States and as part of their judicial system, the Court shall cooperate with the CJEU to ensure the correct application and uniform interpretation of Union law, as any national court, in accordance with Article 267 TFEU in particular. Decisions of the CJEU shall be binding on the Court.’

27 Specific procedure enabling a court of a Member State to ask the Court of Justice of the European Union about the interpretation or validity of Union law in the context of a dispute before it.

28 Which may be defined as a company that obtains the rights to one or more patents in order to profit by means of licensing or litigation, rather than by producing its own goods or services. (Oxford Languages)

its amount will depend on the value of the claim, which may be significant: this may discourage a patent troll who knows that their claim is weak. In this respect, ‘patent trolls’ may lose their threatening influence.²⁹

2. A PATENT’S JOURNEY IN EUROPE: THE NEW LITIGATION SYSTEM FOR EUROPEAN PATENTS AND UNITARY PATENTS

In order to guarantee the efficiency of UP protection against infringement, the UPC will have broad territorial jurisdiction. The set of rules regarding UPC jurisdiction can be divided into two levels: international jurisdiction for the UPC (between the UPC and national courts) and internal jurisdiction (between regional and central divisions of the UPC).

For UPC international jurisdiction, Regulation (EU) no. 1215/2012 (known as Brussels 1 Bis) was modified by Regulation (EU) no. 542/2014 to adapt it to the creation of the UPC, by adding four articles to Brussels 1 Bis: Articles 71a (or 71 Bis) to 71d (or 71 quinquies). The principle, stated in Article 71b(1) of Brussels 1 Bis recast, is that the UPC has jurisdiction when the courts of a Member State party to the UPCA would have had jurisdiction in a matter of UP (i.e., when the defendant is domiciled in a Member State). However, in order to ensure UPC efficiency, Brussels I Bis now provides long arm jurisdiction to the UPC in Article 71b(2) and (3) in cases where the defendant is domiciled outside a Member State. For instance, if the infringement of

an EP causes damage both within and outside the Union, the UPC may have jurisdiction over damage arising outside the Union from such an infringement.³⁰

This solution, while highly favourable to the claimant, is offensive to traditional case law in matters relating to tort, delict and quasi delict, arising from the Fiona Shevill³¹ ruling, where the Court of Justice ruled that the claimant ‘may bring an action for damages against the publisher either before the courts of the Contracting State of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each Contracting State in which the victim claims to have suffered a damage, which have jurisdiction to rule solely in respect of the harm caused in the State of the court seized.’³²

This favour to the alleged victim constitutes evidence of the intention to make the UPC system attractive to patent proprietors. The UPC’s internal jurisdiction is divided into a central division and local divisions. In accordance with Article 33 (1) of the UPCA, claimants have two options with respect to local division jurisdiction. They can bring their action before (a) the local division where the infringement took place or can take place, or (b) the local division where the defendant has his place of residence, or principal place of business.

Though this option between two local divisions is not unusual in international private law,³³ it can lead to situations of

²⁹ This should however be put into perspective as the same arguments are also mentioned as potentially favourable to patent trolls. For instance, some consider that short procedural deadlines could be instrumentalized by patent trolls, as it could make it more difficult for defendants to prepare an effective defence. Also, the potential impact of an injunction by the UPC could be major, as it would apply throughout the territories of the 17 states that ratified the UPCA. It may also be noted that recoverable judicial costs before the UPC are capped, which is not the case before all national courts and could entice patent trolls to try to have an injunction over 17 states, whereas financial risks – if they lose their case – are limited.

³⁰ Article 71b (3).

³¹ Ruling rendered in a case of defamation committed by means of press articles published in several states.

³² Case C-68/93, *Fiona Shevill v. Presse Alliance SA*. (EU:C:1995:61), at 1.

³³ More precisely, this rule is very similar to the system of Regulation no 1215/2012 Brussels 1 Bis, for matters relating to tort, delict and quasi delict, which provides the claimant with an option to choose between the courts with jurisdiction over where the harmful event occurred or may occur (Article 7), and the courts where the defendant is domiciled (Article 4).

forum shopping between local divisions, or situations of *lis pendens* that could result in incompatible decisions. Therefore, a specific set of UPCA rules anticipates potential situations of connection and *lis pendens* before local divisions. In principle, if an action is pending before a division of the UPC, Article 33(2) presents a list of actions between the same parties regarding the same patent, which may not be brought before any other division.

If such a case arises, the division where the action was first filed shall be competent for the whole case, while any division which received actions afterwards shall declare them inadmissible. According to the RoP, this claim constitutes a preliminary objection, which must be lodged within one month of service of the statement of claim.³⁴

Besides, the same article of the UPCA states that, when an infringement has occurred in the territories of three or more regional divisions and an action is pending before a regional division, the regional division concerned shall, at the request of the defendant, refer the case to the central division. This rule conveniently tackles the issue of both connection and forum shopping between regional divisions. To guarantee the efficiency of patent protection, the RoP provides a specific civil procedure for claimants before the UPC, which is the result of highly political negotiations between participating states and is supposed to be a reasonable mix of different civil procedure laws.

It will therefore be a challenge for judges, practitioners and litigants to become acquainted with these rules, which may derogate from their national civil procedure. According to Rule 10 of the RoP ‘stages of the proceedings (*inter partes*

proceedings)’, the procedure before the UPC will consist of five stages, namely: ‘(a) a written procedure; (b) an interim procedure, which may include an interim conference with the parties; (c) an oral procedure which (...) shall include an oral hearing of the parties unless the Court dispenses with the oral hearing with the agreement of the parties; (d) a procedure for the award of damages, which may include a procedure to lay open books; (e) a procedure for cost decisions.’

A recurrent problem highlighted by practitioners is that of tight deadlines.³⁵ Indeed, speed is at the core of the procedure before the UPC and announced in the RoP preamble: ‘Proceedings shall be conducted in a way which will normally allow the final oral hearing on the issues of infringement and validity at first instance to take place within one year.’³⁶

Though the preamble recognizes that complex actions may require more time and procedural steps, the UPC is supposed to make a decision within 12 to 15 months of the initial request. This requirement for speed is reflected in the tight deadlines in the procedure’s early stages. During the written procedure, once the claimant issues its statement of claim, the defendant has one month to lodge a preliminary objection, and three months to issue a statement of defence, possibly including a counterclaim for revocation.

The judge-rapporteur, designated by the presiding judge of the panel to which the action has been assigned, shall rule on the preliminary objection and set a date and time for an interim conference (where necessary) and a date for the oral hearing. It is paradoxical that, although these tight deadlines were initially considered a protective measure for patent proprietors,

³⁴ RoP Rule 19.

³⁵ Guy Brain, *UPC: Need for Speed?*, (2022), available at <https://jakemp.com/en/insights/upc-need-for-speed/>.

³⁶ Paragraph 7 of the preamble to the RoP.

they could become a source of anxiety in cases where the defendant files a counterclaim for the revocation of patents and for the declaration of invalidity of supplementary protection certificates.

Such tight deadlines require litigants to remain responsive in order to abide by this strict procedural calendar. This might become even more difficult if the litigant is attracted to a local division for which they are not fluent in the applicable language, meaning that translators would be involved in the procedure and that these deadlines may be even shorter because of translation times. In this respect, the CJEU may find a role with regard to compliance with EU law (especially as regards fundamental principles of civil procedure, such as the right to a fair trial, the right of defence and the principle of contradiction).

Hence the need for patent proprietors to be represented by competent counsel. In matters of representation, Article 48 of the UPCA states that ‘Parties shall be represented by lawyers authorized to practice before a court of a Contracting Member State’, as well as ‘European Patent Attorneys who are entitled to act as professional representatives before the European Patent Office’. In practice, patent proprietors will most probably use law firms specializing in IP, which already operate in several countries and are used to team-working with foreign patent attorneys.

For patent proprietors, the use of a lawyer or a patent attorney incurs costs that add to the court fees, which are made up of fixed fees and value-based fees. Fixed fees are due whatever the value at stake in the action is. The amount of fixed fees before a first instance court is fixed by the Administrative Committee in accordance

with Article 36(3) UPCA in the table of fees. Fixed fees currently amount to

(i) €11,000 for an infringement action, a counterclaim for infringement, an action for the declaration of non-infringement, and for compensation for the licence of a right, and (ii) €3,000 for an application to determine damages. Meanwhile, value-based fees depend on the value at stake in the action, if this exceeds €500,000.

These fees are also fixed by the Administrative Committee in the table of fees. The additional value-based fees currently start at €2,500 for actions up to €75,000. The maximum additional value-based fees are €325,000 for actions in which the value at stake is over €50 million. Therefore, the costs of an action before the UPC undoubtedly create a problem of fair access to the Court for claimants with limited means. As Article 36(3) UPCA emphasizes, ‘The Court fees shall be fixed at such a level as to ensure a right balance between the principle of fair access to justice (...) and an adequate contribution of the parties for the costs incurred by the Court, recognising the economic benefits to the parties involved, and the objective of a self-financing Court with balanced finances.’ In particular, to tackle this issue, Rule 370 of the RoP states that SMEs³⁷ are required to pay only 60% of the regular fees.

However, the remaining fees are likely to remain dissuasive and a hurdle to effective fair access to the Court. With this in mind, Article 71 UPCA proposes legal aid to claimants with modest resources. This legal aid is supposed to cover both court fees (fixed fees and value-based fees) and the costs of legal aid (lawyer or patent attorney), but also any ‘other necessary costs related to the proceedings to be borne by a party, including costs of witnesses, experts, interpreters

and translators and necessary travel, accommodation and subsistence costs of the applicant and his representative.³⁸ This mechanism is not original, but the specificity of legal aid before the UPC lies in the complexity of certain cases and the value at stake, which can easily amount to millions.

According to the RoP, the Administrative Committee is yet to define the threshold for the maximum level of legal aid. Taking into account the UPC's financial balance, this may undermine fair access to justice (e.g. for complex actions where legal aid will not cover all the costs). Nevertheless, considerations regarding the costs of a procedure before the UPC must be put into perspective. In sectors such as pharmaceuticals or telecommunications, patent litigation mostly involves financially strong companies so that, as highlighted by practitioners, legal aid in patent litigation is extremely rare at national level. Therefore, it is likely that legal aid will not be greatly solicited before the UPC.

The UPC's efficiency is also guaranteed by the easy implementation of UPC rulings. Taking into account the UPC's territorial jurisdiction, Article 34 UPCA provides that the 'decisions of the Court shall cover, in the case of a European patent, the territory of those Contracting Member States for which the European patent has effect'. Within the territory of the Contracting Member States, Rule 354 of the RoP states that 'decisions and orders of the Court shall be directly enforceable from their date of service in each Contracting Member State. Enforcement shall take

place in accordance with the enforcement procedures and conditions governed by the law of the particular Contracting Member State where enforcement takes place'. This rule, which is favourable for the winning party, ensures the efficiency of UPC rulings. Furthermore, UPC decisions should be recognized in non-participant EU Member States.

According to Article 71d of Brussels 1 Bis recast, 'Judgments given by a common court (...) are to be recognized and enforced in a Member State not party to the instrument establishing the common court.'³⁹ Therefore, UPC decisions will be recognized and executable in all 27 Member States, including countries which do not participate in the enhanced cooperation.

3. THE ANTICIPATED CHALLENGES AND POSSIBLE REMEDIES FOR THE UNITARY PATENT AND UNIFIED PATENT COURT

The UPC will have to face and address four potential challenges in the future. The first relates to the outcome at the end of the transitional period⁴⁰ (seven or 14 years): how many opt-out patents will there be, and what will arise from the competition between national courts and the UPC? Notification of an opt-out from the UPC's jurisdiction may be filed with the UPC registry⁴¹ during the sunrise period⁴² and until the end of the transitional period. Most of the IP professionals interviewed advise their clients to opt out during the sunrise period,⁴³ out of caution ('wait and see' strategy), before the UPC makes any

38 RoP Rule 375.

39 However, this solution is logical: the regime of recognition and enforcement of UPC decisions is thereby aligned with the regime of recognition (Article 36 of Brussels 1 Bis) and execution (Article 39 of Brussels 1 Bis) of any national court within the EU. Since the UPC replaces the national courts in matters of unitary patents, a contrary solution would have provided a less protective measure for victims of infringement.

40 Period during which patent holders may decide to opt out from the UPC's jurisdiction for their EPs.

41 Article 83(3) UPCA 2013.

42 Effective from 1 March 2023 and until 1 June 2023.

43 Although the UPC judges interviewed told us that, when drafting this paper, there was no tsunami of opt-out requests.

decisions, and before an action is brought before the UPC against one of their EPs.⁴⁴

It could be quite dangerous to risk a centralized revocation action before the UPC taking effect in the 17 Contracting Member States, especially if a patent proprietor considers a patent to be weak, very valuable or on the watchlist of competitors. The problem with such a strategy would be that it could lead to a situation in which the UPC would never fully take off and deliver the expected benefits of this system.⁴⁵

Furthermore, during the transitional period, actions for infringement or revocation may still be brought before national courts for non-unitary EPs,⁴⁶ even though there are significant differences between the provisions of national patent law and the UPCA. For example, unlike the German courts that tend to create an automatic link between the establishment of a patent infringement and the award of an injunction,^{47 48} the UPC seems to have the discretion not to grant a permanent injunction under Article 63 UPCA.⁴⁹

Therefore, there will necessarily be competition between the national courts and the UPC for actions of this kind: patent proprietors may have an interest in acting before a national court where they will have high chances of obtaining an injunction. The direct consequence is a risk of legal uncertainty caused by diverging decisions and that patent proprietors may favour national courts, which is the opposite of the UPCA's objectives.

To anticipate both challenges, the UPC needs to ensure that its rulings are of outstanding quality and clarity, so that UPC case law can be trusted by patent proprietors and taken into account in the innovation strategies of companies. This should be considered in the light of two other anticipated challenges: (i) the possibility of different judicial approaches between local or regional divisions of the UPC and (ii) the matter of the impartiality of the UPC's technical judges.

The second issue is the possible difference in interpretation of the UPCA between local, regional and central divisions, and the legal uncertainty that this could entail. There are 19 first instance courts within the UPC located in 13 different states and judges in those divisions are nearly all nationals of the local division under consideration.⁵⁰

Therefore, there is no discrepancy between the decisions that will be rendered by the first instance courts. In fact, the nationalities of the judges had already been anticipated by IP experts and companies before the appointments were announced on 20 October 2022, precisely because their approaches to patent disputes could feed into the decisions of the litigants on forum shopping in the UPC (particularly for infringement actions). However, this fear of internal discrepancy should be nuanced. Firstly, once the Court of Appeal starts developing case law, these differences of interpretation will be overshadowed: a better defined and more balanced European patent case law will

44 When an action is brought before the UPC, the patent proprietor no longer has the ability to opt out. – Article 83(3) UPCA 2013.

45 Although the scholars, judges and attorneys interviewed all anticipate the UPC to become a great success.

46 Article 83(1) UPCA 2013.

47 A patent injunction is a court order issued by a judge that instructs a party to end all allegedly infringing activities immediately.

48 Christian Osterrieth, 'Technischer Fortschritt – eine Herausforderung für das Patentrecht? Zum Gebot der Verhältnismäßigkeit beim patentrechtlichen Unterlassungsanspruch', GRUR 985, at 987 (2018)

49 Article 63(1) UPCA: 'the Court **may** grant an injunction against the infringer (...)'.

50 UPC website, Unified Patent Court judicial appointments and Presidium elections, 19 October 2022, available at: <https://www.unified-patent-court.org/en/news/unified-patent-court-judicial-appointments-and-presidium-elections>

emerge with time. Secondly, and most importantly, there will always be only two national judges adjudicating in their local division. The third judge will be selected from an international pool and the judge-rapporteur (who plays a key role in the UPC system), will be randomly designated, may be this international judge.⁵¹

Under this system, forum shopping should be less likely. Furthermore, preventive action may be taken. While the UPCA contains developments on the applicable rules or remedies when an action is brought before the UPC, it is difficult to anticipate how local divisions will interpret these provisions. Therefore, the Presidium of the UPC could, for example, deliver public communiqués intended for the UPC judges on how to apply certain rules in given situations, considering the known differences between some of the EP legal systems.

Another measure might be to promote regular discussion or consultation between UPC judges (time for an exchange of ideas, meetings, seminars, etc.) to ensure that a clear and balanced litigation system exists for EPs. Common training for all UPC judges would also be very useful in this regard⁵² while being a tool for promoting harmonization of procedural practices that UPC judges will face in their respective divisions.

The third issue applies to the impartiality of UPC judges, especially for technical part-time judges. A list of the 34 legally qualified full-time judges and 51 technical part-time judges making up the UPC was released on 20 October 2022. Of the technical judges, 43 are patent attorneys, and most

of them come from the largest law firms and in-house companies in Europe.⁵³ This situation implies a risk of bias, since these professionals necessarily have some ties with the largest companies holding EPs.

This risk of bias was anticipated by Article 17 of the UPCA. According to paragraph 2, 'legally qualified judges, as well as technically qualified judges who are full-time judges of the Court, may not engage in any other occupation, whether gainful or not, unless an exception is granted by the Administrative Committee', while paragraph 4 provides that 'the exercise of the office of technically qualified judges who are part-time judges of the Court shall not exclude the exercise of other functions provided there is no conflict of interest'.

Thus, technical part-time judges can only exercise their judicial functions under the condition that 'there is no conflict of interest.' In a case of conflict of interest, paragraph 5 of the same Article provides that 'the judge concerned shall not take part in proceedings. Rules governing conflicts of interest are set out in the Statute.'

In the above Statute, Article 7, paragraph 2 lists five cases in which judges must be disqualified from taking part in the proceedings of a case if they (a) have taken part as an adviser, (b) have been a party or have acted for one of the parties, (c) have been called upon to pronounce, as a member of a court, tribunal, board of appeal, arbitration or mediation panel, a commission of inquiry or in any other capacity, (d) have a personal or financial interest in the case or in relation to one of the parties, (e) are related to one of the

51 Statement by Ms. Lignières, French judge and member of the UPC Governance, when interviewed by our group on 27 April 2023.

52 All legally qualified and technical judges of the UPC received training in Budapest during the three months following their appointment, as well as some team building events.

53 M. Klos, Patent attorney dominance among UPC technical judges leads to conflict debate, JUVE Patent, 27 October 2022, available at: <https://www.juve-patent.com/people-and-business/patent-attorney-dominance-among-upc-technical-judges-leads-to-conflict-debate/>.

parties or the representatives of the parties by family ties.

The main issue seems to be Article 7(2)(d), as it does not specify how the assessment should be made of when a judge has an ‘interest’ to be considered ‘in relation to one of the parties’. This could entail interpretation issues if one of the parties is not a former client of the technical judge but a client of the law firm in which the latter is, for instance, a partner. The same issue could arise if the patent in question is similar to the patents in cases on which the judge is working on in a private practice.

The European Court of Human Rights (ECtHR) has already ruled that personal, financial, or even professional ties between a judge and a party or his or her lawyer could raise issues of bias.⁵⁴ The impartiality of a UPC judge, which is of the essence in the right to a fair trial⁵⁵ – a fundamental principle incorporated in EU case law⁵⁶ – will necessarily be a question examined on a case-by-case basis. However, if these questions are raised regularly before the Court, this could affect the confidence it inspires among patent proprietors.

As the English dictum⁵⁷ quoted by the ECtHR⁵⁸ says, ‘Justice must not only be done: it must also be seen to be done.’ Under this ‘doctrine of appearances’, what matters most is how the situation objectively appears in the eyes of the public or the litigants. Several remedies could alleviate this risk of bias (or of apparent bias) which may be divided into two categories: the procedural remedies provided by the UPC system and external remedies that could

improve UPC transparency and efficiency. Two procedural remedies exist in the UPC system: abstention and recusal.

Abstention should be the first reaction when a UPC judge knows or feels that his/her impartiality could be doubted. Article 7(3) of the Statute provides that in such a case, either the judge will need to inform the President of the Court of Appeal or the President of the Court of First Instance accordingly, or the President may notify the judge in writing that the latter’s impartiality may be called into question.

The signature by UPC judges of a declaration of impartiality immediately after their oath⁵⁹ and that independence is a crucial concept of professional conduct for members of the EPO⁶⁰ or European attorneys in general allows for optimism with regard to the strict application of these rules. In any case, recusal of an appointed judge may always be requested by one of the litigants. Article 7(4) of the Statute expressly mentions this, and Rule 346 of the RoP specifies the procedure a party must follow to object to a judge taking part in the proceedings of a case (the party should report its objection ‘as soon as is reasonably practicable’). To prevent any mistrust in the institution of the UPC, these cases should remain exceptional.

External remedies may also be considered. A more drastic one would be to prohibit technical judges completely from performing their judicial functions on a part-time basis, and only have full-time technical judges. This would theoretically be possible as Article 57 UPCA gives the UPC the power to appoint court experts

54 ECtHR, *Micallef v. Malta*, Appl. no. 17056/06, Judgment of 15 October 2009, §102; ECtHR, *Elin Sigfusdottir v. Iceland*, Appl. no. 41382/17, Judgment of 25 February 2020.

55 Covered by Article 6 of the European Convention on Human Rights (ECHR).

56 T-184/11, *Nijs / Cour des comptes* (EU:T:2012:236), at para. 84.

57 Dictum by Lord Hewart, Lord Chief Justice of England in *Rex v. Sussex Justices*, [1924] 1 KB 256, 259.

58 ECtHR, 28 June 1984, *Campbell and Fell v. United Kingdom*, no. 7819/77 and no. 7878/77, §33, 77, 81.

59 Article 7(1) of the UPC Statute.

60 According to the Institute of Professional Representatives before the EPO (EPI) *Code of Conduct*. EPO Official Journal, 2022, 129, A61, supplementary publication no. 1.

at any time 'in order to provide expertise for specific aspects of the case', and these experts share the same guarantees of independence and impartiality as UPC judges.⁶¹

However, this would raise the issue of their remuneration and of the UPC's financial means: the UPC system must quickly be successful to be able to hire full-time technical judges and pay them enough for them not to have to rely on their other professional activities. Besides, the purpose of having a pool of technical judges is to appoint them on an ad-hoc basis because of their specific know-how in a particular case; their expertise would not necessarily be needed on a full-time basis. Another solution would be to ensure that thorough information (declaration of interests) about the judges appointed to the case is regularly published and up to date on the UPC website.⁶²

Internal guidelines or a code of ethics are also expected to be formalized between the judges or by the Presidium directly, to codify the appropriate behaviour in defined situations. Finally, the UPC is currently considering recruiting new technical judges to expand the pool.⁶³

The fourth issue that will need to be addressed is the place given to alternative dispute resolution (ADR) within the UPC system. Lawyers and their clients often consider two options – negotiation or litigation when they need to resolve intellectual property disputes. Arbitration, conciliation and mediation are three ADR methods that could prove useful in certain patent law conflicts: several

studies have shown that the inclusion of ADR processes, in addition to litigation, could lead to significantly cheaper, faster and better outcomes, with higher rates of compliance and satisfaction with the outcome.⁶⁴

However, these three methods are still rarely used in practice, frequently because what is at stake is the prevention or limitation of the entry of a competitor onto the market, which is not a matter for which ADR processes appear the most suitable.

The World Intellectual Property Organization (WIPO)⁶⁵ created its own Mediation and Arbitration Center in 1994, which offers a wide variety of ADR measures. In the same spirit, the UPC has created a dedicated Patent Mediation and Arbitration Centre (PMAC) seated in Lisbon (Portugal) and Ljubljana (Slovenia).

According to Article 35 of the UPCA, the Centre will offer support in the settlement of disputes relating to 'classic' EPs and UPs, and settlements reached using the PMAC will have the same executory force as UPC decisions. Furthermore, Article 52(2) UPCA states that, during the interim phase of the judicial procedure, the judge acting as rapporteur 'shall in particular explore with the parties the possibility for a settlement, including through mediation, and/or arbitration, by using the facilities of the Centre'. Rule 332 of the RoP also provides that 'active case management includes: (...) (e) encouraging the parties to make use of the Centre and facilitating the use of the Centre (...)'. The only restriction is that a patent cannot be revoked or limited in mediation or arbitration

61 Article 57(3) UPCA 2013.

62 As suggested by F. Macrez in the preliminary version of *Unified Patent Court and the impartiality issue, Unitary Patent Package & Unified Patent Court – Problems, Possible Improvements and Alternatives*, Ledizioni, In Press., 7 February 2023, at 11 (hal-04023211).

63 Statement by Ms Lignières, French judge and member of the UPC Governance, when interviewed by our group on 27 April 2023.

64 Miriam R. Arfin, *The Benefits of Alternative Dispute Resolution in Intellectual Property Disputes*, 17 Hastings Comm. 893 (1995).

65 A financially independent agency of the United Nations created in 1967 with 193 Member States today.

proceedings:⁶⁶ indeed, most jurisdictions consider the issue of patent validity to be a sensitive matter, directly linked to national sovereignty, so it cannot be delegated to private stakeholders.⁶⁷

There is, in fact, a will to promote ADR in the UPC system, although it may be noted that, like the WIPO, only arbitration and mediation are considered: no distinction is made between mediation and conciliation. While both are designed to help the parties reach a mutually acceptable compromise, the conciliator is usually an expert (a form of 'objective justice'), while the mediator will help the parties express their subjective interests, motives and needs in a neutral and exterior manner (a form of 'subjective justice')

One of the challenges for the UPC will be to clear up several uncertainties arising from a combination of the articles of the UPCA and RoP regarding ADR settlements. In fact, the combined reading of Article 35(2) UPCA and Article 79 UPCA⁶⁸ makes it unclear as to whether settlements only benefit from an enforcement mechanism similar to UPC decisions if they are confirmed by a UPC decision, or whether a settlement reached through the Centre (i) is directly enforceable if no litigation is pending before the UPC, and (ii) has to be confirmed by an enforceable decision of the Court if litigation is pending before the UPC.⁶⁹

The success of the PMAC will globally depend on the ability of the judges to

determine whether a situation would be better settled with ADR methods.⁷⁰

CONCLUSION

It has taken almost 40 years for the EU Member States to reach an agreement on a common patent that would suit the Union's needs, especially to improve its internal single market and to entice EU companies to increase investment in their R&D. It took another 10 years from the signature of the UPCA for the UPC and UP to enter into force.

EU patents will now enter into a new phase, which is a fundamental change and is expected to have an impact on the global patent strategy of companies. This new legal scheme is a first in history. It is indeed the first time that some EU Member States have agreed to delegate a part of their sovereignty to a dedicated court⁷¹ that does not belong to EU institutions. Indeed, the UPC is an international jurisdiction for some EU Member States and not an EU jurisdiction or an international jurisdiction in which any state can participate.

Even though the parties to the UPCA have had time to anticipate and think about its concrete implementation, not all issues have been – or could have been – anticipated in advance. Most of them are likely to arise in the coming months or years. For the time being, IP practitioners seem to have more questions than certainties when preparing the launch of this new offering in their business.

⁶⁶ Article 35(2) UPCA 2013.

⁶⁷ European Patent Academy, *Alternative Dispute Resolutions (ADR)*, at 8, available at: https://ecourses.epo.org/wbts_int/litigation/ADR.pdf.

⁶⁸ Article 79 UPCA provides that 'the parties may, at any time in the course of proceedings, conclude their case by way of settlement, which shall be confirmed by a decision of the Court.'

⁶⁹ Simmons + Simmons LLP, *What will the UPC Patent Mediation and Arbitration Centre bring us?*, JUVE Patent, 6 February 2023, available at: <https://www.simmons-simmons.com/en/publications/cldsvxmz00qwu710vogzful2/whatwill-the-upc-patent-mediation-and-arbitration-centre-bring-us-/>.

⁷⁰ ADR could be useful not only for resolving an entire conflict, but also for setting the amount of damages (to be paid as a settlement indemnity, for instance) once infringement or validity has been ruled by the UPC judges.

⁷¹ This explains why the German Constitutional Court of Karlsruhe decided in its decision of 13 February 2020 that the ratification law of the UPCA should have been approved by a two-thirds majority in the Bundestag, because it has the effect of amending the constitution by transferring part of the German judicial authority to the UPC, which delayed the implementation process of the UP and UPC.

The focus has been placed on the most relevant ones: (i) the opt-out process that could affect the UPC's success, (ii) the possible difference in interpretation of the UPCA between the UPC's divisions, and the legal uncertainty that this could entail, (iii) the requirement of impartiality of UPC judges, especially for technical part-time judges, and (iv) the place given to alternative dispute resolution within the UPC system. It is a shared view among the people we interviewed when drafting this paper (academics, attorneys, in-house counsels and judges) that the UPC is likely to prove a success.

Firstly, participating Member States have a political interest in showing that there is strength in numbers and that non-participating Member States could change their position (maybe also under pressure from national attorneys who have seen a portion of the new market to be conquered slipping away). Secondly, success – especially in the short term – is the only way for the UPC to gain the confidence of companies and lawyers, which will last over time (as it is a self-financed jurisdiction) and to tackle some of the forthcoming challenges.

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TRANSFORMATION THROUGH HARMONIZATION THE POTENTIAL OF A CLIMATE LIABILITY DIRECTIVE TO STRENGTHEN CLIMATE PROTECTION

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The transformation to a sustainable and climate neutral way of living is challenging. From a legal perspective, implementation deficits persist. To overcome these obstacles, individuals and associations raise claims for injunctive relief against private entities involved in climate damaging activities. These claims are highly contested, especially regarding admissibility on the grounds of legal standing. Courts in the EU have handled such horizontal climate actions in quite different ways. This has created and increased distortions within the European judicial systems. These challenges arise from the theory of law of *locus delicti damni* and *locus commissi*. We argue that a Directive harmonizing the relevant procedural and, concerning causality, substantive law questions is necessary. This would increase the effectiveness of climate change protection by unlocking private actors as a resource of legal enforcement. Thus, harmonization serves as a catalyst to overcome the aforementioned obstacles. The ever-shrinking time frame will foreseeably overstrain public and administrative means. This is why we argue that utilizing private actors is imperative to revert back to planetary boundaries in time. We simply cannot afford to not bring ‘all hands on deck’.

KEYWORDS:

CLIMATE CHANGE LITIGATION | CLIMATE JUSTICE | HORIZONTAL CLIMATE ACTIONS
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INTRODUCTION

Global warming is the threat of the 21st century. Compliance with the planetary boundaries and the Paris Agreement requires complete decarbonization of the global economy within an ever-shrinking timeframe. This transformation is not only a technical or economic but also a legal challenge. Therefore, the legal systems need to be revised and revamped.

Such an undertaking is primarily a task for the legislative bodies through the enactment of climate change laws and revision of existing codifications. But a transformation of this scale requires 'all hands on deck'. One particular obstacle is that businesses are (still) performing massive greenhouse gas emitting activities under the legal protection of previously issued approvals. There is growing interest in subjecting these approvals to judicial review to prevent activities that are harmful to the climate and to complete the transformation.

Accordingly, the number of climate lawsuits, a collective term for legal proceedings regarding climate protection, has been increasing in recent years.¹ Roughly 190 lawsuits were filed in the last 12 months and the outcomes have a positive effect on climate protection decision-making.² The variety of climate change litigation strategies is expanding with the increasing number of cases.³ While they were primarily public law proceedings at the beginning, private enforcement is now also gaining momentum.⁴

The idea of civil liability is not new, as it is already envisaged in Principle 13 of the Rio Declaration on Environment and Development of 1992. But horizontal climate change and especially injunction relief litigation face various procedural and substantive obstacles.⁵ Different judicial systems within the European Union (EU) handle civic lawsuits differently. We want to demonstrate that this fragmentation is causing serious obstacles for an EU-conforming civil procedural architecture as the cases brought to the European Courts indicate. Some obstacles are based on the types of claims raised. To overcome the obstacle, we argue that harmonizing the main principles and procedural aspects through an EU Directive safeguards effective and uniform climate change litigation.

2. CIVIL PROCEDURAL OBSTACLES IN THE QUEST FOR CLIMATE CHANGE JUSTICE

A. International Litigation Risks

Climate claims inherently have a cross-border dimension. Greenhouse gas emissions disperse in the atmosphere and can cause climate change damage anywhere.⁶ Before ruling on the merits of a case, a court must clarify its international jurisdiction and establish which substantive law applies.

1. International Jurisdiction

Within the EU, Article 4(1), 63(1) Brussels Ia Regulation⁷ (hereinafter *Brussels Ia*) establishes jurisdiction at the statutory seat, the administrative seat or the seat of the principal place of a company's business. Article 7(2) *Brussels Ia*

1 Fellenberg, 'Rechtsschutz als Instrument des Klimaschutzes - ein Zwischenstand', 41 *Neue Zeitschrift für Verwaltungsrecht (NVwZ)* (2022) 913, at 913; Rodi and Kalis, 'Klimaklagen als Instrument des Klimaschutzes', 2 *Klima und Recht (KlimR)* (2022) 5; Niehaus, 'Gerichte gegen Gesetzgeber? - Der Klimawandel in den Gerichtssälen', in B. Huggins et al. (eds), *Zugang zu Recht* (2021) 241, at 242 et seq.

2 Setzer and Higham, *Global trends in climate change litigation: 2023 snapshot* (2023), at 2.

3 Setzer and Higham, *supra*, at 22 et seq.

4 Setzer and Higham, *supra*, at 21.

5 Comprehensive overview by Weigelt, *Haftung Privater für Beiträge zum Klimawandel* (2022), at 63 et seq.

6 Lehmann and Eichel, 'Globaler Klimawandel und Internationales Privatrecht', 83 *Rebels Zeitschrift (RebelsZ)* (2019) 77, at 78.

7 Regulation (EU) No. 1215/2012, OJ 2012 L 351/1.

establishes special jurisdiction for tort cases at the *locus delicti commissi*⁸ and the *locus damni*.⁹ The CJEU sets a low threshold for establishing the jurisdiction of a Member State's court; it is rather difficult to argue jurisdiction regarding the subsidiaries of large companies.¹⁰

Only the parent companies are mainly domiciled in the EU, while the harm-causing subsidiaries constituting separate corporate entities are located abroad. Claimants have to demonstrate the action of the parent company in order to establish jurisdiction, as in *Okpabi v. Royal Dutch Shell Plc*.¹¹

The United Kingdom's Supreme Court deemed an action against the parent company of a subsidiary operating abroad reviewable in the UK courts. It concluded that the parent company domiciled in the UK owed a duty of care to the suing Nigerian citizens regarding alleged environmental damage and human rights abuses by Shell's Nigerian subsidiary.¹²

This interpretation has significant implications by considering cumulative contributions.¹³ This case raises hope that companies cannot protect themselves by implementing legal but not factual business segmentation. Furthermore, the *locus delicti commissi* can potentially be any place in the world.¹⁴

2. Applicable Law

Within the EU, the Rome II Regulation¹⁵ (hereinafter Rome II) establishes the applicability of substantive law.

As a general rule, *lex loci damni* applies (Article 4(1) Rome II). To justify the application of Dutch law in *Milieudefensie et al. v. Shell*, the court relied on *lex loci commissi* delicti according to the exception provided in Article 7 Rome II. The court argues the Netherlands is 'the country in which the event giving rise to the [environmental] damage occurred'.¹⁶ The corporation's worldwide greenhouse gas emissions can be traced back to strategic decisions taken at its headquarters in the Netherlands.¹⁷

Since Article 7 Rome II allows the claimant to choose between the *lex loci damni* and the *lex loci commissi* delicti, any law in the world is potentially applicable.¹⁸ Several techniques presumably mitigate the uncertainty. One is the same application of the foreseeability provision that applies to claims arising from product liability, namely Article 5(1)(b) Rome II. Another way of reducing the escalating liability is to consider the permit for the operation of the emitter's production sites.¹⁹

According to Article 17 Rome II, the applicable law must, if reasonable, take into account the values of the safety and conduct rules that are applicable at the

8 This was also the basis of the international jurisdiction of the Rechtbank Den Haag in its *Royal Dutch Shell* judgment of 26 May 2021 (C/09/571932 / HA ZA 19-379).

9 G. van Calster, 'Environmental Law and private international law', in Lees, Viñuales (eds), *Oxford Handbook of comparative environmental law* (2019) 1139, at 1153.

10 G. van Calster, *supra*, at 1149.

11 For more examples see: van Calster, 'Environmental Law and private international law', in Lees, Viñuales (eds), *Oxford Handbook of comparative environmental law* (2019) 1139, at 1149.

12 *Okpabi and others (Appellants) v. Royal Dutch Shell Plc and another (Respondents)* [2021] UKSC 3, [1].

13 Mayer, 'The Duty of Care of Fossil-Fuel Producers for Climate Change Mitigation', 11 *Transnational Environmental Law* (TEL) (2022) 407.

14 Frenz, 'Unternehmerische Klimahaftung', 8, *Zeitschrift für Internationales Wirtschaftsrecht (IWRZ)* (2023) 17, at 18.

15 Regulation (EC) No. 864/2007, OJ 2007 L 199/40.

16 Rechtbank Den Haag, *Milieudefensie et al. v. Shell* (NL:RBDHA:2021:5339), C/09/571932 / HA ZA 19-379, at para. 4.3.6 (Neth.).

17 Rechtbank, *supra*, at para. 4.3.6 (Neth.).

18 This raises the question of judicial restraint; see the critique Jestaedt/Lepsius/Möllers/Schönberger, *Das entgrenzte Gericht* (2011), *passim* and at 167 *et seq.*

19 Weller and Tran, 'Klimaklagen im Rechtsvergleich - private enforcement als weltweiter Trend?', 29 *Zeitschrift für Europäisches Privatrecht (ZEuP)* (2021) 573, at 595.

place of the event.²⁰ Public permits can be regarded as rules of safety and conduct. Therefore, permits must be considered to be local data at the level of substantive law. To balance the authorization effect of public permits, these should only be considered under certain preconditions. Namely, if international law allows the conduct, the requirements to obtain a permit correspond to two systems of law and the public participation process in the administrative permit procedure must be performed correctly.²¹

B. Causality and Adequacy

The relationship between greenhouse gas emissions and damages in climate change-related injunctive actions can, at best, be described as indirect: Greenhouse gas emitters do not directly damage a person's health or property. Instead, emissions set a complicated and time-delayed chain in action resulting in injury to people and damage to property.

According to the general rules of civil litigation, the following principle applies: the polluter is only liable for the nuisance he has caused. According to the theory of equivalence (also known as the *conditio-sine-qua-non* theory), conduct is causal for the nuisance if it cannot be disregarded without the nuisance ceasing to exist in its concrete form.²² The injured party must prove an unbroken chain of causation.

Depending on the legal system, the court must 'be satisfied to a degree of certainty that is useful for practical life that silences doubts without completely ruling them out'²³ or at least establish a high degree of probability.²⁴

Therefore, two points must be distinguished: is there a scientifically proven link between emissions and climate change-related nuisances caused by private individuals? and does this meet the requirement to establish causation with regard to a nuisance? In answering the first question, greenhouse gas emissions by the Carbon Majors²⁵ from previous decades can be calculated by using so-called accounting studies based on past production quantities and establishing the share of all emissions worldwide since the beginning of the industrial revolution.²⁶ It is also possible to establish whether a specific natural event, e.g. glacier melt or drought, is caused by climate change by using scientific modelling.²⁷

As for the causality requirements, proving the causal process is complicated because of the large number of contributors. Since it is a matter of distance, as well as long-term and cumulative causes, the contribution of the individual company is often disregarded as insignificant. In *Lliuya v. RWE*, scientists were able to prove that anthropogenic climate change caused and increased the risk of a natural disaster.²⁸

20 Spitzer and Bartscher, 'Liability for Climate Change: Cases, Challenges and Concepts', 2 *Journal of European Tort Law (JETL)* (2017) 137, at 154 f.

