THEMIS ANNUAL JOURNAL 2024

VOLUME 6

Anthemis

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Dépôt légal : D/2025/10.622/128
ISBN : 978-2-8072-1619-8

Mise en page et couverture : CW Design

Imprimé en Belgique

The THEMIS ANNUAL JOURNAL 2024 is comprised of the papers submitted for the 2024 THEMIS Competition semi-finals.

The EJTN is grateful to the individuals who have contributed to this publication.

Funded by the European Union. Views and opinions expressed are however those of the authors only and do not necessarily reflect those of the European Union or the European Commission. Neither the European Union nor the granting authority can be held responsible for them.

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FOREWORD

KOEN LENAERTS*

PRESIDENT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION AND PROFESSOR OF EUROPEAN UNION LAW, LEUVEN UNIVERSITY

I am honoured to introduce this 2024 edition of the *THEMIS Annual Journal*. Every year, the Journal follows the *THEMIS Competition*, which the European Judicial Training Network (EJTN) has organized since 2010.[1] That prestigious competition offers future or recently appointed judges or prosecutors from the Member States and third countries that are candidates for EU membership[2] a platform enabling them to perfect their practical knowledge of EU law and the European Convention of Human Rights (ECHR) and their communication skills. The participating teams, assisted by experienced tutors, increase their knowledge of topics of common interest in European law, especially in the areas of criminal and civil procedure, family law and administrative law. The competition stimulates critical thinking on EU law instruments governing these areas, including difficulties that may arise concerning their interpretation and correct application in national legal systems. Most cases and topics are also designed in such a way as to encourage participants to reflect on how these instruments fit together with national rules, taking into account the complexity of the multi-level system of fundamental rights protection in the EU.

The benefits for participants go far beyond enhanced 'technical' expertise in EU law. The THEMIS Competition, which forms part of the EJTN's 'initial training' activities, spurs the development of a common judicial culture in the EU. A clear illustration is the fact that, every year, one semi-final is dedicated to 'judicial ethics and professional conduct', whereas the grand final addresses judicial protection in the European Union.[3] The EJTN should be commended for offering future judges or prosecutors from all over Europe an opportunity to engage in high-level discussions on these topics. A clear connection can be made in this respect between the THEMIS Competition and the mission conferred upon the Court of Justice by the Treaties, which is to ensure that 'in the interpretation and application of the Treaties the law is observed'.[4] That mission relates to the very *raison d'être* of EU law which, as the Court already explained in 1963,[5] is to create individual rights that are directly enforceable before national courts and for which

* All opinions expressed are personal to the author.

1 The competition was, however, created in 2006, on a joint initiative from the Portuguese Centre for Judicial Studies (CEJ) and the National Institute of Magistracy in Romania (NIM).

2 Participation to the competition is open to judicial trainees originating from the EJTN's members and observers.

3 According to the THEMIS Competition Rules published on the EJTN's website, that covers, in particular, the 'right to an effective remedy' and the 'right to a fair and public hearing before an independent and impartial tribunal'.

4 Art. 19(1), first subparagraph, TEU.

5 CJEU, *van Gend en Loos*, judgment of 5 February 1963 (EU:C:1963:1), 26/62.

effective remedies must therefore exist.[6] The Court cannot fulfil that 'constitutional' mission without the assistance of national courts, which are primarily responsible for ensuring that all EU citizens effectively enjoy the rights conferred upon them by EU law. That explains why the Court described the preliminary ruling procedure as the 'keystone' of the EU judicial system,[7] and, consequently, as an essential condition for upholding the EU rule of law.[8] It is crucial for future judges and prosecutors in the Member States to understand the seminal role they will play in upholding that value during their judicial careers.[9] That responsibility has 'mechanically' increased with the unprecedented expansion of EU law into a wider range of areas such as environmental protection, asylum and migration, data protection, and cross-border judicial cooperation in criminal, civil and commercial matters. In a unique atmosphere combining professionalism, fair play and good humour, the THEMIS Competition fosters mutual trust between participants beyond the differences in legal cultures and systems. It thus promotes the participants' awareness of belonging to the same judicial community. In that sense, the competition contributes in real time to the consolidation of the Area of Freedom, Security and Justice, which is one of the main objectives of the European Union.[10]

This edition of the *THEMIS Annual Journal* contains twelve contributions submitted for the semi-finals of the 2024 competition. They cover very different topics which all raise current challenges in the European legal space, such as the admissibility of evidence and respect for fundamental rights in the context of European investigation orders, the use of non-fungible tokens for money-laundering, the use of artificial intelligence for facial recognition in the context of law enforcement, the effectiveness of EU law in the context of international sports arbitration, or the use of social media by members of the judiciary. That 'sample' of legal thinking on issues of common interest is very useful. It reflects how young judicial professionals tackle those legal issues and balance the various interests and legal instruments or concepts at stake. It also serves as a model for all judicial trainees from the EU, stimulating their interest in European law, their capacity to develop legal reasoning, ensuring compliance with both EU law and the ECHR, and more generally their taste for excellence.

It follows from all the foregoing that the true winner of the THEMIS Competition is the trust which European citizens place in our justice systems. The EJTN has perfectly understood the importance of initial training in that endeavour, in close partnership with the Court of Justice.[11]

Koen Lenaerts

6 K. Lenaerts, J.A. Gutierrez-Fons and S. Adam, 'Exploring the Autonomy of the European Union Legal order', *ZaöRV* (2021/1), at 75.
7 CJEU, *Accession of the European Union to the ECHR* (EU:C:2014:2454), Opinion 2/13 of 18 December 2014, at para. 176, and Case C351/22, *Neves 77 Solutions* (EU:C:2024:723), judgment of 10 September 2024, at para. 52.
8 CJEU, case C-64/16, *Associação Sindical dos Juízes Portugueses* (EU:C:2018:117), judgment of 27 February 2018.
9 See Art. 2 TEU.
10 Art. 3(2) TEU.
11 In a *Statement* published in 2023, the Court of Justice expressed its commitment to further strengthen cooperation with the EJTN ['Supporting the European Judicial Training Network (EJTN) to shape a sustainable European judicial culture', Panorama 2023, available on the website of the Court of Justice].

PRÉFACE

KOEN LENAERTS*

PRÉSIDENT DE LA COUR DE JUSTICE DE L'UNION EUROPÉENNE ET PROFESSEUR DE DROIT DE L'UNION EUROPÉENNE, UNIVERSITÉ DE LOUVAIN

J'ai l'honneur de présenter cette édition 2024 du *Journal annuel THEMIS.* Chaque année, le *Journal* suit le *concours THEMIS,* organisé par le Réseau européen de formation judiciaire (REFJ) depuis 2010[1]. Ce concours prestigieux offre aux futurs juges ou procureurs, ou aux juges ou procureurs récemment nommés, des États membres et des pays tiers candidats à l'adhésion à l'Union[2] une plateforme leur permettant de parfaire leurs connaissances pratiques du droit de l'Union et de la Convention européenne des droits de l'homme (CEDH) ainsi que leurs compétences en matière de communication. Les équipes participantes, assistées de tuteurs expérimentés, approfondissent leurs connaissances sur des sujets d'intérêt commun en droit européen, notamment dans les domaines de la procédure pénale et civile, du droit de la famille et du droit administratif. Le concours stimule la réflexion critique sur les instruments juridiques de l'UE régissant ces domaines, y compris les difficultés qui peuvent survenir en ce qui concerne leur interprétation et leur application correcte dans les systèmes juridiques nationaux. La plupart des cas et des sujets sont également conçus de manière à encourager les participants à réfléchir à la manière dont ces instruments s'harmonisent avec les règles nationales, en tenant compte de la complexité du système « multiniveaux » de protection des droits fondamentaux dans l'UE.

Les avantages pour les participants vont bien au-delà d'une expertise « technique » renforcée en matière de droit de l'Union. Le concours THEMIS, qui s'inscrit dans le cadre des activités de « formation initiale » du REFJ, favorise le développement d'une culture judiciaire commune dans l'Union. Une illustration claire est le fait que, chaque année, une demi-finale est consacrée à « l'éthique judiciaire et à la conduite professionnelle », tandis que la grande finale porte sur la protection juridictionnelle dans l'Union européenne[3]. Il convient de féliciter le REFJ d'offrir aux futurs juges ou procureurs de toute l'Europe l'occasion d'engager des discussions de haut niveau sur ces sujets. Un lien clair peut être établi à cet égard entre le concours THEMIS et la mission conférée à la Cour de justice par les traités, qui est d'assurer « le respect du droit dans l'interprétation et l'application des traités »[4]. Cette mission se rattache à la raison d'être même du droit de l'Union qui,

* Toutes les opinions exprimées sont personnelles à l'auteur.

1 Le concours a toutefois été créé en 2006, à l'initiative conjointe du Centre portugais d'études judiciaires (CEJ) et de l'Institut national de la magistrature de Roumanie (NIM).

2 La participation au concours est ouverte aux stagiaires judiciaires issus des membres et observateurs du REFJ.

3 Selon les règles du concours THEMIS publiées sur le site Internet du REFJ, celles-ci couvrent notamment le « droit à un recours effectif » et le « droit à un procès équitable et public devant un tribunal indépendant et impartial ».

4 Art. 19, § 1, al. 1er, TUE.

comme la Cour l'a déjà expliqué en 1963[5], est de créer des droits individuels directement opposables devant les juridictions nationales et pour lesquels des voies de recours effectives doivent donc exister[6]. La Cour ne saurait remplir cette mission « constitutionnelle » sans l'assistance des juridictions nationales, qui sont principalement chargées de veiller à ce que tous les citoyens de l'Union jouissent effectivement des droits qui leur sont conférés par le droit de l'Union. Cela explique pourquoi la Cour a qualifié la procédure préjudicielle de « pierre angulaire » du système judiciaire dans l'Union[7] et, par conséquent, de condition essentielle au respect de l'État de droit de l'Union[8]. Il est essentiel que les futurs juges et procureurs des États membres comprennent le rôle fondamental qu'ils joueront dans le maintien de cette valeur au cours de leur carrière[9]. Cette responsabilité s'est « mécaniquement » accrue avec l'extension sans précédent du droit de l'Union à un éventail toujours plus large de domaines tels que la protection de l'environnement, l'asile et la migration, la protection des données et la coopération judiciaire transfrontière en matière pénale, civile et commerciale. Dans une atmosphère unique alliant professionnalisme, *fair-play* et bonne humeur, le concours THEMIS favorise la confiance mutuelle entre les participants au-delà des différences de cultures et de systèmes juridiques. Elle accroît ainsi la prise de conscience des participants d'appartenir à la même communauté judiciaire. En ce sens, le concours contribue en temps réel à la consolidation de l'espace de liberté, de sécurité et de justice, qui est l'un des principaux objectifs de l'Union européenne[10].

Cette édition du *Journal annuel THEMIS* contient notamment douze contributions soumises pour les demi-finales du concours 2024. Elles couvrent des sujets très différents qui soulèvent tous des défis actuels dans l'espace juridique européen, tels que l'admissibilité des preuves et le respect des droits fondamentaux dans le contexte des décisions d'enquête européennes, l'utilisation de jetons non fongibles pour le blanchiment d'argent, l'utilisation de l'intelligence artificielle pour la reconnaissance faciale dans le contexte de l'application de la loi, l'efficacité du droit de l'Union dans le contexte de l'arbitrage sportif international ou l'utilisation des médias sociaux par les membres du pouvoir judiciaire. Cet « échantillon » de réflexion juridique sur des questions d'intérêt commun est très utile. Il reflète la manière dont les jeunes professionnels de la justice abordent ces questions et équilibrent les différents intérêts et instruments juridiques ou concepts en jeu. Il sert également de modèle à tous les auditeurs de justice de l'UE, en stimulant leur intérêt pour le droit européen, leur capacité à développer un raisonnement juridique garantissant le respect du droit de l'UE et de la CEDH, et, plus généralement, leur goût pour l'excellence.

Il résulte de tout ce qui précède que le véritable gagnant du concours THEMIS est la confiance que les citoyens européens accordent à nos systèmes judiciaires. Le REFJ a parfaitement compris l'importance de la formation initiale dans cette entreprise, en partenariat étroit avec la Cour de justice[11].

Koen Lenaerts

5 CJUE, *van Gend en Loos,* arrêt du 5 février 1963, 26/62, EU:C:1963:1.
6 K. Lenaerts, J.A. Gutierrez-Fons et S. Adam, « Exploring the Autonomy of the European Union Legal Order », *ZaöRV*, 2021/1, p. 75.
7 CJUE, *Adhésion de l'Union européenne à la CEDH,* avis 2/13 du 18 décembre 2014, EU:C:2014:2454, pt 176, et aff. C-351/22, *Neves 77 Solutions,* arrêt du 10 septembre 2024, EU:C:2024:723, pt 52.
8 CJUE, aff. C-64/16, *Associação Sindical dos Juízes Portugueses,* arrêt du 27 février 2018, EU:C:2018:117.
9 Voy. art. 2 du traité UE.
10 Art. 3, § 2, du traité UE.
11 Dans une déclaration publiée en 2023, la Cour de justice s'est engagée à renforcer encore la coopération avec le REFJ [« Soutenir le réseau européen de formation judiciaire (REFJ) pour façonner une culture judiciaire européenne durable », Panorama 2023, disponible sur le site web de la Cour de justice].

FOREWORD

THEMIS EDITORIAL COMMITTEE

We are delighted to present the 2024 issue of the *THEMIS Annual Journal*, marking the sixth year of this publication highlighting the European Judicial Training Network's (EJTN) renowned THEMIS Competition. This unique platform brings together young magistrates from across the European Union, offering them an opportunity to test their knowledge of European law while sharing innovative ideas for its future development. Each year, the competition serves as a forum for exploring contemporary legal issues either of a cross-border nature or of common interest to most Member States, for connecting them with broader European principles and for gaining new judicial skills and perspectives. The THEMIS Competition plays a vital role in training future judges and prosecutors, in particular by enhancing their understanding of EU law, developing practical skills and nurturing a judicial mindset grounded in European values.

Since it became an official EJTN activity in 2010, the competition has continuously evolved to meet the changing needs of new generations of magistrates.[1] The four semi-finals deal every year with various topics of criminal law, administrative law, civil law and judicial ethics/professional conduct. They involve up to 11 teams each, placed under the guidance of tutors. Jurors (European judges, prosecutors and scholars) select the top eight teams that will take part in the Grand Final. The latter consists of two parts, both of which relate to issues of judicial protection in the EU: an essay based on a common case for all teams and four series of pleadings in fictitious cases before a moot court composed of the jury members of the Grand Final. This process allows nearly 200 participants annually to deepen their knowledge of EU law and create new connections with fellow judicial trainees from across Europe.

This 2024 issue of the *Annual Journal* marks an important step in its history, announcing a major evolution in both content and format. Until the previous edition, the *Annual Journal* was an 'internal' publication of the EJTN. Although hard copies were distributed to all judicial training institutions within the EJTN, and an online version was available on the Network's website, dissemination among legal academics and practitioners was relatively limited. During the first half of 2025, the taskforce in charge of rethinking the THEMIS Competition[2] decided that time had come to increase the visibility of the best material produced by the participating teams. That required reshuffling the *Annual Journal* into a fully fledged academic publication

1 From 2006 to 2009, the competition was organized by Portugal's Centre for Judicial Studies (CEJ) and Romania's National Institute of Magistracy (NIM).

2 Composed of Ingrid Derveaux (EJTN's Secretary General), Octavia Spineanu-Matei (Judge at the Court of Justice of the European Union), Emmanuelle Laudic-Baron (*École Nationale de la Magistrature* – France), Amelia Onisor (*National Institute of Magistracy* – Romania), Umit Oral (*Institut de Formation Judiciaire/ Instituut voor Gerechtelijke Opleiding* – Belgium), and Melanie Rems (*Federal Office of Justice* – Germany).

referencing the main legal databases in Europe. We are grateful to *Anthemis* for their enthusiasm and dedication in accompanying the EJTN and the newly established editorial committee in that endeavour.

Our editorial promise is quite simple: to publish studies combining a doctrinal, sometimes comparative, dimension with elements of judicial practice, written by magistrates who are at the heart of the issues of justice and the rule of law as founding values of the Union and part of our common constitutional legacy.

Advancing this promise aligns with EJTN's core mission, which is to foster a common European judicial culture built up on mutual trust. On the one hand, it is such as to encourage wider participation in the competition in the future by teams originating from more Member States than in the past. It will also stimulate even more excellence among participants, as, from now on, there is a prospect for them to have their work better promoted through an international publication. On the other hand, we believe that the *Annual Journal* can truly become an instrument of dialogue among magistrates in Europe, as it offers a unique mosaic of how young magistrates in different justice systems on the continent approach legal issues of common interest. That mosaic also represents useful material to other legal professionals, such as lawyers or academics, better equipping them for future litigation or research.

This change in format and distribution must be accompanied by reflection on how the content of the *Annual Journal* might evolve. In the past, only the best papers submitted in the semi-finals were published. Although the current issue is still largely based on semi-final papers, we intend to better promote in the future the materials produced by the teams that performed best in the Grand Final. Such an evolution is, indeed, in line with the fact that the Journal has its roots in a competition. Without prejudice to other evolutions in the future, this 2024 issue has already innovated on this point with a *testimonial by the winners of the 2024 edition* of the competition on their experiment as participants.

Turning now to the 'substantive' contributions in the area of *criminal law*, a first paper by a German team examines the recent difficulties that arose concerning *cross-border judicial cooperation in the context of EncroChat Investigations*.[3] The authors address in particular legal issues arising in the context of European Investigation Orders (EIOs) which aimed to allow evidence collected in one Member State to be used in another Member State. One of those issues concerns the rights of the defence in Articles 47 (right to fair trial) and 48 (presumption of innocence) of the Charter of Fundamental Rights of the EU (hereafter, 'the Charter'). The paper explores the implications of the landmark *EncroChat* judgment of the Court of Justice,[4] in which the latter has clarified which national law applies to ascertaining the lawfulness of an EIO and how EU law protects the fundamental rights of the individuals subject to the collection of evidence through the interception of telecommunications. The authors formulate critical views about that judgment and a decision of the German Federal Court. They argue in particular that their interpretation of EU law, whilst promoting mutual trust and the effectiveness of judicial cooperation in criminal matters, involves undue interference

3 *EncroChat* has been offering seemingly tap-proof smartphones (so-called 'crypto phones') among customers in 140 countries since 2015. It is common ground that those smartphones are regularly used by criminal offenders, in order to conceal their offences and make investigations more difficult.

4 Case C-670/22, Judgment of 30 April 2024, *M.N. (EncroChat)* (EU:C:2024:372).

with fundamental rights envisaged from the perspective of German constitutional law, and entails a risk of circumvention of national rules governing the admissibility of evidence in criminal investigations. In order to overcome those concerns, they advocate for the adoption of EU rules governing the admissibility of evidence gathered in another Member State. In the second paper, a Hungarian team discusses the *Proposal for a common European Regulation on the transfer of criminal proceedings*.[5] After explaining the problems caused by regulatory fragmentation in the EU in the investigation phase, the authors offer critical views on the specific EU instrument governing transfers recently proposed by the European Commission.[6] Whilst recognizing that such a legal instrument would fill in an important gap in the area of judicial cooperation in criminal matters within the EU, they argue that some important issues shall have to be tackled to reconcile it with fundamental rights, including the right to an effective judicial remedy guaranteed in Article 47 of the Charter. The third paper in the area of criminal law, authored by a Portuguese team, explores the challenges raised by law enforcement authorities by *money laundering through the use of non-fungible tokens (NFTs)*.[7] The authors emphasize that money laundering cases using NFTs have multiplied over the past few years, as NFTs provide money launderers with new opportunities to blur the origins of illicit gains. They argue that the existing EU regulatory framework on money-laundering and crypto-assets might not adequately address that fast-growing phenomenon. In order to better tackle the cross-border nature of most infringements, they suggest, in particular, better coordination between the authorities in charge of financial supervision and the fight against money laundering in the Member States with EU bodies such as the EPPO. The positive role that judicial authorities can play in enforcing existing legislation and investigating money laundering cases involving NFTs is also highlighted.

Another series of papers deals with contemporary issues arising in the area of administrative law. A first paper by a French team, at the intersection between administrative and criminal law, examines the *use of retrospective facial recognition by law enforcement authorities in Europe*. The authors describe the lack of transparency in the use of this technology by Member States, its heterogeneous development and the absence of dedicated legal frameworks at domestic level. The conjunction of these factors generates threats for the rights to private life and data protection, due in particular to the large databases of facial imagery linked to civil identity of individuals and the mass collection of facial image evidence that retrospective facial recognition requires. They argue that existing European instruments are too broad to address the use of that investigating tool properly and therefore advocate for a specific instrument harmonizing the legal regimes governing it in the Member States. The second paper, prepared by a Greek team, explores *the use of AI by tax administrations* aiming to boost their efficiency. In their paper, the authors examine the balance to be struck between such efficiency gains and respect due to the general principles of EU administrative law, such as the right to be heard, to access one's file and to be given reasons, the principle of equality and the right not to be

5 This proposal has since been adopted. See Regulation (EU) 2024/3011 of the European Parliament and of the Council of 27 November 2024 on the transfer of proceedings in criminal matters (*OJ* 2024 L 2024/3011).

6 COM/2023/185 final.

7 The authors define an NFT as 'a unique code that represents a digital and physical good, like a digital trading card, which uses blockchain technology to certify the authenticity and ownership of that specific and unique digital object'.

discriminated, as well as the principle of proportionality. In accordance with the rules enshrined in the recent AI act adopted by the EU,[8] they underscore the responsibility of tax authorities to ensure transparency, accountability as well as human agency and oversight in order to mitigate the risks that AI creates when used in public administration. In a third and last paper in the area of administrative law, a Hungarian team examines the *WhatsApp* case before EU Courts, in which key issues arise concerning admissibility of a direct action initiated against binding decisions of the European Data Protection Board (EDPB).[9] The authors express critical views on the position of the General Court, which considered in essence, at first instance, that the decision at issue was preparatory in nature as it was addressed to a national data protection authority responsible for adopting a final decision and that the decision was therefore not of direct concern to the applicant. They argue in particular that references for a preliminary ruling on the validity of such decisions – in the context of challenges against decisions by national data protection bodies – do not offer the same level of effectiveness as a direct action before EU courts as they do not allow the Court of Justice to examine issues of fact pending before national courts. It remains to be seen whether the Court of Justice will confirm on appeal the General Court's strict position.

In the area of *civil law*, a first contribution by a French team deals with the European Commission's 2022 *proposal for a 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*.[10] After examining EU legal instruments in force dealing with private international law issues connected to family matters, the paper offers a critical and contextualized analysis of the balance that the proposal intends to strike. They shed light on that respect of the proposed rules aimed to promote the rights of moving EU citizens and the child's best interests. However, they also highlight the guarantees that the proposal contains for preserving different conceptions among the Member States of what a 'family' constitutes, and public order requirements concerning the establishment and recognition of parenthood. They describe the rules envisaged under the proposal as a desirable development, taking stock of the profound transformation of the concept of 'family' in our society over the past few decades. The second paper, prepared by a German team, addresses the sensitive and much-debated issue of *judicial oversight of arbitration awards by courts in the Member States in the light of EU law*. They discuss a case recently decided by the Court of Justice concerning arbitration in the sports sector,[11] in essence defending the latter's strict position as being necessary to uphold the primacy and effectiveness of EU law. They acknowledge, however, that a balance must be struck between the autonomy of the parties wishing to submit their disputes to effective arbitration procedures and the autonomy of EU law. Against that background, the authors come up with an original proposal, *i.e.*

8 Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonized rules on artificial intelligence and amending Regulations (EC) no. 300/2008, (EU) no. 167/2013, (EU) no. 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) (*OJ* 2024 L 2024/1689).

9 Case T-709/201, *WhatsApp Ireland v European Data Protection Board* (EU:T:2022:783). An appeal is pending before the Grand Chamber of the Court of Justice (see case C-97/23 P).

10 COM/2022/695.

11 Judgment of 21 December 2023, *International Skating Union v Commission* (C-124/21 P, EU:C:2023:1012). See also, for the most recent development in EU case-law concerning this topic, the judgment of 1st August 2025, Case C-600/23, *Royal Football Club Seraing* (EU:C:2025:617).

extending the possibility to make references to a preliminary ruling to the Court under Article 267 TFEU to arbitration bodies, even when they have their seat outside the EU as it is the case for the Court of Arbitration for Sport based in Lausanne. In the third paper in the area of civil law, a Romanian team explores the legal intricacies concerning the validity and enforcement of *asymmetric jurisdiction clauses in private contracts*, especially in the light of the Brussels I Recast Regulation.[12] In essence, such asymmetry arises where one of the parties enjoys more options than the other one(s) regarding issues of jurisdiction under a contract binding upon them.

The fourth and last area covered in this issue relates to *judicial ethics and rules governing the professional conduct of judges and prosecutors*. In a first article, a French team discusses the *interplay between diversity among members of justice systems and impartiality*, which forms part of the fundamental guarantees attached to the right to a fair trial guaranteed by Article 6 ECHR and the right to an effective judicial remedy guaranteed by Article 47 of the Charter. Increased attention is paid to diversity within the judiciary in a large number of justice systems in the EU. The authors argue in that context that diversity could prove to be an asset for increasing the impartiality of judges in Europe. They conclude that, although reinforcing diversity within the judiciary is not an easy task, increased knowledge and training about biases might deliver positive results in terms of impartiality and thus, in turn, reinforce the trust in minority groups in justice systems. In a second paper, a Dutch team explored the *judiciary's response to the attack in 2022 by a group of three activists against Vermeer's masterpiece, 'The Girl with a Pearl Earring', as a protest against what they denounced as an insufficient public action to address climate change*. The criminal court's verdict in the appeal proceedings surprised many observers, as it did not impose a prison sentence to avoid a so-called 'chilling effect' on other people's exercise of their freedom of expression and freedom of peaceful assembly, including through civic disobedience.[13] The authors examine the case through the prism of judicial ethics and explore, in particular, the challenges that cases like this one pose to the judiciary and what role the judge's own moral views can play in it. After providing an overview of the case law of the ECtHR and of Dutch courts on the 'chilling effect' of criminally sanctioning protestors, they reflect on citizens' expectations *vis-à-vis* the judiciary in a case such as that one. Codes of judicial ethics do not preclude judges from having opinions on politics, but require from them that they show 'reserve and discretion' when expressing such opinions, so as to guarantee public trust in judges' independence and impartiality. The authors argue that judges faced with a case of provocative activism must overcome three categories of challenges: the challenge of *instrumentalisation*, which means that justice should avoid being used to promote the interests of a particular group; *delegitimisation*, meaning in essence that carefully balanced and reasoned judgments are necessary to minimize the negative impact of the decision on the court's credibility; and *identification*, referring to the requirement for judges to maintain distance with the interests of the parties involved – in particular the protestors – in order to pass judgement without prejudices and biases. In their conclusion, they highlight the thin line judges must walk when deciding such cases, balancing out their personal beliefs and own

12 Regulation (EU) no. 1215/2012 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 (*OJ* 2012 L 351).
13 That decision was based on a provision of the Dutch Criminal Code on 'legal pardon' (Art. 9a).

moral code with the basic ethical principles of impartiality and independence. In a third and last paper, a Spanish team discusses some of the *most pressing challenges resulting from active use of social media by judges and prosecutors* on the basis of interviews with three Spanish judges and a survey among young Spanish judges.[14] Whilst some argue that limits are necessary to avoid any possible excesses and protect impartiality, others take the view that judges should be able to use social media as freely as anyone else, based on the fundamental right of freedom of expression. The authors plead in favour of a nuanced approach, accepting as a principle the active participation of judges to social media but with certain limits aimed to protect their impartiality and the dignity of judicial offices. In their opinion, the Bangalore principles of judicial conduct (independence, impartiality, integrity, propriety, equality, and competence and diligence), in particular, should always constitute a point of reference when appraising whether social media use by a judge is appropriate or not. The development of an individual ethos by all judges and prosecutors wishing to be active on social media should be encouraged, albeit benefitting from the appropriate guidance and scrutiny from councils for the judiciary and other competent bodies. The authors thus acknowledge that judges must exercise caution on social media and, in particular, maintain an appearance of impartiality. However, that should be without prejudice to their capacity to be active on social media, as such communication can be a valuable tool for spreading relevant and accurate information about the law and judicial activity within society.

Finally, we wish to express our sincere appreciation to all the teams for their hard work, to the jurors for their thorough evaluation and selection of the best papers[15] and to the EJTN Secretariat staff, especially Flavio Mastrorillo as project manager of the THEMIS Competition, for their dedication in organizing it. Their collective efforts give practical effect to this volume's purpose: building a bridge between EU legal doctrine and daily judicial practice in the Member States.

The Editors

14 The paper also contains a comparative analysis among judiciaries in various EU Member States.

15 Jūlija Muraru-Kļučica, Razvan Horatiu Radu and Consuelo Scerri Herrera (semi-final on EU and European Criminal Procedural Law); Hrvoje Miladin, Dario Simeoli and Hanna Werth (semi-final on EU and European Administrative Law); Aleš Galič, Paola Giacalone and Emma-Jean Hinchy (semi-final on EU and European Civil Procedural Law); Stylianos Bios, Christopher McNall and Andrea Moravčíková (semi-final on Judicial Ethics and Professional Conduct), Mariana Canotilho, Lorenzo Salazar, Françoise Tulkens, Dalia Vasariené and Peter George Xuereb (Grand Final).

ÉDITORIAL

COMITÉ ÉDITORIAL THEMIS

Nous sommes ravis de présenter l'édition 2024 du *Journal annuel THEMIS*. Il marque la sixième année de cette publication, qui met en lumière le célèbre concours THEMIS du Réseau européen de formation judiciaire (REFJ). Cette plateforme unique rassemble de jeunes magistrats de toute l'Union européenne, leur offrant l'occasion de tester leurs connaissances du droit européen tout en partageant des idées innovantes pour son développement futur. Chaque année, le concours sert de forum pour explorer des questions juridiques contemporaines de nature transfrontalière ou présentant un intérêt commun pour la plupart des États membres, pour les relier plus largement à des principes du droit européen et pour acquérir de nouvelles compétences et perspectives au sujet de l'office judiciaire. Le concours THEMIS joue un rôle essentiel dans la formation des futurs juges et procureurs, notamment en améliorant leur compréhension du droit de l'Union, en développant des compétences pratiques et en cultivant un « logiciel » judiciaire fondé sur les valeurs européennes.

Depuis qu'il est devenu une activité officielle du REFJ en 2010, le concours n'a cessé d'évoluer pour répondre aux besoins changeants des nouvelles générations de magistrats[1]. Les quatre demi-finales traitent chaque année de divers sujets de droit pénal, de droit administratif, de droit civil et d'éthique judiciaire/conduite professionnelle. Elles impliquent jusqu'à 11 équipes chacune, placées sous la direction de tuteurs. Les jurés (juges, procureurs et universitaires européens) sélectionnent les huit meilleures équipes qui participeront à la Grande Finale. Cette dernière se compose de deux parties, qui portent toutes deux sur des questions de protection juridictionnelle dans l'UE : un essai basé sur un cas commun pour toutes les équipes et quatre séries de plaidoiries dans des affaires devant un tribunal fictif composé des membres du jury de la Grande Finale. Ce processus permet à près de 200 participants chaque année d'approfondir leurs connaissances du droit de l'UE et de créer de nouveaux liens avec de très jeunes (candidats) magistrats issus de toute l'Europe.

Ce volume marque une étape importante dans l'histoire du *Journal annuel*, annonçant une évolution majeure tant dans son contenu que dans son format. Jusqu'à l'édition précédente, le *Journal annuel* était une publication « interne » du REFJ. Bien que des copies physiques aient été distribuées à tous les établissements de formation judiciaire au sein du REFJ et qu'une version en ligne soit disponible sur le site web du réseau, la diffusion auprès des universitaires et des praticiens du droit était jusqu'ici relativement limitée. Au cours du premier semestre 2025, le groupe de travail chargé de repenser le

1 De 2006 à 2009, le concours a été organisé par le Centre portugais d'études judiciaires (CEJ) et l'Institut national de la magistrature (NIM) de Roumanie.

concours THEMIS[2] a décidé que le moment était venu d'accroître la visibilité des meilleurs papiers produits par les équipes participantes. Cela a nécessité le remaniement du *Journal annuel* en une publication académique à part entière avec référencement sur les principales bases de données juridiques en Europe. Nous sommes reconnaissants à la maison d'édition *Anthemis* pour son enthousiasme et son dévouement pour accompagner dans cette entreprise ambitieuse le REFJ et le comité de rédaction nouvellement créé à cette occasion.

Notre promesse éditoriale est assez simple : publier des études combinant une dimension doctrinale, parfois comparative, avec des éléments de la pratique judiciaire, rédigées par des magistrats qui sont au cœur des enjeux de la justice et de l'État de droit en tant que valeurs fondatrices de l'Union et parcelle de notre héritage constitutionnel commun.

Cette publication s'inscrit dans le droit fil de la mission principale du REFJ, qui est de favoriser une culture judiciaire européenne commune fondée sur la confiance mutuelle au sein de l'Union. D'une part, elle est de nature à encourager à l'avenir une plus large participation au concours d'équipes provenant d'un plus grand nombre d'États membres que par le passé. Ce nouveau format de publication stimulera également l'excellence parmi les participants, étant donné qu'à partir de maintenant, il est possible que leur travail soit mieux promu qu'autrefois grâce à une publication internationale. D'autre part, nous sommes convaincus que le *Journal annuel* peut vraiment devenir un instrument de dialogue entre les magistrats en Europe, car il offre une mosaïque unique de la façon dont les jeunes magistrats des différents systèmes judiciaires du continent abordent des questions juridiques d'intérêt commun. Cette mosaïque représente également une source pertinente pour d'autres professionnels du droit, tels que des avocats ou des universitaires, de nature à mieux les préparer pour de futurs litiges ou recherches.

Ce changement de format et de diffusion doit s'accompagner d'une réflexion sur la manière dont le contenu du *Journal annuel* pourrait évoluer. Dans le passé, seuls les meilleurs articles soumis en demi-finale étaient publiés. Bien que le numéro actuel soit encore largement basé sur des articles de demi-finale, nous avons l'intention de mieux promouvoir à l'avenir les matériaux produits par les équipes qui ont le mieux performé lors de la Grande Finale. Une telle évolution est en effet conforme au fait que le Journal annuel a ses racines dans un concours. Sans préjuger d'autres évolutions à venir, ce numéro 2024 innove déjà sur ce point avec un *témoignage des lauréats de l'édition 2024* du concours sur leur expérience en tant que participants.

En ce qui concerne les contributions « substantielles », dans le domaine du *droit pénal*, un premier article rédigé par une équipe allemande examine les difficultés récentes qui sont apparues en ce qui concerne *la coopération judiciaire transfrontali*ère dans le cadre des enquêtes *EncroChat*[3]. Les auteurs abordent en particulier les questions juridiques soulevées dans le contexte de décisions d'enquête européenne (DEE) qui visaient à permettre l'utilisation d'éléments de preuve recueillis dans un État membre dans un autre État membre. L'une de ces questions concerne

2 Composé d'Ingrid Derveaux (Secrétaire générale du REFJ), Octavia Spineanu-Matei (Juge à la Cour de justice de l'Union européenne), Emmanuelle Laudic-Baron (*École nationale de la magistrature* – France), Amelia Onisor (*Institut national de la magistrature* – Roumanie), Umit Oral (*Institut de formation judiciaire/Instituut voor Gerechtelijke Opleiding* – Belgique) et Melanie Rems (*Office fédéral de la justice* – Allemagne).

3 Depuis 2015, *EncroChat* propose des smartphones « cryptés » à ses clients dans 140 pays. Il est constant que ces smartphones sont régulièrement utilisés par les auteurs d'infractions pénales, afin de dissimuler leurs infractions et de rendre les enquêtes plus difficiles.

les droits de la défense énoncés aux articles 47 (droit à un procès équitable) et 48 (présomption d'innocence) de la Charte des droits fondamentaux de l'Union européenne (ci-après, la « Charte »). L'article explore les implications de l'important arrêt *EncroChat* de la Cour de justice[4], dans lequel cette dernière a précisé quel droit national s'applique pour vérifier la légalité d'une décision d'enquête européenne et comment le droit de l'Union protège les droits fondamentaux des personnes soumises à la collecte de preuves par l'interception de télécommunications. Les auteurs formulent des critiques à l'égard de cet arrêt et d'une décision du Tribunal fédéral allemand. Elles font notamment valoir que l'interprétation du droit de l'Union contenue dans cet arrêt et cette décision, tout en favorisant la confiance mutuelle et l'efficacité de la coopération judiciaire en matière pénale, implique une ingérence indue dans les droits fondamentaux envisagés sous l'angle du droit constitutionnel allemand et comporte un risque de contournement des règles nationales régissant l'admissibilité des preuves dans les enquêtes pénales. Afin de surmonter ces préoccupations, ils plaident en faveur de l'adoption de règles à l'échelle de l'Union régissant la recevabilité des preuves recueillies dans un autre État membre.

Dans une deuxième contribution, une équipe hongroise examine la *proposition de règlement européen commun sur le transfert des procédures en matière pénale*[5]. Après avoir expliqué les problèmes causés par la fragmentation réglementaire dans l'UE au cours de la phase d'enquête, les auteurs présentent des points de vue critiques sur l'instrument spécifique de l'UE régissant les transferts récemment proposé par la Commission européenne[6]. Tout en reconnaissant qu'un tel instrument juridique comblerait une lacune importante dans le domaine de la coopération judiciaire en matière pénale au sein de l'UE, ils font valoir que certaines questions importantes doivent être abordées pour le concilier avec les droits fondamentaux, y compris le droit à un recours juridictionnel effectif garanti à l'article 47 de la Charte.

Le troisième article dans le domaine du droit pénal, rédigé par une équipe portugaise, explore les défis posés aux autorités répressives par *le blanchiment de capitaux par l'utilisation de jetons non fongibles (NFT)*[7]. Les auteurs soulignent que les cas de blanchiment d'argent utilisant des NFT se sont multipliés au cours des dernières années, car les NFT offrent aux contrevenants de nouvelles possibilités de rendre plus difficile l'identification de l'origine des gains illicites. Ils font valoir que le cadre réglementaire existant de l'UE en matière de blanchiment de capitaux et de cryptoactifs pourrait ne pas répondre de manière adéquate à ce phénomène en pleine croissance. Afin de mieux lutter contre le caractère transfrontalier de la plupart des infractions, ils suggèrent en particulier une meilleure coordination entre les autorités chargées de la surveillance financière et de la lutte contre le blanchiment de capitaux dans les États membres et les organes de l'UE tels que le Parquet européen. Le rôle positif que les autorités judiciaires peuvent jouer dans l'application de la législation existante et dans les enquêtes sur les affaires de

4 Arrêt du 30 avril 2024, aff. C-670/22, *M.N. (EncroChat)* (EU:C:2024:372).
5 Cette proposition a depuis lors été adoptée. Voy. Règlement (UE) 2024/3011 du Parlement européen et du Conseil, du 27 novembre 2024, relatif au transfert des procédures en matière pénale (*J.O.*, 18 décembre 2024, L 2024/3011).
6 COM(2023) 185 final.
7 Les auteurs définissent un NFT comme « un code unique qui représente un bien numérique et physique, comme une carte de trading numérique, qui utilise la technologie *blockchain* pour certifier l'authenticité et la propriété de cet objet numérique spécifique et unique ».

blanchiment de capitaux impliquant des NFT est également souligné.

Une autre série de contributions traite de questions contemporaines qui se posent dans le domaine du *droit administratif*. Un premier article d'une équipe française, à l'intersection du droit administratif et du droit pénal, examine l'utilisation de *la reconnaissance faciale rétrospective par les services répressifs en Europe.* Les auteurs décrivent le manque de transparence sur l'utilisation de cette technologie par les États membres, son développement hétérogène et l'absence de cadres juridiques spécifiques au niveau national. La conjonction de ces facteurs génère des menaces pour les droits à la vie privée et à la protection des données, en raison notamment des grandes bases de données d'imagerie faciale liées à l'identité civile des personnes et de la collecte massive d'images faciales que requiert la reconnaissance faciale rétrospective. Ils font valoir que les instruments européens existants sont trop généraux pour aborder correctement l'utilisation de cet outil d'enquête et plaident donc en faveur d'un instrument spécifique harmonisant les régimes juridiques qui le régissent dans les États membres.

Le deuxième article, préparé par une équipe grecque, explore *l'utilisation de l'IA par les administrations fiscales* dans le but d'accroître leur efficacité. Les auteurs y examinent l'équilibre à trouver entre ces gains d'efficacité et le respect dû aux principes généraux du droit administratif de l'Union, tels que le droit d'être entendu, d'accéder à son dossier et de recevoir une décision motivée, le principe d'égalité et le droit de ne pas être discriminé, ainsi que le principe de proportionnalité. Conformément aux règles consacrées dans la récente loi sur l'IA adoptée par l'UE[8], ils soulignent la responsabilité des autorités fiscales pour garantir la transparence, la responsabilité ainsi que l'action et la surveillance humaines afin d'atténuer les risques que l'IA crée lorsqu'elle est utilisée dans l'administration publique.

Dans un troisième et dernier article dans le domaine du droit administratif, une équipe hongroise examine l'affaire *WhatsApp* devant les juridictions de l'UE, dans laquelle des questions clés se posent concernant la recevabilité d'une action directe engagée contre des décisions contraignantes du comité européen de la protection des données (CEPD)[9]. Les auteurs expriment des critiques sur la position du Tribunal, qui a considéré en substance, en première instance, que la décision litigieuse était de nature préparatoire puisqu'elle était adressée à une autorité nationale de protection des données chargée d'adopter une décision finale et que la décision ne concernait donc pas directement la requérante. Elles font notamment valoir que les renvois préjudiciels sur la validité de telles décisions – dans le cadre de recours contre des décisions rendues par des organismes nationaux de protection des données – n'offrent pas le même niveau d'efficacité qu'un recours direct devant les juridictions de l'Union, car ils ne permettent pas à la Cour d'examiner des questions de fait pendantes devant les juridictions nationales. Il reste à voir si la Cour de justice confirmera, dans le pourvoi dont elle est saisie, la position stricte du Tribunal.

8 Règlement (UE) 2024/1689 du Parlement européen et du Conseil du 13 juin 2024 établissant des règles harmonisées concernant l'intelligence artificielle et modifiant les règlements (CE) nº 300/2008, (UE) nº 167/2013, (UE) nº 168/2013, (UE) 2018/858, (UE) 2018/1139 et (UE) 2019/2144 et les directives 2014/90/UE, (UE) 2016/797 et (UE) 2020/1828 (règlement sur l'intelligence artificielle) (*J.O.*, 12 juillet 2024, L 2024/1689).

9 Aff. T-709/201, *WhatsApp Ireland/Comité européen de la protection des données* (EU:T:2022:783). Un pourvoi est pendant devant la grande chambre de la Cour de justice (voy. aff. C-97/23 P).

Dans le domaine du *droit civil*, une première contribution d'une équipe française porte *sur la proposition de règlement de la Commission européenne de 2022 relatif à la compétence, la loi applicable, la reconnaissance des décisions et l'acceptation des actes authentiques en matière de filiation et à la création d'un certificat européen de filiation*[10]. Après avoir examiné les instruments juridiques de l'UE en vigueur traitant de problèmes de droit international privé liés aux questions familiales, l'article propose une analyse critique et contextualisée de l'équilibre que la proposition vise à atteindre. Ils mettent en lumière, à cet égard, les règles proposées visant à promouvoir les droits des citoyens de l'Union en matière de déplacement et l'intérêt supérieur de l'enfant. Toutefois, ils soulignent également les garanties que la proposition contient pour préserver les différentes conceptions, entre les États membres, de ce qu'est une « famille » et les exigences d'ordre public concernant l'établissement et la reconnaissance de la filiation. Ils décrivent les règles envisagées dans la proposition comme une évolution souhaitable, en faisant le point sur la profonde transformation du concept de « famille » dans notre société au cours des dernières décennies.

Le deuxième article, préparé par une équipe allemande, aborde la question sensible et très débattue du *contrôle judiciaire des sentences arbitrales par les juridictions des États membres à la lumière du droit de l'Union.* Ils discutent d'une affaire récemment tranchée par la Cour de justice concernant l'arbitrage dans le secteur du sport[11], défendant en substance la position stricte de cette dernière comme étant nécessaire au maintien de la primauté et de l'effectivité du droit de l'Union. Elles reconnaissent toutefois qu'un équilibre doit être trouvé entre l'autonomie des parties souhaitant soumettre leurs litiges à des procédures d'arbitrage efficaces et l'autonomie du droit de l'Union. Dans ce contexte, les auteurs présentent une proposition originale, à savoir l'extension de la possibilité de saisir la Cour à titre préjudiciel en vertu de l'article 267 TFUE à des organismes d'arbitrage, même lorsqu'ils ont leur siège en dehors de l'UE, comme c'est le cas pour le Tribunal arbitral du sport basé à Lausanne.

Dans le troisième et dernier article dans le domaine du droit civil, une équipe roumaine explore les subtilités juridiques entourant la validité et l'application des *clauses de compétence asymétriques dans les contrats privés,* en particulier à la lumière du règlement Bruxelles I (refonte)[12]. Pour l'essentiel, une telle asymétrie se produit lorsque l'une des parties dispose de plus d'options que l'autre en ce qui concerne les questions de compétence en vertu d'un contrat qui les lie.

Le quatrième et dernier domaine couvert par cette question concerne la *déontologie judiciaire et les règles régissant la conduite professionnelle des juges et des procureurs*. Dans un premier article, une équipe française discute de l'interaction *entre la diversité des membres des systèmes judiciaires et l'impartialité*, qui fait partie des garanties fondamentales attachées au droit à un procès équitable protégé par l'article 6 de la CEDH et au droit à un recours juridictionnel effectif garanti par l'article 47 de la Charte. Une attention accrue est accordée à la diversité au sein du système judiciaire dans un grand

10 COM(2022) 695 final.

11 Arrêt du 21 décembre 2023, aff. C-124/21 P, *International Skating Union/Commission (*EU:C:2023:1012). Voy. également, pour l'évolution la plus récente de la jurisprudence de l'Union en la matière, arrêt du 1er août 2025, aff. C-600/23, *Royal Football Club Seraing* (EU:C:2025:617).

12 Règlement (UE) n° 1215/2012 du Parlement européen et du Conseil du 12 décembre 2012 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale (*J.O.*, 2012, L 351, p. 1).

nombre de systèmes judiciaires de l'UE. Les auteurs font valoir dans ce contexte que la diversité pourrait s'avérer un atout pour accroître l'impartialité des juges en Europe. Ils concluent que, bien que le renforcement de la diversité au sein du pouvoir judiciaire ne soit pas une tâche facile, une connaissance et une formation accrues sur les préjugés pourraient donner des résultats positifs en termes d'impartialité et, partant, renforcer la confiance des groupes minoritaires dans les systèmes judiciaires.

Dans un deuxième article, une équipe néerlandaise a exploré la *réponse du pouvoir judiciaire à l'attaque perpétrée en 2022 par un groupe de trois militants contre le chef-d'œuvre de Vermeer, « La jeune fille à la perle », afin de protester contre ce qu'ils ont dénoncé comme une action publique insuffisante pour lutter contre le changement climatique.* Le verdict rendu par la juridiction pénale dans le cadre de la procédure d'appel a surpris de nombreux observateurs, car il n'a pas prononcé de peine d'emprisonnement pour éviter un « effet dissuasif » sur l'exercice par d'autres personnes de leur liberté d'expression et de réunion pacifique, y compris par la désobéissance civique[13]. Les auteurs examinent l'affaire à travers le prisme de l'éthique judiciaire et explorent, en particulier, les défis que des cas tels que celui-ci posent au pouvoir judiciaire ainsi que le rôle que les opinions morales du juge peuvent y jouer. Après avoir donné un aperçu de la jurisprudence pertinente de la Cour européenne des droits de l'homme et des juridictions néerlandaises sur l'« effet dissuasif » des sanctions pénales infligées aux manifestants, ils réfléchissent aux attentes des citoyens à l'égard du pouvoir judiciaire dans une affaire telle que celle-ci. Les codes de déontologie judiciaire n'empêchent pas les juges d'avoir des opinions politiques, mais exigent d'eux qu'ils fassent preuve de réserve et de discrétion lorsqu'ils expriment de telles opinions, afin de garantir la confiance du public dans l'indépendance et l'impartialité des juges. Les auteurs soutiennent que les juges confrontés à un cas d'activisme provocateur doivent surmonter trois catégories de défis : le défi de l'*instrumentalisation*, signifiant que la justice devrait éviter d'être utilisée pour promouvoir les intérêts d'un groupe particulier ; *la délégitimation,* évoquant la nécessité que les jugements soient soigneusement équilibrés et motivés pour réduire au minimum l'incidence négative de la décision sur la crédibilité de la juridiction ; et *l'identification*, faisant référence à l'obligation pour les juges de maintenir une distance avec les intérêts des parties concernées – en particulier les manifestants – afin de rendre un jugement sans préjugés. Dans leur conclusion, ils soulignent la marge étroite dont disposent les juges lorsqu'ils statuent sur de telles affaires, en veillant à pondérer leurs croyances personnelles et leur propre code moral avec les principes éthiques fondamentaux d'impartialité et d'indépendance.

Dans un troisième et dernier article, une équipe espagnole discute de certains des *défis les plus urgents résultant de l'utilisation active des médias sociaux par les juges et les procureurs* en se fondant sur des entretiens avec trois juges espagnols et une enquête auprès de jeunes juges de cet État membre[14]. Alors que certains soutiennent que des limites sont nécessaires pour éviter d'éventuels excès et protéger l'impartialité, d'autres estiment que les juges devraient pouvoir utiliser les médias sociaux aussi librement que quiconque, sur la base du droit fondamental à la liberté d'expression. Les auteurs plaident en faveur d'une approche nuancée, acceptant comme principe la participation active des

13 Cette décision était fondée sur une disposition du Code pénal néerlandais relative à la « grâce légale » (art. 9*bis*).
14 L'article contient également une analyse comparative entre les systèmes judiciaires de différents États membres de l'UE.

juges aux médias sociaux mais avec certaines limites visant à protéger leur impartialité et la dignité des fonctions judiciaires. Selon eux, les principes de Bangalore en matière de conduite judiciaire (indépendance, impartialité, intégrité, convenance, égalité, compétence et diligence) en particulier devraient toujours constituer un point de référence pour apprécier si l'utilisation des médias sociaux par un juge est appropriée ou non. Le développement d'une éthique individuelle par tous les juges et procureurs souhaitant être actifs sur les médias sociaux devrait être encouragé, tout en bénéficiant des orientations et du contrôle appropriés des conseils de la magistrature et d'autres organes compétents. Les auteurs reconnaissent donc que les juges doivent faire preuve de prudence sur les médias sociaux et, en particulier, conserver une apparence d'impartialité. Toutefois, cela devrait être sans préjudice de leur capacité à être actifs sur les médias sociaux, car cette communication peut être un outil précieux pour diffuser des informations pertinentes et précises sur le droit et l'activité judiciaire au sein de la société.

Nous tenons encore à exprimer notre sincère gratitude à toutes les équipes pour leur travail, aux jurés pour leur évaluation approfondie et à la sélection des meilleurs articles[15] et au personnel du secrétariat du REFJ, en particulier Flavio Mastrorillo en tant que chef de projet du concours THEMIS, pour leur dévouement dans l'organisation de celui-ci. Leurs efforts collectifs concrétisent l'objectif de ce volume : établir un pont sur la doctrine juridique dans l'Union et la pratique judiciaire quotidienne au sein des États membres.

Les rédacteurs

15 Jūlija Muraru-Kūučica, Razvan Horatiu Radu et Consuelo Scerri Herrera (demi-finale sur le droit pénal européen et de l'UE) ; Hrvoje Miladin, Dario Simeoli et Hanna Werth (demi-finale sur le droit administratif européen et de l'UE) ; Aleš Galič, Paola Giacalone et Emma-Jean Hinchy (demi-finale sur le droit civil européen et de l'UE) ; Stylianos Bios, Christopher McNall et Andrea Moravčíková (demi-finale sur l'éthique judiciaire et la déontologie) ; et Mariana Canotilho, Lorenzo Salazar, Françoise Tulkens, Dalia Vasariené et Peter George Xuereb (Grande finale).

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

Semi-final B at the Training and Study Centre for the Judiciary in Utrecht

Semi-final C at the Italian Ministry of Justice in Rome

Semi-final D at the German Judicial Academy in Trier

Grand final at the Italian School for the Judiciary in Naples

SEMI-FINAL A

EU AND EUROPEAN CRIMINAL PROCEDURAL LAW

PARTICIPATING TEAMS:

Croatia, Czech Republic, France, Germany, Greece, Hungary, Moldova, Poland, Portugal I, Portugal II

1ST PLACE: FRANCE
2ND PLACE: GREECE
3RD PLACE: MOLDOVA

Selected papers for the THEMIS Annual Journal: Germany, Hungary, Portugal II

14-17 MAY 2024 - BUDAPEST, HUNGARY - OFFICE OF THE PROSECUTOR GENERAL

JURY MEMBERS

JŪLIJA MURARU-KĻUČICA (LV)

Lawyer at the Department of International Cooperation of the Ministry of Justice of the Republic of Latvia, Lecturer at EKA University of Applied Science and Riga Stradiņš University

For over 18 years, I have been involved in applying criminal procedural law in the European Union, working with judicial cooperation instruments and advising practitioners throughout the EU. This was my third participation as a jury member in the THEMIS Competition, where I have gained valuable experience through academic and practical exercises on various topics related to EU and European criminal procedural law, a critical and evolving area of law that reflects the complexities and diversities of criminal justice systems across different countries.

The competition's format, including written submissions and oral presentations, allowed participants to demonstrate their knowledge, analytical skills, and practical application of criminal procedural law.

The topics addressed during the semi-finals were comprehensive, covering significant aspects such as the rights of the victims in criminal procedure, cross-border cooperation in criminal matters, and the balance between security and fundamental rights. The diversity of topics ensured a holistic assessment of the participants' understanding and their ability to tackle complex legal issues.

Participants showcased a high level of proficiency in both theoretical and practical dimensions of cross-border criminal procedural law. The written submissions were particularly noteworthy for their depth of research, clarity of argumentation, and integration of EU legal principles within national practices. Teams demonstrated an impressive ability to navigate through various EU judicial acts, practical instruments, and case laws from the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR).

I would like to thank EJTN for organizing the THEMIS Competition at such a high level within the European Union. Their dedication to fostering academic and practical excellence in the field of criminal procedural law is truly commendable. I would like to express my gratitude to my fellow jury members, Mrs. Consuelo Scerri Herrera and Mr. Horatiu Razvan Radu, who contributed to the discussions.

I congratulate all teams and, in particular, Team France, the winners of the Semi-final.

It was a pleasure working together for the entire week in the beautiful city of Budapest.

HORATIU RAZVAN RADU (RO)

Prosecutor at the Public Ministry, Prosecutor Office attached to High Court of Cassation and Justice, Professor in ECtHR and EU Law

Without any doubt, the THEMIS Semi-final A on EU and European criminal procedural law is a rich and unforgettable experience for competitors, organizers, tutors, and jurors.

Over the course of a week, I had the opportunity to come into contact with very well prepared young magistrates, judiciously grounded papers in both substantive and procedural law with numerous practical examples, excellent presentations, and an atmosphere of high academic level.

The participants addressed topics of maximum European and regional interest, such as online sexual exploitation, child pornography, domestic violence, investigation of high-level corruption, and alternative justice, paying particular attention to the standards of the ECtHR and the EU law.

The emotions were intense, in proportion to the complexity of the presentations, and it was quite difficult to identify winners. Each team managed to prepare a consistent paper in a relatively short period of time and to defend it at a high academic level, sometimes giving the presentation an artistic touch. Regardless of the final result, the magistracy schools and the participants are the main winners.

It is worth mentioning the role of the EJTN, which has been organizing this event for years, based on the initiative of the Romanian and Portuguese judicial institutions. The THEMIS Competition has become a landmark event and the quality of the performance of the competitors has increased year after year. An important role is also given to the tutors, who managed with their experience to offer trainees good professional advice, and allowed them to have a successful performance.

Special thanks to the host institution, the Office of the Prosecutor General of Hungary, that created the best conditions for the event.

Finally, I can strongly affirm, looking at the participants professionality, that the European magistracy has a bright future.

CONSUELO SCERRI HERRERA (MT)

Judge at the Criminal Court of Appeal of Malta

I only have words of praise for the organization of this competition, which was excellent. It was awesome. The participants were very prepared and excelled in their performance, and it was a great pleasure to see the different countries competing.

Naturally, each candidate had their own style, from a traditional one to a more courageous interaction. Some of the participants gave a spectacular performance. I have no doubt that all participants went through a lot of preparation before going to Hungary, as this is obvious from their oratory and written contribution.

The topics chosen were diverse and thus made the experience even more interesting. Team Portugal II went so far to discuss NFT's, a relatively new subject on the horizon. The word 'challenge' well defines the competition. Participants prepared themselves to cover for any eventuality and were able to answer most questions that were asked by the jury, addressing several EU instruments and Directives.

No doubt that all participants gained an invaluable experience from this event. They learned to interact in a legal platform in a foreign language, thus instiling in them confidence and also reflecting clarity of mind. It is an experience where young professionals establish new links with colleagues across European borders.

The competition enables tutors to teach competitors how to best assist their clients in a composed, well-prepared fashion and enables competitors to feel confident in their performance, to reduce fear and face the unknown with determination and pride.

To conclude, I must admit that THEMIS is not only a competition but it is a show-off of legal knowledge, experience, and culture. I would encourage all young magistrates to apply and make the best of such a dynamic legal European experience.

Team Members:
Jeanina-Felicia KUHLMANN
Michelle MAY
Christopher PUHL

Team Germany

CRACKING THE CODE: REVEALING THE COMPLEXITY OF EU MUTUAL ASSISTANCE IN CRIMINAL MATTERS THROUGH ENCROCHAT INVESTIGATIONS

This paper conducts a thorough examination of cooperation within the European Union concerning criminal matters, particularly in the context of the use of evidence in EncroChat cases. Beginning with an overview of the EncroChat case, it delves into the workings of judicial cooperation within the European Union, focusing primarily on the European Investigation Order (EIO). It further analyses the admissibility of criminal evidence obtained by another Member State from both German and European perspectives and presents the authors' critical examination of the current legislation and jurisdiction. Finally, using EncroChat as an example, this paper aims to raise awareness about the current challenges of using evidence obtained through mutual legal assistance. It encourages the legal community to address admissibility issues when an EIO is issued incorrectly, advocating for the introduction of European minimum standards without entirely sacrificing the sovereignty of Member states.

KEYWORDS:
DIRECTIVE ON THE EUROPEAN INVESTIGATION ORDER | ENCROCHAT | EU MUTUAL LEGAL ASSISTANCE | ADMISSIBILITY OF EVIDENCE | REGULATORY GAP | EUROPEAN MINIMUM STANDARDS

Le présent article étudie de manière approfondie la coopération au sein de l'Union européenne en matière pénale, plus particulièrement dans le contexte de l'utilisation de preuves dans les affaires EncroChat. Après avoir donné une vue d'ensemble de l'affaire EncroChat, l'étude aborde le fonctionnement de la coopération judiciaire au sein de l'Union européenne, en se concentrant principalement sur la décision d'enquête européenne (*DEE*). Ensuite, les auteurs analysent l'admissibilité des preuves pénales obtenues par un autre État membre du point de vue tant allemand qu'européen avant de clôturer sur un examen critique de la législation et de la compétence actuelles. En prenant l'exemple d'EncroChat, cet article vise à sensibiliser aux défis actuels liés à l'utilisation des preuves obtenues dans le cadre de l'entraide judiciaire. Il encourage la communauté juridique à traiter les questions de recevabilité lorsqu'une décision d'enquête européenne est émise de manière incorrecte, en préconisant l'introduction de normes minimales européennes sans sacrifier entièrement la souveraineté des États membres.

MOTS-CLÉS :

DIRECTIVE RELATIVE À LA DÉCISION D'ENQUÊTE EUROPÉENNE | ENCROCHAT | ASSISTANCE JURIDIQUE MUTUELLE DE L'UE | RECEVABILITÉ DES PREUVES | LACUNE RÉGLEMENTAIRE | NORMES MINIMALES EUROPÉENNES

1. INTRODUCTION

In today's interconnected society, messaging applications have become an integral part of everyday life, seamlessly facilitating communication and connection across the globe. The widespread adoption of platforms that increasingly promote private data protection has led to the realization that those are not only used for trivial day-to-day communication but, rather, are becoming vehicles for illicit activities carried out by the world of organized crime. Consequently, digital evidence gained through the interception of telecommunication has emerged as a crucial component in prosecuting such crimes. The EncroChat case serves as a representative example of how the technological evolution within our society has reshaped the landscape of criminal investigations and raised critical questions about the admissibility of evidence gathered in another Member State and the efficacy of law enforcement measures in the European Union.