21 Aldag, 'Due Diligence and Environmental Damages Under Rome II', 28 *European Review of Private Law (ERPL)* (2020) 1231, at 1243.

22 Wagner, Ecker and Hartl, 'Ermöglichung von Klimaklagen (Klimahaftungsrecht)', in Kerschner (ed.), *Jahrbuch des österreichischen und europäischen Umweltrechts 2022* (2022) 135, at 144.

23 Thus in Germany, Bundesgerichtshof [BGH] [Federal Court of Justice] 17 February 1970, III ZR 139/67, *Neue Juristische Wochenschrift* (NJW) 946 (1970) (Ger.).

24 Thus in the United Kingdom; Giesen, 'The Burden of Proof and other Procedural Devices in Tort Law', in Koziol and Steininger (eds), *European Tort Law 2008* (2008) 49.

25 Carbon Majors are the 25 private and state-owned companies collectively responsible for more than 50% of all industrial greenhouse gas emissions from fossil fuels since 1988; Griffin, Heed and van der Vlugt, *The Carbon Majors Database* (2017), available at <https://cdn.cdp.net/cdp-production/comfy/cms/files/000/000/979/original/Carbon-Majors-Database-2017-Method.pdf>; cf. <https://climateaccountability.org/carbonmajors.html>.

26 Heede, 'Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010', 122 *Climatic Change* (2014) 229, at 231f.

27 Schirmer, 'Klimahaftung und Kausalität – und es geht doch!', 22 *JuristenZeitung (JZ)* (2021) 1099, at 1100.

28 Smith, Roe and Allen, 'Increased outburst flood hazard from Lake Palcacocha due to human-induced glacier retreat', 14 *Nature Geoscience* (2021) 85, at 88.

Yet, the Court stated that ‘the contribution of individual greenhouse gas emitters to global climate change is so small that the individual emitter has not significantly increased the potential consequences of climate change.’²⁹ However, each company has contributed to the overall nuisance through its emissions. Multi-causal liability scenarios do not result in all minor polluters being exempted from liability.

Joint and several liability is not foreign to tort law, just like company blockades and spontaneous looting.³⁰ Therefore, it is advisable to look at the relationship to other polluters instead of the absolute figures of emissions to correctly classify a company’s causal contribution.³¹

C. Permitted but Harmful – Influence by Public Permits and Fundamental Rights

The core defence argument for injunctive relief for climate-damaging behaviour is based on the legalization of greenhouse gas emissions. Although the permits that have been granted legalize greenhouse gas emissions, approvals do not rule out liability claims under private law *per se*.³² But they protect emitters to the extent of the regulated content of the approval. What if the legal basis of the public permit expressly limits private-law defence claims if the permit holder operates in compliance with the permit (e.g. Germany 14(1)1 of the Federal Immission Control Act or § 11 of the Air Traffic Act)? Although

this is a specific issue under German law, the underlying idea also applies to other European legal systems.³³

Further obstacles arise from the primacy of Union law. Climate protection law, such as greenhouse gas emission standards for motor vehicles, is highly regulated by Union law. Defendant automobile companies can rely on compliance with EU standards such as the Type Approval Regulation³⁴ or the Fleet Limitation Regulation.³⁵ It is difficult to justify further-reaching actions under national law when a subject is harmonized.³⁶

As a rule, the operator of an installation fulfils his legal obligation regarding climate and environmental protection if he complies with the values of the (environmentally) legally prescribed limits. However, as for greenhouse gas emissions trading,³⁷ it can be argued that the legislator would have deliberately chosen not to limit greenhouse gas emissions, but purely to provide economic incentives to reduce them.³⁸ Yet, the only objective of the greenhouse gas certificate system is a general restriction to prevent nuisance caused to the public good of the climate, but not to prevent or compensate for direct nuisance of legally recognized private goods.³⁹ Another area of friction is the conflict between fundamental rights and civil law, the German Federal Constitutional Court presented a balancing

29 Landgericht [LG] Essen [regional court], 15 December 2016, 2 O 285/15, *Neue Zeitschrift für Verwaltungsrecht (NVwZ)* 734 (2017) (not legally binding).

30 Hinteregger, ‘Klimaschutz mit den Mitteln des Privatrechts? Der Beitrag des Haftungsrechts’, in Kirchengast, Schulev-Steindl and Schnedl (eds), *Klimaschutzrecht zwischen Wunsch und Wirklichkeit* (2018) 197, at 211.

31 Rechtbank Den Haag, *Milieudefensie et al. v. Shell* (NL:RBDHA:2021:5339), C/09/571932 / HA ZA 19-379, at para. 4.4.49 f. (Neth.); cf. Schirmer, ‘Haftung für künftige Klimaschäden’, 76 *Neue Juristische Wochenschrift (NJW)* (2023) 113, at 115 para. 13 et seq.; Schirmer, ‘Klimahaftung und Kausalität - und es geht doch!’, 76 *JuristenZeitung (JZ)* (2021) 1099, at 1103.

32 Hinteregger, ‘Klimaschutz mit den Mitteln des Privatrechts? Der Beitrag des Haftungsrechts’, in Kirchengast, Schulev-Steindl and Schnedl (eds), *Klimaschutzrecht zwischen Wunsch und Wirklichkeit* (2018) 197, at 214.

33 Howarth, ‘Environmental Law and Private Law’, in E. Lees, J. Viñuales (eds), *Oxford Handbook of comparative environmental law* (2019) 1091, at 1116.

34 Article 1(1) Regulation (EU) 2018/858, OJ 2018 L 151/1.

35 Article 1(1) Regulation (EU) 2019/631, OJ 2019 L 111/13.

36 Fellenberg, *supra* note 1, at 913.

37 In Germany: Treibhausgas-Emissionshandelsgesetz [TEHG] [Greenhouse Gas Emissions Trading Act], 21 July 2011 (BGBl. I at 1475).

38 Wagner, *Klimahaftung vor Gericht* (2020), at 71 et seq.

39 Wagner, Ecker and Hartl, ‘Ermöglichung von Klimaklagen (Klimahaftungsrecht)’, in Kerschner (ed.), *Jahrbuch des österreichischen und europäischen Umweltrechts* 2022 (2022) 135, at 147; Article 1 Directive 2003/87/EC, OJ 2003 L 275/32.

solution in climate matters.⁴⁰ With this and subsequent decisions, the Court emphasized the temporal dimension of fundamental rights: 'Given the limited amount of greenhouse gas emissions that can still enter the earth's atmosphere, emissions permitted today reduce the potential for emissions in future periods.

This simultaneously jeopardizes the future exercise of freedom because, at least at present, a great deal of daily life, work and business conduct cannot take place without the direct or indirect release of greenhouse gas emissions into the earth's atmosphere.⁴¹ However, a German regional civil court decided on a conflict between the fundamental rights of the claimants and the defendant in favour of the latter: 'A balancing of interests between the fundamental rights presupposes that the consequences for the claimants arising from the defendant's conduct to be prohibited are at least foreseeable.

However, this is not the case. (...) It cannot be established that the defendant's continued production of internal combustion engines will lead to measures by the legislature restricting freedom. (...) An unlawful violation of the fundamental rights of the claimants can therefore not be established.⁴² Yet, it is still unclear whether other civil courts will balance these conflicts similarly.

3. THE DEVELOPMENT OF CLIMATE CHANGE LAWSUITS FROM PUBLIC LAW TO CIVIL LAW

How did it all start? Developments in jurisprudence and law-making in public law paved the way for civil climate litigation. These proceedings faced uncertainty regarding the jurisdiction and legal standing of the applicants from the very beginning.

A. Public Law Actions – Vertical Action Constellations

A public law climate claim is a legal action of a private person or an organization against the state or a public law institution claiming that the latter is not taking sufficient measures of protection.⁴³ Such a relationship is referred to as vertical.⁴⁴ The proceedings can take place at national and Union levels, as well as before international courts and arbitral tribunals.⁴⁵

Claimants are individual people, environmental protection organizations and associations.⁴⁶ Their complaints can be based on the European Convention on Human Rights (ECHR), the fundamental rights of the Charter of Fundamental Rights of the European Union (CFR) and the respective constitutions, as well as on tort/delict law.⁴⁷ In addition to the case under dispute, claimants often want to achieve a change in the national regulatory framework and persuade policymakers to take appropriate measures to achieve the

40 Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], order of 24 March 2021, 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20, Neue Juristische Wochenschrift (NJW) 1723 (2021) (Ger.).

41 *Juristische Wochenschrift* (NJW) 844 (2022), para. 8 (translated by the authors).

42 Landgericht [LG] Stuttgart [regional court], 13 September 2022, 17 O 789/21, *Neue Zeitschrift für Verwaltungsrecht* (NVwZ) 1663, at 1664 para. 21 et seq. (2022) (translated by the authors).

43 Wagner, Ecker and Hartl, 'Ermöglichung von Klimaklagen (Klimahafungsrecht)', in Kerschner (ed.), *Jahrbuch des österreichischen und europäischen Umweltrechts* 2022 (2022) 135, at 141f.

44 Winter, 'Armando Carvalho et alii versus Europäische Union: Rechtsdogmatische und staatsrechtliche Probleme einer Klimaklage vor dem Europäischen Gericht', 30; *Zeitschrift für Umweltrecht* (ZUR) (2019) 259, at 259.

45 Fellenberg, *supra* note 1, at 913; Wagner, Ecker and Hartl, 'Ermöglichung von Klimaklagen (Klimahafungsrecht)', in Kerschner (ed.), *Jahrbuch des österreichischen und europäischen Umweltrechts* 2022 (2022) 135, at 141f.

46 Wagner, Ecker and Hartl, 'Ermöglichung von Klimaklagen (Klimahafungsrecht)', in Kerschner (ed.), *Jahrbuch des österreichischen und europäischen Umweltrechts* 2022 (2022) 135, at 136; Wagner, 'Klimaschutz mit den Mitteln des Privatrechts? Präventive privatrechtliche Instrumente: Klimaschutzklagen', in Kirchengast, Schulev-Steindl and Schnedl (eds), *Klimaschutzrecht zwischen Wunsch und Wirklichkeit* (2018) 217, at 233.

47 Fellenberg, *supra* note 1, at 913.

emission reduction targets.⁴⁸

1. Cases before the ECtHR

As the Convention does not grant an *actio popularis* for an individual complaint under Article 34 ECHR, the claimant must establish that he is a victim of a breach of his rights under the convention arising from an act or omission that is attributable to a contracting party.⁴⁹ In the past, cases regarding environmental damage failed, as no individual concern could be proved,⁵⁰ an issue which is also highly problematic with regard to climate change cases.⁵¹

Three climate cases recently passed the admissibility test and are currently pending before the Grand Chamber.⁵² All the applicants are basing their claims on a breach of the right to life under Article 2 ECHR and their right to respect for private and family life under Article 8 ECHR.⁵³ In Duarte Agostinho and others, six young Portuguese people filed a complaint against 33 states.

They alleged that the greenhouse gas emissions of the states contribute to climate change and cause heat waves affecting young people's health.⁵⁴ In *Carême v. France*, the former mayor of Grande-Synthe complained that France was not doing enough to comply with the greenhouse gas emission targets it had set

itself.⁵⁵ In *KlimaSeniorinnen and others v. Switzerland*, the Swiss association and four individuals want an increase in the level of ambition of the climate protection measures to protect older people from the effects of climate change. Rising temperatures caused by climate change mean that older women's health, in particular, would be at risk.⁵⁶ The fact that hearings have been scheduled and that jurisdiction was relinquished to the Grand Chamber indicates a forthcoming development in ECtHR jurisprudence.

2. EU Level

Individuals can bring actions for annulment before the European Court of Justice (ECJ). The claimant has to be individually concerned by the disputed act (Article 263(4) TFEU). According to the ECJ's Plaumann formula, this is only the case if the legal act 'affects them by reason of certain attributes which 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 person addressed.'⁵⁷ The mere assertion that fundamental rights have been breached is not sufficient.⁵⁸

Therefore, these actions have so far failed because the claimants could not prove that they were directly and individually

48 Fellenberg, *supra* note 1, at 914.

49 Council of Europe, *Practical Guide on Admissibility Criteria* (2022), 9.

50 ECtHR, *Caron and others v. France*, Appl. no. 48629/8, Decision of 29 June 2010.

51 In the context of climate change lawsuits, the admissibility criterion of 'victim'/legal standing is problematic as the claimants have to establish that the environmental damage affects them personally. See ECtHR, *Cordela et al. v. Italy*, Appl. no. 54414/13 and 54264/15, Judgment of 24 January 2019, at para. 100 *et seq.*

52 ECtHR, Press Release, 3 February 2023, ECtHR 030 (2023), available at <https://hudoc.echr.coe.int/eng-press?i=003-7559178-10387331>.

53 Fellenberg, *supra* note 1, at 917.

54 ECHR, Duarte Agostinho and Others v. Portugal and Others (*communicated case*), Appl. no. 39371/20, decision pending, cf. <http://hudoc.echr.coe.int/>; ECHR, Information Note on the Court's case-law 24, 6 December 2022, available at <https://hudoc.echr.coe.int/fre?i=002-13055>.

55 ECtHR, *Carême v. France*, https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20220607_Application-no.-718921_press-release-1.pdf.

56 ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, Appl. no. 53600/20, decision pending, cf. <http://hudoc.echr.coe.int>; Verein KlimaSeniorinnen Schweiz, Application of 26 November 2020, available at <https://www.klimasenioren.ch/wp-content/uploads/2021/01/2020-11-26-KlimaSeniorinnen-Beschwerde-an-den-EGMR-Deutsch.pdf>, at 5; ECHR, Information Note on the Court's case-law, available at <https://hudoc.echr.coe.int/fre?i=002-13649>; critically Wegener, 'Menschenrecht auf Klimaschutz?', 75 Neue Juristische Wochenschrift (NJW) (2022) 425, at 425f.

57 C-25/62, *Plaumann v. Commission* (EU:C:1963:17), at 107.

58 C-565/19 P, *Armando Carvalho and Others v. European Parliament and Council of the European Union* (EU:C:2021:252), at para. 49.

affected.⁵⁹ In People's Climate,⁶⁰ the claimants asked to declare three legal acts of the EU void.

They claimed that the emission allowed by the acts breaches their rights to life, health, occupation and property protected by the CFR and the TFEU while breaching the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement. The ECJ dismissed the case on procedural grounds of legal standing, since they could not prove that they were directly and individually interested.

According to the recently amended regulation on the application of the Aarhus Convention,⁶¹ which regulates access to information, public participation in decision-making and access to justice in environmental matters, individuals and non-governmental organizations can have environment-related Union legal acts reviewed before Union courts.⁶²

Therefore, individuals can bring an action without being directly affected if at least 4,000 individuals support the application, these individuals are residents in at least five Member States, at least 250 of them come from each of these Member

States and sufficient public interest is confirmed.⁶³

3. National Level

Climate lawsuits are more successful on a national level on constitutional grounds. In the Netherlands, the state was obliged to further reduce greenhouse gas emissions as a result of a complaint by the non-profit foundation Urgenda.⁶⁴ In France, the Conseil constitutionnel dealt with the constitutionality of the law to combat climate change.⁶⁵ In the Grand Synthe case, the French Conseil d'État obliged the French government to present a strategy for achieving its climate targets.⁶⁶ In Austria, Greenpeace challenged acts of law that resulted in preferential tax treatment for air travel before the Constitutional Court.⁶⁷ The case was dismissed on procedural grounds.⁶⁸

In Germany, the Federal Constitutional Court ruled in its Climate Decision that the legislator's failure to plan a reduction in the trajectory of German greenhouse gas emissions beyond 2030 was unconstitutional and breached the complainants' fundamental rights because of its 'prior effect similar to an intervention'.⁶⁹

59 Wagner, Ecker and Hartl, 'Ermöglichung von Klimaklagen (Klimahaftungsrecht)', in Kerschner (ed.), *Jahrbuch des österreichischen und europäischen Umweltrechts 2022* (2022) 135, at 138; Krämer, 'Climate Change, Human Rights and Access to Justice', 16 *Journal for European Environmental & Planning Law* (2019) 21, at 32.

60 C-565/19 P, *Carvalho and Others v. European Parliament and Council of the European Union* (EU:C:2021:252).

61 Regulation (EU) 2021/1767, OJ 2021 L 356/1.

62 Fellenberg, *supra* note 1, at 918.

63 Fellenberg, *supra* note 1, at 918.

64 HR 20 December 2019, NL-HR:2019:2006 (De Staat der Nederlanden/Stichting Urgenda) (Neth.); cf. Wagner, 'Klimaschutz durch Gerichte', 74 *Neue Juristische Wochenschrift* (NJW) (2021) 2257, at 2257; Saurer and Purnhagen, 'Klimawandel vor Gericht - Der Rechtsstreit der Nichtregierungsorganisation "Urgenda" gegen die Niederlande und seine Bedeutung für Deutschland', 27 *Zeitschrift für Umweltrecht* (ZUR) (2016) 16, at 16.

65 [Law 2021-1104 of 22 August 2021], *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], 24 August 2021, No. 196.

66 Conseil d'État [CE] [highest administrative court], 19 November 2020, 427301, available at <https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2020-11-19/427301>; Amadori and Fuchs, 'Aktuelle Entwicklungen des verwaltungsgerichtlichen Umweltrechtsschutzes in Frankreich', 40 *Neue Zeitschrift für Verwaltungsrecht* (NVwZ) (2021) 1748, at 1752f.

67 Verfassungsgerichtshof [VfGH] [Constitutional Court], 30 September 2020, G144-145/2020-13, V 332/2020-13, https://www.vfgh.gv.at/downloads/VfGH_Beschluss_G_144_2020_vom_30_September_2020.pdf (Austria); Wagner, Ecker and Hartl, 'Ermöglichung von Klimaklagen (Klimahaftungsrecht)', in Kerschner (ed.), *Jahrbuch des österreichischen und europäischen Umweltrechts 2022* (2022) 135, at 138; for more details see Schulev-Steindl, 'Klimaklage: VfGH weist Individualantrag gegen steuerliche Begünstigung der Luftfahrt zurück', 17 *Recht der Umwelt* (RdU) (2020) 251.

68 Verfassungsgerichtshof [VfGH] [Constitutional Court], 30 September 2020, G144-145/2020-13, V 332/2020-13, https://www.vfgh.gv.at/downloads/VfGH_Beschluss_G_144_2020_vom_30_September_2020.pdf, at para 3 *et seq.* (Austria).

69 Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], order of 24 March 2021, 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20, *Neue Juristische Wochenschrift* (NJW) 1723 (2021), para 183 *et seq.* (translated by authors).

As for administrative law, several farmers and Greenpeace brought an action before the Berlin Administrative Court obliging the Federal Government to achieve the goal of reducing greenhouse gas emissions in Germany by 40% by 2020 compared to 1990 by amending the Climate Protection Action Programme 2020.⁷⁰ The action was held to be inadmissible on the grounds of legal standing. Greenpeace was not recognized as an association with regard to climate protection under § 3 of the Environmental Appeals Act (Umwelt-Rechtsbehelfsgesetz).

Furthermore, the farmers lacked standing, as the action programme was a mere political declaration of intent from which the claimants could not infer any rights.⁷¹ Individuals can also file injunctions against the state. Typically, these are actions for annulment, e.g., actions against planning approvals for airports or against emission control permits.⁷²

Finally, a writ of mandamus is possible. For example, if the authority is to be obliged to revoke an existing permit for reasons of climate protection law.⁷³ The problem here is to establish whether and to what extent the projects in dispute affect the climate and to what extent this impact can be attributed at all.⁷⁴

B. Civil Law Actions – Horizontal Climate Actions

Although the importance of civil liability has been acknowledged since the Rio Conference, its concrete implementation is only just beginning.⁷⁵ The number of civil lawsuits has increased recently. This shows that the potential of private law in the fight against climate change and its interaction with public climate law is slowly being recognized.⁷⁶

These civil lawsuits can be roughly divided into two types, climate liability actions and climate protection actions.⁷⁷ In climate liability actions, a private person or organization sues a private greenhouse gas emitter on the basis of a private right to obtain financial compensation.⁷⁸

The claims are either for compensation for climate-related damages or for the reimbursement of expenses arising from necessary adaptation measures.⁷⁹ In climate protection lawsuits, private individuals sue to achieve the adaptation of climate-damaging behaviour.⁸⁰

The objective is to compel the defendant to reduce greenhouse gas emissions. This is achieved either through injunctive relief, as in the prominent *Milieudéfensie et al v. Royal Dutch Shell* case,⁸¹ or through corporate remedies.

70 Verwaltungsgericht [VG] Berlin, 31 October 2019, 10 K 412/18, *Neue Zeitschrift für Verwaltungsrecht* (NVwZ) 1289 (2020).

71 Fellenberg, *supra* note 1, at 917.

72 Fellenberg, *supra* note 1, at 918.

73 Fellenberg, *supra* note 1, at 918.

74 Fellenberg, *supra* note 1, at 918.

75 Sands and Peel (eds), *Principles of International Environmental Law*, 4th edition (2018), at 771 *et seq.*

76 Howarth, 'Environmental Law and Private Law' in Lees, Viñuales (eds), *Oxford Handbook of comparative environmental law* (2019) 1091, at 1092.

77 Schmidt-Ahrendts and Schneider, 'Gerichtsverfahren zum Klimaschutz', 75 *Neue Juristische Wochenschrift* (NJW) (2022) 3475, at 3477, marginal no. 22 *et seq.*

78 Wagner, Ecker and Hartl, 'Ermöglichung von Klimaklagen (Klimahaftungsrecht)', in Kerschner (ed.), *Jahrbuch des österreichischen und europäischen Umweltrechts* 2022 (2022) 135, at 142.

79 Wagner, Ecker and Hartl, 'Ermöglichung von Klimaklagen (Klimahaftungsrecht)', in Kerschner (ed.), *Jahrbuch des österreichischen und europäischen Umweltrechts* 2022 (2022) 135, at 139; Fellenberg, 'Rechtsschutz als Instrument des Klimaschutzes - ein Zwischenstand', 41 *Neue Zeitschrift für Verwaltungsrecht* (NVwZ) (2022) 913, at 919.

80 Schmidt-Ahrendts and Schneider, 'Gerichtsverfahren zum Klimaschutz', 75 *Neue Juristische Wochenschrift* (NJW) (2022) 3475, at 3477, marginal no. 24.

81 Rechtbank Den Haag, *Milieudéfensie et al. v. Shell* (NL:RBDHA:2021:5339), C/09/571932 / HA ZA 19-379 (Neth.).

4. TYPES OF CLAIMS USED IN CLIMATE PROTECTION LITIGATION CASES

Claims used in climate litigation vary from tort and property law to corporate law. They are all founded on well-established theories of law and, where these are missing, on the creation of jurisprudence.

A. Tort/Delict Law – Negligence

The requirements for bringing a claim under tort/delict law are structurally concurrent in all legal systems.⁸²

They all accept that a recognized individual or public good is unlawfully infringed or endangered and that the debtor is legally responsible for imminent or occurring damages.⁸³ The unlawfulness of the act or omission can either stem from a breach of a duty of care or the breach of a specific code of conduct.⁸⁴ While a specific tort/delict law regime dealing with climate change-related rights violations is mostly missing, the basic norms of tort/delict law are applied.⁸⁵ The three main problems of all bases of claims are legal causality, breach of duty and illegality.⁸⁶

1. Duty of Care to Mitigate Climate Change: *Milieudefensie v. Royal Dutch Shell*

In the *Milieudefensie v. Royal Dutch Shell* landmark case, while discussing Article 6:162 of the Dutch Civil Code, the District Court of The Hague held that the defendant's action is tortious, as it breaches its duty to mitigate climate change and is therefore causing environmental damage.

A tortious act requires that (i) the actions are attributable, (ii) the action is an actionable causal loss, and (iii) the unwritten legal duty is precisely directed to the protection of the claimants.⁸⁷

While the claimant proved the first two requirements, the court constructed the duty of care by using an unwritten law argument. According to the relevant norm, an act or omission can be tortious if it breaches what, according to an unwritten law, has to be regarded as appropriate social conduct.

To define the scope of this duty, the court draws on international climate change law and human rights treaties. While international treaties such as the Paris Agreement do not address private players, they would reflect a common consent on the prerequisites to stop climate change. The failure to act in line with this unwritten legal duty results in damage to the environment.

2. Special Tort/Delict Law Claims – Specific Code of Conduct

Another way to establish whether behaviour is tortious is to take redress to extraordinary tort law duties. An example is the French *loi de vigilance*. Large companies established in France need to develop a risk and action plan regarding human rights and environmental protection. The parent company has to safeguard these rights and ensure compliance by subsidiaries and suppliers.⁸⁸

82 Weller and Tran, 'Milieudefensie et al. versus Shell: Auswirkung auf Klimaklagen gegen deutsche Unternehmen', 4 *Zeitschrift für Europäisches Umwelt- und Planungsrecht* (EurUP) (2021) 342, at 347.

83 Similar: Spitzer and Butscher, 'Liability for Climate Change: Cases, Challenges and Concepts', 2 *Journal of European Tort Law* (JETL) (2017) 137, at 155.

84 Hinteregger, 'Klimaschutz mit den Mitteln des Privatrechts? Der Beitrag des Haftungsrechts', in Kirchengast, Schulev-Steindl and Schnedl (eds), *Klimaschutzrecht zwischen Wunsch und Wirklichkeit* (2018) 197, at 213.

85 Weller and Tran, 'Milieudefensie et al. versus Shell: Auswirkung auf Klimaklagen gegen deutsche Unternehmen', 4 *Zeitschrift für Europäisches Umwelt- und Planungsrecht* (EurUP) (2021) 342, at 344.

86 Schirmer, *Nachhaltiges Privatrecht* (2023), at 174.

87 Rechtbank Den Haag, *Milieudefensie et al. v. Shell* (NL:RBDHA:2021:5339), C/09/571932 / HA ZA 19-379, at para 4.4 (Neth.);

Weller and Tran, 'Milieudefensie et al. versus Shell: Auswirkung auf Klimaklagen gegen deutsche Unternehmen', 4 *Zeitschrift für Europäisches Umwelt- und Planungsrecht* (EurUP) (2021) 342, at 350.

88 Neyert, 'France', in Lees, Vifiales (eds), *Oxford Handbook of comparative environmental law* (2019) 172, at 187.

Lawsuits invoking general tort/delict law norms, such as Article 1240 and 1241 of the French Code Civil, and claiming causal environmental or human rights damages, are currently pending before French courts.⁸⁹

In Germany, claimants could invoke the special tort law regime of the Environmental Liability Act (Umwelthaftungsgesetz, UmweltHG). The application of this protection regime in climate change cases has so far been mostly rejected, since the act only covers damage to individual legal assets, such as body, health, and property (§ 1(1) UmweltHG).⁹⁰

3. Private Nuisance

Causing a private nuisance can result in climate change liability. Private nuisance is a general term for unlawful interference with a private right. By way of example, German civil law illustrates the structure of private environmental nuisance claims. Nuisance can be based solely on provisions such as § 1004(1)(2) of the German Civil Code, arguing that the claimant's property is endangered through the defendant's activities.⁹¹

The tortious claim is based on § 1004(1) in conjunction with § 823(1) of the German Civil Code. Based on the German Federal Constitutional Court's doctrine of an indirect third-party effect of fundamental rights,⁹² claimants can obtain an injunction based on the threat of a breach of one

of their fundamental rights, such as the general personality right⁹³ or the right of preservation of greenhouse gas emissions related to the exercise of liberty⁹⁴ or health.⁹⁵ The difficulty is the existence and scope of the defendant's private rights.

However, the values that constitutional courts have set regarding climate protection and their legal validity for the individual can slowly seep into civil law through this linkage. Over time, this can lead to more recognition of climate-related rights.

B. Claims under Corporate Law

Corporate Law offers two ways of bringing climate change litigation cases. On the one hand, cases based on explicit duties under corporate law require consideration of environmental matters. For example, the French Article 1833 of the French Code Civil requires companies to consider environmental issues in their management. On the other hand, shareholders can invoke a breach of their interests.

Environmental questions can be linked to fiduciary duties of due diligence and acting in the company's best interest. In the long term, environmental concerns, if not appropriately addressed, will negatively affect the company's success, cause the company to be liable for tort, and thereby breach the interest of the shareholders.⁹⁶ Two cases have been filed to date on

89 *Notre Affaire à Tous, Les Amis de la Terre, and Oxfam France v. BNP Paribas*, summary available at <http://climatecasechart.com/non-us-case/notre-affaire-a-tous-les-amis-de-la-terre-and-oxfam-france-v-bnp-paribas/>; *Envol Vert et al. v. Casino*, summary available at <http://climatecasechart.com/non-us-case/envol-vert-et-al-v-casino/>; *Friends of the Earth et al. v. Total*, summary available at <http://climatecasechart.com/non-us-case/friends-of-the-earth-et-al-v-total/>; *Notre Affaire à Tous and Others v. Total*, summary available at <http://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-total/>.

90 Nitsch, 'Liability for climate change damages under the German Environmental Liability Act', in Kahl and Weller (eds), *Climate Change Litigation* (2021), 429 *et seq.*

91 Fellenberg, *supra* note 1, at 919.

92 Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], judgment of 15 January 1958, 1 BvR 400/51, *Gewerblicher Rechtsschutz und Urheberrecht* (GRUR) 254 (1958).

93 Cf. Landgericht [LG] Stuttgart [regional court], 13 September 2022, 17 O 789/21, *Deutsche Umwelthilfe (DUH) v. Mercedes-Benz AG*, summary available at <http://climatecasechart.com/non-us-case/deutsche-umwelthilfe-duh-v-mercedes-benz-ag/>; Landgericht [LG] München I [regional court], 7 February 2023, 3 O 12581/21, *Deutsche Umwelthilfe (DUH) v. Bayerische Motoren Werke AG (BMW)*, summary available at <http://climatecasechart.com/non-us-case/deutsche-umwelthilfe-duh-v-bmw/>.

94 Cf. Landgericht [LG] Detmold [regional court], 24 February 2023, 01 O 199/21, Beck-Rechtsprechung (BeckRS) 2862 (2023).

95 Cf. Landgericht [LG] Detmold [regional court], 24 February 2023, 01 O 199/21, Beck-Rechtsprechung (BeckRS) 2862 (2023).

96 Weller and Tran, 'Klimaklagen im Rechtsvergleich - private enforcement als weltweiter Trend?', *Zeitschrift für Europäisches Privatrecht* (ZEuP) (2021) 573, at 601.

the basis of this argument. The first case was *ClientEarth v. Enea*, before the Polish Regional Court in Poznań in 2018.⁹⁷ The claimant argued that the management's decision to build a new coal-fired power plant would breach the company's economic interest as the power plant has a substantial climate-related financial risk.⁹⁸ The case was adjudicated on the formal aspects of the adoption of the decision, so the court did not give its opinion on the environmental argument.⁹⁹

The second case raised a great deal of attention. The environmental NGO, ClientEarth, filed an action against the board of directors of Shell plc with the High Court of Justice based on UK Company Law.¹⁰⁰ The claimant argued a breach by the board of Sections 172 and 174 of the United Kingdom Company Act by not adequately managing climate change-related financial risks regarding future regulation or potential lawsuits.

5. EUROPEAN HARMONIZATION AS AN OPPORTUNITY FOR EFFECTIVE CLIMATE CHANGE PROTECTION

We argue that the difficulties described above would profit immensely from EU-wide harmonization. Climate protection is a global task but, more importantly, one that is under the governance and regulation of the EU. Very different approaches between Member States hamper the completion of the internal market and the climate protection efforts

as a whole. We would like to demonstrate the importance of such a directive for which the EU has legislative competence. Its main content would focus on procedural safeguards.

A. Private Law as a Catalyst for Climate Protection

Public law climate lawsuits in Europe have been on the increase in recent years as a promising climate protection instrument. It is now time to translate the supra-individual rights into private law.¹⁰¹ Even though it is primarily the task of public law to promote climate protection, since a supra-individual legal good is affected, private law can act as a catalyst.¹⁰²

Inspiration can be taken from the common law jurisdictions, which recognize public nuisance claims regarding environmental protection between private parties.¹⁰³ The promotion of climate protection is primarily the task of public law, as a supra-individual legal good is affected. However, private law can act as a catalyst.¹⁰⁴ The reason is that new legislation often requires administrative parties to ensure implementation. But the resources available to administrations are scarce.

The application of private law unlocks resources and players that can significantly enhance (the scope and extent of) enforcement and help strike a balance of the interests involved. Therefore, the recognition of private claims would reduce administrative enforcement

97 Sabin Center for Climate Change Law, Summary of *ClientEarth v. Enea*, available at <http://climatecasechart.com/non-us-case/clientearth-v-enea/>.

98 Sabin Center for Climate Change Law, Briefing of *ClientEarth v. Enea* (2018), available at http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2018/20180920_Not-Available_na-1.pdf/.

99 Sabin Center for Climate Change Law, Summary of *ClientEarth v. Enea*, available at <http://climatecasechart.com/non-us-case/clientearth-v-enea/>.

100 Sabin Center for Climate Change Law, Summary of *ClientEarth v. Shell's Board of Directors*, available at <http://climatecasechart.com/non-us-case/clientearth-v-shells-board-of-directors/>.

101 See development of the thought: Howarth, 'Environmental Law and Private Law', in Lees and Viñuales (eds), *Oxford Handbook of comparative environmental law* (2019) 1091, at 1092.

102 Weller and Tran, 'Klimaklagen im Rechtsvergleich – private enforcement als weltweiter Trend?', 29 *Zeitschrift für Europäisches Privatrecht* (ZEuP) (2021) 573, at 575.

103 See Russo, 'Productive Public Nuisance', 2018 *University of Illinois Law Review* (Ill. L. Rev.) 1969, at 1974 *et seq.*

104 Weller and Tran, 'Klimaklagen im Rechtsvergleich – private enforcement als weltweiter Trend?', 29 *Zeitschrift für Europäisches Privatrecht* (ZEuP) (2021) 573, at 575.

shortcomings.¹⁰⁵ It would also help sustain governmental and administrative resources by unclogging planning and approval law procedures.

This approach gives rise to concern. Critics argue that it is not the objective of private law to protect *supra*-individual interests.¹⁰⁶ Such claims pursue public interests, such as health or the state of the environment. However, individual rights to health and property are already affected by climate change and are therefore intertwined with the climate-neutral transformation.

One of the core principles of environmental law – the principle that the polluter pays – protects not only the public but also individuals, so such an approach is not alien to environmental and climate change law.¹⁰⁷ EU harmonization could implement the approach, which, in its structure, should follow the Environmental Liability Directive.¹⁰⁸ The objective of such an EU framework should focus on the effectiveness of private-law climate change claims and the prevention of internal market distortions.

Otherwise, companies operating within the EU would be incentivized to relocate their headquarters and subsidiaries to countries with lower liability risks. Therefore, a race to the bottom between the Member States could ensue. The EU would once more take a leading role in the world by harmonizing civil procedural principles through a climate change directive.¹⁰⁹ If the EU materialized soft law, private players would have to include their global

climate risks in their corporate decision-making. Damage to the climate as a common good should not be externalized and not borne by the general public but by the polluter, as enshrined in Article 191(2) TFEU. State practice that gives individuals the rights described below and their recognition as law could therefore help establish new customary international law, as in Article 38(I)(b) of the ICJ Statute. In the coming few years, in particular within the EU, continued civil procedural practice as a general practice could emerge regarding injunctive relief.

B. Legal Basis and Legal Nature of a Harmonization Measure

The EU has the necessary competence to create a climate liability directive based on the principle of conferral, as referred to in Article 5(2)1 TFEU. The competence could arise from the internal market competence, Articles 114 or 115 TFEU, or from the environmental competence in Article 192 or 191 TFEU. The objective focus of the measure determines the relevant competence.¹¹⁰

The potential Climate Liability Directive is essentially concerned with environmental policy issues and the implementation of the principle that the polluter pays under Article 191(2)1 TFEU. Therefore, the measure would be based on Article 192(1) TFEU. It allows the EU to act without limiting the means of action.¹¹¹

Consequently, all measures laid down in Article 288 TFEU are available to the EU legislator. Therefore, the question

¹⁰⁵ Further development of the idea: Karl, 'Vollzugsdefizite im Umweltrecht', in Gottfried, Schulev-Steindl und Schnedl (eds), *Klimaschutzrecht zwischen Wunsch und Wirklichkeit* (2018) 171, at 172 *et seq.*

¹⁰⁶ Friedrich, 'Politischer Druck durch Rechtsschutz', in Huggins et al. (eds), *Zugang zu Recht* (2021) 219, at 227 *et seq.*

¹⁰⁷ See Sands and Peel (eds), *Principles of International Environmental Law*, 4th edition (2018), at 240–243.

¹⁰⁸ Wagner, Ecker and Hartl, 'Ermöglichung von Klimaklagen (Klimahafungsrecht)', in Kerschner (ed.), *Jahrbuch des österreichischen und europäischen Umweltrechts 2022* (2022) 135, at 143.; Wagner, 'Das "Shell Urteil": Der gerichtlich einklagbare Klimaschutz trifft nun auch Unternehmen', 1 *Nachhaltigkeitsrecht (NR)* (2021) 347, at 350.

¹⁰⁹ For example, in Australia (Privacy Amendment (Notifiable Data Breaches) Act 2017), California (California Consumer Privacy Act 2018), Japan (Act on the Protection of Personal Information 2020), Brazil (Lei Geral de Proteção de Dados 2018).

¹¹⁰ Such was the case with European data protection law, see C-155/07, *Council v. Commission* (EU:C:2008:605), at para. 34, with further references.

¹¹¹ Käller, in Schwarze EU-Kommentar, 3rd edition (2018), Article 192 AEUV marginal no. 2.

is which type of legal act the EU could adopt. Regulations and directives should be considered, as referred to in Article 288 TFEU. Regulations are directly applicable. The moment they enter into force, they are legally binding in all Member States without any further implementations.¹¹² Directives are binding as to the result to be achieved.

However, the state has discretion with regard to the form and methods of implementation. Directives, in general, must be implemented to become effective. EU civil procedure law is essentially regulated through regulations, as the Rome and Brussels regulations demonstrate. In contrast, the right to file representative actions has been created in the form of a directive.¹¹³ When a competence norm allows for more than one type of legal act, the principle of proportionality and the principle of subsidiarity require thorough considerations of the sovereignty of the Member States.¹¹⁴

The following proposal has a profound effect on civil procedural matters. Member States do not share a common civil procedural code. A regulation would require the Member States to apply the new rules directly and possibly amend their national law. A directive would give the Member States flexibility by implementing the new rules in their procedural law and would grant a margin of appreciation.

Furthermore, environmental issues are highly complex with difficult cultural, social and technical factors.¹¹⁵ Therefore,

a directive is preferable to ensure that each Member State has a wide margin of appreciation to take into account these varying factors.

C. Civil Procedural Aspects in a Climate Liability Directive

A climate liability directive should address matters of admissibility and the merits of climate change claims. A commitment to the justiciability of climate change claims, the clarification of the applicable jurisdiction, the extension of the right to file representative actions, and harmonization regarding the issue of causality and possible defence arguments are preferable.

1. Decision-making Competence of the Judiciary: the Case against Judicial Restraint

In the past, some liability actions failed due because of a lack of justiciability. Justiciability means that a court has the power to decide on the matters of a case.¹¹⁶ Some courts denied their competence because balancing the interests in climate litigation would be a task that rests solely with the legislator.¹¹⁷ We argue that it has always been the task of the courts to fill existing gaps.¹¹⁸

With the recognition of the polluter's responsibility under civil law, the courts have to balance established rights and obligations. This task is not new to civil courts, especially in tort law. Therefore, the directive should clarify that the courts of the Member States have jurisdiction.