2. DESCRIPTION OF THE ENCROCHAT CASE

A. Technological Background

The European communications network and service provider EncroChat had been offering seemingly tap-proof smartphones (so-called 'crypto phones') among customers in 140 countries since 2015.[1] These were increasingly used by members of organized crime to coordinate and execute crimes, with a total of 60,000 customers at the time of the shutdown in July 2020.[2] According to the French Gendarmerie Nationale *(FGN)* 90% of users were criminals and the British National Crime Agency *(NCA)* found no evidence that non-criminals were using EncroChat.[3]

The company promoted its devices, highlighting anonymity as their primary selling point. They used modified Android phones with encrypted messaging and options to remove the camera, microphone, and GPS for maximum anonymity. In addition, the phones were equipped with several security features that could immediately wipe all data from the device. One such feature was a panic button function that automatically deleted phone contacts and messages when entering a special PIN code.[4] EncroChat smartphones could be purchased through anonymous channels at a price of €1000, while the service for 6 months costs €1500.[5] To this day, the founders and operators of the company remain unknown.[6]

B. Infiltration

In 2017 and 2018, the FGN discovered the EncroChat phones and their encrypted messaging services, which were operated via French servers.[7] With judicial approval, the French police later secured the data from that server. This led to the forming of a joint investigation team (JIT) – a cooperation between the Dutch police, and other countries' experts – which developed and finally installed a Trojan software on EncroChat's server after the approval of a

1 D.-K. Kipker/H. Bruns, 'EncroChat und die "Chain of Custody"', *Multimedia und Recht* (2022), at 363.
2 A. Gebhard/R. Michalke, 'Der Zweck heiligt die Mittel nicht – Der EncroChat-Komplex und die Grenzen strafprozessualer Beweisverwertung', *NJW* (2022), at 655.
3 R. Wright, 'Hundreds arrested across Europe as French police crack encrypted network', *Financial Times* (2 July 2020).
4 D.-K. Kipker/H. Bruns, *supra* note 2.
5 Europol, 'Dismantling of an Encrypted Network Sends Shockwaves Through Organised Crime Groups Across Europe', 2 July 2020, available at: https://www.europol.europa.eu/media-press/newsroom/news/dismantling-of-encrypted-network-sends-shock-waves-through-organised-crime-groups-across-europe.
6 Der Spiegel, 'Decrypted: The secret diary of organized crime', 15 March 2021, available at: https://www.spiegel.de/panorama/justiz/spiegel-tv-vom-15-03-2021-entschluesselt-das-geheime-tagebuch-der-organisierten-kriminalitaet-a-763ec429-299b-432d-8a85-61de9fa384de.
7 S. Beukelmann, 'Verwertbarkeit von EncroChat-Daten', *NJW* (2022), at 248.

judge in Lille (France) on 20 March 2020[8]. The software uses an update mechanism to intercept messages before transmission and capture lock screen passwords.[9] Therefore the NCA has been able to read the messages of EncroChat customers since 1st April 2020.[10]

C. Impact

The JIT collected millions of messages and data from suspects. Facilitated by Europol, these data sets were passed on to law enforcement authorities of several EU Member States through EIOs.[11] Until now the investigations have led to 6,558 arrests worldwide, including 197 high-value targets.[12] As a result, large-scale drug shipments, attempted murders, corruption and violent attacks have been prevented.[13] Altogether more than 115 million criminal conversations from 60,000 users were analysed and evaluated, which led to a total of 7,134 years of imprisonment for convicted criminals up to now.[14] Furthermore 739.7 million euros, 103.5 tons of cocaine, 971 vehicles and 271 properties or apartments were seized.[15] In effect, controversies over criminal convictions based on intercepted EncroChat data are sparking discussions in many courts across Europe, including the Court of Justice of the European Union (*CJEU*). This is primarily because of the significant implications the inception measure poses for suspects' rights and, on the other side, its crucial role for effective law enforcement practices.

3. MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

A. Legal Framework

The purpose of mutual legal assistance in criminal matters is to promote international cooperation in law enforcement and ensure that criminals cannot evade justice by fleeing to other countries. It facilitates authorities, among other things, in gathering and exchanging evidence across borders. To gain a detailed understanding of mutual legal assistance in criminal matters in the European Union, it is important to first examine the underlying legal foundation:

A key element in this regard is the EU Convention on Mutual Assistance in Criminal Matters *(The Convention)*, often referred to as the parent convention, ratified on 20 April 1959. The Convention was extended by subsequent amendments, notably on 29 May 2000 *(MLA Convention EU)*, along with other supplementary protocols. These instruments are considered lex generalis. Further Article 82 of the Treaty on the Functioning of the European Union *(TFEU)* explicitly establishes the principle of mutual recognition as a cornerstone of EU law. The European Parliament and the Council of the European Union adopted the Directive on the European Investigation Order *(DEIO)* on 3 April 2014,[16] which is built upon this fundamental legal pillar. Its primary objective is to restructure the process of evidence acquisition in cross-border criminal investigations within the European Union by

8 D.-K. Kipker/H. Bruns, *supra* note 2.
9 Der Spiegel, *supra* note 7.
10 R. Wright, *supra* note 4.
11 Europol, *supra* note 6.
12 Europol, 'Dismantling encrypted criminal EncroChat communications leads to over 6500 arrests and close to EUR 900 million seized - Judiciary and law enforcement present first overview of results', 27 June 2023, available at: https://www.europol.europa.eu/media-press/newsroom/news/dismantling-encrypted-criminal-encrochat-communications-leads-to-over-6-500-arrests-and-close-to-eur-900-million-seized.
13 *Ibid*.
14 *Ibid*.
15 *Ibid*.
16 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ 2014 L 130/1.

introducing standardized procedures that are both faster and more transparent than under its parent convention.[17] As set in Article 34 (I) (c) of the DEIO, these procedures are intended to supersede existing conventions and additional protocols, thereby acquiring a status of lex specialis. Consequently, the DEIO has been instrumental in establishing a more specific and comprehensive legal framework.

The DEIO also introduced the EIO, which has become the central instrument for obtaining evidence through mutual assistance in criminal matters.[18] As per the definition in Article 1 (I) of the DEIO, the EIO is a judicial decision which has been issued by a judicial authority of a Member State ('the issuing state') to have one or several specific investigative measure(s) carried out in another Member State ('the executing state') to obtain evidence. EIO investigations operate under the principle of *forum regit actum* outlined in Article 4 of the MLA Convention EU. According to this provision, 'when mutual assistance is afforded, the requested Member State shall comply with the formalities and procedures expressly indicated by the requesting Member State ….'[19]

The DEIO was implemented in almost all European countries. Finally, international treaties also play a relevant role in regulating criminal cross-border investigations, particularly bilateral supplementary agreements to the Convention. As stated in Article 34 (III) of the DEIO, these treaties could potentially take precedence over the provisions outlined in the national implementations of the DEIO.

B. Admissibility of Assistance

In contractual and European mutual legal assistance, there is generally an obligation to provide assistance. For cases where there is no legal basis for issuing an EIO (for example, cases of non-contractual assistance), the general principles of international law apply, particularly the principle of reciprocity, according to which states should grant each other equal treatment with regard to rights and obligations.[20] Yet, since almost all European Member States have implemented the DEIO, the practical relevance of these general principles is nearly zero for mutual legal assistance.

Nonetheless, there are grounds for obstructing mutual legal assistance. The most relevant one is the *principle of ordre public,* which allows the refusal of assistance. According to Article 2 (b) of the Convention, assistance may be refused 'if the requested Party considers that execution of the request is likely to prejudice the sovereignty, security, ordre public or other essential interests of its country'.

Lastly, mutual legal assistance must be proportionate. It is important to mention, however, that due to its lesser degree of intrusion, mutual legal assistance faces fewer restrictions than, for example, enforcement assistance and extradition.[21] In the end, the DEIO remains flexible towards the legal systems of other Member States and operates based on a consultation mechanism (see Article 6 (III) of the DEIO) that promotes 'direct contact' amongst judicial authorities,

17 K.. Brahms/T. Gut, 'Zur Umsetzung der Richtlinie Europäische Ermittlungsanordnung in das deutsche Recht – Ermittlungsmaßnahmen auf Bestellschein?', *NStZ* (2017), at 388.

18 Deutscher Bundestag, 'Entwurf eines Gesetzes zur Änderung des Gesetzes über die internationale Rechtshilfe in Strafsachen', 18/9757 *Drucksache*, at 19, available at: https://dserver.bundestag.de/btd/18/097/1809757.pdf.

19 Eucrim, 'Admissibility of evidence in criminal proceedings in the EU', 3*Eucrim* (2020), at 201-208; M. Kusak, 'Mutual admissibility of evidence and the European investigation order: aspirations lost in reality', 7 January 2019, available at: https://doi.org/10.1007/s12027-018-0537-0; European Commission, 'Study on cross-border use of evidence in criminal proceedings', *Final Report* (March 2022), at 12.

20 T. Hackner/C. Schierholt, 'Internationale Rechtshilfe in Strafsachen, Ein Leitfaden für die Praxis', 4 *Auflage* (2023), at 41.

21 K. Ambos/A. M. Poschadel, 'Rechtshilfe in Strafsachen', *Nomos Kommentar* (2015), at 87.

aiming to avoid the potential refusal of the investigation demanded.[22]

C. Procedure

The competent judicial authority of the issuing state issues an EIO within the scope of the application, adhering to necessary formal requirements and utilizing the provided form sheet. According to Article 3 of the DEIO, the 'EIO shall cover any investigative measure with the exception of the setting up of a joint investigation team (JIT) and the gathering of evidence within such a team …'. The competent authority in the executing state is obligated to recognize and execute the EIO without additional formalities, treating it as if the investigative measure had been ordered according to national law in accordance with Article 9 (I) of the DEIO, within specified timeframes pursuant to Article 12 of the DEIO, adhering to procedural and formal requirements expressly indicated by the issuing authority in compliance with Article 9 (II) of the DEIO, unless the DEIO permits non-recognition, non-execution or other grounds for refusal. Any refusal by the executing state must align with the grounds explicitly stated in Article 11 and Article 22 of the DEIO.

Concerning measures regarding the interception of telecommunication, there are additional requirements outlined in Articles 30 and 31 of the DEIO that were particularly relevant and disputed in the EncroChat case.

4. ADMISSIBILITY OF CRIMINAL EVIDENCE: A EUROPEAN PERSPECTIVE

In essence, it is firmly established that national courts retain the authority to determine the admissibility of evidence. According to longstanding European case law, the ECtHR and the CJEU have affirmed that national courts are primarily responsible for establishing the standards governing the admissibility and assessment of information and evidence obtained.[23]

The Advocate General Ćapeta confirmed this in her recent opinion on the request for a preliminary ruling from the Berlin Regional Court regarding the admissibility of acquired EncroChat data. She emphasizes that, while currently, EU law does not govern the admissibility of evidence obtained through an EIO issued in violation of DEIO requirements, national law needs to cover this area in compliance with the requirements of the rights of the defence in Articles 47 (fair trial) and 48 (presumption of innocence) of the Charter of Fundamental Rights of the European Union (*CFR*).[24] Certainly, exceptions apply, particularly in cases where methods of gathering evidence violate human rights to the extent that the evidence is automatically deemed inadmissible.[25] These include cases in which evidence was obtained through torture, inhuman or degrading treatment, as well as evidence acquired through entrapment or the planting of evidence.[26]

Further, the *forum regit actum principle* proved incapable of addressing the admissibility question in the cross-border

22 J. E. Guerra/C. Janssens, 'Legal and Practical Challenges in the Application of the European Investigation Order', Summary of the Eurojust Meeting of 19 and 20 September 2018, 1 *Eucrim* (2019), at 49 and 52.
23 ECtHR, *Hümmer v. Germany,* Appl. no. 26171/07, Judgement of 19 October 2012, at 45-46; *Schatschaschwili v. Germany,* Appl. no. 9154/10, Judgement of 15 December 2015, at 104; Joined Cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net and Others v. Premier ministre and Others* (ECLI:CE:ECHR:2015:1215JUD000915410).
24 Staatsanwaltschaft Berlin, 'Opinion of advocate general Ćapeta Case C-670/22 v M.N', 26 October 2023.
25 B. Garamvölgyi/K. Ligeti/A. Ondrejová/M. von Galen, 'Admissibility of Evidence in Criminal Proceedings', 3 *Eucrim* (2020), at 205.
26 Directorate-General for Justice and Consumers (European Commission), 'Study on cross-border use of evidence in criminal proceedings', at 33.

movement of evidence. Previously, mutual legal assistance followed the locus regit actum principle, linking the applicable law to the location of evidence or the investigative measure.[27] However, this approach failed to address procedural differences between Member States, rendering evidence collected in one state inadmissible in another, prompting the European Commission to seek a solution.[28] As a result, the *MLA Convention EU* introduced the *forum regit actum principle* (Article 4), requiring the requested member state to adhere to the formalities and procedures specified by the requesting state.[29] Still, in practice, the principle has not been successful in overcoming the challenges posed by the differing criminal procedural laws and practices of the Member States.

Consequently, the DEIO does not have a direct impact on the admissibility of evidence either. Its shortcomings are evident in its failure to implement uniform rules regarding evidence admissibility within the EU. However, it did establish a system of mutual recognition to regulate cross-border evidence collection, underscoring the importance of the principles of mutual trust and respect for different legal systems. Those are according to the CJEU pivotal for the establishment of a borderless Union.[30] Similarly, the European Court of Human Rights (*ECtHR*) stresses that mutual trust among Member States in their criminal justice systems and the recognition of each other's criminal laws are essential, irrespective of potential differences in outcomes under their own national laws.[31]

Now considering the EncroChat case, a crucial question emerges: Is it adequate to justify the admissibility of evidence obtained from the large-scale interception of telecommunications solely based on the principle of European mutual trust, or does this approach unfairly restrict the sovereignty of Member States and the rights of the defence? States are required under Article 6 of the European Convention of Human Rights (*ECHR*) to ensure a fair trial. However, the absence of clear guidelines in the context of international evidence exchanges for ensuring the protection of human rights leaves room for ambiguity and inconsistency in addressing crucial legal matters across European borders.[32]

In the end, it is evident that there are regulatory gaps in the admissibility of evidence, which even the DEIO could not fully address. Consequently, the call for a minimum European standard regarding mutual admissibility of evidence is gaining popularity.[33] This concept is not novel; it traces back to the Lisbon Treaty, where Article 82 (II) of the TFEU empowered the European Parliament and the Council to establish minimum rules to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension. So finally, from a European perspective, Article 82 (II) of the TFEU provides us with a tool, ready to thoroughly address the issue of admissibility in cross-border criminal evidence, yet it has not been adequately utilized until now.

27 Eucrim, *supra* note 19.
28 Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, Brussels, 11 November 2009, COM (2009).
29 Eucrim, *supra* note 19; M. Kusak, *supra* note 19.
30 Opinion 2/13 of the Court (Full Court) of 18 December 2014, at 191-194.
31 H. Gözütok/K. Brügge, 'Judgment of the court in Joined Cases C-187/01 and C-385/01', 11 February 2003, at 33.
32 R. Stoykova, 'Encrochat: "The hacker with a warrant and fair trials?"', *Forensic Science International: Digital Investigation* 46 (2023) 301602, at 12, available at: https://doi.org/10.1016/j.fsidi.2023.301602.
33 M. Kusak, *supra* note 19; Van de Sandt/van Bunningen, 'The call from the private security industry for a common comprehensive approach for data scientific investigations, in White Paper Towards Data Scientific Investigations: A Comprehensive Data Science Framework and Case Study for Investigating Organized Crime and Serving the Public Interest', March 2021.

Until the European legislator acts, German courts have created their own approach to addressing this question.

5. GERMANY IS CONVINCED! OR IS IT NOT?

Due to the regulatory gap regarding the admissibility of evidence obtained through mutual legal assistance, German courts did not and could not consistently assess the admissibility of EncroChat data. While most German courts have, however, ruled in favour of the admissibility,[34] the Berlin Regional Court has vehemently disagreed.

In the spirit of legal comparison and mutual benefit, and to illustrate the significant impact of admissibility on case outcomes – ranging from conviction to acquittal – readers will be given a closer insight into the approaches of the German courts in the following.

A. Berlin Regional Court[35]: Violation of the DEIO and National Law Hinders Admissibility

In its judgement of 1st July 2021, the Berlin Regional Court denied the admissibility of the EncroChat data. In the opinion of the court, the gathering of information from EncroChat users on German territory was carried out in violation of the DEIO (see 1.) and German criminal procedure law (see 2.). Therefore, the court prohibits the use of EncroChat data as evidence in German criminal proceedings (see 3.).

1. Violation of Article 31 of the DEIO

In the event that one Member State carries out interception measures on the territory of another Member State, both Member States have to respect a specific procedure defined in *Article 31 of the DEIO*:

> 1. Where, *for the purpose of carrying out an investigative measure*, the interception of telecommunications is authorized by … one Member State (the 'intercepting Member State') and the communication address of the subject of the interception … is being used on the territory of another Member State (the 'notified Member State') …, *the intercepting Member State shall notify … the notified Member State* of the interception:
> (a) prior to the interception …
> (b) during the interception or after the interception …
>
> 3. The … notified Member State may, *in case where the interception would not be authorized in a similar domestic case, notify* without delay … the competent authority of the intercepting Member State
> (a) that the *interception may not be carried out or shall be terminated*; and
> (b) where necessary, that any *material already intercepted* while the subject of the interception was on its territory may *not be used* …

According to paragraph 1, France had to notify Germany of the interception of EncroChat users on German territory. Paragraph 3, on the other hand, states that Germany had to review the interception measure under German law and, in case of a violation, had to forbid the evidence gathering by France on their territory.

In line with multiple German Higher Regional Courts,[36] the Berlin Regional Court discovered that neither the notification by the French state nor the review by the German state took place. However, in contrast to these courts, it considers the notification to not

34 Rostock Higher Regional Court, '20 Ws 121/21', 11 May 2021 – Schleswig, '2 Ws 47/21', 29 April 2021; Rostock, '20 Ws 70/21', 23 March 2021; Hamburg, '1 Ws 2/21', 29 January 2021; Bremen, '1 Ws 166/20'.
35 Regional Court Berlin, 'decision of 1 July 2021 - (525 KLs) 254 Js 592/20 (10/21)'.
36 Higher Regional Court of Schleswig, '2 Ws 47/21', *juris* (2021), at 25; Hamburg, '1 Ws 2/21', *juris* (2021), at 99-104; Bremen, '1 Ws 166/20', *juris* (2020), at 26.

be dispensable, viewing its primary purpose as the protection of individuals affected by the surveillance. Therefore, the court concluded that the breach of Article 31 of the DEIO unlawfully violated the fundamental right of personality in its manifestation as protection of the confidentiality and integrity of information technology system (so-called IT-fundamental right)[37] and the telecommunication secrecy of the EncroChat users. [38]

Ultimately, by accepting the EncroChat data gathered and transferred from France, German law enforcement authorities violated the fundamental rights of the individuals involved.

2. Violation of German Criminal Procedure law, §§ 100a, 100b StPO

Due to the requirement in Article 31 (III) of the DEIO to review investigative measures, the court opined that the European principles of mutual trust and recognition of judicial decisions are disregarded, making national law decisive in the context of telecommunication interception. According to §§ 100a and 100b of the German Code of Criminal Procedure (StPO), prior to implementing the monitoring measure, there must be sufficient evidence indicating the involvement of a specific suspect and a particular event. The very aim of the French monitoring measure, 'to identify users' and 'highlight their criminal activities',[39] shows that neither the suspects nor the criminal acts were specifically known before the data was gathered. Therefore, the court holds that the interception of EncroChat users violates §§ 100a and 100b StPO. In conjunction with Article 31 of the DEIO, the interception measure would not have been authorized. Consequently, the violation of Article 31 of the DEIO is considered extremely severe.

3. Prohibition on the Use of Evidence

Under German law, the unlawful gathering of evidence does not always result in a ban on its use in court. To determine whether the mentioned violations should lead to a prohibition on using EncroChat data, the Berlin Regional Court applied *the 'doctrine of balancing'*. This involved weighing the state's interest in establishing the truth and ensuring effective criminal justice against the accused's interest in a lawful procedure.[40]

The court argued that Article 31 of the DEIO aims to safeguard the fundamental rights of EncroChat users. It found the failure to comply with the notification obligation significant enough to supersede the state's interest in prosecution. This issue was worsened by the possibility that proper notification could have rendered the measure illegal due to violations of §§ 100a and 100b of the StPO. These violations of national criminal procedure law alone would render the chat data inadmissible.[41] Even the presumption of the most serious offences could not compensate for the lack of concrete facts of suspicion. Such an approach would amount to 'prosecution at any price', which the German legislator did not intend.

The mass surveillance of telephones, in violation of the DEIO and without concrete suspicion, undermines fundamental concepts of justice under German law to such an extent that it cannot be used in trial. Consequently, the court considered the interests of the accused to predominate, leading it to prohibit the use of EncroChat data as evidence in its proceedings.

37 Article 2 (I) in conjunction with Article 1 (I), Constitution of the Federal Republic of Germany.
38 Article 10 Constitution of the Federal Republic of Germany.
39 French Public Prosecutor's Office, 'Request', 29 January 2020, at 2-12.
40 Federal Court of Justice, '3 StR 390/17', *juris*, at 24.
41 Council of the European Union on encryption, 'Resolution', 24 November 2020, 13084/1/20.

B. German Federal Court of Justice affirms usability[42]

In contrast to the Berlin Regional Court, the German Federal Court of Justice decided in its decision of 2 March 2022 that the gathering and transfer of the EncroChat data was lawful. Not only does the German Federal Court deny the violation of the DEIO and German criminal procedure and constitutional law but it also faces up to the regulatory gap and developed its own approach to assess the admissibility of the EncroChat data.

1. Lawfulness of Data Gathering by France

(a) No violation of Article 31 of the DEIO

As well as the Berlin Regional Court, the Federal Court of Justice states that evidence obtained through failure to adhere to specific mutual legal assistance provisions designed to protect individual rights, should be prohibited from use. However, the court rejects that the DEIO has the purpose to protect individual rights in this case: In its opinion, the requirement for notification outlined in Article 31 (I) of the DEIO serves to protect the fundamental rights of the intercepted German individuals *only* in criminal proceedings *outside* of Germany. This is because German constitutional and criminal procedure law is sufficient to provide individual protection in domestic criminal proceedings. A recourse to legal assistance provisions is therefore not necessary. Article 31 of the DEIO only regulates interstate legal relations and does not concern the use of evidence in Germany. Therefore - other than assumed by the Berlin Regional Court – Article 31 of the DEIO does not protect the fundamental rights of a person in criminal proceedings on German territory.

(b) No violation of German criminal procedure law

The court states further that the legality of an investigative act in mutual legal assistance proceedings is determined by the law of the state *conducting* the investigation. It was therefore irrelevant whether the collection of EncroChat data by the French investigating authorities violated the national §§ 100a and 100b StPO.

Furthermore, the German court did not have to review the legality of the data gathering based on French criminal procedure law. This is because the European Union is based on mutual trust and the presumption that other Member States comply with Union law and fundamental rights. This presumption can only be challenged if there are legitimate grounds for assuming an unjustified violation of fundamental rights. In the opinion of the court, the presumption that the French authorities acted lawfully when gathering the EncroChat data is upheld. It did not recognize any violation of the fundamental rights of the persons concerned.

(c) No violation of ordre public

The court also emphasizes that the French authorities did not violate the German order public when gathering the EncroChat data. The principle of order public is violated if the result of the application of foreign law is an unacceptable contradiction to the basic ideas of the national legal system and the concepts of justice enshrined in it.[43] In the opinion of the court, the gathering of EncroChat data does not violate fundamental national values, given the seriousness of the offences in question. Fundamental deficits in the rule of law were also not apparent against the background of the state's mandate to protect its citizens, in particular from the dangers posed by drug trafficking and organized

42 German Federal Court of Justice, '5 StR 457/21', *juris*, at 24.
43 J. Von Hein, 'EGBGB Article 6, paragraph 1', *MüKoBGB* (2024).

crime. Given the usual criminal utilization of EncroChat-phones, the court also denied a case of 'suspicionless' mass surveillance.

(d) No violation of national constitutional law – Filling the regulatory gap

The German Federal Court of Justice did not see a ban on the use of evidence arising from a violation of German constitutional law either. Intercepting the EncroChat-messages interferes with the users' constitutional right to privacy. In Germany, evidence collected by national investigative authorities is generally admissible in court, with exceptions defined by criminal procedural law or case law. However, there are no such regulations for evidence gathered by other Member States and transmitted through mutual legal assistance. To fill this gap, the court has developed the following standard.

Information obtained by a foreign state through secret investigative measures may only be used:

1. for the prosecution of particularly *serious criminal offences*
2. if the investigation of the facts is made considerably *more difficult by other means* and
3. the *core area of private life is not affected*.

By applying their developed standards, the court examined that the EncroChat data offers evidence for the prosecution of particularly serious drug-related offences. Without this data, these offences would not be possible to investigate. By intercepting the crime-related conversations of the EncroChat users, their core area of private life was in no way affected. In conclusion, the violation of their fundamental right to privacy is justified and the gathering of EncroChat data remains lawful.

2. Lawfulness of the Data Transfer to Germany

Besides the gathering, the data transfer from France to Germany was also lawful in the opinion of the court. The EIO issued by the German prosecutor's office for the transfer from France was based on *Article 6 (I) of the DEIO*:

1. The issuing authority may only issue an *EIO* where the following *conditions* have been met:
   (a) the issuing of the *EIO is necessary and proportionate* for the purpose of the proceedings …; and
   (b) the investigative measure(s) indicated in the *EIO could have been ordered* under the same conditions *in a similar domestic case*.
2. …

(a) Article 6 (I) (a) of the DEIO: EIO is necessary and proportionate

Given the suspicion of serious criminal offences, which would be significantly harder to investigate without the EncroChat data, the court finds the EIO issued by the German prosecutor's office that was aimed at the transfer of the EncroChat data collected by France, both necessary and proportionate.

(b) Article 6 (I) (b) of the DEIO does not apply

Furthermore, the court states that Article 6 (I) (b) of the DEIO does not require German prosecutors to examine whether a hypothetical alternative intervention could have been lawfully ordered under German procedural law before issuing the EIO. According to the wording and structure, Article 6 (I) (b) of the DEIO only relates to investigative measures specified in the EIO, which the executing state is still to carry out in the future. However, an EIO can also be issued for the transfer of evidence that another state has already obtained based on its own

investigation activities under its national law in accordance with *Article 1 (I) of the DEIO*:

> 1. A European Investigation Order (EIO) is a judicial decision which has been issued or validated by a judicial authority of a Member State ('the issuing State') to have one or several specific investigative measure(s) carried out in another Member State ('the executing State') to obtain evidence in accordance with this Directive.
>
> *The EIO may also be issued for obtaining evidence that is already in the possession of the competent authorities of the executing State.*

As a result, an assessment of a hypothetical alternative intervention is not necessary because the EIO, which is only aimed at the transfer of evidence, does not contain an investigative measure yet to be executed. The French authorities gathered the EncroChat data on their own initiative. They did not act on an investigation order from a German prosecutor's office, but merely agreed on a transfer of evidence. Therefore, compliance with §§ 100a and 100b StPO is ultimately not decisive in the context of the transfer of the EncroChat data.

6. DECISION OF THE CJEU[44]

While the Berlin Federal Court rejected the admissibility of the EncroChat data based on a violation of Article 31 of the DEIO, of German criminal procedure law and constitutional law, the German Federal Court was of the opposite opinion and developed their own evaluation standard. In its long-awaited decision of 30 April2024, the CJEU[45] has also expressed its opinion on the problematic points. Similarly, it formulated another approach for determining the admissibility of evidence obtained and shared by another Member State via an EIO in domestic criminal trials.

A. Article 6 of the DEIO: National Law Decisive for Lawfulness of an EIO

The CJEU clarified that the legality of issuing an EIO is determined by the requirements of the national law of the issuing state *(lex fori)*. As a result, the CJEU assigns less scope to the principle of mutual trust than the German Federal Court did in its decision. Furthermore, the CJEU highlights the necessity of making a clear distinction between the requirements for an EIO aimed at evidence gathering and one intended for evidence transfer. This means that an EIO for the transfer of evidence that is lawful under the law of the issuing state remains lawful even if the evidence gathered by the executing state was unlawful under the national law of the issuing state.

B. Article 31 of the DEIO: Protection of Individual Rights

The CJEU also clarifies that Article 31 of the DEIO serves to protect the rights of individuals. Thus, in case the interception measure violates the right to privacy and communication of the monitored individuals as enshrined in Article 7 CFR, Article 31 of the DEIO is meant to protect those affected. According to the CJEU, the protection of the fundamental rights of the monitored individuals also extends to the admissibility of the data for prosecutorial purposes in the issuing state. Therefore, the court considers that it is possible to prohibit the use of evidence due to a violation of Article 31 of the DEIO.

C. Admissibility of Evidence Obtained in a Manner Contrary to EU Law

Furthermore, under current EU law, it is primarily up to national law to determine the rules regarding the admissibility of

44 Case C-670/22, *M.N.* (EncroChat) (EU:C:2024:372).
45 Case C-670/22, *M.N.* (EncroChat) (ECLI:EU:C:2024:372).

evidence obtained in a manner contrary to EU law in criminal proceedings. The CJEU simply requires in this respect that if the accused cannot effectively challenge crucial evidence, this evidence should be deemed inadmissible. Thus, the court developed its own standard for addressing the issue of admissibility regarding evidence gathered and transferred by another Member State, diverging from the approach taken by the German Federal Court.

D. Issuing State Prohibited from Verifying the Criminal Procedure in the Executing State

The CJEU states that the EIO falls under judicial cooperation in criminal matters, as outlined in Article 82 (I) of the TFEU. This cooperation is based on mutual recognition of judgments and decisions, forming the foundation of criminal judicial cooperation. It relies on mutual trust and the presumption that other Member States comply with EU law and fundamental rights. Consequently, if an issuing authority seeks to use an EIO to transmit evidence already held by competent authorities in the executing state, it cannot assess the legality of the separate procedure used by the executing Member State to gather the evidence. Any other interpretation of the DEIO would complicate and weaken its system, undermining its objective.

7. STATEMENT OF THE AUTHORS

We take a critical view of the legislation and jurisdiction outlined above dealing with cross-border gathering of evidence. In the following, we aim to highlight our points of concern and approval to further advance the discourse on this judicial issue.

A. Points of Concern

1. Regulatory Gap for Admissibility of Evidence Gathered by Another Member State

From our perspective, the German and European legislators have simply not considered the present constellation. There are no agreements between the Member States that regulate, under which circumstances the evidence acquired by another Member State can be used within domestic proceedings. There are especially no laws that specify what impact it has on a domestic procedure if the gathering abroad is considered unlawful under domestic law. As a result of this absence of specific regulation among the Member States, the admissibility of EncroChat data collected by France has become a contentious issue in domestic legal proceedings, posing an imminent risk that potential criminals might slip through the legal net.

2. Mutual Trust Insufficient as Minimum Standard

We see shortcomings in the Mutual Trust regime due to Member States maintaining significantly divergent approaches to various regulatory fields. An illustrative example is the ongoing debate surrounding the admissibility of EncroChat data in German courts, particularly in light of the newly enacted Cannabis Control Act *(KCanG)* that took effect on 1st April 2024. This law legalizes the regulated production, supply, and distribution of recreational cannabis under state supervision, removing cannabis from Germany's Narcotics Act *(BtMG)*. As a result, ongoing investigations and proceedings for previously considered serious offences will no longer be punishable and eventually cease upon the law's implementation.

The recent implementation of the KCanG highlights potential discrepancies that other states might not replicate. This clearly shows that all Member States are evolving at different paces, along with their legal domains. Thus, relying on mutual trust does not guarantee legal certainty because the landscape is too fragmented; Member States cannot grasp the jurisprudential and legislative status of all subjects in other

Member States. Inevitably, this will create further complications within both the mutual trust regime and criminal assistance procedures.

3. CJEU's Decision Poses a Risk of 'Forum gifting'

From our perspective, the decision of the CJEU, which states that the legality of an EIO and the conditions for excluding evidence are determined by national law, paints the following problematic picture: Member State A cannot gather certain evidence without violating its national law. If it were to do so anyway, it would risk a ban on the use of evidence. For this reason, Member State B, under whose law the gathering of evidence is lawful, carries out the collection of evidence. Member State A then, subsequently issues an EIO for the transmission of the evidence gathered by Member State B. The legality of this EIO does not give rise to any objections under the national provisions of Member State A. Member State B then transmits the evidence to Member State A. Member State A can now introduce the evidence obtained into the criminal proceedings without fear of a ban on the use of evidence, as the legality of the gathering of evidence is now governed solely by the law of Member State B.

The case law of the CJEU and Article 4 of the MLA Convention EU prevent Member States from intentionally undermining their national law. In fact, if Member State A were to expressly submit an EIO to Member State B for the purpose of gathering evidence, the legality of the gathering of evidence would continue to be governed by the law of Member State A. Therefore, 'shopping' a forum by outsourcing the gathering of evidence through an EIO is prevented. However, if information has already been gathered by one Member State before another Member State officially requested the gathering, national laws are bypassed. This is shown by the example of the EncroChat case outlined above, in which the French law enforcement authorities also found information about German suspects by hacking the EncroChat server. Germany did not engage in forum shopping in this case. However, it did benefit from a 'gifted' French forum, according to which the gathering of evidence was lawful, unlike under German law. In our opinion, it is inconsistent and contradictory to say that choosing a more favourable jurisdiction is unlawful but getting it as a 'gift' – served on a silver plate – ought to be lawful. This 'forum gifting' entails the risk of far-reaching restrictions on national criminal and constitutional law as well as national fundamental values in the context of evaluations of prohibitions on the use of evidence.

4. Restriction of Member States Sovereignty Leading to a Significant Violation of the Accused's Fundamental Rights

Further, we are concerned about the protection of the accused's fundamental rights by the German Federal Court as well as the CJEU.

We are surprised that the Federal Court of Justice states that EncroChat users are sufficiently protected from foreign surveillance measures by national criminal procedure law. However, the court did not consider national law to be decisive. As a result, it deprived EncroChat users of the protection of the DEIO and that of national law. Therefore, we identify a significant violation of the fundamental rights of EncroChat users by the German Federal Court.

Although the CJEU supports the admissibility of the evidence on different grounds than the German Federal Court, its decision also deeply interferes with the rights of the accused. In cases where the gathering of evidence would have been unlawful under national law but was lawfully carried out and transmitted by another Member State, all

requirements of national law are irrelevant. The consequences of this ruling are worrying: the national standards governing investigative measures against suspects are largely shaped by the individual national understanding of the significance of their fundamental rights. By allowing the possibility that these highly sensitive national values may be irrelevant, the CJEU announces an alarming erosion of the national rights of suspects in the Member States.

From a German perspective, the present EncroChat case already demonstrates this erosion. In Germany, there is no investigative measure that even comes close to the extent of the French EncroChat investigation. The most intrusive measure in German criminal procedural law is the online search according to § 100b StPO. German law considers this investigative measure to be so intrusive that it is only permitted if there is a concrete suspicion of a specific individual committing a specific serious crime in order to protect the rights of the accused. In contrast, France gathered the EncroChat data of over 60,000 completely unknown users. Germany could never have lawfully obtained and utilized the EncroChat data in this way. The fact that the CJEU nevertheless makes this possible with reference to the law on mutual legal assistance and the principle of mutual trust is certainly pleasing from a prosecution perspective given the rich dataset that has led to many convictions.

For us, however, a constitutional state has a responsibility to adhere to its principles of criminal procedure and constitutional law and to protect the fundamental rights of its citizens, even if it risks missing the chance of a conviction.

Otherwise, the tide could turn quickly and Member States could find themselves facing a significant restriction in their sovereignty, as exemplified in the following case. Member State X gathers evidence. This gathering of evidence is invalid under its law and valid under the law of Member State Y. Member State Y receives the evidence from Member State X by means of an EIO, but cannot use it because the gathering of evidence was unlawful under the law of Member State X. Member State Y can therefore not convict its criminals due to the legal system of Member State X. This would lead to one Member State's law regulating the admissibility of evidence and, therefore, the outcome of a case in another Member State.

Do Member States really want to give up their sovereignty to such an extent?

B. Points of Approval

1. No Violation of the Principle of Fair Trial

Like the CJEU, we are of the opinion that the principle of fair trial in accordance with Article 6 ECHR, in particular the fundamental rights of the defence and the principle of equality of arms, has not been violated.

Although the cross-border gathering of evidence may lead to a violation of national law, the principle of fair trial is to be understood in its entirety and requires an overall view of the proceedings. After reviewing the collected data sets, the defence lawyers of the accused are in a position to effectively comment on the information and evidence obtained. They are given sufficient opportunity to participate in the proceedings, to obtain necessary information and present their arguments. This level of participation is to be considered sufficient to meet the standards of a fair trial.

2. Strengthening Effective Law Enforcement

While we recognize the existing weaknesses in ensuring a fair trial and protecting the rights of the accused amid widespread digital evidence collection, we must also acknowledge the need for the admissibility

of this evidence to maintain the function and effectiveness of our criminal justice system. It is the responsibility of the state to ensure the preservation of the legal order safeguarding its citizens from both internal and external threats. Denying the use of such evidence and 'missing the chance of a conviction' would be contrary to that purpose and, moreover, contrary to the general sense of justice among the law-abiding population. By questioning the legality of EncroChat investigations, we risk allowing criminal gangs to mock our legal system from their hideouts. However, our strong national and European data protection laws should not serve as a shield for criminals to operate with impunity. This is vital to effectively deter crime among the citizens of the European Union and for maintaining confidence in law enforcement and our justice system.

3. Mutual Trust as a Good Legal Base for Efficient Law Enforcement

Although we are opposed to overly restricting Member States sovereignty, we support the European Union's goal of creating freedom, security, and the rule of law across borders as well as common European values. We believe that a certain degree of mutual trust and recognition between the Member States are essential for a functioning Union and European Single Market. Based on this, we are in favour of harmonization in the area of prohibitions on the use of evidence, which we believe will have a positive impact on reducing bureaucracy, strengthening the rule of law and eventually also securing the efficiency of law enforcement in the fight against crime.

8. CONCLUSION

We came to the conclusion that the core issue is the absence of laws determining when evidence improperly gathered by another Member State can be used in domestic trials. We consider European cooperation in the gathering and sharing of digital evidence a necessary tool to address illegal activities that are becoming increasingly international and hidden. In this regard, the DEIO, the ruling of the CJEU and the principle of mutual trust are a good start, but not sufficient to regulate the broad field of admissibility of evidence in the European Union.

We undoubtedly cannot permit criminals to continue their illicit activities under the guise of our rule of law. Certainly, the fundamental rights in question of the suspects are of the utmost importance and have been largely disregarded. However, considering the large number of criminals utilizing international infrastructure such as EncroChat, effective international cooperation between Member States is essential for successful prosecution and the admissibility of cross-border gathered evidence is vital to maintaining confidence in law enforcement and our justice system.

Therefore, we encourage the European Union to use its powers under Article 82 TFEU to establish minimum rules on the admissibility of evidence gathered in another Member State to facilitate mutual recognition of judgments, judicial decisions as well as police and judicial cooperation in criminal matters. At the same time, we are committed to respecting and protecting the sovereignty of the Member States with regard to their criminal procedural and constitutional values.

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TOWARDS FINDING THE MISSING LINK
CRITICAL ANALYSIS OF THE PROPOSAL FOR A COMMON EUROPEAN REGULATION ON THE TRANSFER OF CRIMINAL PROCEEDINGS

The transfer of criminal proceedings, the process by which the authority of one Member State transfers a criminal case to the authority of another state with the request to consider taking over the criminal proceedings, currently has a fragmented legal framework, which leads to a number of problems. The process of creating common European rules for this significant form of cooperation is currently underway. In the present paper, we examined the fragmented legal framework, the domestic practice, the problems encountered in practice and the possible solutions to these problems offered by the new Regulation of the European Parliament and of the Council on the transfer of proceedings in criminal matters.

KEYWORDS:
TRANSFER OF PROCEEDINGS | FRAGMENTED LEGAL FRAMEWORK | PROBLEMS IN THE CURRENT PRACTISE | PARALLEL PROCEEDINGS | PROPOSAL FOR A NEW REGULATION | CRIMINAL PROCEEDINGS

Le transfert des procédures pénales, processus par lequel l'autorité d'un État membre transfère une affaire pénale à l'autorité d'un autre État avec la demande d'envisager de reprendre la procédure pénale, a actuellement un cadre juridique fragmenté, ce qui entraîne un certain nombre de problèmes. Le processus de création de règles européennes communes pour cette forme importante de coopération est en cours. Dans le présent article, les auteurs examinent le cadre juridique, la pratique interne et les problèmes rencontrés ainsi que les options de solution à ces problèmes offertes par le nouveau règlement du Parlement européen et du Conseil relatif à la transmission des procédures pénales.

MOTS-CLÉS :

TRANSFERT DE PROCÉDURES | CADRE JURIDIQUE FRAGMENTÉ | PROBLÈMES DANS LA PRATIQUE ACTUELLE | PROCÉDURES PARALLÈLES | PROPOSITION DE NOUVELLE RÉGLEMENTATION | PROCÉDURES CRIMINELLES

INTRODUCTORY THOUGHTS

As of today, a comprehensive legal framework provides judicial authorities with user-friendly solutions for handling cross-border elements in criminal cases, in close cooperation with their counterparts in other European Union Member States (hereinafter: 'MSs'). This framework has recently been driven by the principle of mutual recognition[1] and has produced particularly successful instruments such as the European Arrest Warrant (hereinafter: 'EAW')[2] and the European Investigation Order (hereinafter: 'EIO').[3] However, EU legislators have had little influence on one 'classical form' of this evolving judicial cooperation: the *transfer of criminal proceedings* (hereinafter: 'TROP').[4]

The TROP, the process in which the authority of one state transfers a criminal case to the authority of another state, with the request to consider prosecution, currently has a fragmented legal framework, which leads to several problems. As the *Eurojust Report on the Transfer of Proceedings in the European Union* elaborated, the plurality of legal bases and lack of a specific EU legal instrument, the differences of the national laws of MSs, lead to several legal issues and difficulties in practice.[5]

The process of establishing a common European regulation for this significant form of cooperation, in other words – reflecting on the title of the present written paper – finding the missing link, is currently underway.[6] In this context, the aim of our written paper is to outline the theoretical and practical challenges of the TROP in a comprehensive manner, emphasizing the necessity for the forthcoming legislative act.

Criminal law is an element of state sovereignty, but the commission of crimes often crosses borders. Hungary has seven neighbouring countries and foreign offenders sometimes return to their home country, therefore cross-border cases are not rare in Hungary. In this written paper, we wanted to examine the circumstances in which the transfer of prosecution is possible in these cases. We focus on the investigation phase and the period up to the indictment because experience shows that this is the typical application of this legal instrument. In our written paper, we will go through the history of the different TROP Conventions, the current legislation, the problems encountered in practice, such as the problems of finding the competent authority and the legal basis because of the fragmented legislation, the translation problems, the question of the involvement of suspects and victims, and their right to a legal remedy, etc. (see Chapter 1 and Chapter 2.3). We are examining the solutions to these problems offered by the new *Proposal for a Regulation of the European Parliament and of the Council on the Transfer of Proceedings in Criminal matters* (hereinafter: 'Proposal', see Chapter 3).

1 P. Verrest, M. Lindemann, P. Mevis and S. Salverda, *The Transfer of Criminal Proceeding in the EU. An exploration of the current practice and of possible ways for improvement, based on practitioners' views,* Erasmus University Rotterdam, Universität Bielefeld, May 2022, at 6.
2 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision.
3 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.
4 J. Boudewijn, *Transfer of Criminal Proceedings: From Stumbling Block to Cornerstone of Cooperation in Criminal Matters in the EU,* ERA Forum, No. 3/2020. at 449. Verrest, Lindemann, Mevis and Salverda (2022), *supra* note 1, at 6.
5 *Eurojust Report on the Transfer of Proceedings in the European Union*, Eurojust, January 2023, at 4-5.
6 Proposal for a Regulation of the European Parliament and of the Council on the transfer of proceedings in criminal matters {SWD(2023) 77 final} – {SWD(2023) 78 final}, COM (2023) 185 final, Brussels, 5 April 2023.

1. BRIEF OVERVIEW OF THE LEGAL ENVIRONMENT

A. Crucial Character – Crucial Points

Rather than attempting to bring unity to the diversity of various TROP definitions,[7] which notion is by now best reflected in the content of the proposal for the specific EU legislation currently under negotiation and presented below, it is more appropriate to highlight the crucial character of the form of cooperation being examined.

For a long time, states have refused any formal cooperation in criminal matters, fearing for their sovereignty. Even when it did take place, it was on an *ad hoc* basis, usually between two neighbouring states. Over time, however, it became apparent that overemphasis of sovereignty compromised the effectiveness of cross-border law enforcement and rendered states powerless to act if the defendant was not within their borders.

It is important to note that in the 20th century, especially in the latter half, there was a growing emphasis on treating the defendant as both the subject and object of legal proceedings. This trend coincided with the increasing recognition of human rights,[8] which began to play a more prominent role in extradition procedures. Accordingly, it is preferable for the defendant, particularly if facing a custodial sentence, for the criminal proceedings to occur in their domestic environment.[9]

The TROP also serves the interests of law enforcement efficiency by saving the transferring state time, effort, and money. This approach may be particularly useful in cases where the defendant has already fled the *locus delicti*.[10] All of this is borne out by the growing judicial authorities need to effectively combat cross-border crime, which is enhanced by the increasing internationalization of crime.[11]

The transfer of proceedings is an important instrument of judicial cooperation that may allow national authorities to overcome conflicts of jurisdiction between MSs and jurisdictional issues, more generally resulting in multiple criminal proceedings, which are specifically inherent in cases of transnational criminal activities. In other cases, it may be the only solution to avoid impunity for certain offences. Transferring criminal proceedings to another country responds not only to a principle of effectiveness and proper administration of justice in the fight against cross-border crime, but also seeks to ensure compliance with the fundamental rights of the accused, in particular the right not to be tried or punished twice in criminal proceedings for the same criminal offence in different Member States under Article 50 of the Charter of Fundamental Rights of the European Union[12] *(ne bis idem).* At the same time, it represents a sensitive topic strictly related to the sovereignty of states since, in practice, a transfer of proceedings may be equal to a waiver of jurisdiction in favour of another state.[13]

7 See i.a. Boudewijn, *supra* note 4, at 449-450, Verrest, Lindemann, Mevis and Salverda, *supra* note 1, at 6, *Eurojust Report on the Transfer of Proceedings in the European Union*, Eurojust, January 2023, at 3.

8 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14

9 Boudewijn, *supra* note 4, at 456., K. Ligeti, *Büntetőeljárás* átadása/átvétele, in F. Kondorosi and K. Ligeti (eds.), *Az európai büntetőjog kézikönyve,* Magyar Közlöny Lap- és Könyvkiadó, Budapest, (2008), at 139-140; M. P. Nyitrai, *Nemzetközi és európai büntetőjog* (2006), at 270 and 273-274.

10 Also worth noting in this regard, that cyberspace has been rapidly gaining ground as *locus delicti*. Boudewijn, *supra* note 4, at 456.

11 Boudewijn, *supra* note 4, at 455; P. Polt, *Nemzetközi bűnügyi együttműködés újabb fordulat előtt*, Miskolci Jogi Szemle, No. 2/2019, at 331.

12 Charter of Fundamental Rights of the European Union, 2012/C 326/02, 26 October 2012, Article 50: No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

13 Eurojust Report 2023, *supra* note 5, at 3.

It should also be noted that TROP has the potential to reduce the prison population and encourage authorities to exercise more restraint in pre-trial detention. This is particularly important in MSs where detention rates are disproportionate[14] to the number of nationals or permanent residents.[15] On this issue, it is important to note that the latest statistics show that in 2021, one in five detainees in EU MSs held foreign citizenship in the reporting state for the question and this data remained stable compared to 2020.[16]

B. The Roots of the Proposal for the TROP Regulation

1. Regional Conventions – Council of Europe

Perhaps the earliest example of the idea, which emerged after the Second World War, of regulating the TROP in the framework of international conventions[17] is the provision in *Article 21 of the Council of Europe Convention of Mutual Assistance in Criminal Matters* (1959) (hereinafter: 1959 MLA Convention).[18] The referred article states that information laid up by a Contracting Party for criminal proceedings to be brought before the courts of the other Party shall be transmitted between the Ministries of Justice concerned. The requested Party shall inform the requesting Party by similar means about the outcome of the proceedings and the actions taken based on such an official 'denunciation'.[19]

Shortly after the drafting of the 1959 MLA Convention, it became apparent that a more detailed instrument was required from a substantive approach to facilitate the processing of requests based on uniform principles and rules. This has led to a tendency whereby the institution of the laying of information in criminal matters, initially a component of mutual legal assistance (hereinafter: 'MLA'), has gradually evolved into the concept of the TROP, which has increasingly become a standalone form of MLA, while the aforementioned institution has remained complementary to it, although in certain national laws, such as Hungarian law, it also exists in an autonomous form.[20]

The initial step in the TROP's journey towards autonomy was taken within the *European Convention on the Punishment of Road Traffic Offences* (1964).[21] Although the relevant rules in the 1964 Convention, appear to have been drafted only in a specific, narrow field of law, namely the area of road traffic offences, it was the first time that more detailed provisions were drafted to give substance to the TROP at the international level and to lay the foundations for a uniform system.[22] It is worth noting that only Cyprus, Denmark, France, Romania, and Sweden have ratified the 1964 Convention.[23]

14 ECtHR, *Varga and others v. Hungary*, Appl. nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, Judgment of 10 March 2015.
15 Ligeti, *supra* note 9, at 140; M. Nyitrai, *supra* note 9, at 273.
16 H. Wermink, M. T. Light and A. P. Krubnik, *Pretrial Detention and Incarceration Decisions for Foreign Nationals: A Mixed-Methods Approach*, *European Journal on Criminal Policy and Research,* Vol. 28/2022, at 368. Source of the data referred to: M. F. Aebi and M. M. Tiago, *Council of Europe Annual Penal Statistics. SPACE I – 2020. Prison populations*, Council of Europe, Strasbourg, 15 December 2020, Updated on 11 April 2021.
17 Nyitrai, *supra* note 9, at 277.
18 European Convention on Mutual Assistance in Criminal Matters (ETS No. 30), signed in Strasbourg on 20 April 1959. (hereinafter: 1959 MLA Convention).
19 Article 21 of the 1959 MLA Convention, Nyitrai, *supra* note 9, at 277; Verrest, Lindemann, Mevis and Salverda, *supra* note 1, at 23.
20 See Title 3 ('Laying of information before a foreign state'), Section 45 of the *Act XXXVIII of 1996 on International Mutual Legal Assistance in Criminal Matters* (hereinafter: IMLA Act); Nyitrai, *supra* note 9, at 277.
21 European Convention on the Punishment of Road Traffic Offences (ETS No. 52.), signed in Strasbourg on 30 November 1964. (hereinafter: CoE 1964 Convention). M. Ludwiczak, *Jurisdiction and Applicable Law in the EU Directive on Transfer of Proceedings in Criminal Matters,* New Journal of European Criminal Law, No. 3/2010, at 347.
22 Ligeti, *supra* note 9, at 140.
23 *Chart of signatures and ratifications of Treaty 052*, Council of Europe, Coe.int.

The *Council of Europe Convention on Transfer of Proceedings in Criminal Matters* (1972) (hereinafter: 1972 Convention)[24] was the first convention to elevate the TROP to a general level, rather than limiting its applicability to certain types of criminal offences. Moreover, it was the instrument whose birth was a clear sign that the TROP was evolving into an autonomous form of MLA, with uniform principles and rules, thus adopting a very different position from that of the 1959 MLA Convention. Essentially, it could be said that it provides a comprehensive procedure for requesting the TROP, along with a list of criteria that may support such a transfer.[25]

It is also worth highlighting that the 1972 Convention permits the initiation of a transfer for various reasons.[26] However, it merely provides for the possibility of the TROP and does not make it mandatory in any case.[27] It is worth noting, in this context, that the 1972 Convention limits the grounds for refusing an incoming request to a specific list, however, the receiving state has broad discretion to reject a request, as the first refusal ground enables the receiving state to fully review the justification of the proposed transfer. Therefore, a transfer may only occur with the consent of both states.[28] The 1972 Convention outlines provisions for the procedure, such as the suspect's right to be heard on the transfer[29] and the regulation of provisional measures as well.[30] It applies the principle of *ne bis in idem*, which allows the transferring state to end its criminal procedure to avoid problems arising from it,[31] which is particularly relevant to states with a strict legality principle.[32]

However, apart from listing these progressive provisions, it is crucial to recognize the existing circumstances. Specifically, the 1972 Convention was only ratified by 13 MSs (and 12 more European states) and signed (but not ratified) by 10 others, including Hungary in 2001,[33] which means ratification by less than half of the MSs at the EU level. Consequently, remaining within the EU dimension, as practice shows, the 1959 MLA Convention mentioned above, which has been ratified by all MSs,[34] is often used as a basis for the TROPs between MSs.[35] In alternative scenarios, it is important to note that specific bilateral or multilateral agreements are utilized.[36] Moreover, cases may be transferred even in the absence of an international convention governing the issue, by applying the principle of reciprocity alongside relevant provisions of national law.[37]

2. United Nations Conventions, Model Treaty

Some UN Conventions contain provisions regarding the TROP. Based on the framework established under Article 8 of the *United Nations Convention against Illicit Traffic in*

24 European Convention on the Transfer of Proceedings in Criminal Matters (ETS No. 73), signed in Strasbourg on 15 May 1972. (hereinafter: 1972 Convention).
25 Eurojust Report 2023, *supra* note 5, at 4; Verrest, Lindemann, Mevis and Salverda, *supra* note 1, at 23.
26 See Article 8 of the 1972 Convention.
27 *Ibid*., Article 6.
28 *Ibid*., Article 10; Boudewijn, *supra* note 4, at 451.
29 Article 17 of the 1972 Convention.
30 *Ibid*., Articles 27-29.
31 *Ibid*., Article 3.
32 Boudewijn, *supra* note 4, at 451.
33 *Chart of signatures and ratifications of Treaty 073*, Council of Europe, Coe.int.
34 *Chart of signatures and ratifications of Treaty 030*, Council of Europe, Coe.int.
35 Eurojust Report 2023, *supra* note 5, at 4.
36 In the EU, there have been two regions, the Benelux states and the Nordic states, that have historically engaged in a more intimate form of regional or sub-regional cooperation. This collaboration has extended to issues related to criminal law and criminal procedures. See D. Helenius, 'Nordic and European Judicial Cooperation in Criminal Matters', in L. Ervo, P. Letto-Vanamo and A. Nylund (eds.), *Rethinking Nordic Courts* 90 (2020), at 133.
37 Boudewijn, *supra* note 4, at 451; Eurojust Report 2023, *supra* note 5, at 5.

Narcotic Drugs and Psychotropic Substances (1988)[38] and Article 21 of the *United Nations Convention against Transnational Organized Crime* (2000)[39], there is no obligation on states parties to transfer proceedings in any particular case. It does, however, require the states to consider the possibility of using the TROP for the prosecution of offences falling within the scope of the Conventions.

The United Nations has sought to promote the development of bilateral and multilateral treaties on the subject of the transfer of proceedings by preparing a *Model Treaty on the Transfer of Proceedings in Criminal Matters* (1990).[40] According to the Model Treaty,[41] the transfer of proceedings may take place in respect of any offence that may be prosecuted in the requesting state if such transfer is, first of all, in the interests of the proper administration of justice. A second basic condition is that of dual criminality. Articles 8 and 9 of the Model Treaty provide for the rights of both the suspect and the victim of a crime. The suspected person may express his or her "interest" in the TROP, as may his or her close relatives or his or her legal representatives. The requesting and requested states shall ensure that the rights of the victim to restitution or compensation shall not be affected as a result of the transfer.

3. EU Legal Instruments

It should be mentioned that in 1990 an *Agreement on the Transfer of Proceedings in Criminal Matters* was signed within the European Economic Community to supplement the existing multilateral Conventions between the MSs. However, it never entered into force due to a lack of ratifications.[42] The Agreement was created because the MSs found the 1972 Convention too complex and inflexible in many areas, making it difficult to apply in practice.[43] Therefore, they decided to draw up a multilateral convention to supplement its provisions and facilitate their application.

Another legal basis relied upon for the TROP is the spontaneous exchange of information, as outlined in *Article 7 of the Convention on Mutual Assistance in Criminal Matters Between the Member States of the European Union* (2000).[44] However, the purpose of Article 7 is not primarily the TROP, but primarily to provide a legal basis for the transfer of information when the authorities of a state believe that information obtained in the course of their proceedings may be useful to another state - for example, to facilitate the ordering of an investigation.

Regarding the EU legal instruments, it is worth mentioning that, in certain EU MSs, the implementation of *Framework Decision*

38 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, Article 8: The Parties shall give consideration to the possibility of transferring to one another proceedings for criminal prosecution of offences established in accordance with Article 3, paragraph 1, in cases where such transfer is considered to be in the interests of a proper administration of justice.

39 United Nations convention against Transnational Organized Crime and the Protocols thereto, 2004, Article 21: States Parties shall consider the possibility of transferring to another proceedings for the prosecution of an offence covered by this Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.

40 Conference of the Parties of the United Nations convention against Transnational Organized Crime (2017), available at https://www.unodc.org/documents/treaties/International_Cooperation_2017/V1705658_E.pdf

41 General Assembly Resolution 45/118 (1990), available at https://www.legal-tools.org/doc/249b08/pdf/.

42 Agreement between the Member States (of the European Communities) on the Transfer of Proceedings in Criminal Matters, signed in Rome on 6 November 1990. The Agreement was signed by eight of the twelve MSs of the European Communities at the time. Only one MS, France, ratified it in 1996. Ludwiczak, *supra* note 21, at 348; Nyitrai, *supra* note 9, at 287.

43 E. Denza, '2000 Convention on Mutual Assistance in Criminal Matters', 40/5 *Common Market Law Review* (2003), at 1056.

44 Convention ... on Mutual Assistance in Criminal Matters between the Member States of the European Union. Article 7 Within the limits of their national law, the competent authorities of the Member States may exchange information, without a request to that effect, relating to criminal offences and the infringements of rules of law referred to in Article 3 (1), the punishment or handling of which falls within the competence of the receiving authority at the time the information is provided.

2009/948/JHA on the prevention of conflicts of jurisdiction[45] has been extensive, especially in regulating the process of transferring legal proceedings to other EU MSs. While the Framework Decision 2009/948/JHA mandates a consultation process for competent national authorities in cases where parallel proceedings involving the same individual and facts are ongoing in another MS, it does not address the subsequent TROP that may occur following an agreement on the appropriate jurisdiction for prosecuting the case.[46]

In 2009, an initiative for a Council Framework Decision regarding the TROP,[47] known as the 'Swedish initiative' and backed by 16 MSs, was introduced. However, discussions were suspended following the implementation of the Lisbon Treaty.[48] It should also be mentioned that in 2012, a significant number of professionals, including scholars and practitioners across all EU MSs, were surveyed regarding the potential development of a set of criteria to determine the appropriateness of TROP in particular situations. The survey results revealed that an overwhelming majority of 90% of respondents expressed the necessity for the formulation of such guidelines.[49] In December 2020, the Council, through its conclusions on the EAW,[50] urged the European Commission to assess the feasibility and potential advantages of a new proposal for an EU instrument concerning the TROP. This endeavour was subsequently included in the Commission's agenda for 2022,[51] following the completion of a public consultation, and the forthcoming adoption of the legislative proposal anticipated.

As we can see, in the absence of a specific EU instrument so far, several different legal bases are used across the MSs, there are no explicit uniform rules on the criteria for transferring proceedings and on the procedural safeguards, so a new European law regulating the TROP is absolutely necessary. After the above history, the Commission presented its new Proposal on April 5, 2023.

As the *Explanatory Memorandum of the Proposal* explains, the rise in cross-border crime poses significant challenges, often leading to scenarios where multiple MSs have jurisdiction over the same case. In such situations, establishing common rules for transferring criminal proceedings between MSs becomes essential. These rules are vital for effectively combating cross-border crime and ensuring that the MS best equipped to investigate or prosecute a criminal offence takes the lead. In essence, the establishment of common rules for transferring criminal proceedings within the EU is a crucial step towards strengthening collaboration among MSs and bolstering the Union's capacity to combat cross-border crime effectively. Despite this, the current EU measures lack specific regulations governing this form of cooperation. To address these gaps, the

45 Framework Decision 2009/948/JHA of 30 November 2009, OJ L 328/42. According to the research conducted by Verrest, Lindemann, Mevis, and Salverda, respondents expressed that the Council Framework Decision provided limited assistance. Verrest, Lindemann, Mevis and Salverda, *supra* note 1, at 21.

46 Eurojust Report 2023, *supra* note 5, at 4-5.

47 Initiative ... for a Council Framework Decision 2009/…/JHA of … on transfer of proceedings in criminal matters. Verrest, Lindemann, Mevis and Salverda, *supra* note 1, at 6. Ludwiczak, along with other scholars, determined that the proposed Directive would result in a significant shift where the EU, rather than individual MSs, would be responsible for establishing national regulations on jurisdiction. Ludwiczak, *supra* note 21, at 352.

48 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007.

49 G. Vermeulen, W. De Bondt and C. Ryckman (eds.), *Rethinking international cooperation in criminal matters in the EU: moving beyond actors, bringing logic back, footed in reality,* 42 (2012), at 476.

50 Council Conclusions 2020/C 419/09.

51 COM/2021/645 final Commission work programme 2022 Making Europe stronger together, COM/2021/645 final.

Commission has opted to propose a new instrument dedicated to facilitating TROP.[52]

Before moving on to the new Proposal, we briefly present the Hungarian legal regulations and the problems that have arisen in practice, looking for answers to the question on what kinds of solutions the new Proposal provides for them.

2. THE HUNGARIAN LEGISLATION AND PRACTICE

A. Transfer of Proceedings from Hungary

Hungarian regulations are based on Article 21 of the 1959 MLA Convention, bilateral agreements, and Act XXXVIII of 1996 on International Mutual Legal Assistance in Criminal Matters (IMLA Act).

1. Relevant Rules of the IMLA Act

According to the IMLA Act, it is the competence of the Prosecutor General to make the decision on transferring the criminal proceeding from Hungary prior to the indictment. After it, the Minister of Justice is entitled to make the decision. According to the Act, the proceeding can be transferred if it is practical, based on the place of the crime committed, the defendant's place of residence or the interest of the victim.

The law makes it possible to organize consultations with foreign states about the transfer, to discuss the transfer of documents, seized assets, and evidence, and to clarify which documents have to be translated. It is also laid down in the text that an indictment cannot be filed, the proceeding cannot be terminated, nor can a final judgment be made after such a request has been filed. After the requested judicial authority notifies the Hungarian authority that the proceeding has been accepted, the Hungarian proceeding could be terminated, against which no remedy is provided.[53]

2. Bilateral Agreements

In the past, with mostly neighbouring states, Hungary has signed bilateral treaties that regulate the question of transfers. These are between Hungary and Czechoslovakia,[54] Romania,[55] Austria,[56] Yugoslavia,[57] and the Soviet Union.[58] Although, this means that, through the succession of states, Hungary has a legal basis for the transfers of proceedings to the neighbouring states, the actual details are still missing in the legislation. The Visegrad Group (V4) is a regional cooperation among the Czech Republic, the Republic of Poland, the Slovak Republic and Hungary. Judicial cooperation in criminal matters between the V4 countries has traditionally been good. The Prosecutor General of the Visegrad Group met for the first time in 2012 and since then they have met annually. The Prosecutor General agreed that improving judicial cooperation among the MSs of the European Union is a priority.