¹¹² Joined cases 16/62 and 17/62, *Confédération nationale des producteurs de fruits et légumes and others v. Council of the European Economic Community* (EU:C:1962:47).

¹¹³ Directive (EU) 2020/1828, OJ 2020 L 409/1.

¹¹⁴ Bievvert, in Schwarze EU-Kommentar, 3rd edition (2018), Article 288 AEUV marginal no. 14.

¹¹⁵ Council of Europe, *Manual on Human Rights and the Environment*, 3rd edition (2022), at marginal no. 35, available at <https://rm.coe.int/manual-environment-3rd-edition/1680a56197>, accessed on 30 August 2023.

¹¹⁶ McGoldrick, 'The Boundaries of Justiciability', 59 *International and Comparative Law Quarterly* (2010) 981.

¹¹⁷ Detailed elaboration of the argumentation strands e.g. Weller and Tran, 'Klimaklagen im Rechtsvergleich - private enforcement als weltweiter Trend?', *Zeitschrift für Europäisches Privatrecht (ZEuP)* (2021) 573, at 603.

¹¹⁸ See also Schmidt-Ahrendts and Schneider, 'Gerichtsverfahren zum Klimaschutz', 48 *Neue Juristische Wochenschrift (NJW)* (2022) 3475, at 3475.

2. The Significance of Potential Damage

Since the relationship between damage and causal harmful behaviour could potentially be established anywhere in the world, the concern could arise that the case load could increase sharply. A *de minimis* rule both regarding the damage and the alleged breach could limit the admissibility of a claim.¹¹⁹

Such a limitation is unwarranted. As demonstrated below, individuals usually have limited expert knowledge and financial resources, as well as high opportunity costs. Additionally, experience shows that associations pick only the most promising or interesting cases, i.e. litigate strategically, because of their limited resources.¹²⁰

3. Regulation of International Jurisdiction and Applicable Law

Brussels Ia specifies the jurisdiction for active and passive climate claims arising within the EU. A new regulatory framework is unnecessary if the company is domiciled in the EU. It may be feasible to extend claims regarding the issue of carbon leakage to claims brought against separate legal companies only loosely connected to a holding company in the EU. Rome II addresses the question of conflict of law within the EU.¹²¹

For clarification, Article 17 Rome II should be amended to state that public law operating permits should be regarded as local rules of safety and conduct. These rules of the place of action must then

be considered in the substantive law examination of the claim in addition to the law of the place of the consequences within the meaning of Article 4(1) Rome II. Such consideration should be limited by a formula of ‘as far as appropriate’ in the Article, which would give the courts a wide margin of appreciation.

4. Legal Standing and the Extension of the Right of Associations to Bring Legal Action

Climate lawsuits are often associated with significant financial and procedural obstacles. Representative actions improve access to justice for the affected individuals and foster strategic litigation in the field of climate protection.¹²² In addition, the nature of climate protection as a collective legal¹²³ interest would be emphasized.

The ECtHR recognizes legal persons as claimants in the area of protection of fundamental rights.¹²⁴ Its Grand Chamber also accepts local standing of environmental associations, at least within the scope of the Aarhus Convention.¹²⁵ With the Directive on collective redress created in 2020,¹²⁶ Member States were obliged to create a collective redress mechanism for the protection of consumers and the interests of the general public.¹²⁷

The directive does not yet cover climate liability actions but could include them in the future. Article 8 of the Directive even explicitly provides for injunctions

119 Nevertheless the introduction of a *de minimis* rule is problematic as it conflicts with the right to access to justice, a basic component of the rule of law. Differently from international courts, where rules like the relatively new rule in Article 35 (3) b ECHR are justified, the national legal system must also offer remedies for relatively small incidents.

120 ClientEarth, an environmental litigation NGO, currently has 166 active cases while employing approx. 150 lawyers, <https://www.clientearth.de/>, accessed on 29 August 2023.

121 For a comprehensive overview, see: Kahl and Weller (eds), *Climate Change Litigation* (2021), 139ff; and van Calster, ‘Environmental Law and private international law’, in Lees, Viñuales (eds), *Oxford Handbook of comparative environmental law* (2019) 1139, at 1153.

122 Willert and Isfort, ‘Potenzial der europäischen Verbandsklage für Klimaklagen’, 2 *Klima und Recht (KlimR)* (2023) 49, at 51.

123 Making it a counterpart to public nuisance actions in common law jurisdiction.

124 Council of Europe, *Practical Guide on Admissibility Criteria* (2022), 9 et seq.

125 C-873/19, *Deutsche Umwelthilfe eV v. Bundesrepublik Deutschland* (EU:C:2022:857), at para. 46.

126 Directive (EU) 2020/1828, OJ 2020 L 409/1.

127 Willert and Isfort, ‘Potenzial der europäischen Verbandsklage für Klimaklagen’, 2 *Klima und Recht (KlimR)* (2023) 51, at 52.

and allows qualified entities to sue for injunctive relief independently of consumers.¹²⁸ This would benefit climate change litigation, as experience shows that lawsuits are often led, funded, or advised by climate protection NGOs. It would also counteract the limitations of individuals of expert knowledge, financial resources and opportunity costs. As we argued at the outset, the transformation needs all available resources to revert to planetary boundaries.

Only the consumer protection standards explicitly laid down in Annex I, Article 2(1) of the Directive currently fall within the scope of the Directive. Climate protection is not yet included. The abolition of the principle of listing in Annex 1 of the Directive could resolve this issue.¹²⁹ Alternatively, climate change claims could be included in Article 1. We argue for either the amendment of Article 1 of the Representative Action Directive or to regulate climate change proceedings in the potential Climate Liability Directive.

Experience in other states demonstrates that representative actions are preferred,¹³⁰ and NGOs such as ClientEarth,¹³¹ Greenpeace¹³² and Friends of the Earth¹³³ are already advancing such proceedings. These players constitute a significant resource for activating the transformative powers of the judicial branch.

Therefore, we argue in favour of the inclusion of an evaluation clause in the potential Climate Liability Directive to assess the effectiveness of the Directive, especially with regard to the matter of the practical enforceability of claims by smaller individuals against large corporations and the use of representative action proceedings.

5. Rules on the Question of Causality

The Climate Liability Directive should clarify that commingling defence does not apply to climate claims. Unlike damage caused by acid rain, it does not matter where the individual greenhouse gas particles are, but rather that each one contributes to climate change.¹³⁴ It is not a matter of isolating the individual contribution but essentially the liability of cumulative causation.

The relative materiality of the causation contribution can be used as a yardstick to uniformly address the problem of cumulative damage.¹³⁵ As discussed in Part 2, the relevant ratio compares the company's contribution to greenhouse gas emissions to global emissions. We propose a contribution criterion of 0.40% as a first approximation to establish unambiguous criteria and create incentives for companies to adjust their behaviour.¹³⁶

128 The term consumer is understood broadly, i.e. any natural person outside their trade, business, craft or profession; Schuschnigg 'Die Verbandsklagen-Richtlinie: Umsetzungsbreite und ihre Grenzen', 33 Europäische Zeitschrift für Wirtschaftsrecht (EuZW) (2022) 1043, at 1046; Augenhöfer, 'Die neue Verbandsklagen-Richtlinie - effektiver Verbraucherschutz durch Zivilprozessrecht?', 74 Neue Juristische Wochenschrift (NJW) (2021) 113, at 116 para. 20.

129 This is the idea of the German draft bill, see cf. Willert and Isfort, 'Potenzial der europäischen Verbandsklage für Klimaklagen', 2 Klima und Recht (KlimR) (2023) 49, at 52.

130 E.g. in the USA, see: Willert and Isfort, 'Potenzial der europäischen Verbandsklage für Klimaklagen', 2 Klima und Recht (KlimR) (2023) 49, at 49.

131 Cf. *ClientEarth v. Enea*.

132 Cf. Verwaltungsgericht (VG) Berlin, 31 October 2019, 10 K 412/18, Neue Zeitschrift für Verwaltungsrecht (NVwZ) 1289 (2020).

133 Cf. *Friends of the Earth et al. v. Total*.

134 Schirmer, 'Klimahaftung und Kausalität - und es geht doch!', 76 JuristenZeitung (JZ) (2021) 1099, at 1102.

135 Schirmer, 'Haftung für künftige Klimaschäden', 76 Neue Juristische Wochenschrift (NJW) (2023) 113, at 113.

136 In the pending case *Lliuya v. RWE*, the plaintiff claims that RWE's overall greenhouse gas emissions amount to 0.47% of worldwide emissions, see Oberlandesgericht (OLG) Hamm [Higher Regional Court], order of 24 February 2023, press release available at https://www.olg-hamm.nrw.de/behoerde/presse/pressemitteilung_archiv/archiv/2017_pressearchiv/153-17-VT-peruanischer-Landwirt-RWE.pdf (translated by the authors).

6. Interrelationship of Public and Private Law

A written due diligence duty that dynamically adapts climate protection developments to public law should be introduced. In *Milieudefensie et al. v. Shell* (see Part II) the court demonstrated how such a due diligence obligation can be structured. International treaties, such as the Paris Agreement are not directly binding on companies.

They nevertheless reflect a common consent on what is necessary to stop climate change. Therefore, they can influence the understanding of legal concepts regarding the obligations of companies. The transformative power of the interrelationship of private and public law can achieve a climate-neutral economy. This would strengthen climate protection law by unlocking the means of private law.

6. SUMMARY

Private enforcement is a fierce weapon in the battle against climate change and can enhance climate protection. Private entities wielding it unleash transformative powers to overcome implementation shortcomings. Civil law actions for damages lead to attributing the damage to the polluter, as envisaged by the causation principle and the principle of the polluter pays. In addition to tort law in particular, corporate law offers good leverage for exerting pressure on company management in matters of climate protection.

A potential Climate Liability Directive could transform the EU into a private climate change litigation pioneer. This would ensure the application of uniform procedural and substantive core principles within the jurisdictions of the Member States. It also opens the door to the ECJ by referral. A unified and cohesive approach of the Member States would, in effect, transform climate protection regimes.

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GEO-BLOCKING AND THE BUILDING OF VIRTUAL TROY UNRAVELING THE JURISDICTIONAL CONUNDRUM

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The use of geo-blocking techniques in the online environment has reached a point where it also manages to influence jurisdiction rules, apart from the unsettling effects it has on the freedom of consumers and the integration of the European market. The objective of this paper is to raise awareness regarding the Byzantine nature of the geo-blocking phenomenon, while shedding some light on the issue of international jurisdiction, especially when in terms of determining the extent to which this analysis is affected when the parties resort to geo-blocking techniques. For this purpose, we are treating the manner in which special rules of international jurisdiction regarding consumer contracts are affected by the new rules against geo-discrimination, namely the Geoblocking Regulation. We then look at some issues that are not particularly regulated with regard to this phenomenon, namely the difficulties in ensuring adequate access to justice for breaches of personality rights and copyright infringements. Lastly, we aim to present a set of proposals with the intention of shifting the current paradigm according to which international jurisdiction is established in matters related to online tort, so as to shape a legal environment that is more accustomed to the technology-dominated world of today.

KEYWORDS:

GEO-BLOCKING REGULATION | GEO-BLOCKING | CONSUMER CONTRACTS | BREACHES OF
PERSONALITY RIGHTS | COPYRIGHT INFRINGEMENT | ONLINE SALES | INTERNATIONAL
JURISDICTION | ONLINE TORTS

INTRODUCTION

Just like the ancient city of Troy was protected by walls that prevented outsiders from entering, geo-blocking erects virtual walls that restrict access to online content, based on the geographical location of the internet user attempting to explore it. The consequences of geo-blocking are similar to those of Troy's walls: it creates isolation, hinders exchange and perpetuates inequalities.

People may have various expectations of the Internet, but yet there is one common expectation that seems to be constant across time and generations, namely unrestricted access to information. Therefore, tearing down these digital walls by surrendering the tools that enable geo-blocking may have a great impact on ensuring that the Internet remains a borderless entity which fosters open exchange and inclusivity.

Globalization in the age of the Internet has broadened the sphere of legal relationships that involve a cross-border element. Proceedings arising from online contract and tort relations have become increasingly complex, given that they could involve more participants, while connections with multiple Member States are more easily established.

In these conditions, national judges encounter various challenges ranging from establishing international jurisdiction and applicable law, to the taking of evidence and handling the service of judicial documents in a different Member State.

Bearing these ideas in mind, the objective of our paper is to raise awareness about the Byzantine nature of the geo-blocking phenomenon, which is as insufficiently explored as it is widespread.¹

We are mostly preoccupied by the desideratum of predictability, efficiency and fairness in terms of cross-border litigations arising from legal relationships formed in the online environment. Therefore, we have chosen to shed some light on the issue of international jurisdiction,² especially in terms of determining the extent to which this analysis is affected when the parties resort to geo-blocking techniques.

For this purpose, we are treating the manner in which special rules of international jurisdiction regarding consumer contracts are affected by the new rules against geo-discrimination, as well as some issues that are not particularly regulated with respect to this phenomenon, namely the difficulties in ensuring adequate access to justice with regard to breaches of personality rights and copyright infringements.

Lastly, we have presented a set of proposals with the intention of shifting the current paradigm according to which international jurisdiction is established in matters related to online tort, so as to shape a legal environment that is more accustomed to the technology-dominated world of today.

¹ According to an unsettling result reported by the European Commission, geo-blocking practices or limitations to cross-border delivery were identified in approximately 63% of all websites assessed. Even more troubling was the finding that only 37% of websites actually allowed cross-border EU visitors to reach the final stage before completing a purchase (successfully entering payment card details. In this regard, a Mystery Shopping Survey was conducted by the Commission in 2015, before the submission of the proposal for a regulation on geo-blocking, where approximately 10,500 websites in the EU were analysed and typical cross-border shopping situations were modelled. In order to do this, the websites were first visited by mystery shoppers as domestic users and then as users from another Member State. The unabridged findings are available at https://ec.europa.eu/info/sites/info/files/geoblocking-final-report_en.pdf. On the same note, according to the findings contained in the Communication 'A Digital Single Market Strategy for Europe' COM(2015) 192 final, 61% of EU consumers feel confident about online purchasing from a retailer located in their own Member State, while only 38% feel confident about purchasing from another EU Member State and only 7% of Small and Medium Enterprises (hereinafter referred to as 'SMEs') in the EU make cross-border sales.

² This is the point in which multiple aspects of the proceedings are clarified, including the applicable procedural law.

1. TO TRADE OR NOT TO TRADE – WHAT STANDS IN THE WAY?

Among the reasons why companies, mainly small ones,³ are reluctant to conduct cross-border ecommerce or are tempted to differentiate prices or terms of sale, are the existence of different legal environments, further national requirements, additional transport costs, language requirements on pre-contractual information and back office requirements.⁴

Therefore, a significant deterrent to the conclusion of cross-border contracts is, among other things, the fact that potential litigation could take place in a state other than the state of residence, which inevitably means higher costs, unknown procedural law and the need for the judgment to be recognized and enforced in a different state.

Therefore, an important culprit in the creation of fractures in the internal market is the phenomenon of geo-discrimination, which encompasses all practices that differentiate customers solely on territorial criteria, such as the customer's nationality, place of residence or place of establishment.⁵

A. Jurisdiction. Why so Reluctant?

Union law provides for various instruments that aim to facilitate different objectives in relation to consumer protection. The EU wants to encourage both consumers and professionals to continue to enter into commercial relationships, particularly in a cross-border context, in order to facilitate the development of the internal market, through rules that ensure the interests of both parties are satisfied. To this end, the EU aims to provide for both substantive and procedural protection for these parties.⁶

The instrument that addresses these needs from a procedural point of view is the Brussels I Regulation (recast) (hereinafter referred to as the 'Regulation'),⁷ which is the framework regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,⁸ provided that the litigation has a cross-border element.

The main pillars of the regulation include two principles which are vital for a fair trial,⁹ namely the need for predictability and foreseeability. In this regard, Recital (15) provides that 'the rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's

³ SMEs and micro-enterprises.

⁴ According to the Opinion of the European Economic and Social Committee on the 'Proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC' COM(2016) 289 final.

⁵ These practices can vary from the 'harder' forms like geo-blocking, when there is no access to the product or service, to 'softer' ones, when a product or service may be purchased, but under different general conditions or for a different price. For this distinction, see Maćik, 'Geo-discrimination in Online Shopping. The consumer's perspective', 6 *Handel Wewnętrzny* (2017), at 214–224.

⁶ Law, 'Article 17' in M. Requejo Isidro (ed.), *Brussels I Bis*, A Commentary on Regulation (EU) No 1215/2012, Edward Edgar Publishing (2022), at 323.

⁷ Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) OJ L 351, 20.12.2012, at 1–32.

⁸ S.-A. Stănescu, *Procesul civil internațional*, Hamangiu (2017), at 32.

⁹ The right to a fair trial is a fundamental principle of EU law, enshrined in Article 47 of the Charter of Fundamental Rights of the European Union and in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which afford the same protection, see C-439/11, *Ziegler v. Commission* (EU:C:2013:513), at para. 126. Moreover, this is a fundamental right, see joined cases C-354/20 PPU and C-412/20 PPU, *Openbaar Ministerie (Independence of the issuing judicial authority)* (EU:C:2020:1033), at para. 39.

domicile and that jurisdiction should always be available on this ground'.¹⁰

The fundamental logic behind this principle of foreseeability is that the defendant should not be called to trial in a Member State that is foreign from what he could reasonably expect on the basis of the circumstances of the legal relationship in question.¹¹ Hence, *actor sequitur forum rei* is the default rule in this regard, the 'Grundnorm'.¹² It has as its rationale the self-evident appropriateness of suing the defendant in the country of its domicile.¹³

The defendant 'is deemed to be not only physically closer to the place of his domicile, but also more familiar with the language and the procedural and substantive laws of that country'.¹⁴ The essential elements of this general provision are that the defendant's domicile has to be situated in any of the Member States for the regulation to be applicable, and that the criterion we rely on is the domicile, nationality or other connecting criteria thus being rendered irrelevant at this point.

Of vital importance in this context is the delineation of the concept of domicile, especially with regard to legal persons.¹⁵ In terms of what concerns legal persons, Article 63 of the Regulation turns to the classic rule of autonomous qualification and establishes a legal person's domicile

using three alternative criteria, namely its statutory seat, its central administration or its main place of business. However, according to Article 17(2) of the Regulation, which is a special provision on this matter, where a consumer enters into a contract with a party who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising from the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

Therefore, even if, according to the criteria laid down in Article 63, the legal person contracting with a consumer is not domiciled in the EU, it will be deemed as if it has a secondary seat in the EU. This rule broadens the applicability of the defendant's domicile criterion to places where it would not normally work, thereby expanding the jurisdiction of the courts of the Member States and consequently affording increased protection for consumers.

Having anticipated the discussion on the manner in which consumers, as weaker parties, are granted special treatment,¹⁶ we notice that the Brussels I Bis Regulation contains a set of rules dedicated to contracts concluded with consumers,¹⁷ rules that have been qualified by the literature as protective rules of jurisdiction. These rules have a particular purpose,

10 Furthermore, Recital (13) pleads for a certain connection of the proceedings to the territory of the EU, stating that there must be a connection between proceedings to which this Regulation applies and the territory of the Member States. Accordingly, common rules of jurisdiction should, in principle, apply when the defendant is domiciled in a Member State. Therefore, it emphasizes the predictability aspiration of the rules contained in the Regulation, as it states that, given the fact that the Regulation is an act of the European Union, it is reasonable to require a certain connection between the object that it governs – the proceedings brought before the courts of a Member State – and the EU territory.

11 For a broader analysis on the criterion of reasonableness, see Loacker, 'The rise and fall of a defining criterion? The targeting of digital commercial activities as a factor establishing consumer jurisdictions before and after the Geo-Blocking Regulation', in P. Mankowski (ed.), *Research Handbook on the Brussels I Bis Regulation* (2020) 207, at 210.

12 A. Bell, *Forum Shopping and venue in transnational litigation*, Oxford (2003), at para. 3.60–3.63.

13 Ibid.

14 Opinion of AG Tanchev, in C-617/15, on 12 January 2017, *Hummel Holding A/S v. Nike Inc. Nike Retail BV* (ECLI:EU:C:2017:13) at para. 82.

15 Law, *supra* note 6, at 349. As for the notion of domicile of the natural persons, Article 62 of the Regulation requires the national courts to apply their own internal law to establish whether the party does indeed have his/her domicile there, thus appearing as an exception to the general rule, according to which the terms of the Regulation are to be qualified autonomously.

16 See also Ragno, 'Article 6', in F. Ferrari (ed.), *Rome I Regulation. Pocket commentary*, Sellier European Law Publishers (2015) 208, at 210.

17 Section 4 of the first chapter of the Brussels I Bis Regulation, Articles 17–19.

namely that of safeguarding the interests of the weaker party to a contract, by applying rules of jurisdiction that are more favourable than the general rules.¹⁸

Therefore, they are of utmost importance for ensuring effective access to justice for the consumer, who usually has limited resources and for whom the costs of litigation in a foreign state¹⁹ would turn into an obstacle to the access to a judge.²⁰ According to the position taken in the literature, the protection of the weaker party under the Brussels I Bis Regulation is intended to help it compensate for the *de facto* vulnerable position held in the proceedings arising from the relationship between the economically stronger party and the economically weaker and legally less experienced party.²¹

A detailed examination of the above provisions shows that the partial waiver of the general criterion that is the defendant's domicile stands out. In this respect, according to the rule contained in Article 18, the consumer may bring an action against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts of the place where the consumer is domiciled.

Consequently, as long as the consumer is domiciled in one of the Member States, the defendant's domicile is no longer relevant for establishing jurisdiction,²² even safely assuming that it can also be situated outside the EU.²³ Therefore, in this particular situation, it was concluded that the Regulation gains universal application, like that of the Rome I Regulation.²⁴ In the paradigm of the Brussels I Bis Regulation, the consumer is the person who concludes a contract for a purpose which can be considered as being outside his trade or profession, as stated in Article 17(1).²⁵

Attentive readers will notice that the Rome I Regulation is more explicit than the Brussels I Bis Regulation when it explains that the contract must be concluded with another person acting in the exercise of his trade or profession, who is therefore a professional, and when it requires the weaker party to be a natural person.²⁶

However, the Brussels I Bis Regulation must be read in the same way: this can be inferred from the objective of protecting the weaker party that the contracting partner of the consumer must act within his trade or profession, and normally has a (much) greater range of resources, both from an economical and from a legal point of view.²⁷ It can also be extrapolated from

18 According to Recital 18, which emphasizes the fact that the objective of protecting the consumer needs special provisions derogating from the general rules that normally protect the defendant, regardless of a certain quality he or she may possess.

19 More often than not, of small or moderate value.

20 L. Zidaru, *Competența în materie civilă și comercială potrivit Regulamentului Bruxelles I Bis (nr. 1215/2012)*, Hamangiu (2017), at 309.

21 Moravcova, 'Consumer protection under the Brussels I Bis and Rome I Regulations', 2 [1] *Journal of Administrative Sciences* (2022) 100, at 101.

22 European Commission, Directorate-General for Justice and Consumers, *Study to support the preparation of a report on the application of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ia Regulation)*, Final Report, 2023, at 153.

23 Ibid., at 309–310.

24 See Article 2 of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, at 6–16 (hereinafter referred to as 'Rome I Regulation').

25 Chalas, 'Compétence en matière de contrats conclus par les consommateurs (Règlement Bruxelles I)', 3 *Revue critique de droit international privé* (2016) 485, at 486.

26 According to Article 6 of the Rome I Regulation, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional: (a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or (b) by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities.

27 C. Schmon, *The interconnection of the EU Regulations Brussels I Recast and Rome I. Jurisdiction and Law*, Springer (2020), at 111. See also European Commission, Study, *supra* note 22, at 154.

the presumption of the weak economic position that natural persons, rather than legal persons, deserve general protection.²⁸

The objective of granting this protection in the European Union is to ensure a proper and efficient internal market.²⁹ Even though the end goal of these special provisions is to safeguard the interests of the consumer that enters into a legal relationship with a professional, not all contracts fall under the protection of these particular rules.

To be more specific, those that do can be identified through two alternative criteria. The material criterion refers to contracts for the sale of goods on instalment payment terms (Article 17(1)(a)) and contracts for a loan repayable in instalments, or any other form of credit for financing the sale of goods (Article 17(1)(b)). The second criterion is territorial, related to the professional's targeting of its activity to the consumer's Member State, as Article 17(1)(c) applies to cases in which the contract is concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, *directs* such activities to that Member State or to several states including that Member State, and the contract falls within the scope of such activities. As for the definition of the

targeting criterion, the CJEU has laid down a non-exhaustive list of relevant factors that are to be taken into consideration by the national court in order to ultimately ascertain whether the trader had the intention of engaging in a contractual relationship with a consumer from a certain Member State.

Therefore, the judgment in the *Pammer/Alpenhof*³⁰ case is a stepping stone for the intricate endeavour of determining the real commercial intentions of the professional.³¹ Accordingly, the CJEU also points out a very important aspect, namely that the mere accessibility of the trader's or the intermediary's website in the Member State in which the consumer is domiciled is insufficient³² for the directness criterion to be satisfied, while the same is true of a mention of an email address, geographical address or telephone number without an international code.³³

The decisions that followed confirmed these principles and broadened the scope of application of the protective provisions by stating that it is decisive to have the element of directing the activity to the Member State, but whether the consumer was aware of this or not is irrelevant. Therefore, in *Emrek*,³⁴ the CJEU held that the application of the protective provisions

28 According to Recital 24 of Regulation (EC) No 593/2008 (Rome I), which makes a special reference to consumer contracts, the two regulations (Rome I and Brussels I Bis) must be interpreted consistently and harmoniously. On the same note, see also Moravcova, *supra* note 21, at 102. The author also supports the correlated interpretation of these regulations to avoid contradictions and for having a uniform way of dealing with them throughout the EU.

29 In this respect, it has been said that empowering consumers means providing a robust framework of principles and tools that enable them to drive a smart, sustainable and inclusive economy. Empowered consumers who can rely on such a framework, which ensures their safety, information, education, rights, means of redress and enforcement, can actively participate in the market and make it work for them by exercising their power of choice and by having their rights properly enforced. On this note, see Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *A European Consumer Agenda - Boosting Confidence and Growth*, COM/2012/0225 final, at 2.

30 Joined cases C-585/08 and C-144/09, *Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v. Oliver Heller* (EU:C:2010:740).

31 Therefore, as established in the *Pammer/Alpenhof* judgment, at para. 93, circumstances like 'the international nature of the activity, mention of itineraries from other Member States for going to the place where the trader is established, use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language, mention of telephone numbers with an international code, outlay of expenditure on an internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other Member States, the use of a top-level domain name other than that of the Member State in which the trader is established, or mention of an international clientele composed of customers domiciled in various Member States' are some of the many factors that could be considered evidence in the process of concluding that the activity of the trader was indeed directed towards one or more Member States.

32 *Ibid.*, at para. 94.

33 *Ibid.*, at para. 77.

34 C-218/12, *Lokman Emrek v. Vlado Sabranovic* (EU:C:2013:666).

do ‘not require the existence of a causal link between the means employed to direct the commercial or professional activity to the Member State of the consumer’s domicile and the conclusion of the contract with that consumer,’ while also acknowledging the fact that ‘the existence of such a causal link constitutes evidence of the connection between the contract and such activity.’³⁵

This conclusion is in accordance with the principles that grounded the targeting criterion.³⁶ The logic behind this provision was to ensure that the trader is not brought to trial before the courts of a Member State where he could not expect to be brought, given the Member States in which he intended to conduct his business. If he intended to direct his activity to a certain Member State, the foreseeability of litigation in that Member State was considered and, therefore, it does not interfere with his legitimate expectations.

Therefore, whether the consumer discovered the trader’s activity through the means he specifically used for directing his activity to that particular Member State, given that the purpose of the targeting criterion, namely the predictability³⁷ of litigation in that Member State for the trader, is irrelevant. As for the matter of jurisdiction, Article 18 of the Regulation provides two alternative situations, where the jurisdiction is established differently, depending on whether the consumer is the defendant or the claimant.

Therefore, Article 18(1) establishes jurisdiction for the cases in which the consumer is the claimant, providing an alternative jurisdiction of either the defendant’s domicile or the consumer’s domicile. The purpose of this provision is to ensure effective access to justice for the consumer, for whom litigation abroad might be too onerous. If the only applicable rule would have been the general one contained in Article 4(1), the consumer would have found himself forced to bring the action before the courts of the trader’s domicile.

Given the fact that this endeavour could have been too expensive or complicated for him, he would have therefore been discouraged from seeking his rights. These difficulties are overcome in the paradigm of Article 18(1), through the establishment of alternative jurisdiction in the Member State of the consumer’s domicile.

Article 18(1) favours consumers by allowing them to bring the litigation before the home national courts because they know the language and have a better understanding of the system in force, while going to court or obtaining other services is easier.³⁸ On the other hand, in cases where the consumer is the defendant, Article 18(2) lays down the exclusive jurisdiction of the courts in the Member State of the consumer’s domicile. This provision protects the consumer from proceedings brought before courts other than that of the Member State of his

³⁵ Ibid., at para. 32.

³⁶ Larribere, ‘Le difficile maniement des critères d’application de la compétence de protection des consommateurs’, 2 *Revue critique de droit international privé* (2022) 387, at 391.

³⁷ European Commission, Study, *supra* note 22, at 153. See also Clavel, ‘Protection juridictionnelle effective et règles de droit international privé’, 3 *Journal de droit international (Clunet)* (2019) 695, at para. 4.

³⁸ European Commission, Study, *supra* note 22, at 155.

domicile, excluding alternative jurisdiction or implied prorogation³⁹ of jurisdiction.⁴⁰

B. No More Geo-Blocking: Non-Contracting Arsenal Meets Regulatory Prohibition

The regulation⁴¹ on addressing unjustified geo-blocking and other forms of discrimination based on the customer's nationality, place of residence or place of establishment⁴² within the internal market ('the Geo-Blocking Regulation') was adopted by the European legislator, by virtue of the powers vested in him by Article 114 TFEU, and came in as the much-needed guardian of a wholly integrated market, being an important part of the Digital Single Market Strategy⁴³ and the Single Market Strategy.⁴⁴

This regulation is founded on some very important principles, namely the prohibition of discrimination based on nationality,⁴⁵ which also covers indirect discrimination,⁴⁶ as well as the smooth development of the internal market. Bearing in mind this ambitious goal, it is clear that the unjustifiable narrowing

of customer choices, based solely on territorial principles, creates an immense obstacle in the way of achieving a well-functioning integrated market.⁴⁷

Therefore, the regulation's general objective is to abolish the barriers to the free movement of, *inter alia*, goods and services, and give customers better access to them by preventing direct and indirect discrimination techniques performed by traders who are artificially segmenting the market based solely on the place of residence of the customers.⁴⁸

In other words, geo-blocking taken on its own means that the customer is banned from accessing an online interface, simply because they have a certain place of residence, thus serving as the harshest and most obvious form of geographical discrimination. For example, the message presented by the browser, stating that 'This content is not available in your country', is the clearest sign of having fallen victim to a geo-blocking technique. Similarly, the customer can also be discriminated against by being automatically rerouted to

39 In the case of a consumer contract, the parties can only conclude a convention for voluntary prorogation of jurisdiction in very restrictive circumstances. Article 19 is particularly important, because the protective rules for jurisdiction in consumer contracts would not be efficient if the parties were at liberty to derogate from them with the use of contractual clauses. In these cases, given the economic and legal advantages and the greater strength of the trader in the negotiations, the consumer could have been constrained to accept certain clauses which, in the end, would have circumvented the whole purpose of the protective rules. Therefore, this provision comes in anticipation of these risks and establishes restrictive conditions that include the impossibility of departing from the protective rules through clauses concluded before the dispute or which restrict the access for the consumer to the courts where he would have normally been able to bring his actions or be sued.

40 Governed by the provisions of Article 26 of the Regulation, and which also contain a special provision in the second paragraph that imposes the obligation on the national judge to inform the consumer of his rights, namely that of contesting the court's jurisdiction, and of the consequences of entering or not entering an appearance, all before assuming jurisdiction under paragraph (1).

41 Regulation (EU) 2018/302 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, OJ L 601, 2.3.2018, at 1–15.

42 For ease of reference, all three criteria will hereinafter be referred to as 'residence'.

43 This Regulation has been part of a comprehensive package of 28 measures of the Digital Single Market strategy of 2015 (Communication 'A Digital Single Market Strategy for Europe' COM (2015) 192 final) adopted with the aim to ensure better access and conditions to goods and services for individuals and businesses.

44 COM (2015) 550 final.

45 A general principle of Union law, as enshrined in Article 18 of the Treaty on the Functioning of the European Union (hereinafter referred to as 'TFEU') and Article 21(2) of the EU Charter of Fundamental Rights (hereinafter referred to as 'the Charter').

46 The European Court of Human Rights (hereinafter referred to as 'the ECtHR') has developed the concept of indirect discrimination in some of its judgments (e.g. ECtHR, *D.H. and Others v. the Czech Republic* [GC], Application no. 57325/00, Judgment of 13 November 2007, at para. 184; ECtHR, *Opuz v. Turkey*, Application no. 33401/02, Judgment of 9 June 2009, at para. 183. The decisions state that 'a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group'.

47 On the same note, Hamul'ák, Kiss, Gábris, Kocharyan, 'This Content is not Available in Your Country' A General Summary on Geo-Blocking in and outside the European Union', 21 [1] *International and Comparative Law Review* (2021), at 153–183.

48 Proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, COM(2016)0289 final – 2016/0152.

a different version of the website based on his place of residence, without his consent, and without being able to access the version to which he initially sought access.

On the surface, there seems to be no issue here, but the logic behind these practices is that different versions of the website usually show different content or different prices. According to the rules contained in the Geo-Blocking Regulation, both of these practices are now prohibited,⁴⁹ unless blocking or limiting the customer's access, or rerouting him to a different online interface is necessary to ensure compliance with a provision of Union law or of a national law which is in line with the former.⁵⁰

On the same note, geo-discrimination takes place if a trader offers different general conditions of access or different conditions for payment transactions, for reasons related to the customer's place of residence, or for territorial reasons related to any of the components involved in the payment process.⁵¹ As the title of the European instrument itself suggests, the objective is to remove all unjustified forms of discrimination based on the place of residence of the customers.

The new rules define three specific situations where no justification and no objective criteria for different treatment between customers from different EU Member States are plausible,⁵² namely in the case of (1) the sale of goods without physical delivery,⁵³ (2) the sale of electronically supplied services⁵⁴ and (3) the sale of services provided in a specific physical location.⁵⁵ However, these provisions do not stand in the way of traders offering different general conditions of access, or even different prices, in different Member States, or in different territories within the same Member State, for reasons that are non-discriminatory.

C. Does the Prohibition of Geo-Discrimination Alter the Directness Criterion?

Having seen the changes brought by the Geo-blocking Regulation, as well as the sensible way in which the protective measures instituted by the Brussels I Bis Regulation have to be interpreted,⁵⁶ we find ourselves walking on thin ice: how do we balance all of the rights, restrictions and interests so as to keep the consumers protected, the traders happy business-wise, and the Digital Single Market thriving? First and foremost, it should be noted that the Geo-blocking Regulation operates with

49 However, according to the final thesis of Article 3(2), rerouting is still allowed on condition that the customer expresses his consent and the version of the online interface that was initially sought remains available.

50 In this case, the trader is under the obligation to offer a clear and specific explanation to the customer of the reasons why blocking, limiting access or rerouting are necessary in order to comply with said provisions, in the language of the interface to which the customer initially sought access.

51 Such as the customer's place of residence, the location of the payment account, the place of establishment of the payment service provider or the place of issue of the payment instrument within the Union, according to Article 5(1) of the Geo-Blocking Regulation.

52 According to Article 4(1), which prohibits the trader from applying different general conditions of access, for reasons related to the place of residence of the customers.

53 According to Article 4(1)(a), the sale of goods without physical delivery specifies the cases in which the goods are to be delivered to an address or collected by the customer from a location agreed upon by the parties, both of which are situated in a Member State in which the trader usually delivers, in line with his general conditions of access.

54 According to Article 4(1)(b), the prohibition is not applicable to granting access to and using copyright protected works or other protected subject matter, including selling copyright protected works or protected subject matter in an intangible form. Therefore, the trader is required to grant access, according to Article 3, but is allowed to apply different general conditions of access for reasons related to the place of residence of the customers for copyright protected works.

55 Situated inside a territory in which the trader usually operates.

56 It is important to note that, according to Recital (13) of the Geo-Blocking Regulation, the latter should not prejudice judicial cooperation in civil matters regarding the provisions on the law that are applicable to the contractual obligations and on court jurisdiction set out in the Brussels I Bis Regulation and Rome I Regulation.

the concept of *customer*,⁵⁷ which includes both the consumer⁵⁸ and the undertaking that acts as an end user.

Consequently, this dilemma should only be solved with regard to contracts concluded with consumers, as the protection instituted by the Brussels I Bis Regulation is only applicable if the contracting party is a natural person.⁵⁹ Secondly, the most important aspect of the equilibrium is the targeting criterion, instituted by the second hypothesis of Article 17(1)(c), and the way in which it is now being interpreted due to the obligations prescribed by the Geo-blocking Regulation.

In other words, what does it mean for a commercial or professional activity to be directed towards a certain Member State, given that traders are now being prohibited from geo-discriminating customers? As specified by Recital (13), the mere access to the good or service provided does not entail a targeting of activities.⁶⁰ This is even more important when the trader mainly operates through online interfaces or provides online services, as an online website can be found and made use of much more easily than a traditional brick-and-mortar store.

In this regard, according to the Recitals of the Geo-Blocking Regulation the fact that the trader does not block or limit access to an online interface by consumers

from another Member State should not be considered as 'directing the trader's activities to the consumer's Member State'⁶¹ for the purpose of the determination of the applicable law and jurisdiction.⁶²

Also, if the trader provides information or assistance to the consumer as a result of the trader's compliance with this Regulation, it should not be considered to be directing activities to the Member State of the consumer's place of habitual residence or domicile (where the trader provides information).⁶³ The most important distinction that has to be made is between the active measures taken by a trader in order to attract foreign customers and the effortless contracting that takes place as a result of complying with an obligation imposed by Union law.⁶⁴

In other words, also bearing in mind the specifications contained in the Recitals of the regulation, mere compliance with the provisions of the regulation cannot be equated with an active, voluntary, and most of all intentional pursuit of business in all the Member States the trader no longer geo-discriminates against. An uneasy thought that comes to mind is: are consumers now substantially less protected?

Does the Geo-Blocking Regulation really undermine the protection offered to consumers by Article 17(1)(c) of the

57 Defined in Article 2(13) of the Geo-Blocking Regulation, as a consumer who is a national of, or has his or her place of residence in a Member State, or an undertaking which has its place of establishment in a Member State and receives a service or purchases a good, or seeks to do so, within the Union, for the sole purpose of end use.

58 As defined in Article 17 of the Brussels I Bis Regulation.

59 According to the definition of the consumer interpreted in light of the provisions of the Rome I Regulation.

60 It should also be noted that the fact that a trader complies with this Regulation should not be understood in such a way that the trader directs activities to the consumer's Member State, as it is provided by Article 6(1)(b) of the Rome I Regulation, and Article 17(1)(c) of the Brussels I Bis Regulation.

61 On the same note, Recital (18) brings more clarity, specifying that the prohibition of discrimination does not create an obligation for the trader to engage in transactions with customers. To the same effect, traders are not under the obligation to deliver to a specific Member State.

62 Recital (13) of the Geo-Blocking Regulation.

63 On the same note, see Moravcova, *supra* note 21, at 106. The author analyses the directness criterion, starting from the premise that, in the online sales environment, boundaries that delineate the territories of the Member States become blurred, so the simple act of purchasing online from a foreign website does not automatically mean that the protective Brussels regime is applicable.

64 Lockner, *supra* note 11, at 225.

Brussels I Bis Regulation?⁶⁵ The two main pillars on which we build our reasoning are the purpose for which the regulation was adopted and the logic behind the restrictive manner in which the special jurisdiction rules have to be interpreted in order to become applicable. In this respect, the regulation was adopted inside the Digital Single Market Strategy with an aim that is predominantly economic, namely the development of an integrated market.

However, protection is only granted to the consumer on condition that the trader's activity is directed to that consumer's Member State, in order to preserve some foreseeability for the trader and keep their interests well-balanced. Consequently, the fact that a consumer from a certain Member State (to which the trader does not direct his activity) is no longer being discriminated against, is granted access to the trader's products, does not automatically mean that he is offered the protection provided by Article 17(1)(c), mainly because the trader could not have reasonably expected to be called to trial in that specific Member State. In other words, more options for consumers cannot mean greater uncertainty for the trader.

Before the new rules on prohibiting geo-blocking practices came into force, traders could quite simply use the safest tool that prevented them from being called to trial in another country, namely the 'non-contracting tool'.⁶⁶ However, although they are obliged to grant access to all customers in the EU, regardless of nationality, place of residence or place of establishment, and also allow them to complete the transaction (namely enter into a contract) they can still be called to trial only in those Member States to which they direct their commercial or professional activity, not to

any other Member State in which they have a customer.

2. OUTSIDE THE PROTECTIVE WALLS OF THE REGULATION – INTO THE COMPLICATED WEB OF ONLINE TORTS

While geo-blocking practices in commercial relations have been prohibited by the entry into force of the Geo-Blocking Regulation, there are still situations where such tactics are used as a tool for limiting forum options and narrowing down the palette of applicable national laws, to achieve the end goal of limiting liability for damages as much as possible.

As with the 'non-contracting tool' previously mentioned, which used to be the safest option for traders before the restrictions set out in the Geo-Blocking Regulation entered into force, we are now confronted with the 'non-accessibility tool' used by content providers to limit their *formal* audience and keep the consequences of their actions as foreseeable as possible, with regard to where and how they could be held accountable for the damage incurred.

Just imagine: you are an eligible political candidate in your country, and out of nowhere you find out the most denigrating information about yourself from a social media repost of a blog article. You quickly enter the link to access the blog but, to your surprise, the content is blocked in your country. What the owner of the blog has done is the most straightforward form of geo-blocking. More specifically, the creator has made sure that only people from a certain country can actually access the blog's online interface, while everybody else is blocked from doing so. The first question that comes to mind is: why exactly did they do this, given

⁶⁵ A discussion initiated in P. De Miguel Asensio, *Conflict of Laws and the Internet*, Edward Elgar Publishing (2020), at para. 4.50.

⁶⁶ Lockner, *supra* note 11, at 224.

that the substance of the article still reached you and other people in your country? First and foremost, the issue of forum shopping needs to be addressed. Essentially, the owner of the blog may want to avoid being sued in a country other than the one in which he made the denigrating article accessible, for reasons related to geographical distance, which involves higher costs and because it is time consuming.

Furthermore, he is also making sure that the country which he could eventually get sued in follows a procedure that harms him the least, and has a national law that is more favourable to him. For example, he may choose to make the article accessible only in one of the Member States that is well-known for its lengthy procedures in civil and commercial matters,⁶⁷ or where the damages usually awarded to injured parties are not as generous.

Before moving on, it should be clarified that such a situation is not covered by the provisions of the Geo-blocking Regulation, because the owner of the blog might not be a trader who is obliged to allow access to his online interface.⁶⁸ Consequently, he can freely choose to publish his content wherever he likes. So what are the options of the person suing for damages, in such a case where defamation is made across boundaries, in a space with no physical frontiers – the Internet? And are these options fair or are they somewhat outdated?

A. In Pursuit of Compensation – Going Beyond Borders?

In this new digital era, where almost

everything moves online, we are challenged to adapt. A first important challenge involves tackling the international jurisdiction issue when dealing with claims regarding breaches of personality rights, which fall under Article 7(2). The previously mentioned provision establishes alternative jurisdiction in favour of the national court where the harmful event occurred or may occur.

Under this provision, the CJEU has developed the ‘mosaic approach’, in the emblematic *Shevill* judgment,⁶⁹ where moral damage was caused by the publication of a (written) press article, distributed in several Member States. In this case, the CJEU concluded that, in matters relating to infringements of personality rights, the alleged damage is located in any Member State where the publication was distributed, but the claimant can only claim the damage caused in the Member State before the national courts of which the action is brought.

If he or she intends to sue the infringer for the whole of the damage, this action has to be brought before the courts of the Member State where the defendant has his domicile. The mosaic approach was later developed to also cover breaches of personality rights caused by online publications in the joined cases *eDate Advertising and Others*.⁷⁰

The CJEU stated that ‘the person who considers that his rights have been infringed has the option of bringing an action for liability, in respect of all the damage caused, either before the courts of

67 Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, COM(2022) 234, figure 10, at 12, available at https://commission.europa.eu/system/files/2022-05/eu_justice_scoreboard_2022.pdf.

68 For example, he could be the owner of a personal blog, which has no economic objective, thereby falling outside the scope of the notion of ‘trader’ as defined by the Geo-Blocking Regulation, in Article 2(18).

69 C-68/93, *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v. Presse Alliance SA*, (EU:C:1995:61) (hereinafter referred to as ‘*Shevill*’).

70 Joined cases C-509/09 and C-161/10, *eDate Advertising GmbH v. X and Olivier Martinez, Robert Martinez v. MGN Limited* (EU:C:2011:685) (hereinafter referred to as ‘*eDate*’).

the Member State in which the publisher of that content is established or before the courts of the Member State in which the centre of his interests is based. That person may also, instead of an action for liability in respect of all the damage caused, bring his action before the courts of each Member State in the territory of which content placed online is or has been accessible,⁷¹ thus bringing forth a new connecting factor under Article 7(2) of the Brussels I Bis Regulation, namely the place where the victim has their centre of interests.⁷²

Here, it can be observed that the mosaic effect is applied in matters relating to online tort using the accessibility criterion. This means that, in a tort action, the jurisdiction of the courts of a Member State can be based on the mere accessibility of the website where the violation took place in that Member State, naturally only for the damage caused within the territory of that Member State. In that case, the CJEU emphasized that ‘the placing online of content on a website is to be distinguished from the regional distribution of media such as printed matter in that it is intended, in principle, to ensure the ubiquity of that content.

That content may be consulted instantly by an unlimited number of internet users throughout the world, irrespective of any intention on the part of the person who placed it in regard to its consultation beyond that person’s Member State of establishment and outside of that person’s control.’ For this reason, the entire damage cannot be claimed in every Member State where the website is accessible, because that would, in fact, confer jurisdiction to all national courts, given the ubiquitous nature and scope of the Internet.

These principles were later confirmed by more recent case law of the CJEU, in the *Bolagsupplysningen*⁷³ judgment and recently in the *Gtflix Tv*⁷⁴ judgment, where the Court upheld the mosaic effect principle, in stating that ‘a person who, considering that his or her rights have been infringed by the dissemination of disparaging comments concerning him or her on the internet, seeks not only the rectification of the information and the removal of the content placed online concerning him or her but also compensation for the damage resulting from that placement may claim, before the courts of each Member State in which those comments are or were accessible, compensation for the damage suffered in the Member State of the court seized, even though those courts do not have jurisdiction to rule on the application for rectification and removal’.

This case law built the principle of the mosaic effect, establishing that, in matters relating to torts, if the damage is caused online or by means of written publications in various Member States, the victim can only claim for the damage caused in a certain Member State on the basis of Article 7(2) of the Regulation before the national courts of that Member State. Therefore, the alternative jurisdiction based on the place where the damage took place remains effective, but only for a part of the damage, namely the part suffered within the territory of that Member State.

In order to receive the entire reparation of the damage by means of one, singular action, the victim must bring the action before the courts of the Member State where the defendant has his domicile,

⁷¹ *eDate*, at para. 52.

⁷² This generally corresponds to the victims’ habitual residence or the place where they pursue their professional activity or, as regards legal persons, the place where their commercial reputation is most firmly established (*eDate*, at para. 41).

⁷³ C-194/16, *Bolagsupplysningen OÜ and Ingrid Ilsjan v. Svensk Handel AB* (EU:C:2017:766) (further referred to as ‘*Bolagsupplysningen*’).

⁷⁴ C-251/20, *Gtflix Tv v. DR* (EU:C:2021:745) (further referred to as ‘*Gtflix Tv*’).

following the general rule contained in Article 4, or, in the particular case of online damage, the Member State where the defendant has its centre of interests.

B. Beyond Perception: Accessibility versus Visibility

In cases of online torts like that previously presented, the ‘place where the harmful event occurred or may occur’ is not so easily defined, as that could be any place in which the article was accessible.⁷⁵ A peculiar aspect of the specific case is that the article was virtually visible everywhere, even though formal access to it was limited to certain territories.

Therefore, what further needs to be clarified is whether the reposting of content is considered publishing in the way it is interpreted by the CJEU. Clearly, the content has not been accessed in the country which was geographically blocked, so whether the fact that someone else reposted the information constitutes publishing needs to be established.

If the answer is negative, the special rules of jurisdiction applicable to tort caused through online means are in clear need of reform, which takes into account the double edged phenomenon of geo-blocking practices performed for the sole purpose of preventing forum shopping. Given the ubiquitous nature of the information and content posted online in a website,⁷⁶ determining a physical location in which the damage or its part has taken place presents itself as quite a challenge. Therefore, the Court has adopted the ‘accessibility approach’, according to which the courts of a certain Member State

have jurisdiction to rule on a claim for partial compensation of damages, if the content that gave rise to the damages was accessible in that Member State – thereby conferring potential jurisdiction to all Member States. However, pure accessibility of online content is not a very precise criterion of localization, considering that, as a matter of principle, a piece of information published on the web can be accessed from virtually anywhere.⁷⁷ While this assumption omits the possibility of resorting to geo-blocking techniques to make content inaccessible for certain territories, it does make a fairly good point: whatever you do, online content posted in the internet might never be taken down from the Internet.⁷⁸

Or, to be more precise, social media is forever. That is exactly why geo-blocking is neither good nor evil, being more like a double-edged sword. On the one hand, geo-blocking techniques could be employed to limit access to online content in certain territories, as a restorative measure, a solution which was notably admitted by the CJEU in the *Google LLC* judgment.⁷⁹

The main issue though, especially when in cases such as the hypothetical one we presented at the beginning of this section, is that we are dealing with pieces of information which have been perpetuated through social media platforms and are no longer dealing with the accessibility of the content, but its visibility. On top of that, recourse to geo-blocking techniques is highly frowned upon by the European institutions in the context of the ambitious goal of reaching

⁷⁵ For a broader analysis of the ‘mosaic approach’, see *supra* at 12.

⁷⁶ *Gtflix Tv*, at para. 32.

⁷⁷ On the same note, Marongiu Buonaiuti, ‘Jurisdiction Concerning Actions by a Legal Person for Disparaging Statements on the Internet: The Persistence of the Mosaic Approach’, 7 [1] *European Papers* (2022), at 345–360.

⁷⁸ For a study on this issue, see Woodley and Silvestri, ‘The Internet Is Forever: Student Indiscretions Reveal the Need for Effective Social Media Policies in Academia’, 28 *The American Journal of Distance Education* (2014), at 126–138.

⁷⁹ C-507/17, *Google LLC v. Commission nationale de l’informatique et des libertés (CNIL)* (EU:C:2019:772) (further referred to as ‘Google LLC’).

a fully integrated market. In this respect, encouraging such practices⁸⁰ counters the mission of promoting the distribution of services across a single market that is not fragmented by artificial (virtual) borders.⁸¹

On the other hand, geo-blocking techniques that limit accessibility to content for a certain territory are easy to use for purposes pertaining to forum shopping and law shopping, while still not standing in the way of information reaching a wider audience than the one formally envisaged. To support our reasoning, we are also relying on the valuable considerations of the ECtHR who, recognizing the particularities of exercising the freedom of expression in the Internet,⁸² has sought a balance between this fundamental right and rights belonging to other subjects.

Thus, although it recognizes the important advantages of the Internet for exercising freedom of speech, those harmed by defamatory affirmations or other types of illicit content must be left with the possibility of effectively pursuing compensation for the damage incurred.⁸³ Working on that, even though the Court did not make explicitly refer to the issue of jurisdiction, the effective remedy for breaches of personality rights must also include this component.

Consequently, victims of defamation committed through online means must be able to efficiently pursue compensation, which would not be possible in the absence of a rule of jurisdiction that fairly balances the rights in question.⁸⁴ An additional argument as to why the accessibility approach for defamation

cases in which geo-blocking techniques are used is highly inappropriate is that the claimant no longer has to assert that his or her reputation has been affected in the Member State in which the claim is brought. Following the Court's judgments in *eDate and Gtflitx TV*, the rule has been adapted to serve the situation of online publications, so the only assertion that has to be made by the claimant is that the contested publication was accessible in the Member State the courts of which are being seized.

Therefore, the extent to which his or her reputation has been affected there has become irrelevant for establishing jurisdiction. As a matter of principle, this reconfiguration of the conditions that have to be met for jurisdiction to be granted gives the impression that it was meant as a favour for the claimant. However, we note that visible content is still inaccessible content because of geo-blocking practices, namely content which has been disseminated through other means (such as social media) that are no longer under the owner's control, and which he cannot realistically monitor. Consequently, the claimant has far fewer options to sue, because not all factors were considered when the rules were reinterpreted.

3. DIVING DEEPER – NAVIGATING THE TROUBLED WATERS OF COPYRIGHT

Apart from the particular way in which online defamation cases have to be examined now, in the era of the Internet, the rapid development of the latter has also increased the need to provide adequate protection to copyright holders. Online copyright infringements

⁸⁰ Even outside the commercial field.

⁸¹ Marongiu Buonaiuti, *supra* note 77, at 350.

⁸² In this regard, it has recognized that online communication and their content are definitely more likely than written press to especially infringe upon the right to private life (e.g. ECtHR, *Delfi AS c. Estonia*, Application no. 64569/09, Judgment of 16 June 2015, at para. 133).

⁸³ ECtHR, *Delfi AS c. Estonia*, *supra* note 82, at para. 110.

⁸⁴ This reasoning is also in accordance with the ECtHR's principle of granting tangible and efficient rights, not rights that are theoretical and illusory.

most frequently involve infringers who distribute unauthorized content online, which can therefore become accessible simultaneously in any state; this unauthorized online content distribution is referred to as ‘online piracy’.⁸⁵ The rights of copyright holders meet the rights of others to information and freedom of expression⁸⁶ and it is crucial to find a balance between the interests of the copyright holders and the public interest.⁸⁷

According to the so-called ‘dualist concept of copyrights’, economic rights can be distinguished from moral rights. While the former allow authors to control how their work is being used and receive payment for it,⁸⁸ the latter arise from the relationship of the author with his or her work. In other words, this is the right that allows for claiming authorship of the work.⁸⁹

Therefore, copyright law⁹⁰ has the purpose of authorizing or prohibiting copies of the creation from being made and distributed. Difficulties surface when besides the breach of the protected right, geo-blocking techniques also get in the way. For example, the author of a short film distributed his creation within the territory of his country, but soon discovered that his content had been made available in another country, by another publisher, without his consent.

Furthermore, as in the previous case of the politician, he cannot gain access to the content, therefore only being aware that his creation has been unlawfully perpetuated.

A. The Territorial Limitation of Copyright Protection. Quo Vadis?

The first question of interest is that regarding international jurisdiction in such cases of copyright infringement. This represents another variation of online tort, also falling under the provision of Article 7(2) of the Brussels I Bis Regulation, as interpreted by the CJEU. Unfortunately, the above criterion, which takes into regard the victim’s centre of interest, established by way of jurisprudence by the CJEU, does not apply to copyright infringements.⁹¹

In the branch of copyright, according to the CJEU’s judgment in *Hejduk*,⁹² Article 7(2) grants jurisdiction to both the court of the place where the event which may give rise to liability in tort takes place and the court of the place where that event results in damage.⁹³ While the former courts are granted jurisdiction for all the damage sustained, the courts of the place where the damage takes place have jurisdiction to rule solely on the harm caused in the Member State of the seized court.⁹⁴ In the *Pinckney*⁹⁵ judgment, the Court expressly rejected the so-called ‘directed

⁸⁵ J.P. Quintais and J. Poort, *Global Online Piracy Study*. Institute for Information Law (2018), at 9.

⁸⁶ B. Rebero-van Houtert, *Jurisdiction in cross-border copyright infringement cases: rethinking the approach of the Court of Justice of the European Union*, Doctoral Thesis, Maastricht University (2020), at 31.

⁸⁷ The reason why states protect copyrights concern individual authors as well as the public as copyright protection improves creativity, innovation, cultural heritage, legal certainty and economic growth.

⁸⁸ ‘Classical economic rights’ are the reproduction right, the distribution right, and ‘the right of communication to the public’. On this note, see B. Rebero-van Houtert, *supra* note 86, at 388.

⁸⁹ B. Rosenblatt, *Moral Rights Basics*, (1998) available at <https://cyber.harvard.edu/property/library/moralprimer.html>.

⁹⁰ EU copyright law consists of 13 directives and 2 regulations, harmonizing the essential rights of authors, performers, producers and broadcasters. Directive (EU) 2019/790 on copyright in the Digital Single Market facilitates the use of copyright protected material by providing specific rules to achieve a well-functioning marketplace for copyright available at (<https://digital-strategy.ec.europa.eu/en/policies/copyright-legislation>, <https://digitalstrategy.ec.europa.eu/en/policies/copyright>). The protection of copyrights is one of the significant policy areas within the European Union, especially for the functioning of the Digital Single Market. On that note, see the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market, COM (2016) 592 final.

⁹¹ *Bolagsupplysningen*, at para. 35.

⁹² C-441/13, *Pez Hejduk v. EnergieAgentur.NRW GmbH* (EU:C:2015:28) (hereinafter referred to as ‘*Hejduk*’).

⁹³ In *Hejduk*, the alleged tort involved a breach of copyright by certain photographs being posted in an online website without the photographer’s consent.

⁹⁴ P. De Miguel Asensio, *supra* note 65, at para. 4.50.

⁹⁵ C-170/02, *Peter Pinckney v. KDG Mediatech AG* (EU:C:2013:635), at para. 46 (further referred to as ‘*Pinckney*’).

to' criterion, ruling that, with regard to copyright infringements, jurisdiction to hear an action in tort, delict or quasi-delict is already established in favour of the seized court if the Member State in which that court is situated protects the copyrights relied on by the claimant and that the alleged damage can take place within the jurisdiction of the seized court.

Therefore, the principle of territoriality seems to prevail and the court of the territory of protection (*forum loci protectionis*) is regarded as best placed to determine whether those rights have been breached, as well as the nature of the damage caused.⁹⁶ The difficulties arise because of the territorial nature of breaches of copyright. The scope of a prohibition against a breach of copyright is limited both by the extent of the jurisdiction of the court and by the territorial reach of the rights to which the proceedings are related.⁹⁷

We find it intriguing that the Court has also not addressed the situation with respect to moral rights that arise from the author's relationship with the work. In a recent study,⁹⁸ it was stated that there is still some uncertainty in this regard. According to the view of one author,⁹⁹ the 'place of the event giving rise to the damage' in the meaning of Article 7(2) is, in practice, of limited significance to copyright holders who are trying to enforce their rights against online infringements because the location usually coincides with the general jurisdiction based on Article 4 of the Brussels I Bis Regulation.

Therefore, when it comes to online breaches of copyright, the location of the connecting factor stipulated in the case law regarding Article 7(2) is quite controversial because the interpretation determines not only if the courts of a Member State have jurisdiction, but also the extent of their authority.

However, the CJEU also drew some guidelines in the *Pinckney* judgment¹⁰⁰, ruling that in a copyright infringement dispute, the interpretation, under Article 7(2), of the phrase 'place where the harmful event occurred or may occur' is intended to cover, without a shadow of a doubt, both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the applicant, in the courts of either of those places.¹⁰¹

The territorial principle related to copyright influenced the Court's approach to cross-border copyright jurisdiction in two ways. Firstly, the *locus protectionis* criterion in the first pillar of the *Pinckney* doctrine reflects the territorial principle meaning that copyrights are only protected by the state that granted the right. Secondly, the CJEU limited the jurisdiction of the national court because of the territoriality principle related to copyrights.¹⁰²

Territoriality of copyright is therefore the key element that helped the Court reach the conclusion that the place where the damage allegedly caused via the Internet occurs can only be established in the Member State that protects the copyright relied on by the claimant.

⁹⁶ *Pinckney*, at para. 46 and *Hejduk*, at para. 37.

⁹⁷ P. De Miguel Asensio, *supra* note 65, at para. 4.70.

⁹⁸ European Commission, *Study*, *supra* note 22, at 215.

⁹⁹ P. De Miguel Asensio, *supra* note 65, at para. 4.63.

¹⁰⁰ Mr. Pinckney, a French resident, sued the company Mediatech, established in Austria, before a French court seeking to compensate the damage caused by an alleged copyright infringement. Mr. Pinckney asserted to be the author, composer and performer of the songs that Mediatech reproduced by pressing them on compact discs in Austria. The compact discs were sold via various websites accessible in France. Pinckney concerned an action for damages brought by the author of a musical work which was reproduced on CD and distributed over the Internet without the author's consent.

¹⁰¹ C-360/12, *Coty Germany GmbH v. First Note Perfumes NV* (EU:C:2014:1318), at para. 46.

¹⁰² B. Rebero-van Houtert, *supra* note 86, at 112.

The interesting matter is that the existence of a particularly close connection between the dispute and the forum is not based on the accessibility of the infringing content in the forum but on the alleged breach of a right that is only protected within the territory of the forum, as stated in the *Hejduk*¹⁰³ judgment.

We shall focus on the fact that the relevant content has to be accessible via the Internet in the Member State where the damage occurred in order to safeguard the principle of territoriality, which the CJEU established governs the rights related to copyright. It may seem that the fragmentation of copyright at national level in the Member States can constitute a meaningful obstacle standing in the way of effective cross-border enforcement in the EU.

Given that the infringing content, which is subject to the territorially limited injunction, is generally accessible in other states, the main issue that arises is that the owner of the publication or of the website can resort to geo-blocking techniques for some of the Member States. The difficulties arise from the broad interpretation given by the CJEU to the notion of 'the place where the damage occurs' as the connecting factor in claims regarding online activities, in particular its position on the accessibility of online content as the decisive element for determining jurisdiction.¹⁰⁴

It could be said that all is safe with the relatively new Geo-Blocking Regulation which aims to end unjustified practices of geo-discrimination. However, looking more closely, it can be noticed that the regulation does not affect the rules that are applicable in the area of copyright and does not apply to copyright protected works.¹⁰⁵ The reason behind this exclusion of copyright protected works from the scope of the Geo-blocking Regulation¹⁰⁶ is closely related to the territorially limited protection of copyrights.

The legal literature expresses concern about geo-blocking techniques that can be used as a tool for reducing the risk of being sued in multiple Member States for cross-border copyright infringements. It will be interesting in the future to see if the Geo-blocking Regulation is extended to traders who provide electronically supplied services that contain copyright protected works.¹⁰⁷

We salute the engaging perspective in the *Glawischnig-Piesczek* judgment¹⁰⁸ that permitted a rather worldwide approach regarding the removal of the content from online platforms. The Court had to adjudicate on an application for an extraterritorial injunction against Facebook launched by an Austrian politician who had been insulted via Facebook. The Court permitted an injunction for a worldwide removal of the content and did not follow the conclusions proposed by the Advocate General Szpunar¹⁰⁹ who had advocated for a much more restrictive solution,

103 *Hejduk*, at para. 34: 'in circumstances such as those at issue in the main proceedings, it must thus be held that the occurrence of damage and/or the likelihood of its occurrence arise from the accessibility in the Member State of the referring court, via the website (...) of the photographs to which the rights relied on (...) pertain.'

104 Hess, 'Reforming the Brussels I Bis Regulation: Perspectives and Prospects', 4 *Max Planck Institute Luxembourg for Procedural Law Research Paper Series* (2021), at 10.

105 Mazziotti, 'Is Geo-Blocking a Real Cause for Concern in Europe?', 43 *EUI Department of Law Research Paper* (2015), at 1–15.

106 B. Rebero-van Houtert, *supra* note 86, at 172.

107 Brigit van Houtert, 'Geo-blocking as a tool to prevent being sued in EU Member States for cross-border copyright infringements?' 31 May 2022, available at <https://www.maastrichtuniversity.nl/blog/2022/05/geo-blocking-tool-preventbeing-sued-eu-member-states-cross-border-copyright>.

108 C-18/18, *Eva Glawischnig-Piesczek v. Facebook Ireland Limited* (EU:C:2019:821) (hereinafter referred to as 'Glawischnig-Piesczek').

109 Opinion of AG Szpunar in C-507/17, 10 January 2019, *Google LLC, successor to Google Inc. v Commission nationale de l'informatique et des libertés* (EU:C:2019:15).

favouring a territorial limitation of the injunction sustained by geo-blocking. In her dissertation, Rebero-van Houtert advocates for a 'mixed approach' in cross-border copyright infringement disputes.¹¹⁰ To determine if the activities have been directed to the residents of the forum state, reference can be made to the non-exhaustive list of criteria presented in the *Pammer/Alpenhof* ruling. The criteria stated there should be applied by the national courts with a certain degree of flexibility, especially taking into account the nature of the activity under consideration.¹¹¹

While Jääskinen¹¹² has favoured the 'directed activities' approach under Article 7(2) of the Brussels I Bis Regulation in such disputes, Rebero-van Houtert believes that a combination of the 'directed activities' criterion and the mosaic approach would provide more predictability to potential copyright infringers regarding the Member States in which they can be sued.

In the case of alleged online copyright breaches, when several Member State courts could be competent, the current approach to jurisdiction is likely to cause unpredictability, increase litigation costs and risk irreconcilable decisions of the courts.¹¹³

4. FINAL REFLECTIONS – PROPOSED LEGAL REFORMS

One thing is crystal clear: geo-blocking is a highly complex phenomenon, with an impressive number of aspects that rival a respectable diamond. What is even more indisputable is that it mainly has a negative impact on the world of e-commerce and even on other types of legal relationships that arise in the internet.

The cross-border online legal relationships pass over a fractured jigsaw puzzle of national jurisdictions. In the era of digitization, conflicts between jurisdictions in cross-border litigations are frequent and challenging. Their complexity skyrockets by adding geo-blocking to this entangled milieu. EU legislation that tackles litigation arising from online contractual and tort relations gives the impression that it is not sufficiently adapted to these new realities.

The problems identified so far stretch to the field of consumer law, to the area of intellectual property rights and even reach the online tort dimension. We have noticed that, in some of these areas, the instruments for determining international jurisdiction are behind the times (online copyright and online torts) or insufficiently drafted (in consumer law). The problems are diverse, the fields in which they operate vary. Therefore, we cannot refer to a one-size-fits-all solution to change the paradigm, but to tailored solutions.

As for consumer litigation, it is debatable whether the Brussels I Bis Regulation is adapted to assist the courts in solving procedural issues arising from certain e-commerce relationships. The Geo-blocking Regulation deals with different issues and clarifies that mere compliance with the obligations imposed by the Regulation does not mean that the trader is directing his/her activities to a certain Member State.

On one hand, the directness criterion does not seem to offer many advantages to the consumer in this regard. On the other, global liability is unreasonable and unjust, as most traders do not have the resources necessary to ensure the legality of their actions in all countries with

¹¹⁰ B. Rebero-van Houtert, *supra* note 86, at 247.

¹¹¹ Opinion of AG Jääskinen in C-170/12, 13 June 2013, *Peter Pinckney v. KDG Mediatech* (EU:C:2013:400), at para. 66.

¹¹² *Ibid.*

¹¹³ B. Rebero-van Houtert, *supra* note 86, at 38.

Internet connections. Therefore, although a solution that favours the consumer in whole is not sought-after, we opt for an update of the directness criterion.

Hopefully, the CJEU should add things to the non-exhaustive elements already listed in *Pammer/Alpenhof* like the provision of customer support in the languages commonly spoken in particular Member States or organizing promotional events or marketing campaigns specifically targeting consumers in particular Member States. That, and presumably other elements, should contribute to the predictability and the certainty of the rule.

Scholars have different proposals for the issues that arise in relation to the other grounds of jurisdiction that have been addressed in this paper. When it comes to the so-called ‘mosaic principle’, Hess¹¹⁴ recommends that a separate and new paragraph addressing the protection of privacy should be introduced alongside Article 7(2) of the Brussels I Bis Regulation. The new provision ‘should take up the CJEU’s approach of the main interest for infringements committed through the Internet and reduce the mosaic principle to infringements by printed publications’ and it ‘should clarify the jurisdiction and the (extra)territorial reach of injunctions by referring to geo-blocking’.

Lindroos-Hovinheimo¹¹⁵ argued that, in order to improve predictability, the mosaic approach should be abandoned in favour of the victim’s centre-of-interest test, which is more appropriate for defining special jurisdiction. Furthermore, it is important to clarify the Brussels I Bis Regulation on the matter of personality rights, given

their definition and the ways in which they are protected at Member State level. On the contrary, Asensio¹¹⁶ argued that the mosaic approach is not a problem *per se* but the difficulties arise from the broad understanding of the place where the damage occurs as the connecting factor in claims regarding online activities, and, in particular, the Court’s position on the accessibility of online content as the decisive element for determining jurisdiction.

Furthermore, with regard to cross-border copyright infringement cases, Rebero-van Houter claimed¹¹⁷ that the assessment framework to rethink the CJEU’s interpretation of Article 7(2) Brussels I Bis Regulation should include four principles: the principle of predictability in order to meet the reasonable expectations of the copyright holder and the alleged infringer as to which court(s) may obtain jurisdiction; the principle of a close connection between the dispute and the court; the approach to jurisdiction has to facilitate the sound administration of justice; and the principle of balancing the interests involved.

The last of these principles involves the procedural balance between the interests of the litigants.¹¹⁸ In addition, this principle comprises a balance between the broader interests of copyright holders, on the one hand, and traders and users of information and knowledge, on the other. Our proposal for handling both issues regarding the establishment of international jurisdiction in online tort cases considers a mixed approach, similar to that envisaged by Reberovan Houter.

114 Ibid. See also European Commission, *Study*, *supra* note 22, at 273.

115 Lindroos-Hovinheimo, ‘Jurisdiction and personality rights – in which Member State should harmful online content be assessed?’, 29 [2] *Maastricht Journal of European and Comparative Law* (2022), at 214.

116 P. De Miguel Asensio, ‘Protection of Reputation, Good Name and Personality Rights in Cross-Border Digital Media’, 71 [11] *GRUR International (Journal of European and International IP Law)* (2022), at 1019–1033.

117 B. Rebero-van Houter, *supra* note 86, at 178.

118 The copyright holder and the infringer.

As already mentioned, the classical ‘mosaic approach’ is not the most suitable for the online world,¹¹⁹ as it endangers the sound administration of justice and the predictability of the rules of jurisdiction, as well as the consistency and appeasement of decisions made in multiple jurisdictions, which relate to different damages arising from the same harmful event.

In addition, in accordance with Hess’ solution, a special rule of jurisdiction should be incorporated into the Brussels I Bis Regulation, thus leading to a reform of the alternative jurisdiction criteria under Article 7(2). This rule should, as a matter of principle, establish jurisdiction for one court that can award all the damages, which differs from the general rule, while also complying with the principle of the existence of a close connection between the forum and the proceedings.¹²⁰

This approach would also be in accordance with the concept of objective

predictability supported by AG Bobek in his Opinion in the *Mittelbayerischer Verlag* judgment, which acts more like a ‘centre of gravity’ and is based on two coexisting pillars: the location of the claimant’s centre of interests and the way in which harmful information was expressed, namely whether it could have been reasonably predicted that it would be objectively relevant in that Member State.

Above all, what national judges must bear in mind is the fact that their rulings regarding international jurisdiction must suit the ongoing development of the online world and its ramifications. To this end, they should properly balance their reasoning in accordance with the CJEU’s approach. When doubts in interpretation arise, they should not hesitate to refer to the CJEU in the preliminary ruling mechanism, thereby permitting the Court to embrace new perspectives. The Court might then consider that the time has come to change the narrative.

¹¹⁹ At the time that this criteria was born (namely 1995, being later developed in 2010), the Internet was on a completely different level than it is today. In contrast, the Internet of today has a much wider coverage, it offers greater access, and the probability of damages occurring in multiple states is much higher.

¹²⁰ In order to ensure a reasonable degree of foreseeability of the potential forum in terms of the place where the damage arising from an online tort can occur. On the same note, see Opinion of AG Bobek, in C-800/19, 23 February 2021, *Mittelbayerischer Verlag KG v. SM* (EU:C:2021:124).

SEMI-FINAL D

JUDICIAL ETHICS AND PROFESSIONAL CONDUCT

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PARTICIPATING TEAMS:

CZECHIA, FRANCE, GERMANY, GREECE, HUNGARY, ITALY,
MOLDOVA, ROMANIA, THE NETHERLANDS II, SERBIA

1ST PLACE: NETHERLANDS

2ND PLACE: FRANCE

3RD PLACE: GREECE

**Selected papers for the THEMIS Annual Journal:
FRANCE, ROMANIA, THE NETHERLANDS**



4–7 JULY 2023 – KRAKOW, POLAND – NATIONAL SCHOOL OF JUDICIARY AND PUBLIC PROSECUTION (KSSIP)

JURY MEMBERS

CHRISTA CHRISTENSEN (UK)

Employment Judge, Mental Health Tribunal
Judge in the United Kingdom

What a privilege it was to be part of the jury in the Judicial Ethics and Professional Conduct Semi-Finals D in Kraków. Having been part of the jury in the semi-finals in 2022, I had high expectations from the ten teams that took part in 2023. They did not disappoint me. In fact, they exceeded my expectations! Thank you.

All ten teams demonstrated great vibrancy, curiosity, professionalism, a great work ethic and open-mindedness to the challenge from and discussion with the jury and fellow participants on their papers.

Thank you to each member of every team for your very sincere involvement. The themes spanned a broad spectrum of highly relevant topics and included the challenges of the pressure of workload and how to avoid becoming 'robotic' and disconnected from qualitative decision-making; how to stay in touch with the

human realities of those that appear in our court rooms; how well judges are equipped to exercise judicial discretion when faced with adjudication on issues that include multi-culturalism, environmental issues and political complexities and pressures; judges forming associations and trade unions and striking to protect their interests in the face of the lack of adequate institutional protection; how the moral character and integrity of judges can be measured; whether judges are protected when they speak out – what consequences might ensue; what measures exist to protect and strengthen judiciaries from corruption and vulnerability.

I have great confidence that all of these issues will remain in the minds of all of the competition participants as they progress in their judicial and prosecutorial careers.

Good luck to every one of you.

MANUEL MARTINEZ DE AGUIRRE (ES)

Prosecutor at the Supreme Court
of Spain, Professor of Legal Ethics

I was asked urgently if I could be member of the jury panel for the 'Judicial Ethics & Professional Conduct' Semi-Finals D, in the European Judicial Training Network Competition some days before the date.

A fantastic opportunity – I thought – to get a feel for the appraisal that new judges-to-be have with regard to the administration of justice and the problems of this administration in their countries.

So, I accepted with the spirit of a vampire, with the intention of absorbing everything I can reach. And, as I said on the last day, at the end I was full.

I perceived astonishing similarities in the most urgent problems in the administration of justice, independently of the country, the culture, the politic situations... And I learned a lot of new things; a lot of new perspectives for problems and circumstances in order to assess the realities I have to deal with; some different approaches to

old problems or some different way of thinking or reasoning in problematic matters. And all in relation with some shocking cases that have taken place or behaviours that judges and prosecutors must face.

Now (some days after the end of the competition) I am digesting all these concepts without being able to avoid a smile when I remember the enthusiastic people who expounded and defended the ideas and proposals.

TATIANA VERESS (UNODC)

Crime Prevention and Criminal Justice Officer at the United Nations Office on Drugs and Crime

I had the great honour of being one of the jurors at the 2023 THEMIS Semi-Final D on Judicial Ethics and Professional Conduct. I was impressed by the exceptionally skilled teams that participated in the competition.

It was very clear that countless hours of hard work and preparation went into their written papers and oral presentations. All teams demonstrated remarkable knowledge and interest in the challenges experienced by their judiciary in the ever-evolving world, and I was amazed by how diverse and innovative the chosen topics were. At the same time, it was inspiring to see how inter-connected many of the topics are.

Throughout the competition, I was delighted to witness a great level of positive energy and enthusiasm about learning from the experiences of other jurisdictions. In the context of my work

on the UNODC Global Judicial Integrity Network, I have seen first hand what great benefits networking can bring – the sense of belonging to a global community of like-minded individuals, valuable opportunities to be involved in discussions and jointly look for solutions, and the much-needed peer support among judges. I was very pleased to see the same benefits being reaped here.

I have high hopes for these outstanding young judges to make a significant impact on the functioning of the judiciary in the future. I would also like to acknowledge the important role of the teams' tutors in guiding, supporting and cheering for the teams. It was a tremendous pleasure to get to know and work with my fellow jury members who enriched the competition with their extensive expertise. Lastly, I would like to congratulate the EJTN and the organizers and thank them for their continued excellent collaboration.

Team Members:

Bénédicte Jeanson
Lucien Lewertowski-Blanche
Emilie Ratz

**Tutor: Céline Mugerli****Team France**

JUDICIAL WORKLOAD: UNREASONABLE TIMES? WHEN CALLING WORKING CONDITIONS INTO QUESTION CONFLICTS WITH OBLIGATIONS OF PROFESSIONAL CONDUCT

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This paper explores the links between judicial workload and the quality of justice, and how this factor is still an underestimated element in evaluating the efficiency of judicial systems. Yet this question of judicial workload and related issues appear to be a widespread concern throughout Europe where judges have resorted to individual and collective actions to respond to detrimental working conditions. Starting from a questionnaire sent to various European associations and unions of magistrates, and using available research and press coverage, this paper describes the various modes of actions available to judges when questioning their working conditions and puts into perspective the ethical dilemmas posed by such actions. Indeed, raising awareness on this reality can conflict with professional conduct obligations or important principles, such as the duty of reserve, professional conscience, independence and the separation of powers.

This situation inevitably questions the status of judges, their protection by the European social legislation and whether they can, or should be, considered regular workers when it comes to assessing their working conditions. The European courts and, in particular, the Court of Justice of the European Union can play an increasingly important role in the coming years and help define how judicial workload can be taken into account when determining whether a judicial system adheres to European laws and values.

KEYWORDS:

JUDICIAL WORKLOAD | QUALITY OF JUSTICE | EFFICIENCY OF JUSTICE | JUDGES AS WORKERS | ETHICAL SUFFERING | ETHICAL DILEMMAS | JUDICIAL PROFESSIONAL CONDUCT | EUROPEAN SOCIAL LEGISLATION



Keppler, J. F. (1885) *Our overworked Supreme Court*, 1885. N.Y.: Published by Keppler & Schwarzmann, December 9. Retrieved from the Library of Congress at <https://www.loc.gov/item/2011661363/>

PREAMBLE: HOW EXPOSING JUDICIAL WORKLOAD IN EUROPE CAN FOSTER AN EFFECTIVE RIGHT TO A FAIR TRIAL

A. Judicial Workload: the Adjustment Variable to Over-constrained Modern Judiciaries

The strict enforcement of reasonable timeframes for proceedings, the multiplication of intangible legal deadlines – particularly in criminal proceedings – the increasing tendency to refer matters to courts, combined with the restriction of budgets allocated to the functioning of justice have mechanically resulted in extra constraints over judicial systems now in need of more time and more judicial action to function effectively.