3. Conditions of the TROP

In the case of Hungary, when it comes to offering to transfer the criminal proceeding to another state, there are several things the authorities need to take into consideration. First, it needs to be examined if all the opportunities for the detection process in the case of collecting evidence have been fulfilled

52 COM/2023/185 final, Proposal for a Regulation of the European Parliament and of the Council on the Transfer of Proceedings in Criminal Matters (2023), available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52023PC0185&qid=1712395583555.
53 IMLA Act, Section 37-44/B.
54 Act LXI of 1991 signed on 28 March 1989 between Hungary and Czechoslovakia, Articles 68-69.
55 Decree-Law No. 19 of 1959 signed on 7 October 1958 between Hungary and Romania, Article 2.
56 165/1994 (XII. 9.) Government Decree signed on 27 October 1993 between Hungary and Austria, Article 15.
57 Decree-Law No. 1 of 1969 signed on 7 March 1968 between Hungary and Yugoslavia, Articles 82-83.
58 Decree-Law No. 38 of 1958 signed on 15 July 1958 between Hungary and USSR, Articles 54 and 56.

in Hungary. If there is any part of this process that can and has to be done in the requesting state (Hungary), the proceeding cannot be transferred. It would not be practical to transfer the proceeding if the requesting state still needs to conduct acts of collecting evidence, a major part of the investigation. The detection phase of an investigation has to reach a certain level before requesting another state to take the proceeding over can even come into consideration. There has to be exact and certain data in the requesting state's possession which points to the fact that the perpetrator of a crime is a citizen of the requested state, or at least resides there, therefore, the evidentiary proceeding can be continued there. It also has to be examined if there has been a preliminary consultation between the states, and if there has been a parallel process.

4. Review of the Statistics Regarding TROP Initiated by the Prosecution Service of Hungary

The TROP is a relatively rarely used legal instrument in practice, which is shown by the national statistics of the Prosecution Service of Hungary. When reviewing the data, it can be seen that, in comparison to other instruments of international legal assistance, the number of initiatives for the transfer of proceedings is fairly low. In 2022 the Prosecution Service of Hungary initiated only 46 transfers of proceedings, and as the data regarding the previous years (2018: 31, 2019: 37, 2020: 48, 2021: 50) are examined, hardly any difference can be seen in the number of registered initiatives. The most common crimes in these cases were fraud, information system fraud, offences against transport security, or illegal drug possession.

B. Acceptance of Criminal Proceedings

Criminal proceedings by the judicial authorities of a foreign state may be accepted upon request by the aforementioned authorities, if in particular, taking into account the place of the crime, the actual place of residence of the defendant, or the interests of the victim. It is practical to conduct it in Hungary. The Prosecutor General shall decide on the acceptance of criminal proceedings. Procedural acts performed in an accepted criminal proceeding shall be considered as if they were performed on the basis of legal procedural assistance aimed at the acquisition or delivery of evidence or the performance of the procedural act.

1. Review of the Statistics Regarding Requests Received by the Prosecution Service of Hungary

The following table shows the number of received requests from foreign states to accept the criminal proceedings and detailed data regarding whether the transfer was actually made.

Year	Documents received from a foreign authority with the intent of TROP	The request was denied	The request was accepted	Other measures, asking for additional information from the requesting state
2018	299	66	195	38
2019	302	89	157	56
2020	227	66	99	62
2021	232	60	100	72
2022	243	53	120	70

The majority of these requests came from Austria, and the rest of the requests came from other neighbouring countries. The vast majority of them are minor offences with an international element (such as a Hungarian citizen committing a crime abroad) and a significant number of these requests are criminal offences against property. Almost half of the requests are frauds, usually committed in the online space (e.g. non-delivery fraud), and the second most common offence being theft.

Usually, Article 21 of the 1959 MLA Convention is used as the legal basis for offers to take over criminal proceedings in Hungary, but there are also bilateral agreements with several MSs under (see above) which Hungary is obliged to take over the case if the offender is Hungarian.

The most common reason for such an offer is that the defendant is a Hungarian citizen who is currently residing in Hungary, and therefore the proceedings can be conducted more efficiently in Hungary in his or her presence.

2. The Procedure at the Office of the Prosecutor General of Hungary

The procedure starts with a review of the request and the attached case files. During this phase it is a common difficulty that only part of the file is sent or only part of the sent investigation file is translated. This is the stage where possible parallel Hungarian proceedings are checked by using databases and, if there are any parallel proceedings, the Office of the Prosecutor General contacts the competent Hungarian prosecutor's office to collect the domestic case files. The data on the actual whereabouts of the defendant are then checked. If the conditions of the procedure are met, the practicality of taking over the procedure will be considered. Hungary accepts approximately half of the offers. The most common reasons for refusal are the necessary and possible procedural investigative measures have not been carried out in the requesting state, further relevant investigative measures are to be taken in another foreign state. The suspect is presumably not present in Hungary. If, after examining the appropriateness of the request, the Office of the Prosecutor General decides to accept the offer, it makes a formal decision and will call upon the lower, local prosecutor's office with jurisdiction and competence to initiate criminal proceedings. It will also send information to the requesting state, informing the victim(s) about the decision. In Hungary there is no legal remedy against the decision about the acceptance of such transfers. Hungary informs the requesting state of the outcome of the procedure without a specific request to do so.

C. Problems in the Current Practice

The Hungarian Prosecution Service has the same problems in the current practice of the TROP as identified by Eurojust and the EU Commission, which led to the Proposal. The most significant of these problems are enumerated below.

1. Finding the Legal Base

Apparently, there are plenty of legal bases a state can and should rely on when it decides on requesting another state to transfer the criminal proceeding to it, which is already an issue in itself. Instead of one single document stating clear and exact rules, almost every single state has their own practice, and even the matter of which documents they refer to during these transfers, changes from state to state.

2. Form and Criteria of the Request

The IMLA Act does work as guidance, but only on a surface level. It does not even say anything about what a request shall look like; in Hungary, it is not an order, it works via a simple written request to the requested state. We can see that the forms introduced

for the EIO and EAW have facilitated the use of these legal instruments, so the use of such a form could be considered for the TROP. No exact regulation exists that provides the MSs with what a transfer should look like, or on what conditions a criminal process shall be transferred to another state, or shall be taken over. The IMLA Act only states that a criminal proceeding shall be transferred when it is practical. It gives no further guidance on what that term even means in the case of the transfer or what the exact steps should look like. This is the case in many other MSs as well; it is pretty much up to the national law of one state to decide how they handle a transfer, which leads to several issues. The practice of transferring criminal proceedings looks completely different in every single state.

3. Translation Problems

It is also a burning question what we should or should not translate; so far, the only rule we have on this matter is that the states can continue a consultation on the matter between one another.[59] It is fundamentally left up to the interested parties to decide on this, even though this is an issue that requires exact instructions. The translation costs of a longer, more complex document could be extremely high and the translation of them can be time-consuming and practically impossible to execute within a short time limit. In practice, this is usually reduced to translating a couple of key documents in Hungary, but even deciding which of these documents should be treated as the most important is difficult in itself. Some bilateral treaties state that the interested parties can all use their own languages, but of course, that only applies if there is a treaty like that in the first place. Otherwise, the complications of translation cannot be avoided.

4. Finding the Competent Authority

It is not always obvious which authority we need to seek even. While in Hungary the decision concerning the TROP is the competence of the Prosecutor General,[60] this is not necessarily the case in every other state. In Austria, for example, not the central authority but the competent prosecutor's office is entitled to submit the request for TROP. Even when using the European Judicial Network (EJN) Judicial Atlas,[61] it could be hard to find the correct authority which is competent to fulfil the requests.

5. Time Limit

There is no time limit in the IMLA Act, so the processing of an application may take longer. Practice shows that decisions about incoming requests are typically made within 30 days of receipt, but this does not include the time needed for translation or the time for requesting additional information from the requesting state. According to our practice, however, when Hungary is the requesting state, there may be no response for several months from the requested foreign authority.

3. TOWARDS FINDING THE MISSING LINK – THE INNOVATIONS OF THE PROPOSAL

The legislators of the EU Parliament and Council reached a provisional understanding on *6 March 2024 on the new law on the Regulation on the TROP*, currently the Proposal awaiting Parliament's position in 1st reading. The Commission envisions that, by establishing clear guidelines and procedures for the TROP, this new EU instrument will serve to prevent the duplication of criminal proceedings, mitigate the risk of impunity in cases where surrender under an EAW is declined, foster judicial cooperation among

59 IMLA Act, Section 39 (1) a.
60 IMLA Act, Section 38 (1).
61 European Judicial Network Judicial Atlas, available at https://www.ejn-crimjust.europa.eu/ejn2021/AtlasChooseCountry/EN.

MSs, and ultimately uphold the principles of justice and accountability within the EU.[62]

A. Finding the Legal Base

The Proposal provides MSs with precise regulation regarding the practical execution of transfers, addressing key concepts and resolving ambiguities that have historically caused challenges, such as criteria for defining victims in relevant cases.[63]

According to Article 31 of the Proposal, without prejudice to their application between Member States and third states, the Regulation replaces, within its scope of application, the corresponding provisions of the 1972 Convention and the 1959 MLA Convention. We welcome that the fragmented regulation is becoming uniform concerning the MSs. We think that it would be advisable if non-EU Member States that are parties to the 1959 and 1972 Conventions currently in force could also join the scope of the new Regulation.

B. Form and Criteria of the Request

It is also a positive addition that the Proposal assesses the relevant criteria to be taken into account by MSs when requesting a transfer, providing MSs with much needed guidelines in accordance with the initiation of the process.[64] Another advantageous innovation is that the transfer must be initiated with a request form, which has proven to be effective in both EIO[65] and EAW[66] procedures. The Proposal also contains an exhaustive list of information to transfer with a request. Moreover, the Proposal outlines specific procedural rules for transfer implementation with clear instructions to follow in order to successfully hand over the proceedings, thereby enhancing clarity compared to previous ambiguous rules.[67]

Notably, it addresses jurisdictional issues by stipulating that requested states must possess jurisdiction in instances where ongoing proceedings against the suspect exist or where a substantial portion of the criminal damage occurred within their jurisdiction. Additionally, it introduces a novel form of jurisdiction whereby the requested state must have jurisdiction in cases where the surrender of the suspect was previously denied.[68]

C. Translation Problems

In the near past, translations proved to be one of the factors, which could severely lengthen the transfer procedure. In reaction to that, the Regulation aims to bring about a change in the unregulated area. According to the *Eurojust Report*, Eurojust is often called to clarify which Member State should take care of the translation according to the applicable legal rules, as well as which documents should be translated by the requesting state when sending the request, whether the whole case file or only some parts of it.[69]

The use of a standardized request form translated into all official Union languages would facilitate cooperation and the exchange of information between the

62 Explanatory memorandum of the Proposal for a Regulation of the European Parliament and of the Council on the transfer of proceedings in criminal matters at 1-2.
63 Proposal for a Regulation of the European Parliament and of the Council on the transfer of proceedings in criminal matters, Article 2.
64 *Ibid*., Article 5 of the Proposal.
65 Report from the Commission to the European Parliament and the Council on the implementation of directive 2014/41/Eu of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, (2021), available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021DC0409.
66 European Arrest Warrant, available at https://commission.europa.eu/law/cross-border-cases/judicial-cooperation/types-judicial-cooperation/european-arrest-warrant_en.
67 Articles 9 and 10 of the Proposal.
68 Article 3 of the Proposal.
69 Eurojust Report 2023, *supra* note 5, at 21.

requesting and requested authorities, allowing them to take a decision on the request for transfer more quickly and effectively. It would also reduce translation costs and contribute to a higher quality of requests.[70]

According to Article 9 (5) of the Proposal, the completed request form, as well as the essential parts of any other written information accompanying the request for the transfer of criminal proceedings, shall be translated into an official language of the requested state or any other language that the requested state will accept in accordance with Article 30 (1) Point (c).

According to Article 12 (5), where the requesting authority has received the reasoned decision to accept the transfer of criminal proceedings, the requesting authority shall without undue delay forward the original or a certified copy of the case file or relevant parts thereof, accompanied by their translation into an official language of the requested state or any other language that the requested state will accept in accordance with Article 30 (1) Point (c).

The Hungarian practice shows that, the complete criminal file must be sent and evaluated, even in the case of a large volume and workload, in order to make a well-based decision on the transfer. Hence, we do not totally agree with this kind of solution to the Proposal, because it is possible that incomplete information is provided in the request form and that, after receiving the complete file, it is later discovered that the TROP should not be accepted.

The Regulation proposes a clause which creates the opportunity for sharing the expenses of extremely high-cost translation fees. This seems sensible enough, as some languages, like Hungarian, are less widely spoken in the Union. Paragraph (49) specifically states, that MSs should not claim compensation from each other for the translation of documents, but a proposal to share the burden should be considered by the requested authority.[71]

D. Finding the Competent Authority

According to Article 18, each Member State may designate one or more central authorities responsible for the administrative transmission and receipt of requests for the transfer of criminal proceedings. It will be up to the Hungarian legislator to decide whether the central authority will continue to have the power to decide on the TROP in Hungary, or whether it will be decided at the local level, and there are pros and cons to both options. If the Prosecutor General remains the central authority, there will continue to be uniform practice. On the other hand, designating the requests at lower, local levels would perhaps accelerate the procedures, as the local authorities could potentially conduct the transfer in a timelier fashion, even with a remedy. Since the investigation is carried out locally, the transfer request can also be dealt with at that level.

E. Time Limit

A significant advancement introduced by the Proposal is the establishment of a 60-day time limit, further improving the chance of a timely transfer.[72] In specific cases, where the requested state cannot meet the time limit, the deadline may be extended with a maximum of 30 days.

According to Article 9, without undue delay after receipt of a request form, and in any event within seven days of receipt,

70 Proposal at 32 (50).
71 *Ibid*., at 21 (37); at 60 Article 17 (2) of the Proposal.
72 Article 14 of the Proposal.

the requested authority shall send to the requesting authority an acknowledgement of receipt.

Prior to this, the absence of a defined deadline often resulted in long processes, with requested states failing to respond in a timely manner. In a number of cases, the requesting state was not notified of the decision of the requested state for an extended period of time, and in some cases, not even informed whether the request had been received by the requested state at all. So we welcome the limits set out in the Proposal and also the acknowledgement of receipt.

F. Consultation

Preliminary consultation between the states is a fundamental institution to reinforce in the transfer procedure if the aim is to increase the timeliness. In Paragraph (4), the Framework Decision 2009/948/JHA already encourages direct consultations between authorities of MSs in order to avoid the negative consequences of parallel proceedings.[73] According to Hungarian practice, the TROP is rarely preceded by consultation, usually only if Eurojust becomes involved after the identification of parallel procedures.

The Proposal breaks with this approach and makes a consultation between states general. Article 13 of the Proposal also emphasizes the significance of preliminary consultations before the refusal of a request, but Article 15 is the most relevant provision of the consultation. It requires the authorities of both parties to consult each other to effectively execute the Regulation. Consultations between the requesting and requested authorities may also take place before the request for the transfer of criminal proceedings is issued.

Involving Eurojust could also accelerate the transfer procedure, as one of its main purposes is to aid MSs in criminal matters. The Proposal also deals with the question, in Article 16, which states that both the requesting and the requested state may at any time request assistance from Eurojust or the EJN. Paragraph (14) of the aforementioned Framework Decision also provides the basis for the involvement of the agency.[74]

We welcome this provision in the Proposal, also bearing in mind that, as mentioned above, the Hungarian Prosecution Service rejects 50 percent of the requests. With prior consultation, the number of rejections can be reduced, thus avoiding unnecessary work and costs. On reflection, consultation could even be made mandatory for certain priority offences.

G. The Question of an Effective Legal Remedy – The Rights of the Suspect, the Accused Person and the Victim

Perhaps the most controversial topic of the Proposal is the right to a remedy. In MSs' national laws, the right to a remedy in connection with the transfer of proceedings has been an absent concept, even in states, where the suspects and victims are consulted beforehand.[75]

In connection with the remedy itself, the rights of the concerned parties must be subjected to analysis as well. The Proposal introduces a new solution, which is the opportunity given to suspects, accused persons and victims to propose the criminal proceeding in which they are concerned be transferred to another MS.[76] This could be handed in to the competent authorities of the requesting or requested state. Of course, this does not place

73 Council Framework Decision 2009/948/JHA, at 1.
74 *Ibid*., at 2.
75 Eurojust Report 2023, *supra* note 5, at 7.
76 Article 6 of the Proposal.

any obligation on the authorities to avoid the so-called "forum-shopping" phenomenon.[77]

The fact that the requesting authority must inform the suspect or accused person of the intended transfer of the proceedings and make it possible for them to express their opinion is a favourable turn, but the need for an approval from the suspect or accused person does not seem to be appropriate in this – mostly administrative – procedure.[78] As their rights are affected by the decision, it seems to be an acceptable point to provide the suspect/accused person/victim with the reasoned decision about the acceptance of the transfer, as well as information about their right to a remedy in a language they understand, with the respective time limit.

As the Proposal states, the court should examine the validity of the acceptance of the transfer in light of the relevant provisions of the Regulation and make the final decision on the legal remedy within 60 days.[79] The time limit for seeking remedy shall be 15 days. Taking the goals of the Regulation into consideration, it should be sufficient, given that in Hungary, in similar situations, seeking remedy is often paired with an 8-days time limit.

In order to emphasize the arising need for an effective legal remedy in accordance with the transfer, the relevant case law must be taken into consideration as well.

The Court of Justice of the European Union (hereinafter: CJEU) has highlighted the need for the right to a legal remedy in several cases, out of which the case Gavanozov II C-852/19 and Ghezelbash C-63/15 are presented in detail. Given that the TROP is currently a less frequently used instrument, the present cases do not address the right to a legal remedy in this respect, but they may serve as a basis for examination when it comes to discussion whether a legal remedy shall be granted to suspects and victims during the transfer of proceedings. In case C-852/19 *Gavanozov II* (EU:C:2021:902), the CJEU examined the issue of not providing an effective legal remedy against the issuing of an EIO. The CJEU found that it is contrary to EU law if the law of the MSs does not provide any legal remedies against the issuance or content of the EIO.

In case C-63/15 *Ghezelbash* (EU:C:2016:409), the CJEU stated that MSs have to provide a legal remedy against the transfer of an asylum application. The basis of the legal dispute was the fact that Mr Ghezelbash applied for a residence permit to the Netherlands authorities, however, as a result of a search in the EU Visa Information System (VIS), it was found that the French Republic had previously granted a visa to Mr Ghezelbash. Based on the founding of the VIS search, the Netherlands requested the French authorities to take charge of the case. The CJEU in its judgment states that the applicant shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal.

In light of the cases presented, it can be seen that the CJEU is clearly of the opinion that the right to a(n effective) legal remedy should be as broad as possible.

When it comes to the execution of the remedy process, the Proposal states that a judicial authority has to review these legal remedies. If we take into consideration the time limit set in Article 15c, if the accused persons or victims are unidentified at the time of the

77 *Ibid*., at 16 (29), Forum shopping is a practice when the defendants taking actions to have their legal case heard in a court that they believe is most likely submit a favourable judgment.
78 *Ibid*., at 58-59; Articles 15a and 15b of the Proposal.
79 *Ibid.*, at 58-59; Article 15c of the Proposal.

transfer's acceptance, it would prove to be counterproductive to provide those later discovered persons with a retroactively exercisable legal remedy. Not only can they not be informed in a timely fashion, but the process of this would complicate the procedure and unnecessarily exceed the time limit. The Proposal also tries to deal with the case where there is no person to communicate the opportunity for a remedy.[80] This is a rather positive turn in the text, as it resolves the mentioned problem of retroactivity.

H. Parallel Proceedings – To Terminate, or not to Terminate?

The Proposal mandates grounds for refusal, eliminating the reliance on national regulations alone, as it establishes mandatory and discretional grounds.[81] Notably, refusal is mandatory if the transfer contradicts the principle of *ne bis in idem*.[82] The principle of *ne bis in idem* prohibits repeated prosecutions against an individual for the same offence, act, or set of facts.[83] If that happens, the person affected by these decisions has the right to seek a legal remedy against double jeopardy.

To better illustrate the problem of parallel proceedings and, in connection with that, *ne bis in idem*, it is essential to examine the jurisprudence of the CJEU and the European Court of Human Rights (ECtHR). Both courts have a well-developed case law on the application of the aforementioned principle. In applying the *ne bis in idem*, the CJEU relies heavily on the case law developed by the ECtHR, but it is important to note that Article 4 of Protocol 7 of the European Convention on Human Rights only applies to double procedures within the same state.[84]

The comprehensive evaluation of *ne bis in idem* exceeds the limits of our written paper, but it is worth mentioning some relevant cases. The criteria for 'criminal nature' were established in case C-617/10, *Åkerberg Fransson* (EU:C:2013:105), case C-524/15, *Menci* (EU:C:2018:197), and case C-537/16, *Garlsson Real Estate SA.* (EU:C:2018:193). In these cases the CJEU highlighted that a proceeding is criminal in nature based on the legal classification of the offence under national law, the intrinsic nature of the offence and the severity of the penalty for such offence.[85] An important aspect of the 'same person' requirement is that the CJEU declares in case C-58/22, *Parchetul de pe lângă Curtea de Apel Craiova* (EU:C:2024:70) that the *ne bis in idem* principle does not extend to people who were interviewed, such as witnesses during a later terminated investigation.

In case C-436/04, *Van Esbroeck* (EU:C:2006:165), the CJEU states that the legal classification of the offence under national law and the legal interest protected are not relevant for establishing the existence of the same acts. The relevant criterion is the identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected.[86]

In our opinion, it seems unavoidable to have the proceedings conducted in both the requesting and the requested state in

80 *Ibid*., at 43; Article 6 1a of the Proposal.
81 Article 13 of the Proposal.
82 Article 13 (1) b of the Proposal.
83 W. B. Van Bockel, *The Ne Bis in Idem Principle in EU Law* (2010), available at https://hdl.handle.net/1814/14641.
84 Case law by the Court of Justice of the European Union on the principle of ne bis in idem in criminal matters, Eurojust (2014), available at https://www.eurojust.europa.eu/sites/default/files/assets/2024-cjeu-case-law-on-ne-bis-in-idem.pdf, at 8.
85 *Ibid*., at 15-17.
86 *Ibid*., at 25.

a parallel way, at least for a little while, as some procedural actions might remain, that would be more reasonable to execute in the requesting state. If the requesting state ends the proceeding as soon as the transfer happens, some procedural actions become difficult and financially unreasonable to execute. Based on Article 19 (2), the criminal proceedings in the requesting state may remain open in order to allow the requesting authority to undertake necessary urgent investigative or other procedural measures, including measures to prevent the suspect or accused person from absconding.

H. Technological Advancements

In the 21st century, it is highly demanded, even in the legal sphere, to utilize IT tools in the widest range. Article 9 and Article 22 state that the procedure has to be initiated with a specialized request form set out in the Annexe, with the involvement of central authorities, where a Member State has designated a central authority.

In accordance with Article 23, establishing a decentralized IT system enables electronic communication between the requesting and requested authorities, with central authorities and with Eurojust. The use of the already existing IT systems could also be an option for minimizing the costs of such development. The system to handle the requests for the transfers of criminal proceedings and other related matters could be integrated into already existing systems. Article 25 stipulates that each MS will have to install access points to the decentralized IT systems, making sure that these are interoperable with the national IT systems.

The *E-Evidence Digital Exchange System*, which shall be used to send EIOs as issuing authorities to authorities of EU MSs and to receive them as executing authorities from authorities of EU MSs that have joined the System, could be used for forwarding and accepting the TROP requests too.

CONCLUSION

As the legal background is currently fragmented or non-existent, and the Member States have to resort to creative solutions in the absence of an EU-wide legal instrument, the discussed Proposal is of the utmost importance, filling the gap and creating never-before-seen solutions on this question. The presented data shows that the TROP is a quite uncommon legal instrument in Hungary and based on the requests made towards Hungarian authorities it is not a generally used method in other MSs either. However, with the efforts made to simplify the TROPs (the general use of preliminary consultations before the actual transfer and the usage of uniform request forms), we believe that the number of registered transfers will rise if the Regulation is adopted and enters into force.

It is clear that the *Regulation of the European Parliament and of The Council on the Transfer of Proceedings in Criminal matters* is surely needed, as it would provide a uniform solution to the existing issues. It would apply in every case involving transferring the criminal proceedings,[87] and MSs would no longer have fragmented practices. The issue of how a request like this should look like and how a translation shall be done would also be answered by the Regulation, as we demonstrated above. This decision would help reduce the administrative costs of the process.

The Proposal contains many excellent provisions, regulating translations, creating request forms, setting up an IT system, emphasizing the significance of consultations, setting time limits, and so on. These will most likely serve the timeliness of procedures,

87 Article 5 (7) of the Proposal.

minimizing the number of year-long proceedings. The remedial system is also an interesting and important development. However, we do not agree with it entirely, and, as the case may be, it will be a matter for courts to determine whether a timely and effective legal remedy against a transfer decision will be possible. All in all, in our modern, globalized world, this Regulation is as needed as ever, so in our opinion, it will prove out to be a great addition to the EU-acquis and be the missing link in the EU's criminal cooperation.

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MONEY LAUNDERING THROUGH NFT - INTENTS AND EFFICIENCY - A LEGAL PERSPECTIVE

Non-Fungible Tokens (NFTs) are a reality that, due to their increase and expansion deserve our best attention. Furthermore, the fact that they are easily transmitted across borders requires adjusted European coordination. NFTs are being used to commit crimes, especially money laundering, which is a reality EU needs to be aware of.

Based on a conceptual analysis and the European reality, we propose specific measures that can make the protection of interests and rights effective aligned with AI and blockchain.

KEYWORDS:

NFT | MONEY LAUNDERING | PRIVACY CONCERNS | AI | BLOCKCHAIN

Les NFT sont une réalité qui, en raison de leur augmentation et de leur expansion, méritent notre meilleure attention. En outre, le fait qu'ils soient facilement transmissibles au-delà des frontières nécessite une coordination européenne adaptée. Les NFT sont parfois utilisés pour commettre des crimes, en particulier le blanchiment d'argent, une réalité dont l'Union européenne doit être consciente.

Sur la base d'une analyse conceptuelle et de la réalité européenne, les auteurs proposent des mesures spécifiques afin de rendre la protection des intérêts et des droits efficaces et alignés avec l'IA et la chaîne de blocs.

MOTS-CLÉS :

NFT | BLANCHIMENT DE CAPITAUX | LES PRÉOCCUPATIONS EN MATIÈRE DE PROTECTION DE LA VIE PRIVÉE | L'IA | LA CHAÎNE DE BLOCS

1. NFT AND ITS POTENTIAL TO LAUNDER MONEY

A. Characterization of a Non-Fungible Token

NFTs have exploded in popularity over the last few years, being known for some surprising high value purchases. For instance, the artist 'Beeple' sold his digital painting – 'Everydays: The First 5000 Days' for 69.3 million dollars in March 2021.

So, what is an NFT? NFT stands for non-fungible token and it is shifting the way we perceive and assess the value of digital art, collectables, music and other creative works.

It is a digital representation of a value described on the blockchain using a code. Basically, it is a unique code that represents a digital and physical good, like a digital trading card, which uses blockchain technology to certify the authenticity and ownership of that specific and unique digital object.

To better understand NFTs, some Computer Science concepts have to be correctly understood. In Computer Science, a blob refers to a mass of data in binary form that does not necessarily conform to any file format. A blob that cannot be modified after its creation is called an immutable blob. NFTs are essentially unique immutable blobs - they represent a distinct piece of data that does not change over time.

A token, in the context of blockchain technology, is a unique digital record stored on a distributed ledger. Its defining feature is immutability: once created, its core attributes cannot be unilaterally altered. Ownership of a non-fungible token (NFT) is determined through control of the corresponding private cryptographic key linked to a blockchain wallet address. In practice, whoever controls the private key associated with that address has the legal and functional ability to transfer the NFT, thereby selling or assigning it to another address on the blockchain. The authenticity and provenance of the token are insured by the blockchain's consensus mechanism, which publicly verifies each transaction.

For example, when digital artwork is sold online for €600, what is actually transferred is not the artwork itself but a cryptographic token recorded on the blockchain. This token typically contains a reference – often in the form of a URL or metadata – that points to the digital file or to information about the asset. The token is held in a blockchain wallet, and control over it is exercised exclusively by the person who possesses the corresponding private cryptographic key. In practical terms, this person can transfer the token to another wallet, thereby assigning the rights associated with it. What is owned, therefore, is not the underlying artwork but a verifiable piece of digital data whose authenticity and transaction history are secured and publicly validated through cryptographic protocols.

So, why would you want to buy it? What makes an NFT valuable?

A specificity of NFTs is their uniqueness. Each NFT is a one-of-a-kind, with specific attributes distinguishing it from others. This aspect is vital for representing digital art, collectibles or virtual real estate.

It operates through blockchain technology, commonly the Ethereum's ERC-721 standard, for decentralized and transparent recordings of ownership, transactions and history (other blockchains like Binance Smart Chain and Flow also support NFTs).

Moreover, NFTs are indivisible, meaning that, unlike crypto, they cannot be split into smaller units, ensuring full ownership transfers.

Another characteristic of NFTs is their interoperability. They can be traded across various platforms using the same blockchain standard.

Lastly, creating and trading NFTs is a process that can be fully automated with the use of smart contracts. Smart contracts enforce a standard that streamlines tasks such as ownership verification.

To summarize, while standard cryptocurrencies like Bitcoin or Ethereum are fungible and can be exchanged on a one-to-one basis, NFTs are unique because each token has a distinct value and cannot be swapped on a like-for-like basis.

The ERC-721 standard tells us what elements need to be included in the code to describe an NFT, and at its simplest it is just a unique token ID (generated when the NFT is minted) and a contract address (which allows it to be found on the blockchain).

NFTs represent a digital certificate of authenticity and ownership for a specific item or piece of content.

In conclusion, this transformative technology is redefining value and ownership in the digital age, gaining widespread popularity, particularly in the fields of digital art,[1] music, virtual real estate, and gaming.[2]

B. The Risks of the Use of NFTs

The ongoing popularity of NFT comes with its own set of legal risks that participants in the NFT market should be aware of.

These risks span various areas, including intellectual property, contractual agreements, regulatory compliance, and more specifically:

a) Copyright Infringement: Unauthorized tokenization of copyrighted content without proper licensing or ownership rights.

b) Regulatory Compliance: Potential violations of existing securities laws, money laundering regulations, and taxation requirements.

c) Intellectual Property Disputes: Disputes over the ownership and authenticity of digital assets, especially when tokenizing existing works without proper authorization.

d) Privacy Concerns: Inadequate protection of personal information associated with NFT transactions, leading to privacy issues.

e) Security Risks: NFT platforms and marketplaces may be vulnerable to hacking or unauthorized access, jeopardizing user assets.

f) Contractual Ambiguities: Ambiguities or lack of clarity in the terms and conditions of NFT transactions, leading to disputes.

g) Anti-Money Laundering (AML) Concerns: NFT transactions being exploited for money laundering activities due to their pseudonymous nature.

Data protection laws, especially within the General Data Protection Regulation[3]

1 Model Emily Ratajkowski recently sold an NFT called 'Buying Myself Back: A Model for Redistribution' for US$140,000. Her NFT is linked to a photograph of herself standing in front of a painting by artist Richard Prince of a photo of herself – for which she was paid US$150 at the time. Her NFT served two purposes – (1) to take back control of her own image, which she believes Prince had exploited; and (2) to generate revenue. The purchasers of her NFT will not receive a physical copy of the photograph.

2 The National Basketball Association's (NBA) Top Shot is a blockchain-based online platform hosted by Dapper Labs for basketball fans to purchase and trade highlights of NBA sporting history (or 'Moments') through NFTs intended to act as virtual trading cards. Moments are minted (i.e. created) on the underlying blockchain platform but are graphically displayed as digital cubes containing the video highlights in the online marketplace.

3 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), 2016 OJ L119/1 2016.

framework in the EU, tend to give individuals the 'right to be forgotten' and the right to either rectify or even erase their data from both public and private businesses.

Given that blockchain data is immutable, meaning it cannot be altered or deleted once recorded, implementing the *'right to be forgotten'* becomes either impossible or highly challenging. This arises from the fact that once data is recorded on the blockchain, it is permanently stored in a decentralized, distributed ledger, rendering its removal or modification infeasible without compromising the integrity of the entire system. However, the ownership of the NFT, which represents the digital asset, can still be transferred to another person.

For this reason, non-fungible tokens that contain personal data might infringe EU data protection laws.

C. The Mechanics of Money Laundering through NFTs

Money laundering, in its simplest terms, refers to the act of making illegally gained proceeds appear legal by disguising the origins of such funds.

Traditionally,[4] this process involved a series of transactions through banks or other financial institutions, often spanning multiple countries to add layers of complexity.

However, as the digital economy has evolved, so have the methods of money laundering. Authorities and financial monitoring entities have noticed an uptick in money laundering cases using NFTs.

The unique nature of NFTs provides an avenue for money launderers to blur the origins of their illicit gains, making it a concerning trend in the digital financial landscape.

The international organization Financial Action Task Force (FATF) that sets up the Anti-Money Laundering and Combatting the Financing of Terrorism and proliferation (CFT) standards regards NFTs as 'crypto-collectibles'. They distinguish them from cryptocurrencies and virtual assets, recognizing that NFTs may create opportunities for money laundering or terrorist financing.

Since NFTs are technically built on the same systems as other crypto-assets, the risks identified regarding the crypto-market are also relevant to NFTs, making them a prime candidate to be used for money laundering purposes.

This includes, for example, anonymous or pseudonymous transactions, and the lack of supervised brokers/institutions as intermediaries. The use of foreign unsupervised trading platforms, unsupervised means of payment and payment channels

4 Traditional Methods of Money Laundering:
- a) Shell Companies: these are non-active firms created primarily for financial manoeuvres rather than providing goods or services. They serve as a facade, allowing money launderers to move funds discreetly without drawing attention.
- b) Offshore Accounts: by holding money in bank accounts located in countries with strict bank secrecy laws, individuals can shield their assets from scrutiny. These offshore accounts often exist in tax havens, making it challenging for authorities to trace the origins or destination of the founds.
- c) Smurfing also known as "structuring": this technique involves breaking down large amounts of illicit money into smaller, less suspicious amounts. These smaller sums are then deposited separately to escape detection, as massive, irregular deposits can raise alarms.
- d) Trade-Based Laundering: this involves over or under-invoicing of goods and services. By manipulating the price, quantity, or quality of a product, launderers can move money across borders and inflate or deflate the actual value of transactions.
- e) Casinos and Gambling: money launderers might buy chips with illicit funds, play for a short period, and then cash out the chips, receiving a check from the casino. This makes it appear as if the money comes from legitimate gambling winnings.
- f) Cash Businesses: owning cash-intensive businesses like laundromats, car washes, or bars provides an opportunity to co-mingle illegal funds with the day's legitimate earnings, making the illicit funds harder to distinguish.

(such as mixers[5] and tumblers[6]) and decentralized exchange protocols.

The main methods to launder money through NFTs are the following:

1) Overpaying for an NFT to move money: one of the most straightforward tactics involves significantly overpaying for an NFT. By purchasing an NFT at an exorbitant price, a money launderer can effectively transfer funds to another party under the guise of a legitimate transaction. This overinflated sale can make illicit funds appear as legitimate income from a digital asset sale.
2) Wash trading: another method involves creating one's own NFTs and then selling them to oneself or to accomplices at inflated prices. This not only moves money but also gives the appearance of genuine trading activity. When done repeatedly or with multiple accomplices, it can create a web of transactions that becomes harder to trace back to its illicit origins?
3) Using Anonymous or Pseudonymous Crypto-Wallets: The world of cryptocurrencies, where NFTs thrive, is known for its emphasis on privacy and anonymity. Many crypto wallets allow users to remain pseudonymous, providing a layer of obscurity. Money launderers can utilize these wallets to buy and sell NFTs without revealing their true identity, making tracing illicit activities challenging.

2. THE FIGHT OF THE EU AGAINST NFT USE FOR THE PURPOSES OF MONEY LAUNDERING

A. The Main EU Regulations on Money Laundering

On an international level, the Financial Action Task Force[7] leads global action to tackle money laundering, terrorist and proliferation financing.

The FATF researches how money is laundered, how terrorism is funded, promotes global standards to mitigate risks, and assesses whether countries are taking effective action.

Although the FATF is not an EU entity, its recommendations are often adopted and implemented by EU directives on money laundering.

The European Union adopted robust legislation to fight against money laundering and terrorist financing. The first anti-money laundering Directive[8] was adopted in 1990 in order to prevent the misuse of the financial system for the purpose of money laundering. It states that obliged entities shall apply customer due diligence requirements when entering into a business relationship (i.e. identify and verify the identity of clients, monitor transactions and report suspicious transactions).

The main EU regulations in money laundering are the following:

5 A service (often software-based) that pools together cryptocurrency from multiple users and redistributes it, thereby breaking the direct link between sender and receiver. This obfuscation hampers blockchain tracing and is frequently used to conceal the illicit origin of funds in money laundering schemes.
6 A variant of a mixer, typically offering more sophisticated or automated methods of fragmenting and redistributing cryptocurrency. Tumblers may introduce delays, split transactions into smaller amounts, or send them through multiple intermediary wallets, further complicating forensic analysis and reinforcing anonymity.
7 https://www.fatf-gafi.org.
8 Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, OJ 1991 L 166, at 77-82.

a) Directive (EU) 2015/849[9-10] of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing. The purpose of this Directive is to remove any ambiguities in the previous directive and associated legislation, and to improve the consistency of anti-money laundering and counter-terrorist financing rules across all European Union (EU) Member States.

b) Directive (EU) 2018/843[11] of the European Parliament and of the Council of 30 May 2018.

c) Directive (EU) 2019/1153[12] of the European Parliament and of the Council of 20 June 2019 laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences, and repealing Council Decision 2000/642/JHA. This Directive aims to combat money laundering, terrorist financing and other serious offences, through easier access to bank account information by national authorities, including asset recovery offices; better cooperation between law enforcement authorities and financial intelligence units (FIUs); facilitating the exchange of information with the European Union Agency for Law Enforcement Cooperation (Europol).

d) Regulation (EU) 2023/1114,[13] the markets in crypto-assets regulation.

The EU laws have been constantly revised in order to mitigate new risks relating to money laundering and terrorist financing.

B. Systemic Problems Caused by Lack of Standardization and Regulation

There is very little global regulatory guidance as to whether NFTs fall within the perimeter of existing regulations applicable to crypto-assets.

Most jurisdictions have not yet developed regulatory frameworks specifically applicable to NFTs, although several have implemented or published plans to regulate DLT or crypto-assets more broadly.

Liechtenstein has established a law regarding the civil and supervisory framework for the tokenization of rights in physical assets, which would cover certain NFTs.

9 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No. 648/2012, and repealing Directive 2005/60/EC and Commission Directive 2006/70/EC, OJ 2015 L 141, at 73–117.

10 It replaces the previous Directive 2005/60/EC (3rd Anti-Money Laundering Directive, 3AMLD) that entered into force in 2007. The directive also takes into account the recommendations of the Financial Action Task Force from 2012, which were revised in 2023.

11 Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018, commonly referred to as the Fifth Anti-Money Laundering Directive (5AMLD), further reinforced the EU's regulatory framework against money laundering and terrorist financing by amending Directive (EU) 2015/849 (Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, OJ 2018 L156/43).

12 Directive (EU) 2019/1153 of the European Parliament and of the Council of 20 June 2019 established rules facilitating the use of financial and other information for the prevention, detection, investigation, or prosecution of certain criminal offences, thereby complementing the EU's broader anti-money laundering and counter-terrorist financing framework (Directive (EU) 2019/1153 of the European Parliament and of the Council of 20 June 2019 laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences, and repealing Council Decision 2000/642/JHA, OJ 2019 L186/122).

13 Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023, commonly referred to as the Markets in Crypto-Assets Regulation (MiCA), established a harmonized framework for the issuance, public offering, and admission to trading of crypto-assets within the European Union (Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No. 1093/2010 and (EU) No. 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937, OJ 2023 L150/40).

German anti-money-laundering legislation already covers certain aspects of crypto-assets, requiring cryptocurrency exchange platforms and digital wallet custodians to register with the German Federal Financial Supervisory Authority (BaFin). The latter provides specific guidance and information on how Germany implements EU directives related to money laundering, including aspects relating to crypto-assets.

In cases where NFTs are to be categorized as securities under the EU Prospectus Regulation or as capital investments under the German Capital Investment Act, issuers are generally required to draw up a prospectus.

NFTs are not currently regulated specifically in the EU. However, the features of any proposed NFT issuance would need to be considered alongside various existing regimes, including in relation to securities, electronic money and crowdfunding, to ensure that these are not triggered.

On 24 September 2020, the European Commission published the Markets in Crypto-assets Regulation (MICA), which consists of a proposal to regulate currently out-of-scope crypto-assets and their service providers under a single licensing regime.

MICA entered into force in June 2023 and, following its phased implementation throughout 2024, is now fully applicable across the European Union as of 2025. It applies to all persons issuing or providing crypto-asset services within the Union, and equally to non-EU firms that intend to offer such services within EU markets, thereby establishing a single harmonized licensing regime across Member States.

As the world becomes more aware of these tactics, it is crucial for regulatory bodies and platforms to adapt, ensuring that the digital frontier remains safe from such malicious activities.

The inherent properties of NFTs and the decentralized nature of blockchain technology create complexities that regulators must grapple with.

Like any technological challenge, this is a global matter that requires a coordinated, synchronous approach across country borders, as otherwise different countries will keep rolling up their own regulations on NFTs and crypto-assets, ranging from consumer protection and financial system integrity.

Setting such standards is crucial to finding common ground and establishing international standards is crucial to prevent money laundering.

C. Markets in Crypto-Assets Regulation (MICA) and the Role of the European Banking Authority (EBA) and the European Securities and Markets Authority (ESMA)

Money laundering is the 'process by which criminals clean up the benefits of their activities to hide their illegal origin'.[14]

As money laundering cuts seamlessly across country borders, it requires the EU to constantly adapt its strategy to prevent further activity, even more so when it has to deal with the volatility nature of cryptocurrencies. In fact, this concern stems from titles V and VII of the Treaty on the Functioning of the European Union (TFEU).

The increase in money laundering schemes using cryptocurrencies has been evident.[15] As far as money laundering is concerned, the EU's focus is on regulating financial institutions and adopting a preventive stance

14 https://home-affairs.ec.europa.eu/policies/internal-security/organised-crime-and-human-trafficking/money-laundering_en
15 The 2024 Crypto Crime Report, at 22 ff.

to combat this reality, through supervision, increased law enforcement, and granting greater powers to competent authorities to combat this criminal activity.

Throughout 2021, the European Commission presented a package of legislation to address gaps exploited by criminals and to respond to the challenges posed by technological innovation.

These proposals included the creation of the new EU agency, the Anti-Money Laundering Authority (AMLA), intended to serve as the centre of an integrated system with its own authority, coordinating with national bodies under an AML/CFT supervisory mandate.

AMLA was legally established in June 2024, commenced operations in July 2025, and is scheduled to assume its full direct supervisory powers in January 2028.

This new entity will directly and indirectly supervise the highest-risk cross-border financial sector firms' group – also known as Selected Obliged Entities[16] set up by the Member States, thus playing a mainly visible role in the supervision of EU financial institutions by national authorities.

The legislative text establishing AMLA, originally conceived within the 2021 legislative reform package and subsequently amended in 2017, conferred broader powers and responsibilities on the authority, specifically to address deficiencies in existing frameworks that had been exploited by criminals, by strengthening coordination with national financial intelligence units (FIUs), expanding the supervisory scope over high-risk cross-border entities, and reinforcing the preventive and supervisory objectives of the earlier proposals, while also ensuring coherence with the parallel regulatory developments under the MICA framework. In addition, it was necessary to ensure that the legislative framework establishing AMLA was articulated in alignment with Directive (EU) 2020/1504 – the MICA Regulation – which entered into force on 29 June 2023, so as to guarantee consistency between anti-money laundering supervision and the emerging regulatory regime for crypto-assets, including NFTs.

Given the cross-border nature of financial crime, the new authority will strengthen the efficiency of the anti-money laundering and anti-terrorist financing framework by creating an integrated mechanism based on *national supervisors* to ensure that relevant entities in scope will comply with these obligations. National supervision depends on the designation made by Member States when transposing directives related to combating money laundering. These authorities have supervisory powers over obligated entities to ensure they follow necessary procedures to combat AML/CFT risks.

As stated in Article 56 of the Directive (EU) 2015/849, each Member State must establish a financial intelligence unit (FIU) at the national level, responsible for receiving and analysing information on transactions suspected of being linked to money laundering or terrorist financing.

The FIUs exchange information through secure channels like FIU.net, supporting the EU financial intelligence units and establishing a cooperation mechanism. In this regard, operational cooperation and the exchange of information between EU FIUs have been strengthened by the FIU-NET project, which has been operational since 2002 and created a secure computer network

16 The list of this entities is expected to be concluded by August 2025 and it is expected that by 2030 the Commission will have completed its first evaluation of AMLA's performance.

for the exchange of financial information between the Member States.

In contrast to the AMLA, the MICA Regulation aims at regulating the crypto-assets market in the EU to protect investors, ensure market integrity, and promote innovation. The Regulation includes a definition of certain crypto-assets, authorization requirements for service providers, consumer protection standards, and transparency rules for issuance and trading.

One of the proposed obligations is that creators of crypto-asset would need to issue a prospectus-like 'crypto-asset white paper'.

These two European Union initiatives (AMLA and MICA) touch on several points, namely the supervision of financial markets as well as the patent conclusion that none of the entities can supervise and combat money laundering alone, as currently they are in the process of being implemented.

The implementation of AMLA calls for international cooperation between that authority and Member States' authorities so that the exchange of information on suspicious transactions is effective. This may be possible with the development of guidelines and standardized procedures for the analysis of valuations and suspicious transactions, which can be extended to the various Member States.

Regarding the implementation of MICA, the need to protect the regulatory and supervisory requirements for NFTs platforms should be highlighted. In fact, regulation and supervision are fundamental aspects for guaranteeing security and transparency in financial systems and the interests of investors and consumers.

It should be taken into account that Money Laundering supervision at the European level is currently a task of the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA). These three authorities play an important role in supervising and enforcing anti-money-laundering rules in financial institutions in the European Union.

Under the MICA, the EBA supervises crypto-assets based on specific criteria and communicates with the European Public Prosecutor's Office (EPPO) as defined in Directive (EU) 2017/1371.

On the other hand, the ESMA oversees financial markets related to crypto-assets to ensure compliance with regulations. This Authority regulates financial markets in the European Union, but in the context of MICA Regulation, has a relevant role in setting guidelines and standards for the regulation of crypto-assets, ensuring the protection of investors and the integrity of financial markets, and providing guidance and supervision.

D. The case decided by the Maltese Constitutional Court

A particularly interesting case on this matter was decided by the Maltese Constitutional Court.

The case goes back to 2021 when the Maltese Financial Intelligence Analysis Unit (FIAU) applied a €435,576 administrative sanction to a company named Phoenix Payments Ltd. for non-compliance with anti-money laundering regulations (Article 13 of the Anti-Money Laundering Law and Regulation 21 of the Anti-Money Laundering and Terrorist Financing Regulations).

The administrative penalty was imposed after the body had allegedly found a number of deficiencies in the applicant's operation.

Dissatisfied with the fine and its amount, Phoenix Payments Ltd. appealed to the courts

with two arguments: i) the manner in which the investigation was conducted infringed the right to a fair trial and ii) the principle *nullum crimen nulla poena sine lege* was not respected.

Focusing only on the first argument, by invoking Article 39(1) of the Constitution of Malta and Article 6(1) of the European Convention on Human Rights (ECHR), the company claimed that the administrative sanction was, in fact, a criminal one. As such, there are certain principles – as the ones in the referred articles – that need to be complied with. Therefore, the right to a fair trial should apply. This means that only a court of law could apply this type of fine and that the FIAU had acted as an investigator, prosecutor and judge.

The judge on the case decided that the administrative penalties are unconstitutional and in breach of the rights of subject persons to be judged by an independent court and therefore there was a breach of the ECHR.

Malta's anti-money laundering watchdog, FIAU, is required to enforce anti-money-laundering rules and, according to the Prevention of Money Laundering Act, can impose administrative penalties not exceeding €5 million. FIAU considers that it has the power – provided by the European Directive of 2015 – to exercise its powers to sanction those who breach money-laundering rules.

In light of the decision by the court, the FIAU appealed to the Constitutional Court of Malta, raising in particular the issue whether Directive 2015/849 allowed it to impose administrative measures and sanctions 'which may be classified as criminal, although they are not a result of criminal law as normally understood' and whether Article 39 of the Constitution of Malta might 'undermine the primacy, unity and effectiveness of EU law'.

The FIAU´s position is that this is not a criminal charge or prosecution and that recital 59 of the Directive 2015/849/EU imposes that the Member States should ensure that the law is followed.

The issue was the applicability and interpretation of Article 39 of the Constitution of Malta, which provides that everyone charged with a criminal offence must be given a fair trial before an 'independent and impartial tribunal established by law'.

The Constitutional Court examined if the offence at issue was criminal or not.

Going through several cases, such as Engel v. Netherlands,[17] the Court considers that in order to be a criminal charge under Article 6 of the Convention, there are three criteria for determining what is considered a 'criminal charge': (i) classification under domestic law; (ii) the nature of the offence, and (iii) the nature and seriousness of the penalty.

Thus, i) if the applicable national law qualifies it as a criminal offence, it is so according to Article 6; (ii) as regards the nature of the offence, its purpose may be dissuasive and punitive rather than compensatory, which is the usual distinguishing feature in relation to the criminal sanction; iii) the nature and severity of the possible punishment.

In the present case, the Court considered that the alleged irregularities on the basis of which the administrative fine was imposed on the applicant's undertaking do not expressly constitute infringements, that is to say, they are not specifically classified as falling within the scope of Maltese criminal law, with the result that the first criterion of the judgment in Engel is unfounded.

17 https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57479%22]}.

However, as it has already been pointed out above, the nature of the infringement on the basis of which the administrative fine was imposed cannot be compensatory but dissuasive.

Resorting to the Decisions of the Maltese TC, namely Ac. Rosette Thake Noe/Electoral Commission et42, the court decided that the administrative fine, in addition to being a sanction for those who violate the obligations under the law, is also a deterrent, insofar as it aims to avoid a violation of the law. It cannot therefore be regarded as a purely administrative fine. Thus, the administrative penalty imposed in the present case is criminal in nature, provided that Article 39(1) of the Constitution of Malta and Article 6(1) of the European Convention are applicable to the present case.

So, in conclusion, the Court did not accept FIAU's suggestion to refer the matter to the CJEU for a preliminary ruling and considered FIAU's penalties to be illegal as a result of the breach of the right to a fair trial.

This case is very important, as it highlights the fact that FIAU does not have full powers to apply sanctions on criminal matters. The limits of its actions are administrative sanctions and those sanctions cannot, in any way, be disguised as a criminal punishment.

3. DIGITAL TRANSFORMATION ERA: USING BLOCKCHAIN AND ARTIFICIAL INTELLIGENCE, UNDER HUMAN SUPERVISION, TO TRACK AND MONITOR NFT TRANSACTIONS AND IDENTIFY SUSPICIOUS MONEY LAUNDERING ACTIVITIES

We are experiencing a new digital transformation era and with it comes a lot of new challenges.

As law enforcers, we need to be very watchful and cognisant of all the possible new ways of committing crimes. However, as human beings, we are always constrained by our analytical analysis capacities, which can quickly subside when presented with the plethora of data that is blockchain and AI. As such, the analysis of this large volume of data has to be performed with the help of this type of new tool.

Blockchain is a digital ledger distributed across many computers worldwide that registers all transactions usually made with cryptocurrencies. Whenever someone performs a transaction, it gets registered on the blockchain network. Then, computer algorithms determine the authenticity and integrity of the transaction. Once it is verified, this new transaction is recorded with the previous one forming a chain of blocks, with each block containing a list of transactions, hence the name – blockchain. As it is validated and maintained by a network of computers around the world, it is very secure and nearly impossible to tamper with.

No transaction can ever be erased or changed, making it very reliable. It creates a transparent and unchangeable record of transactions. It is the backbone of cryptocurrency, and it can help to prove who owns an asset or who owns a piece of work.

What's the difference between a centralized authority, such as a bank, and a blockchain? In both cases, there is a network of servers that can change the information and has control over the entire transaction's record. However, with a single central authority, that network of servers is entirely controlled by that singleton authority. That control can be exploited by hackers or even by insiders with bad intentions, whereas in the case of blockchain, that network is controlled by independent entities, which hold each other accountable and distribute the responsibility amongst the users.

In summary, blockchain has several advantages:

a) its decentralized nature allows a database to be shared, making it impossible to tamper with;

b) provides transparency and immutability to transactions;

c) blockchain´s peer-to-peer connections help to identify fraud activities in the network;

d) users can easily trace the history of any transactions because they are digitally stamped.

Despite the advantages of the blockchain, it also faces significant challenges that need to be addressed. Firstly, blockchain is one of the most hyped topics in computer science and is exceeding, at a fast pace, its scope. As time goes by, there are more and more transactions, making it bigger and bigger. As a result, the number of users of blockchain is rising and therefore so are the transactions, making it more difficult to process as quickly and as efficiently. The user base is becoming larger and larger.

Moreover, as already established, once a transaction is added to the blockchain, it becomes permanent and cannot be altered or deleted. Paired with the other blockchain traits aforementioned, this decentralized authority results in more entities having access to potentially sensitive information, opening the possibility of privacy violations, especially around healthcare records, financial transactions, and personally identifiable information.

Another issue of blockchain is regulatory uncertainty. We are within a network that operates without any geographical boundaries.

Furthermore, the essence of blockchain contradicts some regulatory compliance already in place – e.g. the right to be forgotten. 'The right to be forgotten' or 'the right to erasure' is at the core of Article 17 of the EU's General Data Protection Regulation (GDPR). It consists of the right to request the deletion of personal data of an individual if the conditions described in the article are checked. As blockchain is immutable, this can be put in question.

With all these concerns, we believe AI is the best tool to complement blockchain technology. AI is a new way of problem and decision solving. A machine is able to mimic humans' decision process, learning how to reason and self-correct. It is a fascinating new way of resolving issues and processing information in a smart way.

The main advantage of AI is its automation of repetitive tasks. Being able to process a large amount of information in a very efficient way, AI leads to high productivity and efficiency in data analysis, impossible to reach for humans. Despite the differences between blockchain and AI, they seem to have a strong complementary usage.

So how can these new tools be used to prevent crime? Through a number of simple steps. Given the ability of AI to process and analyse information through a human created algorithm, it can detect patterns indicative of fraudulent activities. AI can be used to identify suspicious transactions in real time, creating some type of red flag for that specific transaction. Then, specialized humans would analyse the transaction and determine if it was a fraud or not. It would make it easier to trace the flow and identify fraudulent activities related to laundering money.

On top of that, AI could help predict, based on past behaviours of certain users, the probability of trying to launder money, allowing proactive action. Humans responsible for it could be more watchful over

the transactions of suspicious users and act in a more effective and preventive way.

Aligned with the detection of past behaviours, AI could even verify the identity of users through the analysis of biometric data like facial recognition or fingertips, making it safer for clients to make transactions. With this, the world of blockchain and cryptocurrency would be safer, allowing transactions to be more transparent and secure in the eyes of the law.

With the identification of suspicious transactions, the prediction of certain behaviours, the identification of users and the flagging, the complimentary usage of blockchain and AI would allow the due diligence of the clients to be made in a very efficient and reliable way, contributing in a large amount to the fulfilment of the compliance.

Despite all of the upper-hand AI has on humans, there are certain concerns related to structural values of democracy, such as the privacy of its citizens and the criteria used for AI to apply.

There's some resemblance to the issue of privacy with blockchain and AI. Indeed, the same concerns with privacy and data showed with blockchain are also applicable to AI. For that reason, the algorithm developed and the humans supervising the results of AI to achieve the existing compliance – like GDRP.

Another issue AI presents is the criteria that can be chosen for it to apply. AI operates based on an algorithm created by humans. If the algorithm and criteria used to train AI are discriminatory on its basis, it leads to a bias and possible discriminatory outcome. From that point of view, AI is a very dangerous tool that needs to be limited.

Moreover, the same algorithm has to be very precise in order to not generate false positives that would not enable clients to pursue their purchases and complete transactions.

Notwithstanding these disadvantages of AI, there is an opportunity to use it to improve the detection of crime and help uncover criminal behaviours. Humans have an intrinsic dislike of computers deciding their lives, but the world is changing. The ways of committing crimes are becoming more sophisticated and we need to develop mechanisms in this new world to cope with it. We need to be smart and use the new tools available in technology. However, it is crucial to do so in a way that guarantees the values of democracy and the European Union.

In order to ensure the accuracy and fairness of AI-generated-outcomes and these values, we need specialized humans – like magistrates - to supervise its conclusions.

The European Union has been developing the EU AI Act, the first regulation on artificial intelligence. It was approved by the European Parliament on 13 March 2024 and it is a very important step in the regulation of artificial intelligence. On February 2024 was established within the Commission the European AI Office, responsible for the enforcement and implementation of this act within the Member States of this Act, creating an environment where AI respects the values of the European Union. AI developers and deployers will have clear requirements and obligations regarding specific uses of AI, creating a European Union with a trustworthy AI, and respecting fundamental rights.

Under the EU AI Act, all AI systems will be assessed at their risk, having 4 levels of risk: unacceptable risk, high risk, limited risk, and minimal risk. The risks are assigned according to the safety, livelihoods and rights of the people. For instance, a high-risk AI system will include AI technology used in critical infrastructures such as transport or health

that could put the lives and health of citizens at risk.

In terms of supervision, the AI Act assigns it to the national financial authorities, making it their responsibility to assess the risk levels.

Despite all this amazing and pioneering progress, we, as humans, are still not recognizing the potential in AI to help us fight crime, specifically suspicious activities in laundering money.

It is time to execute on the potential AI, complementing the work of algorithm developers with the right law experts, elevating the ability to investigate and detect criminal activity.

4. PROPOSALS

A. The Foundations of a Basic Regulatory Structure Aimed at Preventing this Type of Illicit Behaviour, and the Importance of Cooperation between Authorities

The regulations on money laundering have not been accompanied by the creation of a regulatory body to effectively apply these rules to combat this criminality, which depends on the cooperation of entities that were not created for this purpose.

All the entities involved in investigating money laundering-related crimes will have to aim for transparency and traceability so that access cannot be undermined due to a lack of transparency or traceability of NFTs transactions.

In this respect, the use of ledger technologies, which allow transactions to be recorded and accessed in a secure and transparent manner, as well as their decentralized and immutable storage, would be a safe solution.

On the basis of the measures suggested in order to combat money laundering, pending the implementation of the MICA Regulation, it is possible to conclude that in all of them it is necessary to find the balance between the use of new technologies in the financial sector with the requirements of regulations and protection of the interests of investors and consumers, as well as the market in general.

In this sense, the European Union has already started with MICA, and coordination with AMLA, EUROJUST and EPPO should deepen the exchange of information, knowledge, and control of damages arising from the practice of criminal offences and legal liability-criminal agents.

As one of the main goals of the EU is to fight AML/CFT and to standardize procedures amongst Member States, the FIUs in each Member State should liaise effectively with the EPPO and EUROJUST.

Given the EPPO has jurisdiction over tax fraud cases, we deem this a good opportunity for the EPPO to widen its scope, making use of the current interpretation that supports its creation - improving cooperation between EU Member States in the fight against transnational crime and protecting the European Union's financial interests, as stated in Article 22 of the Regulation (EU) 2017/1939 of 12 October 2017 – which can be damaged by other types of crime.

Once this issue has been overcome, if the national FIU detects or is informed of the possibility of money laundering, it should inform the EPPO, which, within the scope of its powers, would investigate the possible existence of money laundering. To facilitate this procedure, we support the need to create a digital platform that allows for rapid communication between the FIUs and the EPPO, through which all information, triggered procedures and cooperation can be developed.

A standardized form would be created for communication with the EPPO to ensure consistency among Member States. In fact, as is clear from the interinstitutional file No. 2021/0240 (COD), the cross-border nature of crime and criminal proceeds demands of the European Union the creation of an Authority responsible for implementing uniform rules and reducing differences in national legislation and supervisory practices in the various EU Member States.

When implemented, national FIUs communicates the suspicious results originated from criminal activities to the EPPO within 10 days. The suggestion of this deadline aims to protect the effectiveness and obligation of timely communication in a criminality that depends on swift and, above all, enforced cooperation between the involved entities.

The presented solutions could be the key to enabling the necessary international judicial cooperation in the long term, considering that money laundering in the crypto-asset sphere knows no limits, except through an adjusted articulation between all Member States.

In this context, the need to harmonize decisions through the functioning of existing institutions and the possible creation of units/departments specializing in this matter is of the utmost importance.[18]

B. The Role of the Intervention of Judicial Authorities

The previous demand must also be fulfilled through the important role played by the judicial authorities of each Member State.

In fact, only magistrates, therefore EMAML, are able to the verification of compliance and transparency in all situations in which they intervene, encouraging business ethics and respect for applicable laws and regulations.

Judicial authorities, like those who are responsible for the administration of justice, could effectively help mitigate the risks related to money laundering and promote confidentiality in the financial markets.

Furthermore, pending the effective implementation of existing regulations on money laundering, judicial authorities can ensure crime control in a preventive manner. This could be made possible through the dedicated team we propose to create, which would be able to adopt a prior perspective and ensure the procedural mechanisms needed to combat such criminal activity.