This distortion of the ‘legal market’ is

illustrated by an evolution in the number of judicial professionals. In France, for instance, while the number of magistrates¹ has remained stable over the past few decades, the number of defence attorneys has exploded, increasing the ratio between these two professions from 1:2.8 in 1986 to 1:8 in 2020.²

In theory, when considering a set number of cases in a given justice system, various adjustments may be made to that system to keep it afloat:

- The quality of legal decisions may be affected by reducing the length of judicial reasoning or applying pre-established scales and thus reducing their level of personalization;
- Legal deadlines for applicants may be extended, e.g., by postponing court sessions;

¹ While the term ‘magistrate’ can encompass non-professional judges in some common law countries, such as the United Kingdom, the term is used here as it is often used in civil law jurisdictions to encompass judges and public prosecutors.

² French General Inspectorate of Justice, *Final Report on the Support Mission to the Heads of Court and the Directorate of Judicial Services Aimed at Diagnosis Stock Status* (2021), at 21.

- For a set number of judicial professionals, in particular judges and prosecutors, working hours may be extended in order to increase the number of decisions per judge.

This long-ignored potential adjustment to working hours suddenly came to the fore in the French media following the suicide of a young overworked judge in 2021.³ Furthermore, the sudden shift in public awareness seems to go beyond France's borders and affects other European countries as well. Indeed, it seems to be an even more global issue in other liberal democracies around the world, with examples of similar publicity in Israel,⁴ Australia,⁵ the United States of America⁶ and Hong-Kong.⁷

A report by the Global Judicial Integrity Network of the United Nations Office on Drugs and Crime (UNODC) provides insightful material in a global survey of 758 judges and other members of the judiciary from 102 countries across the globe. One of the key findings is that 92% of respondents indicate that judicial work is a source of stress and that the most common contributing factor appears to be excessive workload.⁸

B. Judicial Workload: a Crucial, yet Forgotten Factor for the Quality of Justice

The quality of justice most certainly lies in the time taken to administer it. It concerns

the time each judge takes to prepare each case with a diligent analysis of the facts and the underlying applicable laws. It is also linked to the overall workload of each judge and the ability for them to remain alert and perform their duties with rigour.

In the UNODC's report, the vast majority of the survey's participants believe the lack of judicial well-being (which might be caused, among others and as evidenced by the report, by heavy workloads), might limit the efficiency of judicial and court administration (80% of the participants) or the quality of decisions and judgments (68%). A certain percentage even believes the lack of judicial well-being could jeopardize the integrity of judges and the judiciary (35%) and procedural fairness (31%). 'Procedural errors and errors in judgment' or 'reduced ability to stay open and be receptive to submissions' are among the most commonly cited consequences of the limited well-being of judges.

Some of the other consequences cited are: 'insufficient analysis of evidence', 'lack of empathy', 'tendency to be biased or resort to stereotyping', 'impatience', 'irritability', and even 'anger'.⁹ The acknowledgment of this issue at the United Nations level dates back to the 2007 Commentary on the Bangalore Principles of Judicial Conduct. Under Value 6 on 'competence and diligence', paragraph 194 of the Commentary explicitly refers to the impact

3 *Le Monde*, *Appeal of 3,000 magistrates and a hundred clerks: 'We no longer want a justice system that does not listen and that times everything'* (2021), available at www.lemonde.fr/idees/article/2021/11/23/l-appel-de-3-000-magistrats-et-d-une-centaine-de-greffiers-nous-ne-voulons-plus-d-une-justice-qui-n-ecoute-pas-et-qui-chronometre-tout_6103309_3232.html.

4 Tomer Zarchin, *Judge Resigns After Six Months 'Due to Workload'* (2010), Haaretz, available at www.haaretz.com/2010-06-30/ty-article/judge-resigns-after-six-months-due-to-workload/0000017f-e67c-d62c-a1ff-fe792510000.

5 Michael Pelly, *Judges' union pleads for end to 'unreasonable' workloads* (2018), The Australian Financial Review, available at www.afr.com/companies/professional-services/judges-union-pleads-for-end-to-unreasonable-workloads-20181010-h16h6y. The national judges' organization expresses its concern about 'unreasonable' workloads to governments and fears some judges might be driven to suicide because of work pressure.

6 Garen Staglin, *Why judges, lawyers and court employees need more mental health support* (2021), Forbes, available at www.forbes.com/sites/onemind/2021/03/23/why-judges-lawyers-and-court-employees-need-more-mental-health-support/?sh=4f036df6430b.

7 Dennis Kwok, *Overworked justice system at risk* (2013), South China Morning Post, available at www.scmp.com/comment/insight-opinion/article/1308849/overworked-justice-system-risk.

8 United Nations Office on Drugs and Crime (UNODC), *Exploring Linkages between Judicial Well-Being and Judicial Integrity Report on the Global Survey Conducted by the Global Judicial Integrity Network*, March 2022, at 4–7.

9 Ibid. at 29–30.

of judicial wellbeing on performance and emphasizes that ‘a judge should have sufficient time to permit the maintenance of physical and mental well-being’.¹⁰

The European Charter on the Statute for Judges¹¹ adopted by the Council of Europe in 1998 explicitly references the ‘availability’ of judges as one of their core values. The notion refers both to the time required to judge each case properly and to the attention and alertness that are obviously required overall for such important duties, as it is the judge’s decision that safeguards individual rights.

However, as emphasized in the preamble, ‘the value of this Charter is not a result of a formal status, which, in fact, it does not have, but of the relevance and strength that its authors intended to give to its contents.’ As it is the case for the Commentary on the Bangalore Principles, no judicial effect is attached to the Charter and the subsequent difficulty for litigants to cite it in domestic case law limits its impact. While the quality of justice is one key objective or even a *raison d’être* of the European courts by playing a unifying role for Member States through increasing demanding requirements, judicial workload seems to be one of their blind spots, as we will develop *infra*.

The European courts – vigilant about how justice is administered and the conditions in which proceedings take place – primarily rule on the matter of reasonable length of proceedings from a litigant’s or defendant’s point of view i.e. as the users of a public service, but not from the judicial worker’s perspective.

C. How do Judges Respond to their Workloads and Manage Conflicting Professional Conduct Obligations?

Our research has led us to believe that judicial workload is still more of a social issue than a legal matter and therefore not a parameter that is subject to analysis in European case law on the right to a fair trial and access to justice.

Of course, there are domestic social laws which apply to judicial professionals in each state, but these are not necessarily strictly enforced. For this reason, the analysis of underlying legal texts alone would not be holistic enough to study this topic. The reality of working conditions for judicial workers remains confined to the inner workings of individual justice systems and the everyday running of courts and tribunals.

Especially as judges are required to apply restraint and discretion, the issue is only rarely taken to more public fora such as the national press, and even more rarely directed at foreign audiences. This situation makes the creation of a European community of judicial workers difficult, whereas there is already a vibrant European community of legal professionals.

In addition, it should be emphasized that, because the working conditions of judges are not easily perceived or meant to be perceived by users of the justice system – i.e. those with the right to file an application with a court on the basis of a breach of European laws – these working conditions do not come under the scrutiny of European case law. This is, in a way, the blind spot in the notion of a fair trial. This analysis is the starting point for our article: considering that the quality of justice is inextricably linked to the

¹⁰ United Nations Office on Drugs and Crime (UNODC), *Commentary on the Bangalore Principles of Judicial Conduct*, September (2007), §194, at 104.

¹¹ Council of Europe, European Charter on the Statute for Judges, 8–10 July 1998, DAJ/DOC (98) 23, at para 1.5.

working conditions of those administering it, documenting excessive workload should make this reality available for consideration and evaluation by European courts based on European standards.

However, the reaction of judges to their unreasonable working conditions is complex, as it forces them to face ethical dilemmas about the suitability or appropriateness of such a response. They find themselves stuck between a rock and a hard place and forced to set priorities for their various professional conduct obligations, such as diligence, duty of judicial discretion and restraint, or even the separation of powers, by not interfering with policymakers.

Therefore, we have chosen to study the individual and collective response to the issue of excessive workload and the resulting ethical dilemmas of the chosen responses of judicial professionals as *workers*, as opposed to the institutional responses put forward through public policies (such as increases in resources and staff or the diversion of cases from judicial circuits to alternative dispute resolution).

D. Methodology

In this paper, we have considered the topic of judicial workload not to be strictly limited to legal considerations and believe it necessary to consider sociological and political approaches to fully cover the reality of judicial professionals. Starting from the French situation, where the issue has recently become subject to much public debate, we have attempted

to understand whether this is also a broader European reality. We gathered material from academic research and press coverage, and interviewed French and European judges and prosecutors, as well as unions and associations of judges, as they seem well placed to discuss working conditions. To this effect, we sent a questionnaire¹² to unions in 14 Member States.¹³

We received 14 responses from unions and magistrates in eight countries, either through written exchanges or through interviews.¹⁴ This article compiles and puts into perspective the responses formulated by our colleagues across European countries. While we cannot pretend to describe judicial working conditions in each European country exhaustively, and though we are well aware that interviewing predominantly union representatives could emphasize the most pathological features of domestic judiciaries, we trust that our analysis will help shed an interesting light on a widespread, yet rarely voiced issue.

1. JUDICIAL WORKLOAD: THE BLIND SPOT

A. The Judge's Workload: If You Don't Measure It, It Doesn't Exist

At national level, few statistics exist on the judge's workload. The European Commission for the Efficiency of Justice (CEPEJ)¹⁵ compiles the statistics that are available and to which reference is most frequently made. This body regularly evaluates judicial systems of the Member States of the Council of Europe.¹⁶

12 The following questions were asked: '1) In your country of origin, is there a problem of excessive workload for magistrates (judges and/or prosecutors)? If applicable, has this observation been the subject of public debate, has it been made public, or is it confined within the courts? 2) Have you identified modes of action and responses that magistrates have had in the face of the work overload which puts pressure on their professional obligations?'

13 The questionnaire was sent to the European members of MEDEL (European Magistrates for Democracy and Freedom) and EAM (European Association of Magistrates).

14 Austria, Denmark, France, Germany, Hungary, Italy, Romania and Spain.

15 This body was established by the Committee of Ministers of the Council of Europe more than 20 years ago.

16 CEPEJ, *European judicial systems - CEPEJ Evaluation report - 2022 Evaluation cycle* (2022), available at www.coe.int/en/web/cepej/cepej-work/evaluation-of-judicial-systems.

These assessments were put in place and mostly driven by the analysis that, in the 2000s, more than 50% of the judgments and decisions of the European Court of Human Rights were linked to breaches of Article 6 and the length of proceedings.¹⁷ This analysis, coupled with the introduction of New Public Management methods in public services, led to a managerial assessment of justice systems. Metrics such as Disposition Time¹⁸ and Clearance Rate¹⁹ were introduced to evaluate the efficiency of justice systems and their capacity to absorb incoming claims.

Furthering this approach, in 2007, the CEPEJ set up the Study and Analysis of Judicial Time Use Research Network (SATURN) Centre for judicial time management, the objective of which is to collect sufficiently detailed information to enable Member States to implement policies intended to prevent breaches of the right to a fair trial within a reasonable time. Next to Key Performance Indicators (KPIs) and measuring tools,²⁰ the SATURN Centre worked on a bottom-up approach to best practices by documenting various procedural rules already in existence in individual European countries as a first map of concrete measures for dealing with the length of judicial proceedings.²¹

A working group on the quality of justice was also set up in parallel with SATURN

and focuses on the quality of the public service provided by the judiciary.²² Overall, the work of these two groups focuses on the perspective of the users of justice systems, how easily they get access to justice or how quickly they can have their claims heard. They look at justice systems as public services and how best to manage them.²³

Yet, no metrics exist on time or workload from the justice *professional's* perspective. The only point of comparison in this area is the number of judges per 100,000 inhabitants in each Member State. This number can vary greatly between European states (from 3.3 in Ireland to 41.5 in Slovenia) but has an established median of 17.6 professional judges per 100,000 inhabitants.²⁴

This single point of data is difficult to use to provide a clear picture of workload and is not sufficient to compare workload accurately in each justice system due to the great historical differences in judicial organizations.^{25,26} This lack of metrics or data has been acknowledged and the SATURN Centre is increasingly working on developing tools and metrics to assess judicial needs. Their latest study focuses on case-weighting models in judicial systems²⁷ where the 'case-weights' metrics used and developed in some European countries were highlighted and explored.

17 B. Capellina, *Between Human Rights and modernisation: quantifying the quality of justice* (2017), available at www.cairn.info/revue-francaise-de-socio-economie-2017-2-page-27.htm#no5.

18 Disposition Time (DT) is the calculated time needed for a pending case to be resolved, considering the current pace of work.

19 The Clearance Rate (CR) is the ratio obtained by dividing the number of resolved cases by the number of incoming cases in a given period, expressed as a percentage. It demonstrates how the court or the judicial system is coping with the inflow of cases and allows a comparison to be made between systems regardless of their differences and individual characteristics.

20 CEPEJ, *Time management checklist (checklist of indicators for the analysis of length of proceedings in the justice system)* (2005), available at rm.coe.int/european-commission-for-the-efficiency-of-justice-cepej-time-management/168074767d.

21 CEPEJ, *Compendium of 'best practices' on time management of judicial proceedings* (2006), available at rm.coe.int/terms-of-reference-qual-2022-2023/1680a4e024.

22 CEPEJ, *Terms of reference of the Working Group on quality of justice* (2022), available at rm.coe.int/terms-of-reference-qual-2022-2023/1680a4e024.

23 B. Capellina, *supra* note 17, at 5.

24 CEPEJ, *supra* note 16, at 4.

25 Franck Johannes, 'Cepej: the rank of French justice in Europe is improving (a little)' (2014), *Le Monde*, available at www.lemonde.fr/justice/article/2014/10/09/cepej-la-place-de-la-justice-francaise-en-europe-s-ameliore-un-peu_5995559_1653604.html.

26 CEPEJ, *supra* note 16, at 4.

27 CEPEJ, *Case weighting in judicial systems* (2020), available at www.lemonde.fr/justice/article/2014/10/09/cepej-la-place-de-la-justice-francaise-en-europe-s-ameliore-un-peu_5995559_1653604.html.

These metrics are designed to assess the complexity of cases and help with identifying judicial needs. They use concepts such as ‘judge-day’ or ‘judge-year’.²⁸ Case weight metrics may be calculated automatically using different models and have been developed in Austria, Denmark, Estonia, Germany, Romania and the Netherlands, but they still require extra data from judges in order to be well calibrated.

Judges may still be reluctant to participate and input data for fear of it perhaps being used to assess their individual performances and not the overall judicial system. At a plenary CEPEJ reunion in 2009, the President of the Odintsovo Tribunal in Russia emphasized the panoptical control that allows the production of automatic reports on the situation of each judge in a few seconds.²⁹

In addition, when conducting our interviews and research, we found that this avalanche of metrics on time management has led judges to feel overwhelmed when dealing with their workload, especially when the calculation of KPIs requires manual input from judges, by adding another non-judicial task to their workload.³⁰

However, if data is anonymized and sufficiently regularly updated,³¹ these tools can help bring about reform and not put further pressure on judges to monitor and time their every action. Finally, as we will see *infra*, they could become powerful tools to help judges document their

workload and request further resources based on objective and data-driven indicators, or provide evidence if their responsibility is called into question when delays are deemed unreasonable.³²

B. Judicial Workload: A Generational and Sociological Change Throwing a Spotlight on the Issue

1. Big Shift in the World of Judges

The Covid-19 crisis triggered the materialization of a long-term profound and generational change to the approach to work, with particular emphasis on the notion of work-life balance³³ and the meaning attached to our professional lives. When conducting our research and interviews, it became clear that this underlying current is affecting all parts of society and the judiciary is not immune to it. This is illustrated in the UNODC’s report³⁴ where 69% of survey participants believe that talking about mental health or stress is still a taboo when it comes to judges and members of the judiciary.

Over 97% of survey participants think that more attention should be paid to the importance of promoting judicial well-being. In France, historically and culturally, the profession of judge and prosecutor was associated with long hours and practiced by men. In practice, this means that it has become common for judges to use their holidays to write decisions or for courts to allow criminal hearings to last more than 10 hours per session and finish close to or after midnight.

28 These values are an integral part in models that weigh cases in units of time and allow for a calculation of the required number of judge-positions to adequately and efficiently handle the current weighted caseload.

29 Alt, ‘Judges’ organisations in Europe: a political history’, *Les Cahiers de la Justice* 2016/3 465, at 468.

30 Yet, the CEPEJ study highlights the importance for judges to actively engage and participate in the research on case-weight models, as their input is indispensable to build a solid and accurate database for the calibration of models.

31 According to several judges’ organisations in Germany, reference data underlying the case-weighting model is outdated: Speaker’s Council of the *Neue Richtervereinigung* of Schleswig-Holstein, ‘Realistically documenting workload: no old Pebbly-figures for modern requirements’, *NRV-Wahlmagazin Schleswig-Holstein*, at 22.

32 B.Cappellina, *When management takes over Justice: from the European factory to the courts* (2018), at 293.

33 Pendell and Vander Helm, *Generation Disconnected: Data on Gen Z in the Workplace*, 11 November 2022, available at www.gallup.com/workplace/404693/generation-disconnected-data-gen-workplace.aspx.

34 UNODC, *supra* note 8, at 2.

This rather sacrificial approach to fulfilling judicial duties in the name of working towards an ideal of justice and for an essential public service has led judges and prosecutors to accept degraded working conditions for years. According to some unions, there might, in a way, be a form of shared responsibility, from the older generation to the younger one, to have accepted such working conditions and increasing workload to the point of potentially affecting the quality of justice. By accepting this traditional reality of the trade, ‘judges have become their own worst enemies’, one union representative said.

This has prevented them from raising sufficient awareness among policymakers and from working with the latter to introduce structural reforms and grant sufficient resources.³⁵ The generational change also seems fuelled by a change in the composition of the workforce, which has evolved quite rapidly. In France, for instance, women were only allowed into the profession from 1946, but they now represent 66% of the total workforce, even if the gender balance is not equally weighted across all age groups or ranks.³⁶

This new composition, coupled with the remaining inequality in household chores and childcare between men and women,³⁷ is calling the traditional working conditions of judges into question and giving rise to the need for necessary adjustments. The prestige arising from traditionally long hours now conflicts with the need for a better work-life balance.

2. Tongues are Starting to Loosen

This new context is therefore also at play in how the workload of judges has suddenly been put under public scrutiny. In November 2021, a group of French judges and justice professionals published an article in the *Le Monde* newspaper, sounding the alarm bells about their working conditions.³⁸

This publication followed the tragic suicide of a young French judge, overwhelmed by her workload. Initially signed by 3,000 professionals, the article eventually received the signature of two-thirds of all the judges and prosecutors in the country in the space of two weeks.

The overwhelming response to the publication came as a surprise to many observers and brought the working conditions of justice professionals into the spotlight. The article was published just after the French President launched the ‘Estates General of Justice’ and tasked a special committee with identifying and proposing reforms to the French justice system in crisis.

The final report³⁹ was published in July 2022 and confirmed what justice professionals had highlighted in their article. The report shed light on the profound crisis that the French justice system was going through, deemed to be in a state of considerable decline after decades of failing public policies. The report concluded that the situation is difficult not only today, but has been deteriorating for years, leading to an untenable position for professionals and users of the judiciary.

35 P. Januel, *The column of the 3000 mobilises judges* (2021), Dalloz Actualité, available at www.dalloz-actualite.fr/flash/tribune-des-3000-mobilise-magistrats.

36 Infostat Justice, Ministry of Justice, *Judges: a largely female and mobile workforce*, 2 December 2018, available at www.justice.gouv.fr/art_pix/stat_infostat_161.pdf.

37 European Institute for Gender Equality, *EIGE-2021 Gender Equality Index 2021 Report: Health*, (2021), available at www.eige.europa.eu/publications/gender-equality-index-2021-report/gender-differences-household-chores.

38 *Le Monde*, *supra* note 3, at 1.

39 Comité des Etats Généraux de la justice, *Delivering Justice to citizens* (2022), available at medias.vie-publique.fr/data_storage_s3/rapport/pdf/285620.pdf, at 18.

In other European jurisdictions, the workload of judges is also an issue which is attracting increasing attention. When conducting our research, we found several instances of other European countries, such as Denmark,⁴⁰ Romania⁴¹ and Spain,⁴² where associations or unions of judges are raising awareness about the concerns they have for their profession. The United Kingdom seems to be the only country in the world conducting a continuous survey of the working lives of judges. The survey specifically asks about working conditions in England and Wales,⁴³ Scotland⁴⁴ and Northern Ireland.⁴⁵

The fourth edition, conducted in 2022, highlighted some increased concerns about working conditions.⁴⁶ In particular, this UK-wide survey asks judicial workers questions that do not appear in metrics calculated by CEPEJ, such as ‘space to meet and interact with other judges’, ‘amount of administrative support’ or ‘morale of court staff’.⁴⁷

C. European Social Legislation: A Powerful Tool to Progressively Frame ‘Vocation’ Trades, but not yet Available to Judges

The question of whether a state can define exceptional working conditions for its agents in the name of a specific mission is a more generic issue illustrating the

tensions between generations on the renewed approach to work and working conditions.

In our opinion, it arises from the interviews and responses of several unions that, on the one hand, some accept exceptional working conditions in the name of fulfilling a sovereign duty which surpasses social laws while, on the other, a proportion of the younger generation of judges tends to consider itself as regular workers and therefore entitled to minimum safeguards. This generational change should be envisaged in the context of a broader shift regarding the working conditions of public agents, such as police or military personnel, which are traditionally subject to a specific status because of the nature of their mission and duties.

They are starting to be included in a broader common minimum set of standards applying to working conditions at European level. To this effect, European social legislation and the subsequent interpretation by the Court of Justice of the European Union (CJEU) play an important catalytic role and raise the question of whether judges should be considered regular workers and therefore what level of social protection they should be afforded. CJEU case law shows that the Court intends to build an autonomous definition

40 In June 2020 in Denmark, a working group under the Association of Danish Judges released a report on the working conditions of judges in Denmark. The report shows, among other things, that judges have seen an increase in the amount of sick leave in recent years, which directly ties in to the increased caseload (report sent by the Association of Danish judges, available at www.dommerforeningen.dk/media/74794/rapport-om-dommerenes-arbejdsforhold-juni-2020.pdf).

41 In Romania, the Romanian Magistrates’ Association (RMA) notes that, at the beginning of 2023, the number of vacancies in the judiciary had increased compared to last year, reaching 1,000 vacancies for judges and over 800 vacancies for public prosecutors. This is due to a decline in recruitment after a period of three years in which no admission exams were held or transfers took place, as well as a considerable increase in judges applying for retirement due to growing pressure and uncertainty about their statute.

42 J. Bosch, *The powder keg of judicial conflict* (2023), El Diaro, available at www.eldiario.es/opinion/zona-critica/polvorin-conflicto-judicial_129_10179522.html.

43 UCL Judicial Institute, *2022 UK Judicial Attitude Survey, England & Wales and UK tribunal*, (2022), available at www.judiciary.uk/wp-content/uploads/2023/04/England-Wales-UK-Tribunals-JAS-2022-Report-for-publication.pdf.

44 UCL Judicial Institute, *2022 UK Judicial Attitude Survey, Scotland* (2022), available at www.judiciary.scot/docs/librariesprovider3/judiciarydocuments/judicial-attitudes-survey/2022-jas-scotland-report-for-publication.pdf.

45 UCL Judicial Institute, *2022 UK Judicial Attitude Survey, Northern Ireland* (2022), available at www.judiciaryni.uk/sites/judiciary/files/media-files/2022%20Judicial%20Attitude%20Survey%20-%20Northern%20Ireland%20-%202028%20Mar%2023_0.pdf.

46 In England and Wales, there has been an increase in the proportion of salaried judges saying their case workload was too high, as well as an increase in judges saying their non-case workload is too high. Almost two-thirds (64%) of salaried judges said that working conditions were worse in 2022 than they were in 2020. In Scotland, there has been an increase in the proportion of judges saying their case workload was too high and an increase in judges saying their non-case workload is too high. Over half (59%) of the salaried judges said that working conditions were worse in 2022 than they were in 2020.

47 UCL Judicial Institute, *supra* note 43, at 8.

of workers, rooted in European law, and to limit the margin of appreciation available to Member States in excluding some categories of workers. This indicates a clear intention to consider judges as being regular workers. In a CJEU case (2006) regarding the Spanish police (*Guardia civil*), the Court considered that exceptions to Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work⁴⁸ must be narrowly interpreted.

Indeed, it is settled case law that the application of this Directive, which is intended to protect workers, must be applied broadly.⁴⁹ Exceptions to the Directive, which are detailed in its Article 2.2,⁵⁰ cannot be based on specific sectors in which a worker is employed but ‘exclusively on the specific nature of their mission, which justifies the exception to the rules laid down by the Directive due to an absolute necessity to guarantee the effective protection of the community at large.’^{51,52}

The Directive is therefore applicable when missions are conducted within usual and expected working conditions and, even if the activities undertaken can lead to tasks that are, by nature, unexpected and potentially put workers at risk. This case is significant insofar as it prevents Member States from creating categories of workers that would be excluded from the scope of the Directive altogether and could not benefit from minimum safeguards on working hours on the basis of the sovereign mission they fulfil.

Only an absolute necessity can allow such derogation. This solution could be applied to the judiciary when the need to respect reasonable time of proceedings can lead to increased workloads. Such increases are neither occasional nor exceptional but inherent to the nature of the public service of justice, and should therefore not be systematically excluded from the scope of the Directive.

Similarly, the CJEU interpreted Directive 2003/88/CE (‘The Working Time Directive’) in 2019 in response to a request for a preliminary ruling from the French Administrative High Court regarding an action against France filed by a French police union. Any requirement allowing the calculation of working hours on a monthly basis must integrate guarantees and mechanisms to enforce and respect maximum permissible weekly working hours. Although the nature of police work allows flexibility in arrangements regarding working hours, the CJEU considers that, in line with the Directive, the derogation is implemented ‘with due regard for the general principles of the protection of the safety and health of workers’ and strictly monitors national laws in that respect.⁵³

Reference must also be made to CJEU case C-658/18 of 16 July 2020,⁵⁴ on Italian honorary magistrates, where the question of the applicability of the Working Time Directive to their status as workers arises, and more particularly on the issue of compensation. Interestingly, the Court explicitly expressed that the notion of worker, within the meaning of the Directive, should not be interpreted

⁴⁸ Council Directive 89/391/EEC, OJ L 183, 29 June 1989.

⁴⁹ Case C-132/04, *Commission v. Spain* (ECLI:EU:C:2006:18), at para. 22.

⁵⁰ This Directive is not applicable where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it. In that event, the safety and health of workers must be ensured as far as possible in the light of the objectives of this Directive.

⁵¹ *Ibid.*, at para. 24.

⁵² The CJEU applies a solution to this action for failure to perform similar to that previously established when responding to a request for a preliminary ruling referred by the German Supreme Administrative Court on firemen's rights: Case C-52/04, *Personalrat der Feuerwehr Hamburg v. Leiter der Feuerwehr Hamburg* (ECLI:EU:C:2005:467).

⁵³ Case C-254/18, *Syndicat des cadres de la sécurité intérieure v. Premier ministre* (ECLI:EU:C:2019:318), at para. 35–37.

⁵⁴ Case C-658/18, *UX v. Governo della Repubblica italiana* (ECLI:EU:C:2020:572).

internally by each Member State but should be an autonomous European notion. It should be defined by objective criteria and describe the working relationship given to the rights and obligations of the persons involved with due consideration. This case illustrates the power of European law and its autonomy from categories created by Member States in their domestic laws. Lastly, it should be noted that the Court now attaches the rights of workers not only to the Directive, but also to the Charter of Fundamental Rights of the European Union and its Article 31 on fair and just working conditions.⁵⁵

Another EU directive has been subject to a similar protective interpretation by the CJEU, Directive 97/81/EC concerning the Framework Agreement on part-time work which aims to protect the rights of part-time workers.⁵⁶ Such an interpretation was laid down in case C-393/10 of 1 March 2012, where the Court examined whether judges working part-time and compensated on a fee basis fell under this Directive.

The Court considered that it was for Member States to define the concept of ‘part-time workers who have an employment contract or employment relationship’ and thus fall under the Directive. Yet, the Court emphasized that the definition should not lead to ‘the arbitrary exclusion of that category of persons from the protection offered by Directive 97/81’.⁵⁷

This interpretation of CJEU case law could be particularly relevant considering

that either the preliminary ruling route requested by a national court or an action for the failure to fulfil an obligation before the Commission allow a drawn-out examination of any breach of European Law.⁵⁸ The applicability of the Working Time Directive to judges would allow the enforcement of specific provisions that are relevant to weekly rest periods, maximum weekly working time or length of night duty. However, it is important to note that the Commission has a monopoly over actions for the failure to fulfil an obligation.⁵⁹ While police and military forces have seen dedicated cases and case law, members of the judiciary have not yet had relevant instances that could allow the application of this case law to their evolving working conditions.⁶⁰

So far, we have not found any successful case leading to a judgment against a Member State for breaching European law with regard to the working hours of judges.

D. The Impact of the Workload of Judges on the Quality of Justice and the Right to a Fair Trial: European Courts Still Hesitant on this Issue

1. ECtHR case law is still nascent

One of the reasons for the establishment of the European Court of Human Rights (ECtHR) is the quality of justice administered in the states which are party to the Convention. The Court is known for its extensive case law on the right to a fair trial and reasonable duration of proceedings (Article 6), as well as the right to an effective remedy (Article 13).

The hallmark of the Court’s case law is the attention given, not only to legal texts, but

⁵⁵ Ibid., at para. 113, at 10.

⁵⁶ Council Directive, 97/81/EC, OJ L 014, of 20 January 1998.

⁵⁷ Case C-393/10, *O’Brien v. Ministry of Justice* (ECLI:EU:C:2012:110), at para. 51: ‘An exclusion from that protection may be permitted only if the relationship between judges and the Ministry of Justice is, by its nature, substantially different from that between employers and their employees falling, according to national law, within the category of workers’.

⁵⁸ Indeed, complaints to the Commission are open to any individual arguing a breach of European Law by a Member State.

⁵⁹ Article 258, Treaty on the Functioning of the European Union.

⁶⁰ The Italian case, while relating to judges, actually deals with remuneration policy but not working conditions and workload as analysed in this article.

also to the factual analysis in which justice is administered in order to fully appreciate compliance with the Convention of a procedure leading to a judgment.

Yet, as mentioned *supra*, there is no significant case law related to Articles 6 or 13 on the working conditions of judicial professionals. Case law on such matters could have a strong impact on Member States, as it could force policymakers to take up the issue considering the potential for systematic judgments or decisions against them and the automatic reversal of domestic court decisions.

This was the case, for instance, when the ECtHR developed strict positions on reasonable delays and the duration of proceedings, especially with respect to Article 5(3) and the imperative need for arrested people to ‘be brought promptly before a judge’, forcing Member States to rapidly adjust their legislation.⁶¹

We only found one decision explicitly mentioning working conditions of judges to justify a breach of the right to a fair trial. In *Makhfi v. France*,⁶² the applicant was sentenced by an Assize Court to eight years’ imprisonment for rape and theft as a member of a gang after a two-day hearing. The second day lasted 17 hours and 15 minutes and the decision was issued in the morning after a whole night of hearings and deliberations, almost without any break.

With respect to Article 6(1) and 6(3), the Court considered it ‘essential that not only those charged with the offence, but also their counsel, should be able to follow the proceedings, answer questions and make their submissions without suffering from excessive tiredness’. Similarly, ‘it was vital that judges and jurors should be in full

control of their faculties of concentration and attention in order to follow the proceedings and to be able to give an informed judgment.’⁶³

However, the relevance of this judgment to the working conditions of judges seems to remain limited. Firstly, it should be emphasized that the state of fatigue of the accused was the main basis of the judgment, which the Court already recognized as a basis for the breach of the right to a fair trial insofar as it prevents an effective defence and is often used to sanction Member States.

While the state of fatigue of judges and jurors is ‘crucial’ to give an informed judgment, one must wonder whether this sole basis would have been sufficient to allow a judgment by the ECtHR. Furthermore, we note that the Court does not define any precise limits regarding the number of hours or the duration – which would necessarily have a stronger impact – but purely refers to the facts of the matter where good conditions are not met.

Lastly, the burden of proof rests with the applicant, which is easily met for an Assize court trial, where entire days are dedicated to the trial of a single case, but not as easily for regular, often long criminal hearings scheduled to examine many more minor cases, where each defendant only attends a fraction of the hearing of relevance to their case.

2. Will the CJEU Step in as a Watchdog for the Overall Functioning of Domestic Judiciaries?

While the ECtHR has developed extensive case law on the definition of fair trial and the right to an effective remedy, we believe the CJEU may be in a position to play an

⁶¹ See for example, *Moulin v. France* where the Court denied the qualification of ‘judge’ to French public prosecutors under Article 5(3) of the Convention, forcing France to fully reorganize its custody regime within a year.

⁶² ECtHR, *Makhfi v. France*, App. No. 59335/00, Judgment of 19 October 2004.

⁶³ ECtHR, *Makhfi v. France*, App. No. 59335/00, Judgment of 19 October 2004, at para. 39–40.

increasingly important role in defining the quality of judicial systems. This role, which has recently been developed in the cases of *ASPJ* and *Repubblika* of 2018⁶⁴ and 2021,⁶⁵ was put forward by the action of the European Commission against Poland for the failure to fulfil obligations with respect to the disciplinary status of Polish judges.

In these cases, the Court recalled the prevailing value of the rule of law in Article 2 of the Treaty on European Union (TEU)⁶⁶ and based its judgments on two grounds: Article 19(1)(2) TEU (mirroring Article 13 of the European Convention on Human Rights (ECHR) on the right to an effective remedy) and the second subparagraphs of Article 47 of the European Charter of Fundamental Rights of the European Union (mirroring Article 6 of the ECHR on the right to a fair trial). In its third and last judgment against Poland, the Grand Chamber of the CJEU considered the reform, not in isolation but ‘in the wider context of major reforms concerning the organization of the judiciary.’⁶⁷

So far, we have not found any case law related to the working conditions of justice professionals based on the above articles of the TEU or the Charter of Fundamental Rights. But the following question may be raised: will the CJEU intervene within the framework of its growing safeguarding role of the judicial systems of Member States in the name of the prevailing value of the rule of law?

This question about the role of the CJEU is particularly pertinent, as it has been, or

(increasingly) will be, invited to examine complaints from judges on their working conditions in the light of European social legislation. Ruling on such cases will necessarily raise awareness in the minds of European judges about the effective conditions in which justice is administered in Member States and can, in the long term, affect how they appreciate the compliance of domestic judiciaries with the Treaties.

2. RESPONDING TO THE WORKLOAD OF JUDGES: ETHICAL DILEMMAS

Working conditions deemed as having deteriorated or being untenable are driving individual or collective actions from judges, but they are also raising potential conflicts with obligations of professional conduct, both on the methods used and the merits of the claims.

A. Balancing Workload Management, Professional Conscience and the Preservation of Health:

The Unsolvable Equation

In some instances, judges are stuck with an ethical dilemma: either they judge quickly and poorly, or they judge well, but with unreasonable delays.⁶⁸ For instance, pressure on time and caseload often forces judges to abandon ongoing training, despite the fact that training is, in most countries, a legal obligation.⁶⁹

To cope with such challenges and difficulties, judges have, until now, adopted mostly defensive and symbolic strategies in an attempt to raise awareness among the public and policymakers

⁶⁴ Case C-64/16, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas* (ECLI:EU:C:2018:117).

⁶⁵ Case C-896/19, *Repubblika v. Il-Prim Ministru* (ECLI:EU:C:2021:311).

⁶⁶ Vöhler, ‘The ‘Polish cases and the case-law of the Court of Justice of the European Union in the area of the rule of law’, *Europe des Droits & Libertés/Europe of Rights & Liberties* (2022), at 190.

⁶⁷ C-791/19, *European Commission v. Republic of Poland* (ECLI:EU:C:2021:596), at para. 88.

⁶⁸ *Le Monde*, *supra* note 3, at 1.

⁶⁹ For instance: Article 14 of the French *Ordonnance* of 22 December 1958; in Germany, § 38 Abs. 1 *Deutsches Richter Gesetz* states that judges must exercise their duties ‘to the best of their knowledge’, which implies an obligation of continuous training; in Ireland, Section 19 of the Courts and Court Officers Act 1995 requires that judges follow any training which is required by the relevant court president and Section 7 of the Judicial Council Act 2019 creates an obligation for the Council to provide judicial training.

in order to obtain more resources and systemic reforms. Indeed, judges only use the means they have at hand to protect themselves and on the understanding that they are subject to the law, which they cannot change themselves or disregard. In line with the separation of powers, judges should not step into the policy making arena. Therefore, identified defensive strategies could include the refusal to undertake non-judicial tasks, systematic postponements of hearings or the outright suspension of certain judicial measures.

For instance, judges, prosecutors and court clerks at the Nanterre Court, one of France's biggest courts, collectively agreed to stop performing a list of 121 tasks⁷⁰ and to stop holding hearings after 9 pm.⁷¹ Similarly, in Brussels, Belgium, the Prosecutor's Office, which is the largest in the country, announced that they had suspended several anti-crime measures, including the application of immediate settlement proposals.⁷²

Going even further, judges, prosecutors and court clerks in Lille, France, adopted a motion during a plenary assembly where they declared a judicial 'impossibility to do'⁷³ (*impossibilité de faire*) due to the lack of sufficient manpower, with reference to the notion in French Contract Law

releasing one party from a contractually binding obligation when that obligation is impossible to fulfil.⁷⁴ They emphasized that it was only their 'dedication' and that of the lawyers and police officers that was currently allowing the judiciary 'not to collapse', and specifically prepared a text to be read to litigants to explain why the quality of the public service was degraded to such an extent.⁷⁵

However, judges must also cope with the reality that such defensive positions may be in breach of their obligation of diligence and professional conscience, and the risk of denying justice.⁷⁶ In addition, they still have to abide by the imperative deadlines often prescribed by law, especially in criminal matters.⁷⁷ For instance, the failure to meet certain legal deadlines regarding pre-trial detention can give grounds for prosecution according to Article 432–4 *et seq.* of the French Criminal Code, which incriminates arbitrary detention.

70 Including tasks which are among the judge's legal obligations, such as those for the *juge d'instruction* (investigating judge) to deal with complaints in a timely manner, or for the children's judge to hold a hearing for unaccompanied minors who are the subject of a provisional placement order laid down by the prosecutor. As for court clerks, they have, for example, decided to stop transcribing the judge's handwritten reasons on plain paper into the judgments.

71 Le Parisien, *Faced with staff shortages, Nanterre judges will no longer perform certain tasks*, 2 February 2022, available at www.leparisien.fr/hautes-de-seine-92/face-au-manque-deffectifs-les-magistrats-de-nanterre-nassumeront-plus-certaines-taches-02-02-2022-13BVL133J5EW7CNC7WEGIGQAEY.php. The 121 tasks include administrative tasks, such as the preparation of reports and statistics.

72 La Libre, Brussels Public Prosecutor's Office is facing a crisis because of a lack of magistrates and is suspending several measures to fight crime, 20 April 2023, available at www.lalibre-be.cdn.ampproject.org/c/s/www.lalibre.be/belgique/judiciaire/2023/04/20/parfum-de-crise-au-parquet-de-bruxelles-qui-par-manque-de-magistrats-suspend-plusieurs-mesures-pour-lutter-contre-les-infractions-OTXSXA75KVAVPKBRFWDPPSRD2U/?outputType=amp.

73 This applies to essential acts, such as a reminder by the *juge de l'application des peines* (sentence enforcement judge) of the obligations and prohibitions laid down by a court for persons sentenced to probation for domestic violence.

74 Article 1221 of the French Civil Code.

75 Le Parisien, *In Lille, magistrates and clerks decide to limit hearings to six hours*, 13 December 2021, available at www.leparisien.fr/faits-divers/a-lille-magistrats-et-greffiers-decident-de-limiter-les-audiences-a-six-heures-13-12-2021-J7BML3OZHVEO5ASKDXFJWNSQ6Y.php.

76 See for instance Chapter 5 of French Code of Ethics for Judges and Prosecutors or 'Diligence' obligation in the judicial ethics code edited by the *Deutscher Richterbund* in Germany – breaching these obligations may lead to disciplinary sanctions or even to prosecution for 'denial of justice' (Article 4 of French Civil Code or §339 of the German Criminal Code).

77 Imperative deadlines also exist in civil matters, e.g. in the French protection order (*ordonnance de protection*), the judge for family affairs must issue a decision within six days after a hearing date has been set (Articles 515–11 of the Civil Code).

In January 2020, a man was released from custody while awaiting his appeal against a 30-year sentence for the murder of his ex-partner. That release was difficult for the victim's family and more generally public opinion to understand and accept given the gravity of the accusation.⁷⁸ In this context, bringing the topic of the workload of judges into the public arena is extremely sensitive, meaning that judges have prioritized their duties and professional conscience at the expense of their personal time and rest and in spite of the existing applicable social legislation.

These imperatives make it challenging for judges to respect the rules they try to set for themselves. Such a phenomenon, where all options at hand are clearly unsatisfactory because of their detrimental consequences, is precisely what psychoanalyst Christophe Dejours named 'ethical suffering', which has a particularly negative impact on the mental health of judges.⁷⁹

Ethical suffering may be defined as the situation in which an individual is led by the organization of work to contribute to actions which morale condemns. It is also the consequence of actions implying the betrayal of professional rules under the constraints of productivity.⁸⁰ Well aware of the suffering induced by their activity, many unions have published booklets to inform justice professionals about their rights. Some unions have even published 'survival kits' to help young judges cope with the difficulties they face at work.^{81,82}

B. Beyond the Duty of Restraint, the Importance of Alerting on Working Conditions

Well aware that individual actions would have a limited impact on the improvement of working conditions, not to mention the potential damage to a career, judges have developed collective actions and communication strategies, which are often difficult to reconcile with their strict duty of judicial restraint and discretion.⁸³

Judges have used the media to warn the general public about the difficulties of the justice system. In the *Tribune des 3,000*,⁸⁴ they denounced the fact that 'the major discrepancy between desire [of judges] to provide quality justice and the reality of [their] daily lives makes [their] profession lose its meaning and creates great suffering.' The signatories said: 'we no longer want a justice system that does not listen, that thinks only in numbers, that times everything and counts everything.'

Unions and professional organizations regularly take a position to alert public opinion, the media and the government about the matter of the excessive workload and staff shortage in the judiciary. An example is the recent call from Germany's largest association of judges and prosecutors, *Deutscher Richterbund*, to the German parliament to implement the *Rechtsstaatspakts 2.0* ('Rule of Law Pact 2.0'), demanding the federal government and the *Länder* to better equip courts affected by mass proceedings through increased judicial and nonjudicial staffing,

78 Le Point, *Unreasonable delays: a man released from custody while awaiting appeal trial for the murder of his ex-partner*, [16 January 2020], available at www.lepoint.fr/societe/delai-trop-long-avant-son-proces-en-appel-liberation-d-un-homme-condamne-pour-l-assassinat-de-son-ex-compagne-16-01-2020-2358191_23.php.

79 Dejours, 'Work and ethical suffering. The judicial institution in the management era', 1 *Délibérée* (2022) 70.

80 Dejours studied the consequences of a managerial approach of public services in general and of justice in particular over decades. He documented the increasing isolation of justice professionals as individuals, the decline of collective action and the decreasing quality of work.

81 Young magistrates' association, *Survival kit* (2017), available at www.jeunesmagistrats.fr/v2/KIT-DE-SURVIE-2017.html.

82 Nion syndicale des magistrats, *Judges' work-related suffering* (2018), at 58, available at www.union-syndicale-magistrats.org/web2/themes/fr/userfiles/fichier/publication/livre_blanc_2018/livre_blanc_souffrance.pdf. The 'survival kit' advises, for instance, not to isolate oneself and explains the functioning of administrative investigations.

83 See for instance Chapter 8 of French Code of Ethics for Judges and Prosecutors or 'moderation/restraint' in the judicial ethics code edited by the *Deutscher Richterbund* in Germany.

84 *Le Monde*, *supra* note 3, at 1.

as well as recruiting judicial assistants.^{85,86}

In Austria, judicial profession organizations drafted an ‘urgent appeal to the federal government’⁸⁷ in January 2018 to protest against staff cuts and supported a petition signed by more than 5,000 legal professionals by March 2018.⁸⁸ More radically, in some countries, judges have taken part in demonstrations or have even gone on strike: in Spain, even though Article 127 of the Constitution prohibits unions of judges, about 40% of the 4,400 court judges went on strike for the first time in February 2009 to express their dissatisfaction over the workload and working conditions.

The action was deemed illegal by the government and was subject to much public debate on the right for judges to take strike action and the reality that overworked judges make errors.⁸⁹ Spanish judges went on repeated strikes again in 2013, 2018 and 2023 to call for greater judicial independence and better working conditions.^{90,91} In Austria, 2010 was marked by a series of ‘no-hearing weeks’ over several months. Judges, public prosecutors and their trade union representatives decided to take such action to protest against the shortage of staff in the judiciary.⁹²

In Croatia, judges went on strike in May 2023 to demand better salaries.⁹³ At court level, some of our interviews have shown that there seems to be a new momentum in collective bodies, such as plenary assemblies⁹⁴ or even legal social committees. While they may have been neglected in the past, these bodies are once again seen as a forum for democratic action due to the symbolic significance that these committees give to motions passed by democratic voting.

They may constitute a call for action addressed to court heads and as such, cannot be ignored. A common factor to all these actions is that responsibility for the quality of justice – which includes caseload management and the obligation to meet reasonable deadlines – should be a matter of state responsibility and not solely the personal responsibility of judges, which was the main conclusion of the 2022 French ‘Estates General of Justice’.⁹⁵

Already in 1998, the European Charter on the Statute for Judges had expressly provided that it is the duty of the state to ensure ‘that judges have the means necessary to accomplish their tasks properly and in particular to deal with cases within a reasonable period’. ‘Without explicit indication of this obligation, which is the responsibility of the state, the

85 *Deutscher Richterbund, Unsolicited opinion of the German Judges' Association on Better Management of Mass Proceedings in the Judiciary*, May 2022, available at www.drb.de/positionen/stellungnahmen/stellungnahme/news/1-2022.

86 In an open letter published on 25 January 2022, another German judges' and prosecutors' association, *Die Neue Richtervereinigung*, called on the Hessian Minister of Justice, emphasizing that ‘the Hessian judiciary is now so overburdened and run down to such an extent that not only the work motivation of all those working in the judiciary, but also their health is acutely endangered’ and demanded the strengthening of the staff.

87 *Richtervereinigung, Urgent appeal to the federal government*, 31 January 2018 available at richtervereinigung.at/wpcontent/uploads/delightful-downloads/2018/02/20180131_Appell-an-die-Bundesregierung.pdf.

88 *Richtervereinigung, 5,000 signatures to defend the rule of law!*, 20 March 2018 available at richtervereinigung.at/5-000-unterschriften-zur-verteidigung-des-rechtsstaates.

89 Villarejo, *Debate on legality of judiciary strike*, 13 April 2009, available at www.eurofound.europa.eu/publications/article/2009/debate-on-legality-of-judiciary-strike.

90 AFP, *Spanish judges strike to demand greater independence*, 23 May 2018, available at today.rtl.lu/news/world/a/1183736.html.

91 Bosch, *supra* note 42, at 8.

92 *Die Presse, Revolt of the judges: weeks without hearings*, 18 January 2010, available at www.diepresse.com/533485/aufstand-der-richter-wochen-ohne-verhandlungen.

93 Lozančić, *Judges begin so-called White Strike*, 8 May 2023, available at glashrvatske.hrt.hr/en/domestic/judges-begin-so-called-white-strike-10763356.

94 Article R. 212-22 of the Code of Judiciary Organisation (France). Plenary assemblies are fora where court professionals make decisions on the court's organisation and functioning. Social committees also exist within the Ministry of Justice to discuss topics such as quality of work life, gender equality, career development, etc.

95 *Comité des Etats Généraux de la Justice, supra* note 39, at 7.

justifications of the propositions related to the responsibility of the judges would be deteriorated.⁹⁶ Unfortunately, what was feared at the time seems to have come true: judges are now been made responsible for the shortcomings of justice systems and this is precisely what they are rebelling against.

C. Managing Judges Without Hinderling their Independence: Mission Impossible?

In most European countries, codes of judicial conduct or ethics clearly underline the balance to be struck between efficiency, quality and diligence.⁹⁷ Judges may therefore be subject to disciplinary measures if it is suspected that they might have fallen short of one or more of those professional conduct obligations.

Yet, reconciling the obligation to respect ethical requirements, in particular that of managing caseload, with judicial independence, can prove challenging. Such difficulty has been illustrated in Germany, where a judge was reprimanded for failing to keep up with his judicial duties. The reasons given were that he had, for years, fallen considerably short of completing the same judicial caseload his colleagues handled on average.

The case provided the German Federal Constitutional Court with the opportunity to emphasize that the prohibition for the executive authorities to exert any kind of avoidable influence on the exercise of judicial duties, according to Article 97.1 of the Basic Law on the independence of judges,⁹⁸ 'extends to more indirect, subtle

and psychological forms of influence'. 'Where standards are defined and are the ones against which the (quantitative) caseload handled by a judge is measured, these standards must fully respect judicial independence' said the Court.⁹⁹

Even though putting pressure on the productivity of judges was argued by the claimant as political interference with the judiciary, as it demanded adaptation of his application of the law, the complaint was rejected because of the lack of connection between the reprimand and the breach of judicial independence.¹⁰⁰ This case generated extensive comments within the judicial community. Critics underlined that no legal basis allows the comparison of judges by the administration based on statistics, and that judicial staffing implies such a decisive influence on the application of laws that the task should fall on the legislator and not the executive authority.¹⁰¹

While judges must handle all cases brought before them without delay and without neglecting any, this principle should be tempered by the fact that they act within the means at their disposal. In a recent disciplinary decision,¹⁰² the French High Council for the Judiciary finally recognized that the management of caseload and the quality of the service provided to litigants have to be balanced with what can be diligently done considering the judge's overall workload.

The case illustrates the increasing pressure weighing on judges in France, particularly

⁹⁶ Council of Europe, European Charter on the Statute for Judges, 8–10 July 1998, DAJ/DOC (98) 23, at para 1.6.

⁹⁷ For instance, the code of ethics edited by the Deutscher Richterbund states that 'in dealing with the tasks with which they are entrusted, judges and public prosecutors know that a conflict exists between the size of their workload and the quality to which they aspire. Their answer to this is to behave responsibly, taking into account the fact that the public's access to justice requires as timely a decision as possible but not at the expense of quality'. In France, Chapter 5 of the Judicial Code of Ethics states under 'efficiency and diligence' that 'the magistrate shall act with diligence within a reasonable time'.

⁹⁸ 'Judges shall be independent and subject only to the law'.

⁹⁹ Abstract of the Federal Constitutional Court's Order of 11 November 2021, 2 BvR 1473/20.

¹⁰⁰ Baron van Lijnden, *Interview with Judge Thomas Schulte-Kellinghaus: 'Fixation on numbers is of little intellectual value'*, Legal Tribune Online, 21 July 2015.

¹⁰¹ Franzen, *The rule of averages also requires legal legitimisation*, *Betrifft Justiz Nr. 145*, March 2021, at 34, available at www.betrifftjustiz.de/BJ_Texte/Ganze_Hefte/BJ%20145_final.pdf.

¹⁰² *Conseil Supérieur de la Magistrature statuant comme conseil de discipline des magistrats du siège* (French High Council for the Judiciary), 25 April 2022, available at www.conseil-superieur-magistrature.fr/missions/discipline/s246.

since 2010, and the possibility now open to any litigant to file a disciplinary complaint directly with the High Council¹⁰³ associated with the increasing length of proceedings and a tendency for lawyers to adopt more aggressive defence strategies.¹⁰⁴ This also illustrates the need to report on working conditions when these adversely affect the quality of justice.

To this end, heads of courts are responsible for organizing their courts and allocating the available resources to their judges. Expectations have therefore risen among judges to see their court heads play an active role in managing the courts and protecting their rights, including helping them cope with the increasing number of non-judicial tasks (reporting, project management, etc.)¹⁰⁵ and communicating on the challenges they face with regard to the Ministry of Justice and the media.

In France, while taking up a management position has long been seen as a natural step in a successful judge's career, it is now expected that those high-level positions are occupied by people with an appetite and competence for managerial tasks. This led to a recent reform proposal¹⁰⁶ about the status of judges, which includes the creation of a new hierarchical level corresponding to purely judicial positions with the aim of better reconciling personal preferences and skills with career advancement.

D. Will Legal Actions from Judges Threaten the Separation of Powers?

Beyond the defensive strategies applied by judges as workers to raise awareness and generate a response to their working

conditions, judges have also brought the issue to court to strongly mark their attempt to assert more control over the matter and overtake defensive strategies.

1. The Legal Action Available to Judges as Workers

In France, recourse to administrative judges has primarily been applied via the administrative courts, which have the competence for social law that is applicable to public workers. This brings their demands into the judicial arena which, in itself, implies an important symbolic and public significance. Several recent judgments established a strong causal relationship between the working conditions of judges and the death or illness of judges.

For the first time in 2017, an administrative court recognized the suicide of a judge as a work-related accident, which was directly linked to his working conditions and his work-related exhaustion.¹⁰⁷ More recently, the Administrative Court of Besançon (France) passed a particularly innovative judgment and concluded that instances of harassment linked to working conditions caused a pathology related to the public service. The misconduct was deemed to be a fault for which the state was liable and compensation due because of the loss of salary during sick leave.¹⁰⁸

In France, whilst applicants can bring action directly against the state on grounds of unreasonable times of proceedings,¹⁰⁹ in a way, the administrative courts may have opened up parallel action for judges against the state on the same grounds. In our

¹⁰³ *Loi organique n° 2010-830 du 22 juillet 2010 relative à l'application de l'article 65 de la Constitution*, Law N° 2010-830 of 22 July 2010. Previously, disciplinary complaints against magistrates could only be filed by heads of courts or by the Minister of Justice.

¹⁰⁴ Interview with French Unions.

¹⁰⁵ Recommendation No. R(86)12 of the Council of Europe concerning measures to prevent and reduce the excessive workload in the courts already denounced the tendency of many countries to increase the number of non-judicial tasks.

¹⁰⁶ *Avant-projet de loi organique relatif à l'ouverture, la modernisation et la responsabilité de la magistrature du 17/02/2023* (draft legislation of 17 February 2023).

¹⁰⁷ Administrative Court of Cergy-Pontoise, 29 June 2017, n° 1500649 et n° 1505128.

¹⁰⁸ Administrative Court of Besançon, 26 April 2018, n° 1600571 – 1701293 *Mme Alten v. Ministère de la Justice*.

¹⁰⁹ Article L.141-1 of the Code of Judiciary Organisation.

interviews, we noted this last development is putting pressure on heads of courts, who could become liable on the grounds of psychosocial risk factors. Unions are encouraging judges to precisely document their working conditions and allow judicial action as workers further down the line.

2. Legal Actions as a Way of Reversing Public Policies

Actions before administrative courts are now part of a recent trend expecting French administrative judges, as well as other European administrative judges, to be more assertive and promote changes from governments. Like their actions in the area of environmental law or public health,¹¹⁰ administrative courts are now seen as judges of more general public policies.

Indeed, in 2022, lawyers and judges at the Nanterre Court, grouped together as an association, brought an urgent action before the administrative court against a Ministry of Justice circular that fixed the number of judges per court.¹¹¹ The association asked the Administrative High Court to urge the state to determine the allocation of judges on the basis of relevant and objective criteria that would take into account the number and complexity of the cases brought to the court.

They argued that some cases, such as cases in family law or labour law, were handled in extremely long time-frames because of their nature and the limited number of judges, to the point that some tasks needed to be dropped.¹¹² The association therefore believed that the circular breached Articles

6 and 13 of the ECHR and the right to a reasonable time for proceedings. The High Court rejected the claim on the grounds that the proceedings for interim relief did not meet the urgency test of such a procedure.¹¹³

However, the Court still needs to examine the substance of the claim which could result in new developments and the possibility for judges to use the judicial route to support the improvement of their working conditions. It will be particularly interesting to examine whether the grounds of arbitrary allocation of judges will be chosen. This would demonstrate the importance of KPIs and how they can force policymakers to use them or risk legal action seeking their enforcement.

Similarly, European courts may become more involved in the shaping of public policies. A complaint brought by the main French unions of judges against France for failing to fulfil its obligation under the relevant European social law¹¹⁴ through the application of a derogation for judges to the Working Time Directive¹¹⁵ may be noted. This complaint builds on the CJEU case, *European Commission v. Spain*,¹¹⁶ for excluding police forces from the scope of minimum guarantees regarding their working conditions.

Filed in February 2022, the complaint has not yet been followed up by the Commission. Even if legal actions do not necessarily succeed and do not allow a direct effect on policymakers and their strategy on managing the number of judges,

110 Bruno Lasserre, Vice-President of the Conseil d'État (France), *New frontiers for the administrative law judge* (2020), available at www.conseil-etat.fr/publications-colloques/discours-et-interventions/de-nouvelles-frontieres-pour-le-juge-administratif-par-bruno-lasserre-vice-president-du-conseil-d-etat.

111 Olivia Dufour, *Sick justice: the Nanterre court revolts* (2022), Actua-juridique, available at www.actujuridique.fr/justice/justice-malade-le-tribunal-judiciaire-de-nanterre-se-revolte.

112 The situation is such that some cases are being handled with a delay of more than 2.5 years.

113 *Conseil d'Etat* (France), President of the Court, No. 469176, 22 December 2022.

114 Complaint against the French State for the failure to comply with the European labour legislation that is applicable to magistrates, 9 February 2022, available at www.actu-juridique.fr/justice/les-magistrats-deposent-une-plainte-contre-letat-francais-pour-manquement-a-la-legislation-du-travail.

115 Council and Parliament Directive 2003/88/EC concerning certain aspects of the organization of working time, OJ L 299, 18.11.2003.

116 CJEU, *supra* note 49, at 9.

they have undeniable public impact. This new trend of using legal action is not without its own strong ethical dilemmas. Indeed, and according to French unions, the legal action route before administrative courts has been a late strategy because such action can endanger and threaten the fundamental principle of separating administrative and judicial authorities.

This principle, inherited from the French Revolution,¹¹⁷ primarily arises from the separation of powers in limiting the powers of courts (here the administrative courts) over what is defined through public policies, and therefore the executive power, but also currently prevents administrative courts from having disproportionate powers over the organization of the judiciary. The CJEU's case *UX v. Governo della Repubblica italiana* (cited *supra*) regarding compensation guarantees for Italian honorary magistrates can be noted on this particular question.

In this instance, the European Commission and Italy both raised the question of the inadmissibility of the preliminary ruling referred by an Italian judge before the Court which had an interest in the outcome of the legal action and could therefore not be impartial on the matter. However, the CJEU dismissed this argument, citing numerous cases in which the Court responded to preliminary questions on the status of judges without questioning the independence of the courts submitting the questions.¹¹⁸

3. CONCLUSION: PROPOSALS TO SHIFT FROM RESPONSIBILITY OF JUDGES TO COLLECTIVE RESPONSIBILITY

The issue of excessive workload for judges exists beyond France's borders and is echoed in many European countries.

Whilst the taboo surrounding working conditions is slowly being lifted, a European consensus could soon emerge on the impact of this situation on the effectiveness of fundamental European principles, such as the rule of law, access to a judge and the right to a fair trial.

Experiments are being conducted with a few solutions, which are not yet mature. The definition of judicial leadership, following a bottom-up approach, one that protects¹¹⁹ and enables judges to focus on their judicial tasks, is promising. Finalizing the development of data-driven and objective metrics that will identify the clear need for more staff and importantly, judges, also seems decisive. Legal action before European courts, either preliminary-ruling or failure-to-fulfil actions, that can help define judges as workers and seek the application of European legislation are interesting avenues to pursue. Actions based on the rule of law might also be correct.

The common denominator is that solutions will have to be collective in order to be effective, so judges are not left to struggle with ethical suffering and dilemmas on their own: members of courts and tribunals will necessarily have to reach consensus on how they should be organized. Also, judicial action cannot be borne by judges individually, as this is too heavy and possibly isolating; for it is only the multiplication of cases that will provide sufficient material for European courts to assess and define the role of judicial workload with greater precision in the overall definition of the quality of justice. We can only hope these solutions will be based on our shared European values and promoted by European associations.

¹¹⁷ Law of 16 and 24 August 1790 and decree of 16 fructidor III (2 September 1795).

¹¹⁸ Case C-658/18, *UX v. Governo della Repubblica italiana* (ECLI:EU:C:2020:572), at para. 56.

¹¹⁹ UNODC, *supra* note 8, at 2. The report established a list of 11 possible actions that could be put in place by the judiciary and especially emphasized the key role of leadership in promoting well-being at work.

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THE DUTCH CHILDCARE ALLOWANCE CASE: ETHICAL CONSIDERATIONS FOR THE JUDICIARY

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Abstract: The recent and poignant example of the Dutch Childcare Allowance Case, emphasizes the problems that can arise when strict application by judges of state rule, regulations and policies might create friction with ethical norms. It has opened up the debate on how much room certain apparently strict rules leave for judges to not apply these rules to the letter and when there might be an ethical obligation to rule differently. In this paper, the authors investigate the potential ethical norms that were breached by the judiciary in the Dutch Childcare Allowance Case and ask what can be learned.

The facts of the case, as presented by various reports and reflections made by the institutions involved, are placed into the context of international ethical principles and directives for the judiciary. Based on the results, the authors argue for a more active approach, more individualization and customization by the judiciary to similar situations, in particular with regard to tensions between providing individual justice and a fixed line in case law.

KEYWORDS:

CHILDCARE ALLOWANCE | KINDERTOESLAGAFFAIRE | KINDERTOESLAG | INDIVIDUAL JUSTICE, JUDICIAL INDEPENDENCE | JUDICIAL ETHICS | ETHICS | LOYALTY, INTEGRITY | EFFECTIVITY | EFFICIENCY

1. INTRODUCTION

Imagine the following: parents receive a childcare allowance of 10,000 euros as an advance payment. One of the conditions for the advance payment is that the parents pay 1,300 euros themselves. They end up not being able to prove payment of 300 euros of that 1,300 euros. Subsequently, the state decides this is reason to demand the refund of the full 10,000 euros allowance. This was an actual case that ended up in the Dutch Administrative Jurisdiction Division of the Council of State (AJD), the highest administrative law court in the Netherlands. The AJD ruled that this was the right approach.¹ This case is a prime example of what became known as the Childcare Allowance Case.

A. The Childcare Allowance Case

The Childcare Allowance Case is the common name that was given to the events leading to the findings by the Parliamentary Committee of Inquiry into Childcare Benefit (hereinafter the 'Parliamentary Committee') in 2020 in its report titled 'Unprecedented injustice'.²

The Parliamentary Committee found that, in the period between 2013 and 2019, several bodies of the state, among them being the judiciary, introduced and/or maintained a strict and mostly unjustified 'all-or-nothing' approach with respect to differences between anticipated and actual payments made during a year for childcare services. In practical terms, this 'all-or-nothing approach meant that, even if a parent had acted in good faith but could not provide proof of, for example, the use of a part of the initially anticipated childcare support or part of the mandatory

parental contribution, a parent had to repay the full amount of the allowance for childcare that had been granted. This led to situations such as that introduced above. Ever since the publication in 2020 of the Unprecedented Injustice report, the 'Childcare Allowance Case' has become a household name among the Dutch public, associated with injustice, unreasonableness and inflexibility on the part of the authorities.

Certainly, some of the possible indirect results of the Childcare Allowance Case, such as children being removed from their parents' care, as the parents could not support them anymore financially, are painful.³ The Childcare Allowance Case also stirred the Dutch legal community, triggering reflection papers by the AJD and the district courts on their role in this matter, followed by a report of the Venice Commission in 2021 and numerous articles in law journals.

Today, three years after the publication of 'Unprecedented Injustice', the effects of this report still resound in the Dutch legal landscape. Indeed, in April 2023, the district court of Rotterdam held, in a declaratory decision, that the State of the Netherlands is liable for damages suffered by parents who received childcare allowance and had to repay the full advance.⁴

B. Objective and Outline of this Article

The Childcare Allowance Case offers a fresh opportunity to explore the moral and ethical values of the judiciary. This article discusses various more or less competing ethical values and practical considerations that played a role in the making of the

1 See ABRvS (AJD) 8 June 2016, ECLI:NL:RVS:2016:1610, (numbers are simplified) and note 2, at 128–129.

2 Tweede Kamer der Staten-Generaal, Report of the Childcare Allowance Parliamentary Inquiry Committee 'Unprecedented injustice', 17 December 2020, available in Dutch at: https://www.tweedekamer.nl/sites/default/files/atoms/files/20201217_eindverslag_parlementaire_ondervragingcommissie_%20kinderopvangtoeslag.pdf.

3 Nederlandse Omroep Stichting (NOS), *More Children Placed out-of-home as a Consequence of the Childcare Allowance Affair* (2022), available in Dutch at: <https://nos.nl/artikel/2428355-nog-meer-kinderen-toeslagenaffaire-uit-huis-geplaatst>.

4 See Rb. Rotterdam (District Court of Rotterdam) 26 April 2023, ECLI:NL:RBROT:2023:3475.

Childcare Allowance Case and are part of the day-to-day work of judges. How do judges navigate between legal certainty and an approach that is tailored to the needs of a specific case, and what is the role of notions such as integrity, efficiency, effectiveness, financial considerations, and independence, to name a few, in choosing a route? One research question lies at the heart of this article:

Have judicial/ethical norms been breached by what went wrong in the Childcare Allowance Case? And if so, which norms in particular? What can be learned from the findings?

This article is structured as follows. Chapter 2 outlines the history of the Childcare Allowance Case. Chapter 3 discusses the relevant ethical considerations and values that play a role in judicial administration. It also briefly addresses the tension between these ethical considerations and values. Chapter 4 contains an assessment of the Childcare Allowance Case from the point of view of these ethical considerations. Chapter 5 presents a number of suggestions as to the role of ethical considerations in the day-to-day work of judges. Chapter 6 presents a conclusion.

2. THE CHILDCARE ALLOWANCE CASE

A. Brief History⁵

The Dutch parliament adopted the Act on the Harmonization of Income-related Schemes (hereinafter: 'Awir') on 23 June 2005, which established a childcare allowance system on the basis of which parents are able to purchase specific preschool and out-of-school childcare services from a registered childcare

centre or childminder. Under this scheme, parents are reimbursed for part of the costs of childcare, depending on their income, by means of an allowance. This allowance is a conditional advance payment paid by the state to parents. It should be noted that the state only covers part of the costs of childcare; parents must pay the remainder themselves. As shown in the example in the introduction, this can be a mere fraction of the allowance. Their personal contribution is obligatory and they must present proof of payment.

Until January 2021, Article 26 of the Awir, titled 'Recovery owed by the interested party', read as follows: 'If a revision of an allowance or a revision of an advance results in an amount to be recovered or if a settlement of an advance with an allowance leads to this, the person concerned shall owe the entire amount of the recovery.' This provision was interpreted by the Tax and Customs Administration (TCA), the government body responsible for payment of the allowance, as the basis of the so-called 'all-or-nothing' approach.

This strict approach was not mitigated by any proportionality test or hardship clause. In fact, while the Advisory Division of the Council of State warned against adopting the law without a hardship clause, the Council for the Judiciary, which was consulted on the bill, pointed out that the inclusion of a hardship clause could be a source of conflict and, for that reason, could give rise to frequent appeals to the administrative court.⁶ In the end, the law was passed with an impractical hardship clause.⁷ It was only in June 2020 that the legislator enacted the new Awir Hardship

⁵ This outline of the history of the Childcare Allowance Case is based on the report of the Venice Commission of 18 October 2021, titled 'Opinion on the Legal Protection of Citizens', Opinion No. 1031/2021, CDL-AD(2021)031.

⁶ Explanatory Memorandum of the 2005 Awir – Memorie van toelichting – Harmonisatie van inkomensafhankelijke regelingen (Algemene wet inkomensafhankelijke regelingen), Kamerstukken II, 2004/05, 29764, no. 3, <https://zoek.officielebekendmakingen.nl/kst-29764-3.html>. On 19 October 2011, the Council for the Judiciary objected against further tightening the sanctions policy for social welfare and labour legislation.

⁷ Gewijzigd amendement van de leden OMTZIGT en WEEKERS ter vervanging van dat gedrukt onder nr. 13 (nr. 32), available at <https://zoek.officielebekendmakingen.nl/kst-29764-32.html>.

Adjustment Act. It extended the existing hardship clause.⁸

The ‘all-or-nothing’ approach led to massive claims for refunds by the TCA from parents. In some instances, the annual advance had been some 30,000 euros, and the whole amount had to be repaid, even though the actual amount of incorrect claims was much smaller than the annual amount that had been advanced to the parents. Many parents appealed to the administrative courts and some won their cases in court in the first instance.

In these cases, the TCA appealed to the AJD, which repeatedly confirmed the all-or-nothing approach. The AJD changed its interpretation of the Awir on 23 October 2019 and passed two judgments that applied general principles of good administration and the principle of proportionality.⁹ A motion was submitted on 27 May 2020 to establish a parliamentary inquiry committee to gain a clearer picture of the political decision-making processes regarding the anti-fraud approach with respect to the childcare allowance.¹⁰

A parliamentary committee was set up on 2 July 2020. According to the parliamentary committee’s report, between 2012 and 2019, some 25,000 to 35,000 people were deemed to be guilty of malice or of gross negligence, but it appeared that, in 94% of such cases, the designation of malice or gross negligence was groundless, ‘because the reason had not been properly recorded, because there was no clear

evidence of malice or gross negligence, or because the grounds for being so designated had not been given to the parents in question.’¹¹

On 15 January 2021, the Prime Minister of the Netherlands sent a letter to the President of the House of Representatives in which he apologized on behalf of the government for the unprecedented hardship that the parents and their children had to endure. The government stepped down that same day. The issue of restitution and reparations to the parents remains unresolved to this day.

3. RELEVANT ETHICS AND VALUES

In order to discuss the ethics in play in the Childcare Allowance Case, the relevant ethics and values must first be introduced to provide a common reference framework.

A. Integrity

Judicial integrity is perhaps the broadest of ethical norms that is common to judiciaries internationally.¹² This broadness and ubiquity provide a problem of definition. What does integrity mean in any particular situation? *Kwak and Venema* state that a judge with integrity is loyal to his or her own (institutional) values and norms.¹³ In this context, they view integrity of judges as a term encompassing impartiality, independence, autonomy and professional standards, which prescribes a consistent application of those norms.¹⁴

8 Act of 1 July 2020 amending the General Income-related Schemes Act in connection with the extension of the hardship clause and the introduction of the hardship scheme, a safety net provision, the basis for a compensation scheme, as well as an O/GS-compensation scheme (Awir Hardship Adjustment Act), available at <https://wetten.overheid.nl/BWBR0043785/2020-07-07>.

9 In response to the report ‘Unprecedented injustice’, the President of the Administrative Jurisdiction Division of the Council of State published an article titled Between Law and Justice: Van Ettenkoven, ‘Tussen wet en recht’, 2 *Nederlands Juristenblad* (NJB) (2021) 98, available at https://www.njb.nl/media/4119/098-107_njb02_art02.pdf.

10 Parliamentary document II 2019/20, 31 066, no. 652.

11 Parliamentary document II 2019/20, 31 066, no. 613, referred to in the report titled ‘Unprecedented injustice’, p. 25.

12 Cf. A.J. Kwak and D. Venema, *De Integere Rechter. Ethiek en praktijk van het rechterlijk beroep* (2022), at 61.

13 A.J. Kwak and D. Venema, *De Integere Rechter. Ethiek en praktijk van het rechterlijk beroep* (2022), at 62.

14 S.L. Carter, *Integrity* (1996), at 7 and 123; Cf. A.J. Kwak and D. Venema, *De Integere Rechter. Ethiek en praktijk van het rechterlijk beroep* (2022), at 61.

We note, however, that this view is the same as the meaning of integrity to the relevant institutional values. The question can be asked of whether this means that acting with integrity as a judge means something else in different institutions which hold different values and if, therefore, integrity has no autonomous meaning.

In the case law of the European Court of Human Rights (ECtHR), moral integrity of judges is regarded as an inherent element of the notion of a 'tribunal' in the sense of Article 6 of the European Convention of Human Rights and Fundamental Freedoms (ECHR) and as part of the personal aspect of the notion of 'independence' of a tribunal, characterizing 'a state of mind, which denotes a judge's imperviousness to external pressure as a matter of moral integrity'.¹⁵ The content of the term 'integrity', however, is not outlined in this case law.

In the study of ethics, integrity is often treated as an antonym of the term hypocrisy¹⁶ and refers to internally consistent and uncompromising behaviour in adherence to ethical principles and values.¹⁷ The idea that integrity merely requires the consistent application of a framework of principles is perhaps not fully in line with its common meaning. In common usage, integrity is often viewed as inseparable from the morality of the applied principles.

However, in its pure meaning, it does not require those principles to be morally

acceptable. Kant refers to this as the universal application of the categorical imperative.¹⁸ It is also enshrined in the classical 'golden rule' espoused by many religions: Do unto others as you would have them do unto you. Devoid of further context, this rule only provides for consistent behaviour and not for otherwise morally correct behaviour. As such, as in Kwak and Venema's definition, the moral aspect that is often associated with the term integrity when used to refer to judicial integrity comes from the institutional norms that are associated with it.¹⁹

In rules and frameworks for the judiciary, integrity of the judiciary is often associated with 'correct' behaviour, demonstrative justice, 'justice must be seen to be done' and 'dignity and honour'.²⁰ These references are then again supplemented with other moral and ethical rules, such as the prohibition of favouritism.²¹ In conclusion, integrity only derives moral positive or negative subjective value from the values and principles that one chooses to adhere to and, in the judicial context, it is often used as an overarching principle referring to behaviour that is consistent with all the applicable ethical rules.

B. Efficiency

A just outcome is not perceived as such, or at least valued significantly less if the party has to wait a long time for that outcome. Research shows that the amount of time that one must wait for the outcome of a case brought to court is one of the single most important factors in the perceived procedural justice, 'justice delayed is

15 ECtHR *Guðmundur Andri Ástráðsson v. Iceland*, Appl. No.26374/18, Judgment of 1 December 2020. All ECtHR decisions are available at <http://hudoc.echr.coe.int/>.

16 J.L. Lucaites, C. M. Condit and S. Caudill, *Contemporary rhetorical theory: a reader* (1999), at 92.

17 See the definition of 'integrity' in the *Oxford English Dictionary* (2022).

18 I. Kant, *Fundamental principles of the metaphysic of morals*, translation by T.K. Abbott (2004), available at <https://www.gutenberg.org/ebooks/5682.epub.noimages>, at 33.

19 Cf. A.J. Kwak and D. Venema, *De Integere Rechter. Ethiek en praktijk van het rechterlijk beroep* (2022), at 62.

20 Judicial Group on Strengthening Judicial Integrity, *Bangalore Principles of Judicial Conduct and Integrity*, 2001, available https://www.judicialintegritygroup.org/images/resources/documents/ECOSOC_2006_23_Engl.pdf, at 6; ENCJ, *Judicial Ethics Report 2009–2010* (2010), available at judicialethicsdeontologyfinal.pdf (encj.eu), at 3–4.

21 ENCJ, *supra* note 20 at 3–4.

justice denied.²² For similar reasons, Article 6 ECHR not only guarantees a fair trial but also a trial within reasonable period of time.

The ECtHR finds that the objective of this provision is (also) to prevent people from being subjected to criminal charges for too long.²³ In accordance with this, the ECtHR accepts in its case law that the demands of efficiency and economy can play a role in the context of legal proceedings, for example by sanctioning proceedings without a hearing under certain circumstances.²⁴

The European Network of Councils of the Judiciary (ENCJ) refers to efficiency under the more personally oriented term ‘diligence’, putting greater emphasis on the factors that an individual judge can influence.²⁵ Efficiency is, however, strongly, if not predominantly, influenced by factors that are beyond the control of a single judge, i.e. legislation and the financial and human resources of the institution at issue.²⁶ It is worth mentioning that, within certain judicial systems, financing of the courts is wholly or partially dependent on throughput.

C. Effectivity

Effectivity of the administration of justice is another aspect of primarily procedural justice. It refers broadly to the ability of the justice system to effectuate its stated goals. From the perspective of policymakers, this will be reflected in the ability of the judiciary and the broader justice system to consistently enforce laws and policies. From the perspective of an

applicant, it is reflected in the ability to effectively effectuate (just) outcomes: an effective remedy. As such, it requires clear procedures and enforceable results.

A verdict can be just but still be considered relatively worthless if the applicant has no effective way of enforcing such results. The right to an effective remedy is clearly enshrined in the ECtHR case law. The ECtHR has held that the right of access to a court must be ‘practical and effective, not theoretical or illusory’, and that ‘this observation is particularly true in respect of the guarantees provided for by Article 6 ECHR, in view of the prominent place held in a democratic society by the right to a fair trial.’²⁷ For the right of access to a court to be effective, ‘an individual must have a clear, practical opportunity to challenge an act that is an interference with his rights’.²⁸

D. Loyalty to the System

Some colleagues might balk at the term loyalty, especially when compared with the term independence. However, the ENJC identifies loyalty as a virtue of judges, and it does so as a virtue acting in tandem with independence.²⁹ A judge is perhaps the ultimate servant of the system. The word ‘system’ in that statement refers to the broader system of society and the *trias politica*. The judiciary and justice system enforce the rules of the system upon society. As such, a certain loyalty to that system is inherent in and required of the judiciary. This is formulated as an oath requiring loyalty to the constitution, democratic institutions, fundamental rights, law and procedure and the judicial organization.³⁰

22 Cf. De Rechtspraak, *Doorlooptijden in beweging* (2019) available at <https://www.rechtspraak.nl/SiteCollectionDocuments/eindrapport-doorlooptijden-in-beweging.pdf>, at 6 *et seq.*

23 ECtHR, *Wemhoff v. Germany*, Appl. no. 2122/64, Judgment of 27 June 1968, at 18.

24 ECtHR, *Schuler-Zgraggen v. Switzerland*, Appl. no. 14518/89, Judgment of 24 June 1993; ECtHR, *Eker v. Turkey*, Appl. no. 24016/05, Judgment of 24 October 2017.