In fact, we acknowledge the urgent need to create a specialized international department of magistrates from each Member State – referred to as European Magistrates Against Money Laundering (EMAML) – which would guarantee the effectiveness, transparency and impartiality necessary to make the uniform implementation of the MICA principles and regime effective.

As is clear from Article 47 of the Charter of Fundamental Rights of the European Union, only magistrates have the capacity to ensure that the law is applied fairly and impartially, and that all those involved are treated in accordance with the principles of justice.

Furthermore, taking into account that there is no reversed burden of proof, only a magistrate would be able to guarantee the compliance

18 In Portugal, the Central Department of Investigation and Criminal Action (DCIAP) is a body that coordinates and directs the investigation and prevention of violent, economic-financial, highly organized or particularly complex crime (Article 57, number 1 Statute of the Public Prosecutor's Office/EMP).
It is headed by a deputy attorney general, proposed by the Attorney General of the Republic and appointed by the Superior Council of the Public Ministry. The functions of director of the Central Department of Investigation and Criminal Action are carried out on a service commission (Article 57, number 2, Article 59, number 1 and Article 164 of the Statute of the Public Prosecutor's Office/EMP).

of the entire process in accordance with these fundamental rights and principles. We would like to underline that this conclusion finds special support in the jurisprudence of the European Court of Human Rights, namely in the rulings *Gogitidze and others v. Georgia*, Application No. 36862/05, and *Paraponiaris v. Greece*, Application No. 42132/06.

Moreover, due to the technicality of money laundering matters, only a magistrate using information and evidence collected by other institutions can diligently and effectively identify and investigate any suspicious activity as well as acting within the scope of asset recovery. This aligns with the idea that the complimentary use of blockchain and AI has to be supervised by magistrates that guarantee the values of the EU. AI systems require constant updates in order to adapt to new techniques used in laundering money, and we believe that the people specialized in this area are the most qualified to spot those needs for updates.

This team of magistrates could collaborate with national authorities – FIUs - through the suggested mechanism of international coordination in order to combat this type of crime.

On a similar note, there is an urgent need to focus on awareness and education of consumers and professionals, through collaboration between judicial authorities, so that the money laundering risks associated with NFTs are known and effectively combated.

To summarize, the judicial authorities can play a crucial role in enforcing existing legislation and investigating money laundering cases involving NFTs, based on their extensive legal knowledge.

C. The Importance of the Evidence

Regarding the interdependence of obtaining evidence on the use of NFTs to commit crimes, namely the crime of money laundering, it is important to ensure that the collection of evidence must respect the principles and rules of protection of personal data and the privacy of covered as a stronghold of the States of Human Rights.

In fact, it is crucial to guarantee the chain of custody of the evidence obtained in order to guarantee its validity and use in the trial.

In terms of evaluating the evidence, it is important to highlight the need to respect the rights, freedoms and guarantees of criminal agents so that the decisions made are not likely to be called into question.

Another determining factor in this matter concerns procedural guarantees, namely, the right to exercise contradictory proceedings, the application of the principles of necessity, proportionality and adequacy and the transparency of the judicial process to those involved in it.

In view of the above, the evaluation of evidence in criminal proceedings at the European level will be ensured, in our view, through the consistent and impartial application of established laws and guidelines.

In addition, the proper training of professionals involved in the investigation and judgement of criminal cases also plays a crucial role in guaranteeing the integrity of the criminal process, and this can only be performed by magistrates.

In this matter, the deepening of international cooperation and the densification of the scope of action of existing structures – namely EPPO and AMLA – will only be possible through the role of judicial authorities in a multidimensional aspect (composed of judges and prosecutors) with a presence in

the entities created that allow the guarantee and effectiveness of legal principles and rights.

It is important to create a system for collecting evidence in the context of the aforementioned cross-border crime, with direct transmission by AMLA to the executing judicial authority and direct communication between both, with recognition of the authenticity, confidentiality (within the limits of the respective criminal procedure) and reliability of the data transmitted.

5. CONCLUSIONS

The ongoing popularity of NFT comes with its own set of legal risks that participants in the NFT market should be aware of.

These risks span various areas, including regulatory compliance, privacy concerns, and security risks and because of it we need to create mechanisms that, with the help of technology, can help us win this fight against new crimes. This is a fight that has no boundaries and needs to be based on the mutual help and cooperation of every Member State.

Although important compliance mechanisms already exist to address emerging risks of money laundering and terrorist financing, they remain insufficient. The two European Union frameworks – AMLA, formally established but not yet exercising its full supervisory powers, and MICA, recently entered into force and undergoing phased implementation – cannot, at this stage, supervise and combat money laundering effectively on their own.

It is necessary to take into account that Money Laundering supervision at the European level is currently a task of the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA).

Given these concerns, artificial intelligence should be viewed not as a substitute but as a complementary tool to blockchain technology. Its capacity to automate repetitive tasks and process vast amounts of data can enhance efficiency in detecting suspicious activity. However, AI cannot, by itself, guarantee the protection of core EU principles such as privacy, due diligence, transparency, impartiality, or the integrity of evidence. These values can only be safeguarded through strict regulatory oversight and continuous human supervision, ensuring that technological tools reinforce rather than replace fundamental legal standards.

Magistrates have the ability to apply the law, ensuring that all those involved are treated in accordance with the principles of justice, the fundamental values of human rights or European law, the right to a fair trial and the principle of equality of arms based on the principle of a judge's free evaluation of evidence.

Furthermore, the public prosecutor or investigating judicial magistrate (depending on the legal system of the EU Member State) has a crucial role in guaranteeing the validity and full regularity of the actions of the investigations, a solid proof that is held in trial and the execution of the judicial decision.

SEMI-FINAL B

EU AND EUROPEAN ADMINISTRATIVE LAW

PARTICIPATING TEAMS:

France, Germany, Greece I, Greece II, Hungary, Portugal, Romania

1ST PLACE: FRANCE
2ND PLACE: GERMANY
3RD PLACE: HUNGARY

Selected papers for the THEMIS Annual Journal: France, Greece II and Hungary

2-5 JULY 2024 - UTRECHT, THE NETHERLANDS - TRAINING AND STUDY CENTRE FOR THE JUDICIARY (SSR)

JURY MEMBERS

HRVOJE MILADIN (HR)

Judge at the Administrative Court of Zagreb

The THEMIS COMPETITION represents an added value for each and every participant, including the competitors and the members of the jury. We all got to meet new people and learn something new, and finally returned home more experienced.

The starting point for all the competitors is teamwork and developing a strong sense of cooperation. The same goes for the members of the jury. It was only possible to reach a final decision after constructive analysis and discussions made by a team of people – colleague judges, who do their best to apply their knowledge and experience and fulfil the given role.

On the one hand, being a member of the jury was a privilege, and on the other hand, a responsibility. The young people who competed had just started their careers and invested a huge effort and skills to prepare and present the chosen topic in order not just to win the heart of the jurors, but to give us something truly valuable in the end.

Therefore, it is a demanding task and a challenge for the jurors to say which team did best.

My impression is that young people who participated in this competition truly enjoyed it and made connections with other colleagues from different EU countries, whose experience will help them to develop the idea of belonging to the same legal culture. I have seen young people who have a positive attitude and the spirit and capability to achieve more in their profession.

One could easily say that we are all winners, since the good spirit and positive energy that are shown during the competition are an inspiration for all of us, to go beyond limits in thinking and reasoning and search for more solutions in our daily legal work.

It would not be possible without the EJTN and national judicial institutions, and hopefully they will continue to work to improve the THEMIS Competition in the future.

DARIO SIMEOLI (IT)

Judge of the Council of State

I would like to thank the EJTN for the opportunity to participate in the semi-final B of the THEMIS Competition as a juror. It has been an extremely positive experience well beyond my expectations.

I am convinced that this type of initiative is capable of achieving high cultural objectives. The format of the competition encourages participating teams to develop a legal thesis in an original way and to refine their argumentative skills by responding to objections raised by 'rival' teams. Moreover, the spirit is not that of a rude competition, but of an open and respectful debate.

I was impressed by the quality of work done by young colleagues. With accurate arguments and competent language, each of the groups addressed highly debated issues of European law and proposed interesting solutions.

Reading the papers and their oral discussion allowed me to enrich my knowledge of topics that I did not know in depth and also gave me great hope.

Europe is a miracle concentration of different cultures, identities, languages and traditions. The European legal system is the instrument that contains this wealth and harmonizes it. The logical structure and principles drawn up by the various groups involved once again show that a common European legal culture based on the rule of law underpins national legal systems.

Cultural exchange initiatives such as THEMIS support the integration process by sharing case law and facilitating the creation of a more common and reliable legal language.

Once again, I wish to congratulate all participants and wish them luck for their personal and professional future. I am sure that each of them, through their daily work, will contribute to strengthening our European judicial culture.

I have had the privilege of sharing the role of juror with two extraordinary colleagues – Mrs. Hanna Werth and Mr. Hrvoje Miladin – endowed not only with uncommon culture and sensitivity, but also with great wisdom and kindness.

HANNA WERTH (SE)

Judge at the Administrative Court of Malmö

The THEMIS Competition is a unique opportunity for trainees of the European national judicial academies to assess their legal capacity, share their knowledge, and exchange views on legal matters with their peers.

I have participated as a juror for the first time in the semi-final in Utrecht, the first ever on administrative law. The chosen topics show the breadth of the area of law. We discussed the migration process, the use of AI in the

administration, evidence in cases concerning public procurement, the use of facial recognition, data protection, forced labour, and more. All these topics include important questions about good administration and the Rule of Law, with the overall question being: 'Are the rights of the public ensured?'. That is something judges have to ask themselves every day. That is the judge's most important task – to make sure the public's rights are ensured. It was a privilege to discuss that matter with the trainees during the week.

I was impressed by the participants' work with their papers, presentations, and discussions. I was especially happy to see the way trainees behaved towards their teammates, their competitors, and the jury. They were down-to-earth respectful, curious, and generous. It was a competition, and everyone competed to win, but most importantly, it seemed trainees participated to enjoy and learn, and with that mindset, we all won.

Being a judge is an important and powerful position. I always underline the importance of how a judge behaves – the more powerful you are, the nicer you have to be. After this competition I feel hope for the future. I know that the upcoming judges in Europe are skilled, nice, motivated, and well prepared for the task.

Team Members:
Benoît CHAMBON
Antoine GODART
Rémi MENTHÉOUR

Tutor: Roxanne Delgado

Team France

‘SAY FREEZE!’ – THE USE OF RETROSPECTIVE FACIAL RECOGNITION BY LAW ENFORCEMENT AUTHORITIES IN EUROPE

To this day, there is limited awareness of how extensively law enforcement authorities across Europe use retrospective facial recognition. It stems from a lack of transparency on the use of this technology amongst European states, its heterogeneous development and the absence of dedicated legal frameworks at the domestic level.

This lack of consideration for this technology contrasts with the general European human rights framework, the more specific regulations addressing the protection of personal data within the European Union and the Council of Europe, as well as the jurisprudence of the European Court of Human Rights and the Court of Justice of the European Union. An analysis of these various instruments demonstrates a clear attempt to provide general rules and standards that should be implemented prior to the use of retrospective facial recognition.

This analysis aims to provide recommendations for future legal and procedural frameworks that should be implemented among European states in order to mitigate the adverse consequences of retrospective facial recognition.

KEYWORDS:

ARTIFICIAL INTELLIGENCE | FACIAL RECOGNITION TECHNOLOGY | RIGHT TO PRIVATE LIFE | PERSONAL DATA | INVESTIGATIONS | LAW ENFORCEMENT AUTHORITIES

À ce jour, les autorités répressives de toute l'Europe ne sont guère conscientes de l'ampleur de l'utilisation de la reconnaissance faciale rétrospective par les services répressifs. Elle découle d'un manque de transparence quant à l'utilisation de cette technologie par les États européens, son développement hétérogène et l'absence de cadres juridiques spécifiques au niveau national.

Ce manque de considération pour cette technologie contraste avec le cadre général européen des droits de l'homme, les règlements spécifiques traitant de la protection des données à caractère personnel au sein de l'Union européenne et du Conseil de l'Europe, ainsi qu'avec la jurisprudence de la Cour européenne des droits de l'homme et de la Cour de justice de l'Union européenne. L'analyse de ces différents instruments démontre une tentative claire de fournir des règles et des normes générales qui devraient être mises en œuvre avant l'utilisation de la reconnaissance faciale rétrospective.

Cette analyse vise à fournir des recommandations pour les futurs cadres juridiques et procéduraux qui devraient être mis en œuvre entre les États européens afin d'atténuer les conséquences négatives de la reconnaissance faciale rétrospective.

MOTS-CLÉS :

INTELLIGENCE ARTIFICIELLE | TECHNOLOGIE DE RECONNAISSANCE FACIALE | DROIT À LA VIE PRIVÉE | DONNÉES À CARACTÈRE PERSONNEL | ENQUÊTES | AUTORITÉS D'APPLICATION DU DROIT

INTRODUCTION

With roughly 450 million inhabitants in the European Union (EU), how can investigators identify a suspect from a single image? Chances are high that Facial Recognition Technology (FRT) will be used by law enforcement authorities in the identification process.

FRT was developed in the 1960s and was first tested to identify wanted individuals in a crowd during the 2001 Super Bowl in the United States.[1] Since then, the use of FRT by European law enforcement agencies has spread widely. This phenomenon is illustrated by the growth of the global facial recognition market, which reached a value of US$3.86 billion in 2022.[2]

FRT encompasses all mechanisms of authentication and identification of an individual through facial features, by comparing a captured image to a template stored in a database by means of dedicated software.[3] Three main uses of FRT by law enforcement authorities may be distinguished. Firstly, 'retrospective facial recognition' enables the police to identify individuals in images collected throughout an investigation. Secondly, 'live facial recognition' is used to identify in real-time wanted individuals in the public space. Finally, 'operator initiated facial recognition' allows officers to verify a person of interest's identity when engaging with this person.[4]

The use of live facial recognition is under much scrutiny, and 'operator initiated facial recognition' is still in the early stages of development.[5] On the contrary, retrospective facial recognition does not attract much attention, despite being extensively used for law enforcement purposes.[6] Law enforcement purposes cover prevention, investigation and prosecution of criminal offences and the execution of criminal penalties, as well as maintaining law and order and safeguarding national security.[7] For these purposes, retrospective facial recognition is presented as a time-saving tool, a way to prevent human error, and a means to better prevent repeat offences. For instance, according to a South Wales Police study, the identification of an unknown individual whose image has been collected takes an average of 14 days when carried out by a human police officer, while it is a matter of a few minutes with retrospective facial recognition.[8] However, despite its benefits, the use of retrospective facial recognition also represents a great threat to the right to private life and data protection, as recently underlined by the European Court of Human Rights (ECtHR) in *Glukhin v. Russia*.[9]

Despite limited awareness of the use of retrospective facial recognition, European states are at the forefront of developing and deploying this technology, with heterogeneous use throughout the continent, each entailing risks to the right to private life and data protection (1). This is worrying,

1 D. McCullagh, 'Call it Super Bowl Face Scan I', *Wired*, 2 February 2001, available at https://www.wired.com/2001/02/call-it-super-bowl-face-scan-i/.
2 Zion Market Research, *Facial Recognition Market Size Report, Industry Share, Analysis, Growth, 2030,* available at https://www.zionmarketresearch.com/report/facial-recognition-market.
3 Human Rights Council, *Impact of New Technologies on the Promotion and Protection of Human Rights in the context of Assemblies, including Peaceful Protests*, Report of the United Nations High Commissioner for Human Rights, UN Doc A/HRC/44/24, 24 June 2020, at 30.
4 Home Office News Team, *Police use of Facial Recognition: Factsheet*, 29 October 2023, available at https://homeofficemedia.blog.gov.uk/2023/10/29/police-use-of-facial-recognition-factsheet/.
5 *Ibid*.
6 D. Murray, 'Police Use of Retrospective Facial Recognition Technology: A Step Change in Surveillance Capability Necessitating an Evolution of the Human Rights Law Framework', *Modern Law Review* (2023), at 1-31.
7 Consultative Committee of the Convention for the Protection of Individuals with Regard to Processing of Personal Data, *Guidelines on Facial Recognition,* T-PD (2020)03rev4, 28 January 2021 (T-PD Guidelines).
8 Home Office News Team, *supra* note 4.
9 ECtHR, *Glukhin v. Russia*, Appl. no. 11519/20, Judgement of 4 July 2023.

since, despite great efforts to adapt the applicable European legal framework to this technological development, gaps remain (2). Against this backdrop, this paper seeks to demonstrate that a dedicated legal framework could be implemented to avoid unwarranted infringements on the right to private life and data protection (3).

1. LITTLE KNOWLEDGE BUT BROAD USAGE: THE RISKS ASSOCIATED WITH THE CURRENT USE OF RETROSPECTIVE FACIAL RECOGNITION IN EUROPE

The use of retrospective facial recognition is rapidly growing in Europe. A Greens/EFA report found that in October 2021, in the European Union, 18 Member States had implemented biometric recognition systems for law enforcement purposes or planned to do so shortly.[10] Since then, FRT has improved and several states may be added to the list.[11] While states have been proactive in using retrospective facial recognition (A), such energy has not been followed by the implementation of an appropriate legal and procedural framework (B).

A. The Growing Use of Retrospective Facial Recognition amongst European States

The fast development of retrospective facial recognition has been accompanied by a heterogeneous implementation. Nevertheless, the use of this technology relies on common steps: the setup of large databases matching facial imagery to identity details (1), the mass collection of facial image evidence (2), and the use of an algorithm to match the evidence collected to identity (3).[12] At each stage of this process, considerable risks weigh on the rights of data subjects.

1. Creating a Reference Database

As a preliminary requirement for a working retrospective facial recognition system, law enforcement authorities must have access to a database which matches facial imagery to identity details. While they have largely been granted access to existing databases, they also seek to extend the amount of recorded data.

In practice, police forces have been granted access to several databases that were not specifically designed for retrospective facial recognition. In some countries, authorities have access to existing databases set up for other law enforcement purposes. These databases may compile identity details and photographs of convicts but also suspects, victims, asylum seekers, aliens, unidentified persons, immigrants and visa applicants. For instance, the French *Traitement d'antécédents judiciaires* (TAJ), a criminal database, contains the data of more than 21 million individuals.[13]

In other countries, law enforcement authorities have been granted access to civil databases, including the national ID database.[14] The Hungarian Facial Image Registry, a civil database, gathers over 30 million templates and is available to local authorities for identification through retrospective facial recognition.[15]

10 The Greens/EFA in the European Parliament, *Biometric & behavioural mass surveillance in EU member states*, October 2021, available at https://extranet.greens-efa.eu/public/media/file/1/7297, at 38-39.
11 G. Kostka, L. Steinacker and M. Meckel, 'Under big brother's watchful eye: Cross-country attitudes toward facial recognition technology', 40 *Government Information Quarterly* (2023), at 1.
12 World Economic Forum, *A Policy Framework for Responsible Limits on Facial Recognition Use Case: Law Enforcement Investigations*, November 2022, available at https://www.weforum.org/publications/a-policy-framework-for-responsible-limits-on-facial-recognition-use-case-law-enforcement-investigations-revised-2022/.
13 The Greens/EFA report, *supra* note 10.
14 *Ibid.*
15 *Ibid.*

The misappropriation of databases that were set up for different purposes is especially harmful to the rights of data subjects, who remain unaware of this unforeseen use of their data.

To increase the amount of data at hand and thus the number of identifications, existing databases are constantly fed with new data, at the expense of the rights of data subjects. For instance, in 2019, in the Netherlands, while 218,434 photos were deleted from the 'CATCH' system, 2,653,038 photos were added.[16] This additional data comes from various sources, and may even be collected on social media, without the consent or the awareness of the data subjects. Such behaviour has been pointed out by the French Data Protection Authority, which especially flagged the American company Clearview AI.[17]

Driven by the increasing need for data, authorities have created new databases. In Germany, the 2017 Hamburg G20 meeting provided the opportunity for law enforcement authorities to set up a specific database to investigate criminal offences committed in relation to this event. This database was fuelled with recordings and images collected from police video surveillance material, public transportation cameras, private footage and even files from media sources.[18] It was only after lengthy procedural steps that the database was finally deleted.[19]

These examples illustrate how difficult it can be to restrain the multiplication of data, as well as the numerous risks that accompany their development in the absence of a clear legal basis. Notably, the more data collected, the greater the risks of data breaches.

2. Collecting Facial Images during Investigations

A vast array of techniques is used to collect facial images, ranging from closed-circuit television (CCTV) cameras or body cameras worn by police officers on patrol, to privately-owned smartphones or even doorbell cameras.[20]

The rise of 'smart cameras', specifically designed to recognize the facial features of individuals captured on camera, significantly improves the amount and quality of the data collected daily in public spaces and potentially the number of infringements on the rights of data subjects.[21] In 2017, Serbian authorities, in partnership with the Chinese firm Huawei, initiated a smart city project which enabled the installation of 1000 'smart cameras', raising specific concerns regarding the transfer of data outside Europe.[22]

The Netherlands took a different approach to increase the number of images collected. The *Camera in Beeld* program relies on private individuals voluntarily registering their own security cameras with law enforcement agency systems. When a crime is committed, the police may request access

16 L. Montag *et al*., *The rise and rise of biometric mass surveillance in the EU: A legal analysis of biometric mass surveillance practices in Germany, The Netherlands, and Poland* (2019), at 61-62.

17 Commission Nationale de l'Informatique et des Libertés (CNIL), Délibération de la formation restreinte n° SAN-2023-005 du 17 avril 2023 concernant la société CLEARVIEW AI, available at https://www.legifrance.gouv.fr/cnil/id/CNILTEXT000047527412?init=true&page=1&query=SAN-2023-005&searchField=ALL&tab_selection=all.

18 Der Hamburgische Beauftragte für Datenschutz und Informationsfreiheit (HmbBfDI), 'Einführung der automatisierten Gesichtserkennung beanstandet – Keine Rechtsgrundlage für die Erstellung von biometrischen Gesichtsabdrücken durch die Polizei Hamburg ersichtlich', 31 August 2018, available at https://datenschutz-hamburg.de/fileadmin/user_upload/HmbBfDI/Pressemitteilungen/2018/2018-08-31_Gesichtserkennungssoftware_G20.pdf.

19 HmbBfDI, *Tätigkeitsbericht Datenschutz* (2020) 29, at 107.

20 World Economic Forum, *supra* note 12.

21 CNIL, *supra* note 17.

22 A. Macdonald, 'Serbia lobbying Western support to carry on with smart city biometrics project amid criticism', *Biomectricupdate.com*, 3 October 2022, available at https://www.biometricupdate.com/202210/serbia-lobbying-western-support-to-carry-on-with-smart-city-biometrics-project-amid-criticism.

to the images from those cameras.[23] This program significantly increases the number of images that may be accessed by the police, with more than 314,000 cameras already registered in 2023.[24] This attempt to capture more images in investigations may be criticized. While these registered cameras should only cover private spaces, the vast majority also covers public spaces.[25] Furthermore, the data collected from private cameras may be of much lower quality, as they were not originally intended to serve retrospective facial recognition purposes, which affects the accuracy of the identification.[26]

3. Processing Data with Facial Recognition Software

Retrospective facial recognition relies on the processing of the collected data through specific software. Algorithms compare the image collected with the imagery in the database and provide a probability of a match. When the probability exceeds a predefined threshold, the match is confirmed, sometimes by a human operator.[27] While the reliability of such algorithms is contested, their increasing use by law enforcement authorities has been documented.

To perform the identification task, a wide range of software is currently used in Europe, developed by European and non-European firms. However, the fact that the software that is being used often remains concealed is a source of concern. For instance, a Buzzfeed investigation in 2021 revealed that 28 law enforcement agencies and government organizations from 18 European countries were secretly using Clearview AI's software, developed by an American company, between 2018 and February 2020.[28]

The choice of software is crucial, as the main risk with the use of retrospective facial recognition is its inaccuracy. Many investigations, such as one carried out by Big Brother Watch, have documented severe inaccuracies in some software, which have been acknowledged by some police forces.[29] These inaccuracies are the result of outdated police databases, the sole reliance on software to determine the existence of a match, or even an attempt to identify people wearing masks during the COVID-19 pandemic, which is a new feature of recognition software. [30]

These inaccuracies are especially harmful, as they tend to target certain groups more than others, thus resulting in discriminatory effects.[31] Indeed, there are greater risks of inaccuracies with women and darker-skinned individuals. This is a consequence of the over-representation of white males in the data tested to create some algorithms, and of possible biases of the officer in charge of confirming the match.[32] Facial recognition

23 Politie, *Camera in Beeld - veelgestelde vragen,* available at https://www.politie.nl/onderwerpen/camera-in-beeld.html.
24 '314.000 beveiligingscamera's aangemeld bij politiedatabase', *NOS,* 18 March 2023, available at https://nos.nl/artikel/2467924-314-000-beveiligingscamera-s-aangemeld-bij-politiedatabase.
25 L. Montag, *supra* note 16, at 72.
26 *Ibid*., at 74.
27 World Economic Forum, *supra* note 12, at 13-14.
28 R. Mac, C. Haskins and A. Pequeno, 'Police In At Least 24 Countries Have Used Clearview AI. Find Out Which Ones Here.', *Buzzfeed. News*, 25 August 2021, available at https://www.buzzfeednews.com/article/ryanmac/clearview-ai-international-search-table.
29 Big Brother Watch, *Face Off, the Lawless Growth of Facial Recognition in UK Policing*, May 2018, available at https://bigbrotherwatch.org.uk/wp-content/uploads/2018/05/Face-Off-final-digital-1.pdf; Koebler, 'Detroit Police Chief: Facial Recognition Software Misidentifies 96% of the Time', *Vice,* 29 June 2020, available at https://www.vice.com/en/article/dyzykz/detroit-police-chief-facial-recognition-software-misidentifies-96-of-the-time.
30 International Network of Civil Liberties Organizations, *In Focus: Facial Recognition Tech Stories and Rights Harms from around the World* (2021), 20, at 10, 20, 23, available at https://inclo.net/wp-content/uploads/2024/02/in-focus-facial-recognition-tech-stories.pdf.
31 *Ibid*., at 10.
32 S. Lohr, 'Facial Recognition Is Accurate, if You're a White Guy', *The New York Times*, 9 February 2018, available at https://www.nytimes.com/2018/02/09/technology/facial-recognition-race-artificial-intelligence.html.

algorithms also suffer from greater inaccuracies in people with disabilities, children or the elderly.[33] The existence of such inaccuracies should be well known by those in charge of operating retrospective facial recognition, to avoid to the greatest extent possible the misidentification of an individual. This also demonstrates the interconnection between public and private stakeholders in the development of FRT. While states could implement proper safeguards to minimize the existence of inaccuracies, it is ultimately the responsibility of private stakeholders to develop unbiased algorithms.

B. Heterogeneous Domestic Legal and Procedural Frameworks

While states have been proactive in developing FRT, they have been less engaged in implementing a dedicated legal framework. Therefore, retrospective facial recognition is operated under pre-existing legal frameworks, related to general surveillance systems. As a consequence, the extent to which these frameworks are clear and precise enough to provide for the use of retrospective facial recognition remains a subject of debate, even at domestic level. For instance, in Greece, the Hellenic Data Protection Authority issued a decision in June 2020 explaining that the use of FRT was not covered by existing legislation and that it should be considered as a separate data processing activity.[34]

This decision illustrates that in most states, a national supervisory authority has been set up to monitor all issues relating to personal data.[35] Thus, when applying this framework, the authority should be aware of the implementation of retrospective facial recognition and should approve it *a priori*. However, in many European states, retrospective facial recognition is used in secret, without prior information to the relevant national data protection authority. In France, for instance, the Ministry of the Interior concealed the use of Israeli facial recognition software for eight years, while in Hungary, the implementation of FRT remains at the discretion of the Hungarian secret services, without public awareness.[36]

Against this backdrop, some authorities have been awarded investigative and sanction powers. For instance, the French *Commission Nationale Informatique et Libertés* (CNIL) conducted investigations into allegations that Clearview AI was collecting facial images available on the internet of data subjects present in France and ordered the deletion of the data already collected.[37] In the absence of compliance with this decision in two months, the French administrative authority set a penalty payment of 100,000 euros per day, partially executed in April 2023 for an amount of 5.2 million euros.[38] This shows that when appropriate powers are granted to these authorities, they can effectively contribute to the protection of personal data.

However, the powers devolved to these authorities remain largely limited and the management of the databases used for retrospective facial recognition is not

33 European Union Agency for Fundamental Rights, *Facial recognition technology – Fundamental rights considerations in the context of law enforcement* (2019), Publications Office, at 28.

34 Hellenic Data Protection Authority, Γνωμοδότηση 3/2020 της Αρχής επί του σχεδίου Προεδρικού Διατάγματος σχετικά με τη χρήση συστημάτων επιτήρησης με τη λήψη ή καταγραφή ήχου ή εικόνας σε δημόσιους χώρους available at https://www.dpa.gr/el/enimerwtiko/prakseisArxis/gnomodotisi-32020-tis-arhis-epi-toy-shedioy-proedrikoy-diatagmatos.

35 Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR), OJ 2016 L 119/1, Article 51.

36 Disclosed, 'The French National Police Is Unlawfully Using An Israeli Facial Recognition Software', 14 November 2023, available at https://disclose.ngo/en/article/the-french-national-police-is-unlawfully-using-an-israeli-facial-recognition-software; International Network of Civil Liberties Organizations, *supra* note 30, at 22.

37 CNIL, *supra* note 17.

38 *Ibid.*

always the responsibility of data protection authorities. Indeed, some states have chosen to assign this task to the Ministry of the Interior, which then manages both the database and the police forces using it.[39] This lack of separation between the authority in charge of the database and the authority using it is worrying, as it induces greater risks of covert use of retrospective facial recognition.

There is also no consensus on the procedural safeguards that should be in place in the context of FRT. For instance, the UK Court of Appeal considered in *Bridges v. South Wales* that it was not necessary to request a warrant before using live FRT, as this technology is no more intrusive than overt surveillance with CCTV cameras.[40] This demonstrates an insufficient understanding of the specific risks at stake through the use of FRT. On the contrary, other courts have attempted to mitigate the risks of retrospective facial recognition. For instance, some request that the match be confirmed by human investigators, while some, such as in the Netherlands, also require additional evidence to convict an individual identified with FRT.[41]

It is undeniable that FRT entails great risks to the right to private life and data protection. However, there is no consensus on the extent to which retrospective facial recognition should be implemented to safeguard these rights. As there is a lack of a clear framework on FRT, it is necessary to analyse the applicable European legal framework and its possible impact on the national level.

2. THE EUROPEAN LEGAL FRAMEWORKS: AN EFFECTIVE PROTECTION WITH REMAINING GAPS

At an institutional level, both the European Union and the Council of Europe recognize the risk posed using retrospective facial recognition. Consequently, the rules of the general Human Rights legal framework have been applied to this technological development (A) and dedicated regulations have also been implemented (B).

A. A General Fundamental Rights Framework Suitable for a General Assessment of Facial Recognition Technology

When the notions of private life and personal data were first introduced in the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union (CFREU), the use of retrospective facial recognition was not envisaged. Nevertheless, existing obligations have been applied to this technology, both by the European Court of Human Rights (ECtHR) (1) and the Court of Justice of the European Union (CJEU) (2).