25 ENCJ, *supra* note 20, at 7–9.

26 Cf. *ibid.*

27 ECtHR, *Zubac v. Croatia*, Appl. no. 40160/12, Judgment of 5 April 2018.

28 ECtHR, *Bellet v. France*, Appl. no. 23805/944, Judgment of 4 December 1995.

29 ENJC, *supra* note 20, at 12.

30 *Ibid.*

In a narrower sense or as part thereof, loyalty to the system can also refer to the (unofficial) doctrine of *stare decisis* or the principle that lower courts follow the rulings of the higher courts. It should be noted that, in its judgment of 15 March 2022 in *Grzęda v. Poland*,³¹ the ECtHR held that: (...) the employment relationship of judges with the State must be understood in the light of the specific guarantees essential for judicial independence.

Thus, when referring to the “special trust and loyalty” that they must observe, it is loyalty to the rule of law and democracy and not to holders of State power. This complex aspect of the employment relationship between a judge and the State makes it necessary for members of the judiciary to be sufficiently distanced from other branches of the State in the performance of their duties, so that they can render decisions a fortiori based on the requirements of law and justice, without fear or favour.’

Therefore, from an ECHR perspective, loyalty of judges is related to the rule of law and democracy, and not to the holders of state power. This perspective on loyalty of judges seems to be more or less in line with the ENJC’s interpretation of this term. Abstracted from a specific context, little can be said about how loyalty to the system looks in any particular case.

The over-used example of how this often implicit imperative can be taken too far is the nazi judiciary during and before the Second World War,³² where many judges loyally applied what are generally considered manifestly unjust laws and policies. On the other hand, judges are – at least within the European context – largely

unelected officials who, in that sense, lack a direct mandate to disregard the legislature. Outside of extreme situations, it is hard to exactly pinpoint the dividing line between a ‘healthy’ way of operating within a system and excessive adherence to a system.

E. Judicial Independence

Judicial independence is viewed as being crucial to the rule of law.³³ Looking at the UN Basic Principles on the Independence of the Judiciary, the basic tenets of this independence can be clearly seen; freedom to adjudicate on cases without interference or undue influence.

This means the sole authority to adjudicate on cases before it, no financial interference, no threats and the lack of any other undue consideration than the law and the case before it. With regard to the scope of judicial independence, it is appropriate to mention that independence is not a privilege granted to judges for the judge’s benefit. It is granted to safeguard the rule of law and guarantee citizens an independent judge, which, in turn, contributes to a fair trial.³⁴

Various aspects of the notion of independence have been identified in the case law of the ECtHR, including: (a) the necessary personal and institutional independence that is required for impartial decision-making, (b) the manner of appointment of members of a court, (c) both a state of mind, which denotes a judge’s invulnerability to external pressure as a matter of moral integrity, and a set of institutional and operational arrangements which must provide safeguards against undue influence and/or unfettered discretion of the other State powers, both

31 ECtHR, *Grzęda v. Poland*, Appl. no. 43572/18, Judgment of 15 March 2022.

32 Cf. ENJC, *supra* note 20, at 12, where it is stated that loyalty cannot be expected when democracy or fundamental freedoms are in peril.

33 CCJE, *Magna Carta of Judges (Fundamental Principles)*, 2010, at *Judicial Independence*.

34 ENJC, *Judicial Ethics Report 2009–2010*, 2010, at *Independence*.

at the initial stage of appointment of a judge and during the performance of his or her duties.³⁵

F. Equality

Equality is a term used in many contexts and harbours conflicting principles. Within the judicial context, its most basic application is equal treatment, sometimes referred to as the prohibition of discrimination.³⁶ This prohibits discrimination on legally ‘irrelevant grounds’, such as race, colour, sex, religion, national origin, caste, etc.³⁷ There are, however, two ‘types’ of equality that must also be mentioned in the context of this article, namely the principle of equality of arms and predictability.

Equality of arms means that parties should, in principle, have the same procedural and evidentiary opportunities.³⁸ Predictability refers to the predictability of the outcome, which is explained by stating that cases with equal circumstances should merit equal outcomes.³⁹ Judicial impartiality is an aspect of all these aspects of equality. An impartial judge will not discriminate, will offer equality of arms as far as possible and will treat similar cases in a similar fashion.⁴⁰

G. Individual Justice

All the norms mentioned should be a part of the overarching aim of judges to provide individual justice. But what is the just outcome in the individual case? The goal sounds deceptively simple but, in fact, can be considered the core of the work of judges, and in the quagmire provided by other imperatives driving judicial decision-making, its implementation is not always simple. The failure to provide individual

justice, as seen in the Childcare Allowance Case, can have disastrous results for individuals.

H. Potential for Tension

As can be expected, these ethical considerations and values do not always coexist in harmony or can perhaps even be mutually exclusive. For example, the notion of efficiency, coupled with a considerable caseload and the wish to approach cases in a bespoke manner, can result in conflicting priorities. The same applies to loyalty to the system and individual justice. Following settled case law of a higher court can be perceived as an act of loyalty to the system, and this may also be regarded as an efficient course of action. At the same time, a case that, at first glance, may fall within the ambit of settled case law may require, where relevant, a closer look at the appropriateness of the settled case law to that particular matter and perhaps even a deviation from the settled case law.

4. THE ETHICS OF THE CHILDCARE ALLOWANCE CASE

In addition to criticism of the legislator and the TCA, the report of the parliamentary commission strongly criticizes the judiciary. The parliamentary commission states in this report ‘that administrative law branch has also made a substantial contribution for years to maintaining the implementation of the regulations of the childcare allowance, which are not mandatory under the law and has neglected its important function of (legal) protection of individual citizens.’⁴¹ As the biggest criticism of the judges, the parliamentary commission mentions ‘the

35 Registry of the European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (civil limb)*, updated to 31 August 2022, available at https://www.echr.coe.int/documents/d/echr/guide_art_6_eng, at 61.

36 Judicial Group on Strengthening Judicial Integrity, *supra* note 20, at 8.

37 *Ibid.*

38 De Vocht, T&C *Strafvordering commentaar op art 6 EVRM (2023)*, at e. *Het beginsel van 'equality of arms'*.

39 Some jurisdictions follow more formal versions of this principle than others in the context of the binding effect of case law *stare decisis*; Miriam Webster, *Stare Decisis*, 11 April 2023, available at <https://www.merriamwebster.com/dictionary/stare%20decisis>.

40 Cf. Judicial Group on Strengthening Judicial Integrity, *supra* note 20, at 5–6.

41 Tweede Kamer der Staten-Generaal, *supra* note 2, at 7, 8.

bypassing until 2019 of general principles of good administration, which should serve as a cushion and protective blanket for people in need.' The chairman of the AJD concluded that the AJD should have acted differently,⁴² and the chairman of the Council for the Judiciary stated that 'for the victims of the childcare allowance affair, the rule of law factually did not exist.' Families had to fight against a powerful government.

An unfair battle where the justice system did not always offer the protection that these parents deserved.⁴³ Hereafter we shall analyse the role played by the judges in this matter and the ethical dilemmas they faced.

A. Judicial Independence and Loyalty to the System

As set out above and further below, the interplay between several instances of the judiciary and the TCA plays a prime role in the Childcare Allowance Case, which puts pressure on the independence of individual judges. Independent administration of justice ensures that the judge's decision is free from social, economic or political pressure and that it is based on the judge's own judgment of the relevant facts and legal bases in a specific case. The judge puts the independence given to him at the service of society and gives it form and content with a view of the rights and freedoms of citizens.⁴⁴

The judge should apply the law in each individual case he hears without fear of external factors or coercion. The judge should be guided by the law and his own

conscience and sense of justice. The judge should also ensure that he remains informed of social developments and points of view and should, if necessary, involve them in his opinion, always with the independent evaluation of relevant facts and interpretation of case law and law as a guideline.⁴⁵

B. Independence and Loyalty to the System during the Initial Period (2010–2012)

In 2011, the first rulings were made showing that the AJD followed the 'all-or-nothing' interpretation of the existing laws and regulations as implemented by the TCA. In those decisions, it was ruled that parents must be able to prove that the childcare costs have been incurred and paid. A report shows that, for a significant number of judges, the case law of the AJD was to be followed.⁴⁶

They claimed that the limited number of rulings that the AJD had made on childcare allowance cases during that period showed that the AJD fully accepted the views of the TCA regarding the strict interpretation of the statutory system. The judges indicated that, in the early years, in many cases, there were strong indications that not only childcare agencies but also parents who were affiliated with them deliberately abused the childcare allowance scheme. Therefore, it was clear to them that the legal rules had to be interpreted strictly.⁴⁷

⁴² Ettekoven, *supra* note 9, at 9.

⁴³ Navis, *Memorandum on website for the Judiciary*, 8 October 2021, available in Dutch at <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Raad-voor-derechtspraak/Nieuws/Paginas/Toeslagenaffaire-Belang-rechtsbescherming-individu-moet-zwaarder-wegen-dan-vaste-lijn-jurisprudentie.aspx>.

⁴⁴ Nederlandse Vereniging voor de Rechtspraak (Dutch Association for the Judiciary), *Guide to Judges Code*, 26 September 2011, available at: <https://nvvr.org/uploads/documenten/nvvr-rechterscode.pdf>, at 3.

⁴⁵ *Ibid.*

⁴⁶ De Rechtspraak, *Report of the Working group on the Reflection of the Allowances Affair, Finding Justice in Court*, October 2021, available at <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Raad-voor-derechtspraak/Nieuws/Publiceringsimages/WRT%20rapport%20Recht%20vinden%20bij%20de%20rechtbank%20DEF%20051021.pdf>.

⁴⁷ See *ABRVs (AJD)* 22 June 2011, ECLI:NL:RVS:2011:BQ8833.

C. Independence and Loyalty to the System in 2013–2014

Some of the judges were not convinced in this early period that this also meant that there was no right to a childcare allowance at all in cases where the payment of a large proportion of the costs could be demonstrated. For a while, the judges of the District Court of Rotterdam were the only ones to explicitly and consistently deviate from the ‘all-or-nothing’ approach, with the aim of persuading the Council of State to adjust its case law.

The childcare allowance cases were assigned to one team at the Rotterdam District Court. From mid-2013 to mid-2014, in almost all cases in which the TCA set advances at zero because parents had not demonstrated that they had paid the full personal contribution, the judges ruled that the TCA acted disproportionately and unreasonably.⁴⁸

On 18 July 2013, a three-judge bench of the Court of Rotterdam ruled on the consequences of not meeting (1) the requirements for the written agreement with the childcare institution or childminder agency and (2) the requirement that all costs of childcare must be demonstrated. The court wanted to use this ruling to persuade the Council of State to relax its strict line.

The court further held that it is not proportionate and not reasonable to set the allowance at zero if at least the amount of the allowance received has been used to pay the costs of childcare. Following the ruling of the three-judge bench of 18 July 2013, the District Court of Rotterdam ruled in the same way in a large number of single judgments with

reference to the ruling of the three-judge bench.⁴⁹ The proportionality test and the disproportionality of childcare allowance matters were raised at an informal periodic meeting in February 2014 between judges of the AJD and the district courts. However, this did not lead to a further justification or adjustment of the ‘all-or-nothing’ line in the AJD’s subsequent rulings.

This raises the question of how the subject of proportionality was put on the agenda. Was it just one of the items on the agenda of that meeting, and how much time was actually spent discussing this matter? Did the judges of other courts also recognize the view of their colleagues from the district court of Rotterdam, and which arguments were presented by the judges of the Council of State to defend the ‘all-or-nothing’ position, or were they merely in ‘listening mode’ during that meeting?

This should have been the moment for addressing the legal and ethical sides of the matter, holding emotional discussions about points of view, the disproportionality of the ‘all-or-nothing’ approach, empathy and, if necessary, banging fists on the table. This does not seem to have happened. Reference is made in the AJD report⁵⁰ titled ‘Lessons from the childcare allowance cases’ on this informal meeting during which a letter with the position of the district court of Rotterdam applying the proportionality line was discussed.⁵¹

The report indicates that the Rotterdam rulings and the letter were subsequently discussed within the AJD but did not lead to a change of position. The AJD concludes that this is regrettable and also regrets that the judgments of the AJD did not explicitly

⁴⁸ Tweede Kamer der Staten-Generaal, *supra* note 2 at 30.

⁴⁹ *Ibid.*, at 33.

⁵⁰ De Rechtspraak, *Reflection report of the Administrative Jurisdiction Division of the Council of State, ‘Lessons from Childcare Allowance Cases’*, November 2021, available at <https://www.raadvanstate.nl/publicaties/studies-onderzoeken/>.

⁵¹ *Ibid.*, at 36.

address the arguments put forward by the district court of Rotterdam.⁵² The latter is remarkable and seems to underpin the relaxed nature of the informal meeting.

Apparently, there appeared to be no need felt to respond to the letter of the Rotterdam judges. The Rotterdam judges did not follow this up any further. When it was clear that the ruling three-judge bench of the district court of Rotterdam on appeal did not lead to an adjustment of the ‘all-or-nothing’ line, the court issued fewer and fewer (and at some point no longer any) rulings in which the court went against that line.⁵³

It is striking that the TCA has only appealed against a few of the judgments in which the District Court of Rotterdam deviated from the case law of the Council of State. For example, in 2013, the TCA only appealed against 28 of the total of 89 judgments in favour of the parents.⁵⁴

D. Judicial Independence – Reflections on ‘Deviate or Obey’.

Administrative judges sometimes saw reason to deviate from the ‘all-or-nothing’ line of the AJD but did not do so because they expected that the ruling would be overturned by the AJD. It can be said that it is not possible to provide legal protection if the court is guided solely by its expectations of the decision of the appellate court on the basis of settled case law.

The attitude of the administrative judge affects the outcome of proceedings and how the parties to the proceedings experience the handling of the case. The more active the judge is in mapping the

facts and investigating the grounds of the appeal, the greater the chance that the ruling will do justice to the litigant’s position.⁵⁵ The report of the working group on the reflection of the Childcare Allowance Case also indicates that some judges have apparently succeeded in persuading the TCA to not pursue its strict line any further. In some cases in which the court was less strict than the AJD in assessing the evidence, no appeal was lodged.

The extent to which the reasoning of the judgment is tailored to the specific case seems to have played a significant role in this. In the conversation with the TCA, it emerged that appeals were less likely to be filed if the ruling did not seem to raise expectations for the future among other parents (if there was no fear of a precedent at the TCA).⁵⁶ It can be inferred from this that the fear of the courts to provide parents with false hope in a different ruling, only to be crushed again by the appellate court, was unjustified.

E. Individual Justice

The report of the Parliamentary Committee mentions in its introduction that the political wish to create an efficient system and prevent fraud created a situation in which there was little to no room to provide individual justice in cases of unintentional administrative errors.⁵⁷

The report partly blames the legislator for creating such inflexible legislation.⁵⁸ But – as quoted at the beginning of this chapter – the judiciary also contributed substantially to the harsh application of the law that was not mandatory. Several witnesses stated before the parliamentary

⁵² Ibid., at 37.

⁵³ Ibid., at 33.

⁵⁴ Ibid., at 34.

⁵⁵ Ibid., at 54, 56 and para. 34.

⁵⁶ De Rechtspraak, *supra* note 46, at 51.

⁵⁷ Tweede Kamer der Staten-Generaal, *supra* note 2 at 7.

⁵⁸ Ibid.

committee that legislation should leave room for bespoke outcomes in the case of unforeseen effects and should provide for discretionary room for the executive to counter such unforeseen effects.⁵⁹ ‘An eye for the human dimension’, as it is called in a further heading in the report.⁶⁰

This could very well be rephrased as the application of individual justice. Aside from the efficiency of the law itself, the efficiency of the administration of the law by the executive branch and judicial branch can create tension with the need for individual justice. Several witnesses stated that, in the application of the law, other public values such as (appropriate) interaction with citizens, namely individual justice, should also feature in the calculation.⁶¹

F. Efficiency

Apart from the political wish for an ‘efficient’ fraud prevention system, the report of the parliamentary committee addresses the fact that the coalition agreement of the then government (2010–2012) contained significant spending cuts in the TCA’s budget. This required cutbacks and more (financially) efficient working methods. This put further pressure on the ‘allowance machinery’.⁶²

The report does not get into what role the need for efficiency at the level of the judiciary played or whether this played a role at all in the facts of the Childcare Allowance Case. One can, however, imagine that a strained judiciary – a fact which has been highly published lately due to the negotiations on a new collective bargaining agreement for the judiciary – could not have played a positive role in the ability to provide individual justice in this case. In fact, judges have explicitly

expressed concerns about the effect of higher working pressures on the quality of their work.⁶³

It is clear from the above that political and financial pressure for efficient systems and efficient working methods also played a role in the evolution of the Childcare Allowance Case.

G. Effectivity

Effectivity is not mentioned by name in the parliamentary committee’s report in relation to effective legal remedies for citizens. It is mentioned, however, with reference to the perceived political need to create effective remedies against allowance fraud as a contributing factor in the lead up to the facts of the Childcare Allowance Case.

The authors, however, consider that the factors converging in the Childcare Allowance Case damaged the effectiveness of the legal system. Even considered from the point of view of the perceived goal of the legislation and strict application of policy, i.e. the prevention of fraud, the system in place cannot be considered effective. We believe a fraud prevention system cannot be considered effective if many people who are not attempting or intending to defraud the government become ‘victims’ of the system. Furthermore, the monstrous results this had for many of the parents involved should be taken into consideration in this respect.

It is not without reason that the parliamentary committee’s report states that the judiciary had a hand in upholding the ‘ineffective’ system. Overall, it can be said that the principle of effectivity was

⁵⁹ Ibid., at 31, 32.

⁶⁰ Ibid., at 32, 107; see also the reflection on this principle in footnote 79 on page 127.

⁶¹ Ibid., at 32.

⁶² Ibid., at 14.

⁶³ Mr. Online, *Judiciary Concerned about Quality due to Workload*, 9 January 2023, available in Dutch at: <https://www.mronline.nl/rechters-maken-bezorgd-over-kwaliteit-van-de-rechtspraak-door-hoge-werkdruk/>.

not fully implemented by or properly regarded by the judiciary. However, another more specific aspect of effectivity can be considered: Should a court issue a ruling that provides individual justice by not applying a fraud prevention rule on someone who should not fall within its scope if this court is almost certain that this ruling will be overturned on appeal?

We have seen above in this chapter that rulings going against the ‘all-or-nothing’ approach had a very low chance of survival upon appeal. The AJD had, after all, provided consistent and clear rulings on the matter. The argument can be raised that issuing a ruling which a court knows will be overturned goes against legal effectivity with regard to providing effective legal remedies: in that case, there is a chance that the citizen will not be able to effectuate the remedy issued.

The authors recognize that the lack of administration of individual justice because the decision might very well be overturned on appeal is a very slippery path and that, in reality, that thought may have very well been a contributing factor that led to the judiciary’s role in maintaining this unjust system.

H. Equality

The principle of equality is not overtly discussed in the parliamentary commission’s report. We would argue, however, that it is hard to imagine that it was not a factor in the Childcare Allowance Case. If the principle is that similar cases require similar outcomes, more arguments are necessary to deviate from the established case law, let alone the case law of a higher court. Discussions in court proceedings often apply to outcomes in similar cases, not only during hearings but also in the context of the deliberations between judges after hearings. This

application of the principle of equality can, in general, be stated to weigh in favour of continuing established precedents barring any further specific considerations. The authors also consider this to be one of the contributing factors in the explanation for the observation that fewer rulings were issued over time – even by the one court that went against the grain – that went against the established precedent.

It can be noticed that, eventually, the more individual approach of the Rotterdam judges in individual cases gave way to the apparent pressure emanating from the ‘all-or-nothing’ line established by the AJD. It is clear to the authors, however, that it was not a single factor or a single (misapplied) principle or value that led to the judiciary’s role as described by the parliamentary committee. It was all the factors discussed here working in concert that explain this (at least in part).

5. WHAT CAN BE LEARNED?

A. Be Active – Fact-Finding and Evidence

In any dispute, a judge must actively examine the relevant facts and personal circumstances, discuss them with the parties at the hearing and include the outcome of that investigation in his assessment. The perspective is not so much whether the reasoning of the decision is legally justifiable.

The question is rather whether all the relevant circumstances cast a different light on the case and give rise to further investigation or a well-founded appeal. In this respect, it must not be impossible or disproportionately difficult for the litigant to meet the burden of proof. The litigant should be given the opportunity at the hearing to present his problems, while the judges should show interest in the circumstances that caused those problems and examine the consequences. A report

shows that 81% of the parents and 77% of the children felt unheard by the judges.⁶⁴ In connection with this, the Venice Commission also mentions shortcomings in the information flow from the district courts to the AJD.⁶⁵ If the latter was indeed unaware of the scale of the societal problems caused by its case law, steps should have been taken to improve information flow within the judiciary. The Venice Commission suggests that, if the appeals procedure is insufficient to inform the AJD of the state of administrative law, a separate and internal forum for information exchange between this body and the district courts could be considered.⁶⁶

B. Customization and Proportionality

The law provides a large number of tools to the administrative court for arriving at a proportionate outcome, and the court must also use these instruments if the application of the law to a specific case leads to a disproportionate outcome. Article 3:4 of the AWB (General Administrative Law Act) lays down the principle of proportionality in administrative law. However, the AWB is a general law that is applied in proceedings in all administrative matters unless an issue is regulated differently in a special law. Article 3:4 of the AWB reads:

1. When making an order, the administrative authority shall weigh the interests directly involved in so far as no limitation on this duty derives from a statutory regulation or the nature of the power being exercised.
2. The adverse consequences of an order for one or more interested parties

may not be disproportionate to the purposes to be served by the order.

The administrative court may deviate from the policy rules on the basis of Article 4:84 AWB and a policy rule or generally applicable rule may not be applied in a specific case if its application has disproportionate consequences. A law in the formal sense cannot be disregarded by the court unless, in a specific case, the disproportionate effects have not been taken into account by the legislature.

However, formal laws may, as far as possible, be interpreted in accordance with the principle of proportionality or other legal principles and may be declared non-binding or inapplicable on the grounds of conflict with Treaty provisions (EU/ECHR).⁶⁷

C. Deviation from a Fixed Line in the Case Law

The administrative judge is not bound by the case law of the appellate court in the formal sense and should feel free to deviate from a fixed line in case law if a case requires this, and the legal framework provides a starting point for this. The interpretation of Article 26 Awir can be taken as an example. This article provides that: 'If a revision of a concession or a revision of an advance results in an amount to be recovered or a set-off of an advance with a concession results therein, the person concerned shall owe the amount of the recovery in its entirety.'

Until October 2019, according to the Council of State, the wording of this provision did not leave room for interpretation: 'If a revision of an advance results in an amount to be recovered,

⁶⁴ Report prepared by Parents and Children, *Gelijkwaardig herstel (Equal Recovery), Views and Recommendations on the Childcare Allowance Affair*, December 2021, at 23, available in Dutch at https://www.numberfive.community/_files/ugd/51da02_531252c2e75248b5ab68e08e7f14881b.pdf.

⁶⁵ Venice Commission (European Commission for Democracy through Law), *Opinion on the Legal Protection of Citizens*, adopted at its 128th Plenary Session CDL-AD(2021)031, 18 October 2021, available at [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2021\)031-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)031-e).

⁶⁶ *Ibid.*, at 21.

⁶⁷ De Rechtspraak, *supra* note 46 at 60.

the interested party owes the amount of the recovery in its entirety.’ The implementing officials of the TCA inferred from this wording that it was the will of the legislature that, if a citizen made a mistake, even a minor mistake, the citizen was not entitled to an allowance. If such mistakes were found, the Act on Childcare and Quality Requirements for Playgroups (Wko) was taken as a guideline.

For example, childcare must be based on an agreement (Article 1.52 Wko). The amount of the childcare allowance is based on Article 1.7 Wko on the number of hours of childcare purchased and the legally set rate. The costs incurred for childcare must be paid on time, in full and demonstrably. If one of these requirements is not (fully) met, then, based on the aforementioned interpretation of Article 26 Awir, the TCA recovered the entire amount of the advance paid.

According to Essers, this interpretation is incorrect.⁶⁸ Article 26 Awir merely states that if and insofar as there is an amount to be recovered, the interested party shall owe the amount that is to be recovered in its entirety. This does not mean the entire amount. The TCA could and should have determined the specific amount to be recovered on a case-by-case basis, taking into account the completely disproportionate consequences of the ‘all-or-nothing’ policy.

Therefore, the TCA had discretion in determining the amount to be recovered. That balancing should have resulted in the amount of the recovery being significantly lower in most cases. Article 26 Awir would then have applied to that reduced amount of recovery without causing such disastrous results. The Venice Commission

draws attention to this and states that the principle of proportionality apparently played no role, although the AJD was familiar with the case law of the ECtHR:

A key problem was that the courts and, in the final instance, the Council of State’s Administrative Jurisdiction Division did not intervene decisively against the Tax and Customs Administration’s problematic interpretation of the law.

While the wording of Article 26 of the Awir did require the recovery of the entire amount of the allowance, the Council of State followed the Tax and Customs Administration’s strict interpretation of this provision approving the rigid ‘all-or-nothing’ approach and did not interpret in the light of international law. Such an interpretation could have led to an application of the principle of proportionality.⁶⁹

That the AJD was familiar with the application of the principle of proportionality in similar cases can be determined from an analysis of the case law of the ECtHR. The ECtHR has so far rendered four decisions on the allowances administered by the TCA. In those four cases, the ECtHR concluded that the applications were manifestly ill-founded and declared them inadmissible. The issue was whether Article 8 ECHR parents had the right to the payment of these allowances. The AJD had found that there was no such right.⁷⁰ Deviation by courts from the jurisprudence of the appeal judges is rare but did take place to a limited extent in childcare allowance cases. A common reason for this is that

68 Essers, ‘De menselijke maat en ‘ongekend onrecht’, in T. Kooijmans et al (eds), *Op zoek naar eventwicht. Liber amicorum Marc Groenhuijsen* (2021) 219, at 219.

69 Venice Commission (European Commission for Democracy through Law, *supra* note 65 at 21.

70 *Ibid.*, at 22.

administrative judges did not want to give parents false hope, assuming that they would still be proved wrong on appeal to the Council of State. However, the research of the working group on the reflection of the affairs of the courts has shown that this argument does not hold water. On the one hand, this is because the TCA has not appealed against many rulings that deviated from the 'all-or-nothing' line.⁷¹

On the other hand, it is because it does have significance for a litigant's sense of justice that the court ruled in his favour, regardless of whether that judgment stands on appeal.⁷² Moreover, the argument of false hope is problematic because it inhibits customization and legal formation. Another common reason for not deviating from a fixed line of case law is the importance of legal unity: if courts more frequently issue a ruling that differs from the established case law, the unpredictability of court decisions increases and similar cases more frequently lead to dissimilar outcomes.

The discussions show that there are different views on this among administrative judges, with some judges assigning decisive importance to guaranteeing legal unity and equality and others assigning greater importance to providing legal protection in the individual case.⁷³ The discussion raises, among other things, the question of whether legal unity should play as important a role in the first-instance court as it does in appeal.

With the working group on reflection on the Childcare Allowance case, the authors believe that, in view of their specific role as first-line judges in the handling of cases, courts should attach

greater importance to the provision of legal protection in the individual case (through tailor-made and more extensive fact-finding) than to the uniform application of the law. Nevertheless, it is reasonable to give greater weight to the importance of legal unity and the prevention of false expectations if previous dissenting decisions of the court with a similar reasoning in a similar matter were overturned by the appellate court.⁷⁴

A judgment must always, and certainly if it contains a deviation from existing case law, contain a thorough reasoning specifically tailored to the individual case. This reduces the chance that the ruling will set an unintended precedent and that administrative bodies will appeal for that reason alone. In addition, a concrete justification encourages the appellate court to reconsider its established line and, if that line is not changed, to provide additional arguments.

The use of text blocks and standard considerations increases the risk of automatism and reduces the critical review of the case at hand. It is very important that judges are not guided by the ruling model but that they continue to look critically at the specific facts of the present case.⁷⁵

6. CONCLUSION

The 'Childcare Allowance Case' is currently associated in the Netherlands with injustice, unreasonableness and inflexibility on the part of the authorities. The effects of the 'Unprecedented injustice' report still resound in the Dutch public, political and legal landscape. In this paper, we discussed various ethical values and practical considerations that

⁷¹ In 2013, in approximately 1/3 of the rulings, *supra*.

⁷² De Rechtspraak, *supra* note 46 at 60.

⁷³ *Ibid.*

⁷⁴ *Ibid.*, at 61.

⁷⁵ *Ibid.*, at 61.

can be related to the Childcare Allowance Case based on our research question:

Have judicial/ethical norms been violated by what went wrong in the Childcare Allowance Case? And if so, which norms in particular? What can be learned from the findings?

The most fundamental ethical question that had to be answered by the judges in many cases was whether, on the basis of the alleged breach of the regulations, a firm response that would disproportionately affect the parents was justified. We conclude that, in following the 'all-or-nothing' approach, the courts did indeed breach judicial norms.

They neglected the principle of individual justice and did not provide effective legal protection to the parents. The lack of provision of individual justice also raises serious questions about judicial independence and loyalty to the system. The issues of the Childcare Allowance case were publicly discussed by politicians, legal professionals, youth care professionals and the National Ombudsman and have been brought to

the attention of cabinet ministers and members of parliament for many years.

This could not and should not have escaped the attention of judges working in this field of law, but it seems that the alarm bells did not go off or were at least not (effectively) acted upon. The lack of an individualized approach seems to be the result of the fear of raising expectations of parents that may ultimately not be met. Fears that, in reality, did not always materialize.

Reading the reflection reports of the first-instance judges and the AJD, the authors noted that, although judicial ethics are implicit throughout, they are not, as such, explicitly discussed. As discussed above, several lessons can be learned on the basis of existing reports. More in-depth research on the role of ethical considerations in the judicial decision-making processes of the 'Childcare Allowance Case' may result in further valuable lessons for judicial decision-making, the selection of judges, the composition of benches at court level and at the level of the AJD and the future training of judges.

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THE CULTURAL EXCEPTION A CONTEMPORARY DRAMA IN SIX ACTS

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Although a complex matter, adequate protection of multiculturalism has caught a grip on the public discourse in recent years. Cultural norms of the many peoples of Europe are omnipresent, breathing colour into an otherwise mundane life. Since throwing everybody into a ‘melting pot’ and expecting different traditional customs to be assimilated into the dominant culture is not the correct response, national and international legal systems must establish a proper juridical mechanism in response to the challenges posed by contemporary society. As stated in the judgment of the Supreme Court of California in the 1964 case, *The people, Plaintiff and Respondent, v. Jack Woody et al.*, ‘in a mass society, which presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and the group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of national life give it depth and beauty. We preserve a greater value than tradition when we protect the rights of minorities.’

This study aims to analyse our suggested answer to the talking point presented *supra*, the cultural exception, from the point of view of judicial ethics. It starts with a brief introduction regarding multiculturalism and the rule of law, after which it considers the manner in which cultural expertise can be pursued, using the legitimacy tests proposed in current literature on this subject. Next, three situations are examined in which the cultural exception might be an incident. Finally, we conclude by checking the balance between applying the cultural exception and the disciplinary liability of judges and prosecutors.

KEYWORDS:

MULTICULTURALISM | MINORITIES | TRADITION | RELIGION | CULTURAL EXCEPTION | CULTURAL TEST
JUDGES AND PROSECUTORS | DISCIPLINARY LIABILITY

1. ACT ONE

Once upon a time, there was a beautiful little girl aged 10, promised by her parents to marry a handsome boy, aged 13. The wedding was held shortly after their parents decided on their marital future, celebrating for three days and three nights. The girl and the boy set up a new family and, by the age of 12, she had two healthy babies, with a promising, bright future. No, this story is not about a modern Romeo and Juliet. This is contemporary reality with a traditional spark.

What strikes the reader more, the custom of the promise of the parents or the age of the newly-weds? At that particular age, most of us used to play with dolls or cars, we would watch cartoons and go to school with the most colourful backpack. Would you have imagined yourself marrying and giving birth or providing for your family when you were 12 years old? Should the public authorities intervene and, if so, how?

In our paper, we look at this from the point of view of the clash between ethics and the normality of an ethnic, especially Roma, people regarding the abandonment of school by their girls and arranged early marriages, or a religious group, the work environment of the Adventists on the Sabbath and attitudes of Jehovah's Witnesses to blood transfusions.

In an era of greater cultural diversity, finding harmony between each group's particularities and the rule of law is a hot-topic for us, jurists. Therefore, we will follow the thread from theory to practice, from abstract to concrete and, hopefully, decide on clear-cut conclusions.

2. ACT TWO – WHEN FOREIGN CULTURES TAKE THE STAGE

The idea of multiculturalism in contemporary discourse and in philosophy reflects a debate on how to understand and respond to the challenges associated with cultural diversity based on ethnic, national, and religious differences. The term 'multicultural' is often used as a descriptive term to characterize diversity in a community, but, in what follows, the focus is on multiculturalism as a normative ideal in the context of democratic societies.

While the term has come to encompass a variety of normative claims and goals, it is fair to say that proponents of multiculturalism find common ground in rejecting the idea of the 'melting pot' in which members of minority groups are expected to assimilate into the dominant culture. Instead, proponents of multiculturalism endorse an ideal in which members of minority groups can maintain their distinctive collective identities and practices.¹

A. An Important Actor: The Anthropologist Judge

This clash of concepts is no stranger to the legislative and judiciary powers, for they are called upon to mediate on the rift between a generally homogeneous legal framework and increasingly heterogenic cultures of open communities. It is indeed true that law and anthropology exist within diverse epistemological and methodological fields; they have different aims (e.g., descriptive – anthropology/prescriptive – law) and different ways of dealing with the diversity of human behaviour.

¹ S. Song and E. N. Zalta (ed.), *Multiculturalism*, The Stanford Encyclopedia of Philosophy, Fall 2020 Edition.

Nevertheless, given the current condition of multicultural societies, interdisciplinary dialogue must be encouraged, because law needs anthropology to ensure justice. While judges may not have any anthropological training, they nonetheless must decide on behaviours rooted in what the present status of knowledge calls 'culture'. People can see their rights unjustly denied because legal systems apply the law without an adequate evaluation of the cultural dimension of conduct.²

Therefore, in multicultural societies, cultural expertise is becoming increasingly important as a way of imbuing the law with a kind of knowledge that would otherwise remain inaccessible to judges, lawyers and other personnel involved in a case. Social backgrounds deserve to be considered in litigation because enculturation shapes the perceptions of individuals and influences their actions. The acquisition of cultural categories is largely an unconscious process, so individuals are usually unaware of having internalized them.

B. Multicultural Litigation and Cultural Exceptions. Some Pure Theory

Multicultural legal disputes are characterized by the presence of extraneous elements, such as cultural identity or religious factors, which influence the merits of the case, being relevant in drawing up the resolve. Given that *jus est ars boni et aequi*, some³ state that multicultural litigation may involve exceptions or derogations from the applicable legal framework, known as cultural exceptions or defences, which variously influence civil and criminal cases.

The premise of the cultural defence argument is that culture exerts a strong influence on individuals, predisposing them to act in ways that are consistent with their upbringing. The theoretical basis for a cultural defence hinges on the idea that individuals will think and act in accordance with patterns of culture. Legal systems must acknowledge the influence of cultural imperatives as part of individualized justice, and this cross-cultural jurisprudence does not represent a radical departure from existing policies in most criminal justice systems.

Taking a person's cultural background into account is fundamentally no different from judges taking into consideration other social attributes such as gender, age and mental state. Insofar as individualized justice is an accepted part of legal systems, the cultural difference is simply another factor to review in the context of meting out condign punishment.⁴

One must acknowledge that traditions and other cultural norms pose internal restrictions that refer to the claims of an ethno-cultural group towards its own members, protecting homogeneity and defending the group identity from the destabilizing impact of internal dissent. However, they risk restricting the individual freedom of vulnerable group members with serious repercussions on those who cannot contest or abandon the traditional status if they are part of closed, illiberal, patriarchal or theocratic communities.⁵

These are essential details that must be carefully considered when applying the theory of cultural exceptions. The cultural defence is not a legal institution *per se*,

2 I. Ruggiu, *The 'Cultural Test' as Cultural Expertise: Evolution of a Legal-Anthropological Tool for Judges*, 2019, *Laws*, 8, 15; doi:10.3390/laws8030015.

3 M. O. Constantin, *Diversitate culturală și justiție. Clauza culturală și mariajele timpurii în România. Teză de doctorat*, PhD thesis, 2016.

4 A. D. Renteln, *The Use and Abuse of the Cultural Defense*, *Canadian Journal of Law and Society*, Volume 20, Number 1, 2005, pp. 47–67, *apud*. A. D. Renteln, *A Justification of the Cultural Defense as Partial Excuse*, 1993, 2 *S. Cal. Rev. L. & Women's Stud.* 437.

5 W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford: Calderon Press, 1996.

as the legislation does not expressly regulate a right of cultural exception or a formal mechanism guiding judges and prosecutors involved in multicultural litigation. However, the mechanism is invoked by the parties and used *ex officio* by prosecutors or by judges, in a fairly extensive case history (including in Romania).

Cultural defences are classified in legal and judicial exceptions. Legal cultural exceptions refer to situations where the law itself regulates a derogatory regime from a civil or criminal norm, which is applicable exclusively to a specific community, so that an act will be treated differently, provided that the perpetrator or parties belong to that community.

Judicial cultural exceptions imply parties or judges invoking, *ex officio*, the significance of traditions or religious beliefs regarding the factual situation, thereby altering even the finality of a multicultural dispute, the verdict.⁶ Proper use of the cultural defence theory requires the recognition of the relevance of any specific identity when deliberating on the merits of the case.

Admitting a cultural exception presupposes that the cultural specificity comes to have a decisive value when passing the final judgment in criminal or civil cases. Regardless of whether it takes the form of an actual exemption or a mitigating circumstance, if admitted, the cultural defence will result in a divergent legal treatment of convergent factual situations. Such inconsistent solutions proposed by the judiciary seem to be a breach of the principle of the rule of law opposing every cardinal idea taught at law schools across the world.

However, we must ask ourselves if this is truly a fundamental breach of the rule of law, bordering on discriminatory practices, if this falls within the concept of affirmative action, or whether this is just an apparent exception, a just graft of legal provisions on foreign cultures and traditions.

C. Drafting the Scenario: Diversity within the Rule of Law

John Locke, tackling the notions of freedom and order in his *Second Treatise of Government* (1690), stated: 'The liberty of man, in society, is to be under no other legislative power, but that established, by consent, in the commonwealth; nor under the dominion of any will, or restraint of any law, but what that legislative shall enact, according to the trust put in it.'⁷

In other words, true social liberty begs for a transition from the traditional idiom *rex lex* to a more democratic *lex, rex*, the law is king, for we are all its servants in order to be free. All members of a society, including those in positions of power, are considered equally subject to publicly disclosed legal codes and processes. This concept distinguishes itself between the safeguards that guarantee the upholding of ideals and values on which the European Union was built.

One such core principle is encompassed by the EU motto, 'United in diversity', signifying how Europeans have come together, in the form of the EU, to work for peace and prosperity, all the while being enriched by the continent's many different cultures, traditions and languages. While creating an ever closer union among themselves, the nations of Europe have resolved to share a peaceful future forged on common values by adopting the Charter of Fundamental Rights of the European Union.

6 M. O. Constantin, *Diversitate culturală și justiție. Clauza culturală și mariajele timpurii în România*. Teză de doctorat, cit. supra.

7 J. Locke, *Second Treatise of Civil Government*, Ch. IV, sec. 22, 1690.

Its preamble specifies that ‘Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law.’⁸

The Charter places the individual at the heart of its endeavours, contributing to the preservation and the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe, as well as the national identities of the Member States and the organization of their legal framework. Through its third title, the Charter enables social, cultural, religious and gender equality, simultaneously recognizing the existing differences between people.

D. The Cast: United in Diversity

Diversity is also preserved on a constitutional level in many of the European countries. Just to name a few, Article 14 of the Spanish Constitution, Article 1 of the French Constitution, Article 3 of the Italian Constitution and that of the German Basic Law, Articles 1 and 4 of the Romanian Constitution and Article 8(2) of the Austrian Constitution. All these basic laws guarantee equality before the law and protection against discrimination.

The ‘Constitution’ is a contested notion, of which many conceptions exist, with regard to its use, both in the state and non-state context. Some authors consider constitution to be a strictly state-level legal and political phenomenon, and reject all talk of constitution or constitutionalism beyond the state.⁹ Despite such a restrictive approach, the few extracts illustrated above present a convincing overview of the general commitment in

Europe to protect heterogeneity in the spirit of the EU motto. The said diversity has spawned a variety of novel legal issues. The main question that arises is, what should judges and prosecutors, the guardians of freedom under the law, do when the many heterogenic practices of different cultures defended under constitutional principles come in conflict with substantive law? The rule of law dictates that all peoples living in a confined territory must abide by its rules, regardless of their particularities.

However, such a blind approach is a dangerous slippery slope, detracting from both the ideas of freedom and diversity of conduct. This dilemma of multicultural legal disputes, where the incidence of cultural identity or religious factors, as elements of the factual situation (more specifically), are relevant in determining the verdict, is solved through the appropriate implementation of the theory of cultural defence.

The use of the cultural exception implies the recognition of the relevance of a specific identity for the legal *différend*. The effective application of the cultural exception presupposes that, after careful consideration, the cultural specificity comes to have a decisive drive in passing judgment. Such admission of a cultural defence will result in the differential application of substantive law in the sense that the verdict would have been completely different for an identical state of affairs in the absence of cultural circumstances.¹⁰

At first glance, this might appear, and rightfully so, as a repudiation of the rule of law principle. One might contemplate if such divergent solutions are an example

⁸ Charter of Fundamental Rights of the European Union, 2012/C 326/02.

⁹ K. Tuori, *The Many Constitutions of Europe*, Oxford Handbook Topics in Law, online edition, Oxford Academic, 2 May 2016.

¹⁰ M.O. Constantin, *Un punct de vedere asupra rolului magistraților în problematica diversității culturale*, NRDO, nr. 4/2017, ISSN: 1841-4710.

of rule by law, where the law is a cultural custom that imposes an antithetic, yet favourable legal treatment to that administered to the general public, leading to discrimination. This line of thought generates a false conclusion, because positive action in the context of cultural or religious multifariousness does not represent inequitable practice, but rather the adequate protection of a segment that is at risk.

External defences resembling those instituted by numerous European constitutions, enshrine the collective rights of a minority with respect to the majority, guaranteeing heterogeneity and seeking to limit the impact of general decisions on cultural specificity. They are aimed at the functional relations between groups intending to diminish vulnerability and social unfairness.¹¹ The notion of cultural exception pursues an identical goal of sheltering ethnical or religious minorities against prejudice.

Justices ought to understand that similar actions convey a different underlay, depending on cultural norms followed by the subject of law. Therefore, justice alike is justice denied for certain divisions of population that wish to protect their traditional identity.

3. ACT THREE – WHEN CULTURE BECOMES MORE IMPORTANT THAN LAW

Scholars believe that, when friction between the law and cultural usages of a group arises, the ideal solution would be to solve it through the preparation of a cultural expert study by a qualified anthropologist or another professional (e.g., ethnopsychologist, historian, academic) who is an expert on the cultural

practice emerging in the trial, not just mere judges or prosecutors.¹²

However, as a go-between approach when such a cultural expert might not be at hand, two methods have been proposed for dealing with such an issue to be used by legal specialists: to analyse each case individually or based on a standard structured model.¹³ Moreover, the first respondents to this call for protection of heterogeneity so as to reduce the potential misuse of cultural defences have identified some basic, but reliable questions that could be contemplated as benchmarks by judges or prosecutors when faced with multicultural litigation, be it civil or criminal.

The relevant doctrine named these inquiries ‘tests of legitimacy’, combining a set of general criteria that would be applied to a given case, ensuring both overall acceptance of culture into law and specific care about the destiny of an individual. One such pioneer is Alison Dundels Renteln who, in her groundbreaking book ‘The Cultural Defence’ (2004),¹⁴ proposed a legitimacy test consisting of four questions, namely:

1. Is the defendant a member of an ethno-cultural group?
2. Does the group recognize the tradition invoked in this case?
3. Was the perpetrator influenced by tradition when he acted?
4. Does respecting the custom result in irreparable damage?

In order to see whether a cultural defence is applicable in criminal trials in particular, the four criteria presented above must be cumulatively met. This novel idea paved the way for Renteln to walk so

¹¹ W. Kymlicka, *op. cit.*

¹² I. Ruggiu, *The ‘Cultural Test’ as Cultural Expertise: Evolution of a Legal-Anthropological Tool for Judges*, *cit. supra*.

¹³ *Id.*

¹⁴ A. Dundels Renteln, *The Cultural Defense*, Oxford: Oxford University Press, 2004.

others could run. Refining the Renteln test, legal professionals, such as Ilenia Ruggiu, debated on a proposal that draws attention because of its complexity and furthers the debate on this topic:

1. Does the matter fall within the category of culture?
2. Describe the cultural practice and the group.
3. Relate and link the practice with the broader cultural system/web of significances.
4. Is the practice essential (to the group's survival), compulsory or optional?
5. Is the practice shared or contested within the group?
6. Is the group vulnerable within a society? Is it discriminated against?
7. How would a reasonable person in that group behave in the same circumstances?
8. Is the subject sincere, honest and consistent in claiming the cultural practice?
9. Is there a cultural equivalent, a similar or comparable practice, in the majority culture?
10. Is the practice harmful? Is the harm irreparable?
11. Does the practice perpetuate patriarchy?
12. What is the impact of the practice on the culture and value system of the majority?
13. What positive reasons support the minority following that practice? Is the practice an equally valuable and meaningful life choice?

Undoubtedly, this Ruggiu test provides for a more complex, in-depth cultural analysis, not only because it has more questions, but also because they emphasize different,

but complementary perspectives: objective, subjective and relational.¹⁵ Therefore, in order to prove its efficiency in the courtroom and, eventually, to recognize this second test as a valid form of cultural expertise or useful legal-anthropological tool, we will further bring theory into practice.

4. ACT FOUR – CULTURAL EXCEPTIONS IN ROMANIA

A. Malala's story all over again – Preventing access to compulsory general education

According to Article 380 of the Romanian Criminal Code, a parent or person to whom a minor has been entrusted by law, who unjustifiably withdraws or prevents by any means the minor from attending compulsory general education commits the crime of preventing access to compulsory general education and shall be punished with imprisonment from three months to one year or a fine.¹⁶

The offence represents the failure to comply with the obligations laid down by the law on access to compulsory general education.¹⁷ Moreover, according to Article 86, para. 3 of the National Education Law, the parent or legal guardian is obliged to take measures for the pupil to receive schooling as a result of compulsory education. Failure to comply constitutes an administrative offence, according to Article 360, para. 1 of Law no. 1/2011 and if the act is committed such that it constitutes a criminal offence, only the provisions of Article 380 of the Criminal Code will apply.

Considering the fundamental right to education provided for by the Romanian Constitution in Article 14, one might wonder what could be the reasons for not

¹⁵ I. Ruggiu, *The 'Cultural Test' as Cultural Expertise: Evolution of a Legal–Anthropological Tool for Judges*, cit. supra.

¹⁶ A similar regulation, which inspired our internal text, is found in §195 of the Austrian Criminal Code.

¹⁷ Article 16, para. 1 of the National Education Law no. 1/2011: 'general compulsory education comprises primary education, secondary education and the first two years of upper secondary education.' According to the same law, upper secondary education and the upper class of pre-school education become compulsory until 2020 at the latest, middle class until 2023 at the latest, and lower class until 2030 at the latest.

respecting such an obligation, which is undoubtedly in the interest of the minor, an interest provided for by law as superior. Although the Romanian jurisprudence on this offence is quite limited, a case has recently come to the attention of the public, which bases its reasoning on a cultural exception.

1. A Representatives' Point of View

Some traditional Roma parents refuse to send their children to school, especially girls after the first grades. The response of the Roma representative and local councillor in the Brateiu town hall, a village in central Romania, was unwavering, at least for now: they will not send their girls to school simply because they want to protect them.¹⁸

It was also explained why Roma people within the Brateiu community consider it a danger for girls to go to school: 'Our 12-year-old girl thinks differently than a girl from the majority community, she has different principles, she has different dreams. If I let my daughter go up to eight grades, there is a danger that, at 14, she will do something stupid because of the mentality and thinking she would have. (...) we don't consider our girl or our boy marrying outside the community and there is this danger. (...) the school can be a factor of their exposure.'¹⁹

Furthermore, an interesting problem regarding judicial ethics arises from the following statement of the same representative: 'I've never seen the County or local police inspectorate self-investigate (...) Because you had no reason. (...) you're going to fight windmills, because no one is ever, ever going to come to you and file

a complaint. And you have never been referred to us *ex officio*.'²⁰ The problem that arises in this context is related to the reason why the judicial authorities choose not to initiate criminal proceedings in such cases, given that the facts described meet the typical elements of the offence of preventing access to compulsory general education. Faced with cultural practices that are contrary to the national legal order, the judge or the prosecutor has two main options: to reject them as being inconsistent with existing legal principles and rules or to accept them, legitimizing them by applying them in certain exceptional situations that allow them to exist even though they may be considered socially and legally inappropriate.

In any case, this duality of options exists up to the point at which a certain cultural exception is integrated into positive law. It is, however, debatable to what extent this should be done, because, in our opinion, determining the extent to which a cultural exception is applicable is an activity that should remain within the exclusive competence of the judge or prosecutor.

2. Applying the Ruggiu Test

The questions mentioned above must be asked in the context of a so-called cultural expert study, prepared by a qualified anthropologist or other professional who is an expert of the cultural practice emerging in a trial. However, strictly for academic reasons, we will try to answer these enquiries in our approach, based on the open resources available.

The first group of questions (#1–6) aims to investigate the conditions for recognizing cultural practice by examining its objective

¹⁸ According to this press article, Traian Căldărar, the local Roma representative, made those statements in a meeting organized by the local public authorities and the Mixt Working Group for Roma people in Sibiu: <https://www.turnulsfatului.ro/2023/03/27/romii-caldarari-din-brateiu-nu-vor-renunta-lacasatoriile-intre-minori-si-nu-si-vor-trimite-fetele-la-scoala-bdquo-eu-nu-am-vazut-niciodata-politia-sase-autosesizeze-rdquo-2016127fbclid=IwAR3QNgGyloU5nEhVXLB08utMg4m-7HZsGtRG8cWuQuHjtKbcCOIFr5OawOM>.

¹⁹ Id.

²⁰ Id.

characteristics. It is clear that the Roma community is discriminated against on many levels, so the answer to question number 6 is positive.²¹ To answer questions 1 to 5, we need to check the motive behind the early abandonment. According to the above representative of the Roma community, the reason why Roma girls are not taken to school is the risk that they could marry outside the Roma community.

However, research shows that the majority of Roma girls get married after they complete their studies which are considered compulsory by the child and their parents, while marriage does not lead to dropping out of school.²² As one community representative quoted previously in the study states, ‘After school! The whole sexual relationship started after school! This was a principle I mostly imposed on girls, to have a sexual relationship when they get married and that should be after school!’ (Modern Roma women, Hârşova).

This shows that the practice is not shared within the group, but it is rather contested. Similarly, begging was treated by Italy’s Supreme Court of Cassation as a cultural practice, while Roma people themselves said that it was not the case.²³ Furthermore, we do not consider that the practice is essential for the survival of the Roma minority group. On the contrary, education is an essential pillar for the development of any community, including the Roma community.

Subsequently, the answers to questions 9–13 must be answered in order to give a full overview of the manner in which a judge or a prosecutor should relate to a cultural exception in this particular case. The practice is not similar, nor equivalent in the majority group. There is little case law on preventing access to compulsory general education in Romania, and it mostly has to do either with the parent’s mental capacity to critically assess the content and consequences of the acts committed, having abolished discernment,²⁴ or with preventing the minor from contacting his mother, a conduct which also had repercussions on the child’s education, who was temporarily deprived of the right to attend compulsory education.²⁵

The practice is harmful and the damage done is irreparable.²⁶ Moreover, we must recall the need to ensure that all children²⁷ enjoy the right to education and are ensured equal access to quality early childhood development, care and primary education.²⁸ We also consider that this practice perpetuates patriarchy as the systematic oppression of women. Clearly, preventing access to compulsory general education on the grounds that there is a danger of girls marrying outside the community is a form of oppression of Roma women, which unfortunately takes place within the minority group itself.

21 A study under the ‘Unprejudiced’ project, conducted with the support of the Eastern Partnership Programme and the German Federal Foreign Office in January 2022, showed that Xenophobia against Roma people is widespread not only in Ukraine, but also throughout Europe and the post-Soviet countries. The Roma Survey, 2012 and EU-MIDIS II, 2016 confirm that the levels of discrimination against Roma people in different areas of life remain disturbingly high throughout the EU.

22 M. Voicu and R. Popescu, *Naşterea şi căsătoria la populaţia de romi*, *Calitatea vieţii*, XVII, nos. 3–4, 2006, p. 16.

23 I. Ruggiu, *Is begging a Roma cultural practice? Answers from the Italian law and anthropology*, *Romani Studies* 26: 31–61, 2006.

24 Judgment no. 386/2021 of 26/08/2021, the Local Court of the 6th Sector, Bucharest (Judecătoria Sectorului 6 Bucureşti).

25 Judgment no. 335/2021 of 14/09/2021, the High Court of Cassation and Justice – Criminal Division (Înalta Curte de Casaţie şi Justiţie - Secţia Penală).

26 The importance of the right to education is enshrined in, *inter alia*, the Universal Declaration of Human Rights and other relevant international human rights instruments, including the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities.

27 ECtHR, *Osmanoğlu and Kocabaş v. Switzerland*, Application no. 29086/12, 10.01.2017, para. 105.

28 These important factors were laid down by the Human Rights Council, Thirty-fifth session, 6–23 June 2017, Agenda item 3, Resolution adopted by the Human Rights Council on 22 June 2017, 35/22. Realizing the equal enjoyment of the right to education by every girl, <https://www.right-docs.org/doc/ahrc-res-35-22/>.

We conclude by assessing that preventing access to compulsory general education on the grounds presented by the Roma people quoted above jeopardizes the chances of these girls to live an autonomous life and there is no positive reason for pursuing this practice.

B. Romeo and Juliet à la Roumaine

In Romania, there is a controversial practice among the ethnic group of Roma people for parents to arrange marriages between their children early in their lives. This is invoked as a tradition and consists of an informal union, the cohabitation of the spouses, the wife's need to leave school early and her obligation to fulfil all domestic duties, including intimate relations and the bearing of a child, all with the approval and under the supervision of their parents. On the one hand, under Romanian civil and family law, it is not possible as a rule to legally marry before turning 18. According to Article 272, para. 1 of the Romanian Civil Code, the matrimonial age is set at 18 years, whereas para. 2 provides for a strict exception for persons no younger than 16 years old, under rigorous conditions: thoroughly justified reasons, medical opinion, parental consent and authorization of the court.

On the other hand, according to Article 220, para. 1 of the Romanian Criminal Code, sexual intercourse with a minor aged between 14 and 16 can lead to a punishment of imprisonment for one to five years, whereas, if the minor is under the age of 14 this term of imprisonment will range from two to nine.²⁹ Another relevant aspect of national law considers the procedural possibility of the prosecutor issuing a final decision in a case. Firstly, as

provided for in Article 16, Article 314, para. 1, item a) and Article 315 of the Romanian Criminal Procedures Code, the prosecutor can order the charges to be dropped if the legal conditions are not met for continuing the criminal proceedings (*clasare*).

Secondly, based on an evaluation of the public interest in pursuing a criminal procedure, according to Article 314, para. 1, item b) and Article 318 of the Romanian Criminal Procedures Code, the prosecutor can issue an order of exemption from prosecution (*renunțare la urmărirea penală*).³⁰

1. A Shrewd Observation

In response to a judgment of the European Court of Human Rights issued in *M.G.C. v. Romania*³¹ and other similar cases that followed,³² the Judicial Inspection³³ conducted an analysis of the approach of the judiciary towards sexual deeds against minors, named 'Report regarding the practice of courts and prosecutors' offices in investigating and solving crimes against sexual life with juvenile victims.'³⁴ Even though the case brought before the ECtHR did not involve a particular ethnic group, it is relevant as it set in motion a whole mechanism of exploring and revising Romanian internal practice regarding these crimes.

The reference period of the report was from 1/02/2014 to 27/07/2020 and represents a detailed picture of the judicial activity intertwined with the superior interest of the child. Its aim was to review Romanian internal practice and address the matter of cases regarding underage victims of crimes affecting sexual liberty so as to propose solutions

29 Moreover, if the victim is under duress, unable to defend herself/himself, to express her/his will, the act is treated as rape under Article 218, para. 1 of the Criminal Code.

30 An order that must be confirmed by a judge.

31 ECtHR, *M.G.C. v. Romania*, Application no. 61495/11, Judgment Final, 15/06/2016.

32 ECtHR, *I.C. v. Romania*, Application no. 36934/08, Judgment Final, 24/08/2016.

33 The Judicial Inspection is a body attached to the Superior Council of Magistracy in Romania whose duty is to analyse, verify and control the procedural activity of judges and prosecutors, of courts and prosecutors' offices.

34 The online report: <https://www.csm1909.ro/ViewFile.ashx?guid=1c656a33-bd25-4118-85f1-6411fdeb1c4f-InfoCSM>.

to any shortcomings. One very interesting discovery that is repeated throughout the final report represents the application of cultural defence by taking into account the deeply rooted practice of underage marriage between Roma people, as the vast majority of cases involved minor victims from this ethnic group, with the support of their parents and their community. The report outlined that this cultural exception affects both the legal qualification and the final verdict of a criminal procedure.

Firstly, the judicial inspectors observed that the tradition of marriage of minors is to be found notably among the Roma people and is perceived to be a criterion of the consent test by both the prosecutors and the judges. More precisely, ethnicity is regarded as an aspect that sustains the validity of the consent given by the minor victim, together with cohabitation, even if the girl is only 12 years old and has already carried two pregnancies.³⁵

Before the in-depth analysis, the courts were explicitly required to present the set of criteria that are considered when deciding between rape against a minor and sexual intercourse with a minor, but none admitted that ethnicity is among them. This was only observed by the judicial inspectors after they analysed all the relevant case law. The courts and the prosecutors' offices only mentioned that it usually depends on the age of the victim, her/his degree of development or perception of reality and, mostly, on the evidence gathered and interpreted overall by prosecutors or judges.³⁶

Moreover, the report argued that the prosecutors and judges should have had a more extensive approach in their criminal charges. The parents of not only

the victim, but also the perpetrator were rarely questioned, even though there was evidence that they initiated and encouraged this practice. The proceedings should have gone further so as to consider the parents as accomplices or instigators.

However, there is no example of such case law. Secondly, the verdict is often milder than that applied to people who are not members of this ethnic group. The proceedings usually end before the prosecutor either through an order of exemption based on public interest or through an order to drop the charges because of the failure to meet the legal conditions. Even when they appear before a judge, the perpetrator is rarely sentenced to imprisonment, as the punishment is a suspended sentence of a few months or years.

According to Article 157, para. 4 of the Criminal Code, the criminal action can be initiated *ex officio* if the victim is a minor, but, in reality, public institutions are often notified by hospitals where young girls arrive to give birth or with uro-genital problems. There is a certain acknowledgment of these traditions from the very beginning and judicial bodies remain passive.

Prosecutors and judges usually take into account the fact that the victim and the perpetrator already live together, with the consent of their parents, the young girl is pregnant or has already given birth, circumstances that diminish the social and legal response of public authorities, transforming rape into sexual intercourse with a minor.

Nonetheless, in practice, it is considered that the perpetrator, as the husband, father and main provider for the family,

³⁵ Ibid., p. 266. The Local Court (Judecătoria) of Târgu Mureş, case-law no. x/308/2015, regarding a young girl who gave birth to two children by the age of 12.

³⁶ Ibid., p. 75, p.170.

should not be imprisoned or convicted with a punishment that significantly alters his day-to-day life to avoid jeopardizing the well-being of the family as a whole, including of the young girl and of their baby or babies. Additionally, it appears that parents, any other adult and the community involved in such practice willingly chose to break the law to respect their tradition of the upbringing and education provided by the families of the girls emphasizing their duty to their community and to their future husband in such a manner that young girls and boys cannot object.

However, his practice is, unfortunately, encouraged or, at least, not discouraged by the passive approach of the judiciary with regard to the initiation of criminal proceedings or properly conducting them. In this context, the Judicial Inspection emphasized that there is a pressing issue regarding this tradition of the ethnic group circumventing the law, with serious consequences for the superior interest of the minor that should prevail in any situation.³⁷

Even though the Judicial Inspection did not use this exact wording and did not make reference to the so-called 'cultural defence', it is undoubtedly the same approach – how could a tradition be so important to a tight-knit minority group that it would simply surpass the law?

2. Applying the Ruggiu Test

In this context, we believe that our earlier remarks regarding the matter of preventing access to compulsory general education are pertinent, as the Roma ethnic group is still facing discrimination to a certain extent in Romania. As questions 1–6

encompass the objective characteristics of the cultural practice, from our perspective, the early marriages represent a part of the Roma culture, seen as the customary belief, social form and material trait of a racial or social group.³⁸ Seen essential by those practicing it for a perpetually pure ethnic group, nevertheless, this custom is contested within the group by some of its University-educated members who advocated for it to cease.³⁹ Therefore, it is difficult to define the 'reasonable' nature of a person from this group as it is highly debated as to whether they would continue and abandon this practice.

As for the claim that this is cultural practice, as seen from the case law cited by the Judicial Inspection, the parents, being the ones orchestrating this practice, all truly believe in their actions and are consistent in their claims, while the victim and the perpetrator, as children, can only obey. By far, the most striking answer is related to the tenth question, as this practice is extremely and irreparably harmful to young girls.

They need to abandon education, to fulfil marital obligations at an age when they should thrive, play and study, to bring new life and to dedicate themselves to the needs of others. Where is the superior interest of the child? On paper, but not in their reality. This practice perpetuates patriarchy in its finest forms, without a doubt.

There is no cultural equivalent, similar or comparable practice in Romanian majority culture and there are public authorities and volunteers who try to communicate with these families and support the girls so as to restrict this tradition and its ferocious

³⁷ Ibid., p. 318.

³⁸ According to the Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/culture>.

³⁹ In this context, a Romanian press article is relevant as it includes a statement from sociologist Gelu Duminiță, lecturer at the University of Bucharest and active in Roma NGOs since 2000, condemning this tradition and highlighting the trauma a 12 year old girl who was pregnant after such a marriage can suffer while the authorities accept the 'Roma laws' and do not punish the parents or the 18-year-old husband: <https://www.oradesibiu.ro/>.

consequences on their future. For most of the young girls, it might seem as a natural choice to obey their parents, as their upbringing was based, from the very start, on this idea.

3. To Be or Not to Be a Core Value

Even if the cultural exception can be accepted as a tool on how we apply the law, there are certain core values that cannot be overturned, such as the superior interest of a child.⁴⁰ Therefore, internal positive law which is currently in force should be sufficient to enable both prosecutors and judges to act according to the superior interest of a child who is the victim of a tradition that serves no good to a minor.

The parents, as the first individuals who are legally and morally obliged to raise and educate the child for a better future, put a very young girl in a position that compromises her opportunities, all in the name of a custom that is not compliant with a core principle in a democratic society. Nonetheless, we observed a vivid European interest in this, as the German legislature adopted the Act on the Prevention of Child Marriages concluded abroad.

However, the Federal Constitutional Court noted the failure of the law to address the legal consequences of the invalidation of the marriage and declared it incompatible with the Basic law.⁴¹

C. Unscripted – The Sacrifice of Abraham

The Constitution provides that Romania is the common and indivisible homeland of all its citizens, without discrimination. The fundamental right to freedom of thought, conscience and religion is recognized for any person within Romania through

Article 1 of Law no. 489/2006 on religious freedom and the general regime of religious denominations, being susceptible to limitations only on grounds of public security, the preservation of order, health, public morality, or for the protection of other fundamental prerogatives (Article 2, para. 2 of Law no. 489/2006). Case law involving religious beliefs emphasizes the analysis of differences in legal treatment based on this criterion, which adversely affect the rights of the subjects.

By not differentiating, the judges of the European Court of Human Rights understand, first of all, the equal treatment of people who are in a similar or analogous situation: ‘Article 14 protects persons placed in a similar situation’ (*Marckx v. Belgium*, 13 June 1979, §32) or ‘analogous’ (*Van der Mussele v. Belgium*, 23 November 1983, §46) or ‘relevantly similar’ (*Fredin v. Sweden*, 18 February 1991, §60), later using the phrase ‘analogous or relevantly similar’ (*Sheffield and Horsham v. the United Kingdom*, 30 July 1998, §75). Another relevant case is *Cha’are Shalom Ve Tzedek v. France* (27 June 2000, § 58), where ECtHR judges were required to establish the extent of compatibility between a Jewish tradition and substantive law.

Two aspects are interesting from a theoretical perspective: firstly, the Court’s representation of a custom other than the predominant one and, secondly, the dissension between religion and another legitimate interest, the accent being placed on proportionality.⁴² Nonetheless, as stated above, special situations justify restrictions that are stipulated by law and constitute necessary measures in a democratic society.

⁴⁰ In Law no. 272/2004 regarding the protection and the promotion of a child’s rights, Article 2, para. 4 states that the principle of the superior interest of a child shall prevail in all decisions and actions that concern children, which are undertaken by the public authorities, as well as in cases dealt with by courts.

⁴¹ Press Release No. 36/2023 of 29 March 2023 of the Federal Constitutional Court: <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2023/bvg23-036.html>.

⁴² L. Tec and G. Badea, ‘Libertatea culturii. Cultura libertății. Retrospecții, introspecții, prospecții,’ Editura Universității de Vest, Timișoara, 2023.

1. Genesis 2:2 – and He Rested on the Seventh Day from all the Work He Had Done

A suitable example of discrimination based on religious beliefs involves the unjust treatment of members of the Seventh-Day Adventist Church. As the early Adventist movement consolidated its beliefs, the question of the biblical day of rest and worship was raised. The seventh-day Sabbath, observed from Friday evening to Saturday evening, is an important part of the beliefs and practices of Seventh-Day churches. This day of mandatory rest sparked numerous conflicts between Adventist students or employees and their respective units, who do not wish to accommodate Sabbatarian practices.

Employing the conditions conceptualized by Alison Dundes Renteln or the test proposed by Ilenia Ruggiu to such disputes, the conclusion drawn by the relevant case law found that religious rights enshrined by law are breached by planning activities on the same day as a religious event that requires the abstention from any type of pursuit.⁴³

Thus, a veritable cultural/religious defence is raised, because it is of utmost importance to preserve the freedom of conscience of a religious minority whenever suitable accommodations are possible for the responsible institutions, which must not remain passive, but rather be proactive when faced with systems of diverse beliefs.

2. Leviticus 17:14 - Because the Life of Every Creature Is Its Blood

On the other hand, a thorny problem, where restrictions on expressing one's views constitute necessary measures in a democratic society for the protection of

fundamental human rights and freedoms of people at risk, involves the 'Jehovah's Witnesses' religious denomination and transfusions based on blood products. In this case, unravelling the dilemma with the help of the cultural exception theory, the deduction is fundamentally opposite, despite similar reasoning.

In Romania, parents or guardians have the exclusive right to opt for the religious education of minors according to their own beliefs, while the religion of a child upon reaching the age of 14 cannot be changed without his consent. However, a minor who has reached the age of 16 has the right to choose his own religion (Article 3 of Law no. 489/2006).

Furthermore, the right to religious education allows the parent or legal guardian to decide for the minor child how religious education will be provided, which means that parents who are Jehovah's Witnesses will be able to choose to religiously educate their children in the same way, with the consequences related to the minor's refusal to administer a medical treatment based on blood transfusions.⁴⁴

In principle, except for emergencies, parental consent is requested in order to administer medical treatment to a minor patient, being of essence to keep at heart the minor's interest, his life, health and well-being. Jehovah's Witnesses refuse treatment based on transfusions of allogeneic blood. Members of this religious organization support the idea of bloodless medicine, which does not necessarily mean that they refuse treatment, but that they opt for alternative solutions to blood transfusions. Finding such alternatives has been a challenge for classical medicine,

⁴³ Decision no. 2870/2020 of the High Court of Cassation and Justice; Decision no. 73/01.02.2017 of the National Council for Combating Discrimination.

⁴⁴ M. C. Dobrila, *Refuzul transfuziilor de sânge în cazul pacienților minori, Martori ai lui Iehova. Implicații privind malpraxisul medical*, Revista Dreptul nr. 11/2018.

especially since these solutions involve particularly high costs in a context where Romania currently has problems of a lack of funds.

This means that doctors in hospitals often find themselves in the position of not being able to offer alternative medical care to patients who are Jehovah's Witnesses and are faced with the question of whether there is a risk of medical malpractice when, in emergency situations, with risks to the health or life of the adult patient or a minor patient under conditions of express refusal by the parents, knowingly administer a treatment based on blood transfusion.⁴⁵

The difference between an adult, who is part of the Jehovah's Witnesses religious organization, who refuses blood transfusions, demanding alternative treatments⁴⁶ based on the principle of self-determination and individual autonomy, and the situation involving a parent's refusal for a minor patient (who cannot give an informed consent, either because he has no discernment, being under the age of 14, or because he is underage, namely 14–18 years old) must be pointed out.

Sometimes, in scenarios involving life-or-death medical conditions, the physician appreciates that medical procedures based on blood transfusions must be undertaken, even in conflict with the refusal of the minor's parents, despite the risks of being held liable for medical malpractice. In such cases, after applying the cultural defence test, the following must be noted.

With regard to the rights of parents to decide on the religious education of children and the potential negative consequences of the refusal of medical

treatment on religious grounds to the minor's health or life, the ECtHR case of *Hoffmann v. Austria* (23 June 1993, § 28) is relevant, as it applies to the refusal, after divorce, of some parental rights of the mother as a Jehovah's Witness, as well as the threat to minors because of the refusal of their mothers to accept treatment based on blood transfusions, on religious grounds.

The access of minors to appropriate medical care is a parental responsibility, being both a right and an obligation of the parents. The rejection of the parents on behalf of the minors to accept the urgent and necessary medical treatment recommended by the doctor for the child, on religious grounds, with severe risks to the child's life or health poses ethical problems regarding the balance between parental autonomy, children's right to life and the religious freedom of the parents.

Refusal of treatment of a Jehovah's Witness patient with blood transfusion is based on the idea of personal autonomy and the right to decide about one's own body and health, but the same arguments cannot be used if the Jehovah's Witness parent refuses a blood transfusion for his child, a minor patient. In the case of a minor, it cannot be stated that the child refused the blood transfusion based on the ability to deny treatment in an informed manner, because the ability to fully comprehend the consequences of the refusal is not yet there.

For minor patients, the rejection of the blood transfusions by a parent on behalf of the child on religious grounds does not always take into account the minor's best interests, respecting his right to life and health, his development or the protection he should benefit from. The U.S. Supreme

⁴⁵ Id., M.O. Constantin, *Minori și minorități. Religie și tratament medical*, NRDO, 4-2013.

⁴⁶ For an ECJ example of case law see *A v. Veselības ministrija* (C-243/19), Judgment of the Court (Second Chamber) of 29 October 2020, EU:C:2020:872.

Court postulated that the freedom to practice a religion does not include the right to expose a minor to the risk of death or to actions or omissions that seriously affect his health. The parents should not be able to transform children into martyrs.⁴⁷

In affairs involving minor patients, the emphasis must be placed on the child's best interests, the binding of Isaac being proof beyond any doubt that no God wants the bloodshed of innocents. Although, for the treatment of minor patients, the doctor needs the consent of their parents/legal guardians, however, Article 46, para. 5 of Law no. 272/2004 establishes a derogation. Therefore, in the exceptional situation in which the child's life is in imminent danger or there is a risk of serious consequences regarding the child's health or integrity, the doctor providing the treatment has the right to perform those medical acts which are strictly necessary to save the minor's life, even without the consent of the parents or legal guardians.

As a form of additional protection, when appropriate, it is also possible for a court to terminate the exercise of parental rights, a measure recognized by Article 508 of the Romanian Civil Code. Suppose we find ourselves in a situation where our legal guardian refuses to give his consent, and the medical service providers consider that the intervention is in the patient's best interest. In such a case, the decision will be made by a specialized arbitration committee, made up of three doctors for hospitalized patients and of two doctors for outpatients (Article 17 of Law no. 46/2003).

3. Applying the Ruggiu Test

Following Ilenia Ruggiu's footsteps, it should be emphasized that refraining from blood transfusions is a religious practice

that is deeply rooted in the system of beliefs of Jehovah's Witnesses, stemming from texts considered sacred. This idea, albeit not widespread in other religions, is of utmost relevance to their doctrine, being essential to what the group considers spiritual salvation, therefore characterizing this specific religious minority. However, despite their sincerest beliefs, this practice is not essential for the survival of the group, and is rather harmful to vulnerable people from this denomination. In certain circumstances, the potential damage might even be irreparable.

Foreseeing the above dialectics, a cultural exception justifying the withholding of treatment for minors is inadmissible. The core of the doctor-patient relationship rests in the duty to care for the sick. It should be noted that a Jehovah's Witness child can end up being excluded from the religious community and his family. There are cases where the family refused to take care of the child, because the acceptance of a blood transfusion is an immoral act, and in the situation of a minor who died after receiving a blood donation, according to the parent's beliefs, it is considered that his spiritual life ended.

Facing similar difficulties, consideration should be given as to what the best interest of the child truly means. In addition to the doctor's ethical and legal dilemmas, the parents of Jehovah's Witnesses are also in a difficult position, torn between making a decision that is approved by the religious community, which involves refusing blood transfusions for the minor, even at the risk of his life, or accepting blood transfusions, which may even lead to the excommunication of the whole of that family.

In conclusion, according to the minor patient, emphasis must be placed on

⁴⁷ Supreme Court of the United States, *Prince v. Massachusetts*, 21 U.S. 158, 1944.

the principle of the child's best interest. As portrayed previously in an impactful movie, bound by this paramount consideration, justice should take a scalpel to the heart of religion, for the child's welfare is better served by his newly found passions, by the exercise of lively intelligence, by the expression of a playful and affectionate nature and by all the love and life that lie ahead.

In such predicaments, religious doctrine is hostile to a bright and happy future, so children must be protected from their beliefs, their communities and themselves.⁴⁸

In the case of a doctor who applied a treatment protocol based on blood transfusions to a minor patient, even in opposition to the express refusal of the Jehovah's Witness parents, for religious reasons, liability for medical malpractice cannot be applied, to the extent to which the doctor had the child's interest in mind, namely to protect the child's life and health. This is never an easy decision, as it has severe implications on the community and parties involved, *ergo*, it is advisable to form a group that helps the family and the minor patient reach a decision regarding the administration of blood transfusions, when there are risks to the child's life or health.⁴⁹

5. ACT FIVE – DISCIPLINARY LIABILITY OF JUDGES AND PROSECUTORS

In Romania, disciplinary liability is regulated by Law no. 303/2022 on the statute of judges and prosecutors. Article 270 provides that judges and prosecutors are liable for the culpable commitment of the disciplinary offences provided for by

law. One of the disciplinary offences which can give rise to liability is the exercise of duties in bad faith or with gross negligence, as provided in Article 271, item s).

The law provides that bad faith exists when the judge or prosecutor knowingly breaches the rules of substantive or procedural law, in order to harm a person or accepting that harm a person will be harmed, while gross negligence arises when the judge or prosecutor culpably, seriously, unquestionably and unequivocally disregards the rules of substantive or procedural law.

In the disciplinary liability case law,⁵⁰ it has been held that the constituent components of this disciplinary misconduct are satisfied if provisions of the law which have no connection with the case are applied or decisions are made outside any procedural provisions, on the basis of a major error, for which a reasonable (well-informed and in good faith) observer can find no justification. It is also important to mention that, in the context of disciplinary liability, logical/legal reasoning, the analysis of the evidence and the interpretation of the provisions of the law supported by legal arguments retained for the pronouncement and reasoning of the decision cannot be verified.

Therefore, only those errors which are obvious, unquestionable and unjustified and in clear contradiction of the provisions of the law can give rise to disciplinary liability. The application of a cultural exception can be reasonably justified, given that the judge or prosecutor pursues a legitimate interest in the proceedings, namely that of the cultural minority from which the exception arises. Although, in most cases, this application is in conflict

⁴⁸ For an in-depth depiction of the ethical implications of the intervention of justice in such affairs, we recommend 'The Children Act', 2017 drama film directed by Richard Eyre, produced by Duncan Kenworthy, and written by Ian McEwan, based on his 2014 novel of the same name.

⁴⁹ *Id.*

⁵⁰ Case no. 25/J/2016, Division for judges on disciplinary matter, Judgment no. 4/J/2017, Superior Council of Magistracy, Romania.

with the provisions of substantive law, given that the cultural exception is not regulated by law, we consider it difficult to conclude that, by applying a cultural exception, the judge or prosecutor knowingly breaches the principles of substantive or procedural law, intending to harm a person or accepting that a person will be harmed.

However, disciplinary liability should not be ruled out in all situations, especially in cases where the conditions for applying the cultural exception are not met, according to the tests proposed in the literature.

6. FINAL ACT

In conclusion, we cannot say for sure whether our Romeo and Juliet had a happy ending, nor do we have a definite legal answer to dilemmas like those presented above. Multicultural societies resemble a Rubik's cube, ensuing litigation begging for thorough and thoughtful merging of different manners and traditions within the general convention that is reflected in positive substantive law. However, we hope our thesis provides food for thought, encouraging legal professionals to take steps in the right direction, for never was a story of more woe, than this of Juliet and her Romeo.

Therefore, a compassionate and open-minded overview is desirable, not only because it is expedient, but because it is right. Of course, the legitimacy tests we used are not above constructive criticism, some assessments being arguably too

broad to be conclusive while the degree of relevance of another query depends too much on a judge's assessment. Even so, we must not forget that Rome was not built in a day and we should set our eyes on a more inclusive and welcoming future. All in all, the judge is called upon to carefully consider whether law should prevail over customs or whether the scale tips in favour of the constitutional protection of diversity. Some might argue that the cultural exception may create problems of enforcement and that the dictate of the state should overcome the beliefs of minorities.

But the problems of enforcement here do not inherently differ from those of other situations. On the other hand, the right to freedom of expression embodies a precious heritage of the history of every country. In a mass society, which presses at every point toward conformity, the protection of self-expression, however unique, of the individual and the group becomes ever more important.

The varying currents of the subcultures that flow into the mainstream of national life give it depth and beauty. We preserve a greater value than tradition when we protect the rights of minorities.⁵¹ Finally, admitting a cultural defence is purely an apparent exception from the rule of law, instead, constituting a multicultural approach of European principles of law that foster diversity and nourish cohabitation between variable cultures, faiths and ethnic groups.

51 *The people, Plaintiff and Respondent, v. Jack Woody et al.*, Supreme Court of California, 24 August 1964.

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