1. The European Convention on Human Rights and Retrospective Facial Recognition

The obligations set out in the ECHR have been spelt out by the ECtHR in its different decisions. As such, the ECtHR already ruled that the 'mere storing of data relating to the private life of an individual' interferes with the right to private life, protected by Article 8 of the ECHR.[42] Indeed, the collection of data for facial recognition purposes in the public space still collides with the subject's right to private life, as the right to private life

39 The Greens/EFA report, *supra* note 10.
40 Court of Appeal (United Kingdom), Case C1/2019/2670, *Bridges, R (On the Application Of) v South Wales Police* [2020] EWCA Civ 1058, at para. 126.
41 World Economic Forum, *supra* note 12; District Court Zeeland-West-Brabant, *Rechtbank Zeeland-West-Brabant* [2019], case No. 02-665274-18.
42 ECtHR, *S. and Marper v. the United Kingdom*, Appl. nos. 30562/04 and 30566/04, Judgement [Grand Chamber] of 4 December 2008, at 67.

also exists in the public sphere.[43] Besides, facial imagery is particularly sensitive data (biometric data), being deeply personal and the most apparent distinctive feature among individuals.[44] As such, any use of retrospective facial recognition amounts to interference with the right to private life.[45]

Therefore, in accordance with Article 8(2) of the ECHR, the use of retrospective facial recognition by public authorities is only admissible if it fulfils the three-step test of legality, legitimacy and necessity. Retrospective facial recognition must be used in accordance with the law, pursuant to a legitimate aim – including national security, public safety and the prevention of disorder or crime – and must be necessary in a democratic society to achieve any such aim. Therefore, states should not only provide a legal basis, but the latter must be 'accessible' and 'foreseeable', and specific explanations of the surveillance process should also be provided.[46] Besides, interference with the right to private life must not only be useful, it must be justified by a pressing social need, and there must be no other means that would achieve the same purpose while interfering less seriously with the rights and freedoms at stake.[47]

The ECtHR has more specifically addressed the issue of the collection, storage and processing of personal data, including the use of FRT. It appears that the ECtHR takes into consideration the balance between the potential benefits of this technology and the interests of private life.[48]

Prior to the implementation of surveillance systems, the ECtHR requires states to carefully assess and mitigate the adverse interference of such technology.[49] In that sense, the ECtHR is in favour of the close monitoring of this technology by supervisory authorities.[50] Furthermore, the ECtHR considers that states should only enjoy a narrow margin of appreciation regarding the storage of biometric data.[51]

To assess the compliance of the collection, storage and processing of data, the ECtHR takes into consideration the gravity of the crime. For instance, the ECtHR ruled that the indefinite collection and storage of data of an individual only convicted of a minor offence violates Article 8 of the ECHR, in the absence of a real review.[52] On the contrary, in *P.N. v. Germany*, the ECtHR ruled that there was no violation of Article 8, as storage was only permitted for a limited period, the indefinite retention of data was not possible, and a domestic court had conducted an individual assessment on the likelihood that the applicant would commit a criminal offence again in the future.[53]

Beyond these cases devoted to surveillance systems in general, the ECtHR recently addressed, in *Glukhin v. Russia*, whether the use of FRT to identify an individual in an investigation complied with the ECHR.[54] In this case, retrospective facial recognition and live FRT were used to identify an individual after he peacefully demonstrated in the Moscow underground. This decision reiterates the need for a dedicated legal basis prior to the

43 ECtHR, *Perry v. the United Kingdom,* Appl. no. 63737/00, Judgment of 17 July 2003, at 38.
44 ECtHR, *Reklos and Davourlis v. Greece,* Appl. no. 1234/05, Judgement of 15 January 2009, at 40.
45 EUAFR, *supra* note 33, at 25.
46 ECtHR, *Perry*, *supra* note 43, at 45 and 47.
47 ECtHR, *Glor v. Switzerland*, Appl. no. 13444/04, Judgement of 30 April 2009, at 94.
48 ECtHR, *S. and Marper, supra* note 42, at 112.
49 ECtHR, *Kruslin v. France*, Appl. no. 11801/85, Judgement of 24 April 1990, at 33 and 35.
50 ECtHR, *Breyer v. Germany,* Appl. no. 50001/12, Judgement of 30 January 2020, at 105.
51 ECtHR, *Gaughran v. the United Kingdom,* Appl. no. 45245/15, Judgement of 13 February 2020, at 84, and 88.
52 *Ibid.*, at 96.
53 *Ibid.*, at 81, 82; ECtHR, *P.N. v. Germany*, Appl. no. 74440/17, Judgement of 11 June 2020, at 88.
54 *Glukhin v. Russia*, *supra* note 9.

use of FRT. Indeed, the ECtHR considered that the legal basis in place in Russia was insufficient to provide for the use of this technology as it lacked detailed safeguards to prevent abuse and arbitrariness.[55] Furthermore, the ECtHR ruled that while the prevention of crimes is a legitimate aim to restrict the right to privacy, the use of FRT in this case was not legitimate as the applicant was merely protesting peacefully, and could have only been prosecuted for a minor offence.[56] It may be inferred from this ruling that only the prevention of the most serious crimes justifies the use of retrospective facial recognition.

Moreover, this case illustrates the difficulties that arise when retrospective facial recognition is used in secrecy during an investigation. Indeed, there was no requirement under Russian legislation to notify the person concerned about the use of retrospective facial recognition. As a result, the applicant had difficulties proving that retrospective facial recognition had indeed been used in his case and that, consequently, his right to private life had been violated.[57]

2. The Charter of Fundamental Rights of the European Union and Retrospective Facial Recognition

Under Article 51(1) CFREU, the Charter binds Union institutions and bodies in all their actions and binds Member States only when they implement Union law.[58] When Member States use retrospective facial recognition in this context, the processing generally interferes with respect to private life and communications, protected under Article 7 of the CFREU and the right to the protection of personal data, protected by Article 8. Indeed, the 'processing of biometric data under all circumstances', which is the case for retrospective facial recognition, 'constitutes a serious interference in itself'.[59] Depending on the circumstances, such use of retrospective facial recognition may additionally infringe the right to human dignity, enshrined in Article 1 of the CFREU.[60]

Since retrospective facial recognition interferes with the rights protected by the CFREU, it may only be allowed if used in accordance with Article 52 (1) of the CFREU. Therefore, its use must be provided for by law and respect the essence of the rights and freedoms protected by Articles 1, 7 and 8 of the CFREU. The use of retrospective facial recognition must remain proportionate and necessary and must either meet one of the objectives of general interest recognized by the Union, or be required to ensure the protection of the rights and freedoms of others.

The specific requirements regarding the use of retrospective facial recognition developed by the CJEU match the requirements developed by the ECtHR. The CJEU traditionally addresses whether any limitation of the right to protection of personal data is strictly necessary.[61] Moreover, the legal basis that allows such interference must be clear and provide precise rules governing the scope and application of such interference. It also imposes minimum safeguards to ensure that data subjects have sufficient guarantees to protect their rights effectively.[62]

55 *Ibid.*, at 83.
56 *Ibid.*, at 88.
57 *Ibid.*, at 71.
58 Charter of Fundamental Rights of the European Union (2000), OJ 2016 L202/38, Article 51(1).
59 European Data Protection Board, Guidelines 05/2022 on the use of facial recognition technology in the area of law enforcement (EDPB Guidelines), 26 April 2023, at 36.
60 *Ibid.*, at 39.
61 Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland and others* (EU:C:2014:238), at 52.
62 *Ibid.*, at 54.

While some cases help understand the extent to which retrospective facial recognition may fall under the general European human rights framework, in the absence of decisions specifically addressing the use of retrospective facial recognition, it is impossible to fully assess the compliance of this technology with the rights protected by the ECHR and the CFREU.

B. A Dedicated Assessment of Facial Recognition Technology through Data Protection Regulation

To curb the increasing use of technologies enabling the processing of personal data, and especially the use of FRT, a specific legal framework has been enacted. Several sets of legislation have come into force to ensure the protection of personal data, both in the European Union, with the Law Enforcement Directive (1), the Artificial Intelligence Act (2) and the Prüm Treaty (3), and through wider interstate cooperation, with Convention 108 (4).

1. The Law Enforcement Directive

While the general processing of personal data is regulated by the General Data Protection Regulation (GDPR),[63] the specific use of retrospective facial recognition falls under the scope of the Data Protection Law Enforcement Directive (LED), which aims at protecting citizens' fundamental rights against the processing of personal data for law enforcement purposes.[64]

This directive provides for a specific set of rules in relation to the processing of biometric data. Under the LED, the processing of data must be provided for by law, and unlike under the GDPR, the mere consent of the data subject is insufficient to allow it.[65]

The LED sets out an obligation of information to ensure that retrospective facial recognition is carried out transparently.[66] The LED also provides for the right of data subjects to receive confirmation that their personal data has been processed, and if so, the right for them to access their personal data.[67] Data subjects should also be entitled to request the rectification of personal data and its deletion.[68] When deletion is contested, the data in question should only be used in the situation for which deletion is prevented, and should not serve other purposes.[69]

Finally, any decision that produces adverse legal effects on the data subject should not be solely based on automated processing, except if it is provided for by law, and as long as appropriate safeguards are also provided for.[70]

While the requirements of the LED are much more specific, they still fail to address particular features of the use of retrospective facial recognition, more especially the procedural consequences of a match, and the risks of inaccuracies in facial recognition software.

2. The Artificial Intelligence Act

After a first proposal from the European Commission in April 2021, the Regulation of the European Parliament and the Council Laying down Harmonized Rules on Artificial Intelligence (AI Act) was adopted by the European Parliament and published in the

63 GDPR, *supra* note 35.
64 Directive (EU) 2016/680 of 27 April 2016, OJ 2016 L 119/131, Law Enforcement Directive (LED).
65 *Ibid.*, Article 8.
66 *Ibid.*, Article 13 (2).
67 *Ibid.*, Article 14.
68 *Ibid.*, Articles 16 and 47.
69 *Ibid.*, Article 47.
70 *Ibid.*, Article 11(1).

Official Journal on 12 July 2024.[71] It entered into force on 1 August 2024 and the entry into application will take place in stages from 2 February 2025 until 2 August 2027, when all provisions of the AI Act will be applicable. This new piece of EU legislation restricts the use of biometric identification systems by law enforcement authorities. The regulation adopts a risk-based approach that justifies the prohibition or the authorization of certain AI practices.

The AI Act prohibits the use of real-time facial recognition systems in public spaces for law enforcement purposes, except when such use is strictly necessary to achieve listed aims.[72]

Post-remote biometric identification systems in law enforcement, such as retrospective facial recognition, are classified as high-risk and are accordingly subject to specific requirements and obligations for both developers and public authorities. Thus, the use of retrospective facial recognition must comply with the requirements outlined in Chapter 2 of Title III of the Regulation. As such, retrospective facial recognition tools 'shall be designed and developed in such a way to ensure that their operation is sufficiently transparent to enable users to interpret the system's output and use it appropriately' or 'that they can be effectively overseen by natural persons during the period in which the AI system is in use'.[73]

3. The Prüm Treaty

The Prüm Treaty is an intergovernmental treaty, signed by seven EU Member States in 2005, and whose provisions have been binding on all Member States since 2008, as it was integrated into EU legislation[74]. Norway and Iceland are also party to the cooperation system set up by this treaty. This treaty facilitates the exchange of personal data amongst Member States. While for now this treaty does not allow the sharing of databases for facial recognition purposes, this possibility is being discussed.[75] In that sense, the European Parliament and the Council proposed a regulation to enhance state cooperation and as such strengthen their obligation to 'share information, including biometrics'.[76] This proposal demonstrates the growing interest in the sharing of databases, including those used for facial recognition purposes. This expansion has drawn criticism from the European Data Protection Supervisor and civil-society organizations, who call for stronger safeguards and clearer necessity and proportionality tests for biometric data sharing.[77]

4. The Convention 108 and 108+

Within the Council of Europe, a specific convention addresses the processing of personal data: the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108), a convention ratified by all

71 Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858 (EU), 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act).
72 *Ibid.*, Article 5 (1) (d).
73 *Ibid.*, Article 14 (1).
74 Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, The French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration, adopted 27 May 2005, (Prüm Convention); Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime; Council Decision 2008/616/JHA of 23 June 2008 on the implementation of the Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime.
75 S. Stolton, 'EU police plan massive facial recognition database', *Euractiv*, 3 March 2020, available at https://www.euractiv.com/section/digital/news/eu-police-plan-massive-facial-recognition-database/.
76 Proposal for a Regulation (EU) COM (2023) 754 final of 28 November 2023, 2023/0438(COD).
77 European Data Protection Supervisor, Opinion 4/2024, available at https://www.edps.europa.eu/system/files/.

members of the Council of Europe, and nine non-European states.[78] The Convention 108 was modernized in 2018, but still lacks, as of September 2025, five ratifications, out of the 38 needed to enter into force.[79]

The provisions of the conventions 108 and 108+ specifically address the steps required to ensure the security of the data processed, the transparency of the use of such data, the rights of the data subject, and the applicable procedural framework.

Thus, while both the European Union and the Council of Europe have made clear efforts to mitigate the infringements of FRT on the right to private life and data protection, legislation is not specifically tailored to the specifics of the use of retrospective facial recognition, and additional rules should be implemented.

3. A PROPOSAL TO ENSURE BETTER PROTECTION OF PERSONAL DATA AGAINST THE UNCHECKED USE OF RETROSPECTIVE FACIAL RECOGNITION TECHNOLOGY

The applicable European legal framework is too broad to address the use of FRT properly, and even less the use of retrospective facial recognition. This observation is not reassuring and underscores the need for a dedicated legal framework.[80] We therefore suggest elements for future regulations addressing the use of this technology that align with recommendations already issued at EU and Council of Europe level (A). Any consideration of possible future regulations should also address the steps that should be taken to ensure proper implementation of the suggested rules (B).

A. A Bespoke Proposal Inspired by Existing Recommendations

While the current applicable European legal framework remains quite broad, we aim to provide a detailed idea of possible future regulations that would be tailored to the specifics of retrospective facial recognition. Accordingly, inspiration may be drawn from the various recommendations that have been issued, which spell out obligations and limits for the use of FRT.[81] In particular, bodies emanating from both the European Union and the Council of Europe have issued guidelines regarding the use of FRT. While the guidelines from the Consultative Committee of the Convention for the protection of individuals with regard to automatic processing of personal data are not specific to law enforcement purposes, those from the European Data Protection Board particularly target FRT in the area of law enforcement.[82] These guidelines highlight five overarching aspects of any future regulation of FRT: the lawfulness of the use of FRT for law enforcement purposes (1), the legitimacy of its use (2), the reliability of FRT (3), the need for accountability of the different stakeholders involved (4) and the need to raise awareness of the risks associated with this technology (5).

1. When Is the Use of Retrospective Facial Recognition Lawful?

Firstly, the use of retrospective facial recognition can only be lawful if it relies on

78 Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, ETS 108; 'Chart of Signatures and Ratifications of Treaty 108' (*Council of Europe Portal*), available at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108/signatures.

79 Modernised Convention for the Protection of Individuals with Regard to the Processing of Personal Data (Convention 108+), CETS 223; 'Chart of Signatures and Ratifications of Treaty 223' (*Council of Europe Portal*), available at https://www.coe.int/en/web/conventions/cets-number-/-abridged-title-known?module=signatures-by-treaty&treatynum=223.

80 L. Raposo, 'The Use of Facial Recognition Technology by Law Enforcement in Europe: a Non-Orwellian Draft Proposal', 29 European Journal on Criminal policy and Research (2023) 515.

81 World Economic Forum, *supra* note 12; T-PD Guidelines, *supra* note 7; EDPB Guidelines, *supra* note 59.

82 T-PD Guidelines, *supra* note 7; EDPB Guidelines, *supra* note 59.

an appropriate legal basis.[83] The law should accordingly provide a detailed explanation of the use and intended purpose, as well as the appropriate safeguards to ensure that it satisfies the necessity and proportionality tests.[84] Therefore, existing regulations addressing surveillance systems in general are not sufficient to provide a legal basis for the use of FRT.

Besides, to remain lawful, the databases must be set up and deployed to the extent of what is strictly necessary and proportionate, *a fortiori* in an uncontrolled environment. Thus, states should refrain from increasing the number of databases enabling the use of retrospective facial recognition, apart from exceptional circumstances.

2. When Is the Use of Retrospective Facial Recognition Legitimate?

Secondly, law enforcement authorities should use this technology transparently and fairly to keep such use legitimate.[85] As a result, the transmission of processed data to other entities should be provided to the public, as well as information regarding the retention, deletion, or de-identification of biometric data.[86] While retrospective facial recognition should be used transparently, to the fullest extent possible, both the EDPB and the Consultative Committee of the Convention 108 concede that FRT could be used covertly when it is 'strictly necessary and proportionate in order to prevent imminent and substantial risk to public safety'.[87]

Besides, any use of FRT for law enforcement purposes must comply with the elementary principles of data protection: purpose limitation, data minimization and limited duration of storage.[88] This means that the database used for this purpose should only store images to a strictly necessary extent, and the use of data that originally served a different purpose, such as images on social media, should be strictly limited, unless overriding legitimate purposes provided by law justify its use.[89] In that sense, civil databases should not serve as a basis for the use of retrospective facial recognition. In accordance with the principle of data minimization, any unnecessary data must be deleted.[90] For instance, with retrospective facial recognition, the data that was matched should only be stored for a preset retention period.[91] Besides, when an individual is cleared of all charges, the need to retain their data should be reviewed.

Finally, strong security measures matching the sensitivity of the data stored should be implemented.[92] Furthermore, the data subjects and supervisory authorities should be notified of any serious breaches of security.[93]

3. How to Ensure the Reliability of Facial Recognition Technology?

Thirdly, facial recognition software should meet minimum reliability standards.[94] On this particular issue, the guidelines insist that developers, manufacturers and service providers should make sure their technology

83 T-PD Guidelines, *supra* note 7 at 7; EDPB Guidelines, *supra* note 59, at 43.
84 T-PD Guidelines, *supra* note 7 at 10; EDPB Guidelines, *supra* note 59, Annex II, at 34, 35.
85 T-PD Guidelines, *supra* note 7, at 19; EDPB Guidelines, *supra* note 59, Annex II, at 36.
86 T-PD Guidelines, *supra* note 7, at 20; EDPB Guidelines, *supra* note 59, at 85-89.
87 T-PD Guidelines, *supra* note 7, at 20; EDPB Guidelines, *supra* note 59, at 88.
88 T-PD Guidelines, *supra* note 7, at 21; EDPB Guidelines, *supra* note 59, at 90.
89 T-PD Guidelines, *supra* note 7, at 9, 10.
90 T-PD Guidelines, *supra* note 7, at 21; EDPB Guidelines, *supra* note 59, at 90, 92.
91 T-PD Guidelines, *supra* note 7, at 21; EDPB Guidelines, *supra* note 59, at 57.
92 T-PD Guidelines, *supra* note 7, at 22; EDPB Guidelines, *supra* note 59, at 101.
93 T-PD Guidelines, *supra* note 7, at 22.
94 T-PD Guidelines, *supra* note 7, at 16; EDPB Guidelines, *supra* note 59, at 28.

is sufficiently reliable.[95] To improve reliability, the training of the algorithm must rely on data that ensures representativeness and is of sufficient quality.[96] To review the compliance of the software with established standards, a certification process should be prescribed by law and carried out by the relevant supervisory authority.[97]

In addition, to avoid inaccuracies in the processing of facial images, the quality of the images collected and stored in the database must be checked, and when a false match is detected, appropriate steps must be undertaken to correct such errors.[98] Finally, the processing of data should not solely be carried out electronically. A human operator must remain the decision-maker, and must oversee the general processing of data and confirm any matches.[99]

4. How to Ensure Accountability for the Different Stakeholders Involved?

Fourthly, the use of FRT can only be properly regulated if the different stakeholders involved in this process are held accountable. This need for accountability chiefly concerns both the developers and the users of the technology.[100] To ensure accountability, the use of FRT must be transparent and supervisory authorities should be involved in monitoring it.

Besides, the data subjects should be awarded effective remedies against the use of retrospective facial recognition.[101] They should also be informed of their right to file a complaint with the supervisory authority, especially in instances of false matches.[102]

5. How to Raise Awareness?

Finally, the EDPB and the Consultative Committee of the Convention emphasize that raising awareness of FRT on a large scale is crucial. Awareness efforts should be targeted not only developers but also lawmakers, decision takers, authorities using FRT, supervisory authorities and data subjects.[103]

In particular, police officers who operate retrospective facial recognition in investigations should receive mandatory training on capabilities and limitations, with access to the system restricted to specifically authorized staff. To ensure compliance with this requirement, the name of the accredited officer who operated the identification should be indicated in the proceedings.

In addition, judges, who ultimately assess the evidentiary value of identification, should be aware of the particular issues this technology entails. Furthermore, to ensure effective oversight of the use of retrospective facial recognition in investigations, any identification through this process should be indicated clearly, with the specific probability of a match provided by the software.

While it is possible to draw up a proposal to regulate the use of retrospective facial recognition, this process is only meaningful if the proposal is properly implemented.

B. The Pathway to the Suitable Implementation of the Proposal

To ensure the implementation of our proposal, domestic legislation appears to be the most appropriate level (1). Additionally, to avoid fragmentation of the applicable

95 T-PD Guidelines, *supra* note 7, at 12; EDPB Guidelines, *supra* note 59, Annex II, at 33.
96 T-PD Guidelines, *supra* note 7, at 15, 16; EDPB Guidelines, *supra* note 59, Annex II, at 37.
97 T-PD Guidelines, *supra* note 7, at 12.
98 *Ibid*., at 22.
99 T-PD Guidelines, *supra* note 7, at 23; EDPB Guidelines, *supra* note 59, Annex II, at 37.
100 T-PD Guidelines, *supra* note 7, at 17, 23; EDPB Guidelines, *supra* note 59, at 102.
101 T-PD Guidelines, *supra* note 7, at 27.
102 T-PD Guidelines, *supra* note 7, at 27; EDPB Guidelines, *supra* note 59, at 86.
103 T-PD Guidelines, *supra* note 7, at 13, 16; EDPB Guidelines, *supra* note 59, Annex II, at 37.

legal framework, independent supervisory authorities are key to ensuring uniform implementation (2).

1. Domestic Legislation: The Key to a Binding Regulation on Retrospective Facial Recognition

Our proposal provides quite extensive limits to the use of retrospective facial recognition. While this proposal finds its source in existing guidelines, they have no binding force. Although these guidelines will serve as a reference for domestic and European courts, as was the case in *Glukhin v. Russia*, the assessment of the lawfulness of retrospective facial recognition on a case-by-case basis will not prevent violations from arising, but will only rectify them years after they occurred.[104]

Since relying solely on courts to deliver proper safeguards is unsatisfactory, the existing recommendations should be enshrined in law. While the European Union could intervene in this area, as it has done with the AI Act, further Eu-level measures may not be imminent. Moreover, in the area of law enforcement activities and criminal justice, most laws are still initiated at the national level.[105] Thus, states should adopt new regulations specifically addressing the use of retrospective facial recognition that take the existing recommendations into account.

2. Supervisory Bodies: The Guardians of a Uniform Framework in Europe

Both guidelines outline the variety of stakeholders playing a role in the use of FRT, with obligations falling to the legislators and decision-makers, in charge of setting out and enforcing an appropriate framework, developers and service providers, who must ensure their product meets the standards of reliability and accuracy, and entities using FRT.[106]

This myriad of stakeholders and the implementation of safeguards against the use of retrospective facial recognition at domestic level brings to light the risk of a fragmentation of the applicable framework, depending on national choices. To ensure uniformity for the legal framework throughout Europe, supervisory authorities are central to monitoring the implementation of such frameworks and the use of FRT. To do so, they should monitor the conduct of a proper impact assessment, prior to the implementation of new regulations.[107] Once these regulations enter into force, supervisory authorities should ensure effective oversight of this technology. In order to do this, they should enjoy broad regulatory powers, including the possibility to conduct impact assessments, audits, reports and analyses.[108]

Furthermore, the databases should be managed by independent authorities. When a single authority, such as the Ministry of the Interior, is entrusted with both managing the database and exploiting it, there are higher risks for FRT to be used in secret, as was the case in France[109]. Moreover, since these supervisory authorities are not using the technology, they are less inclined to include unnecessary data in the database. Setting up a dedicated body would also clarify the exercise of legal remedies related to the management of the database, access to data, or requests for its deletion.

Thus, we believe that the existing recommendations for the use of FRT should

104 *Glukhin v. Russia*, *supra* note 9, at 37 and 39.
105 P. Csonka and O. Landwehr, '10 Years after Lisbon – How "Lisbonised" is the Substantive Criminal Law in the EU?', 4 *Eucrim* (2019), at 261–267, available at https://eucrim.eu/articles/10-years-after-lisbon-how-lisbonised-is-the-substantive-criminal-law-in-the-eu/.
106 T-PD Guidelines, *supra* note 7, at 6; EDPB Guidelines, *supra* note 59, Annex II, at 33.
107 T-PD Guidelines, *supra* note 7, at 14; EDPB Guidelines, *supra* note 59, at 98.
108 T-PD Guidelines, *supra* note 7, at 12; EDPB Guidelines, *supra* note 59, Annex II, at 37.
109 Disclosed, *supra* note 36.

serve as a basis for the implementation of domestic legislation addressing the use of retrospective facial recognition, under the necessary growing role of supervisory bodies.

CONCLUDING REMARKS

This paper has attempted to provide detailed explanations of the use of retrospective facial recognition by law enforcement authorities. However, it only reflects the reported use of this technology as of August 2024. Therefore, it is crucial to monitor any new technological developments. For now, FRT is mainly used to identify unknown individuals, but this technology is also developed to enable the identification of emotions.[110] Moreover, surveillance through FRT could worsen, as worrying technological developments have been reported throughout the world. For instance, in China, FRT is also used to monitor individual behaviour and sanction remotely any violation of the law.[111] Chinese authorities have now implemented a social credit system that keeps track, in the form of a social credit score, of all 'trust-breaking behaviour'.[112] To avoid unforeseen technological advances further infringing the right to private life and data protection, the relevant legal framework should always be adapted to these developments. In this paper, we argue that the legislator should always keep track of fast-developing technologies in order to provide sufficient guarantees concerning the protection of rights of individuals. This protection and future regulations must also respect the existing rights enshrined in the ECHR and CFREU.

110 P. Tarnowski *et al.,* 'Emotion recognition using facial expressions', 108 *Procedia Computer Science* (2017) 1175.
111 E. Cho, 'The Social Credit System: Not Just Another Chinese Idiosyncrasy', *Journal of Public and International Affairs* (2020), available at https://jpia.princeton.edu/news/social-credit-system-not-just-another-chinese-idiosyncrasy.
112 *Ibid*.

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TAX ADMINISTRATION ON STEROIDS: STRIKING A BALANCE BETWEEN GENERAL PRINCIPLES OF EU ADMINISTRATIVE LAW AND THE USE OF ARTIFICIAL INTELLIGENCE BY TAX ADMINISTRATIONS

Prompted by a recent press release of the Greek Independent Authority for Public Revenue on the use of artificial intelligence in tax audits, which gave rise to an intense political and social debate, the paper explores the benefits and challenges of incorporating AI systems within tax audit mechanisms. The subject of the paper revolves around the idea of balancing the opportunities associated with deploying AI systems within the tax administration in an attempt to solve inherent governmental problems, such as resource allocation, automation of workflows, faster processing of information, enhanced quality and increased efficiency of services, on the one hand, and respect for the general principles of EU administrative law and the respective

rights of EU citizens, on the other hand. Given their close connection to the rule of law and their special importance in the field of tax administration, the paper focuses, in particular, on the implications of the use of AI by tax authorities on the principle of good administration, especially its manifestation as the right to be heard, the right to access one's file and the obligation to give reasons, the principle of equality and the right to non-discrimination, as well as the principle of proportionality.

KEYWORDS:

ARTIFICIAL INTELLIGENCE | TAX ADMINISTRATION | GOOD ADMINISTRATION | EQUALITY | NON-DISCRIMINATION | PROPORTIONALITY

À la suite d'un récent communiqué de presse de l'Autorité indépendante grecque des recettes publiques sur l'utilisation de l'intelligence artificielle dans les contrôles fiscaux, qui a donné lieu à un débat politique et social intense, la présente analyse explore les avantages et les défis de l'intégration des systèmes d'IA dans les mécanismes de contrôle fiscal. L'étude porte sur l'idée d'équilibrer les possibilités associées au déploiement de systèmes d'IA au sein de l'administration fiscale afin de tenter de résoudre les problèmes gouvernementaux inhérents, tels que, d'une part, l'allocation des ressources, l'automatisation des flux de travail, l'accélération du traitement des informations, l'amélioration de la qualité et de l'efficacité des services, et, d'autre part, le respect des principes généraux du droit administratif de l'Union et des droits respectifs des citoyens de l'Union. Compte tenu de leur lien étroit avec l'État de droit et de leur importance particulière en matière fiscale, l'analyse met l'accent sur les implications de l'utilisation de l'IA par les autorités fiscales sur le principe de bonne administration, plus particulièrement le droit d'être entendu, le droit d'accès au dossier et l'obligation de motivation de la décision, sur le principe d'égalité, sur le droit à la non-discrimination et, enfin, sur le principe de proportionnalité.

MOTS-CLÉS :

INTELLIGENCE ARTIFICIELLE | ADMINISTRATION FISCALE | BONNE ADMINISTRATION | ÉGALITÉ | NON-DISCRIMINATION | PROPORTIONNALITÉ

INTRODUCTION

The purpose of this paper is to describe the main advantages and disadvantages of using Artificial Intelligence (hereinafter 'AI') in the public sector and, in particular, in tax administration before and during tax audits. Even though the same benefits and challenges do not solely appear in the context of tax administration, but extend in all aspects of the public sector, the paper emphasizes the field of taxation, due to both our interest and expertise in taxation law, and the inherent specificities of said domain of law, as a result of its partial harmonization in the framework of European law. The analysis focuses on three fundamental principles governing administrative action, namely good administration, equality and non-discrimination, and proportionality.

The inquiry is prompted by a recent press release by the Greek tax authority on the use of AI in tax audits, which caused an intense political and social debate in the country. Greece appears poised to follow the example of some European countries, where AI systems in tax audits are already in use, as in France,[1] in Germany,[2] in Italy,[3] in Sweden,[4] in Norway,[5] in Spain,[6] and in Portugal.[7] In these countries, so far, it seems that the use of AI has not provoked a public debate about it, or condemnations against the State. In that scope, the new Greek tax system aims to analyse large data sets from various sources, such as banking transactions, social media and money transfers, to detect unusual discrepancies in the incomes of citizens and businesses.[8]

However, the use of AI has turned unmanageable in other European countries. In Finland,[9] the tax administration was not able to give reasons for the automated imposition of taxes,[10] in Poland the authorities could not justify the freezing of corporate bank accounts, based on data collected using AI,[11] and in Slovak Republic the tax administration collected corresponding data using AI for purposes irrelevant to tax audits.[12] All the above have created social and political tensions within each country.

Similar matters have been encountered in the Netherlands, where the government resigned in 2021, after it was revealed that the Dutch tax administration, and in particular the *toeslagen* (social security unit), had illegally demanded the full retroactive refund of all childcare benefits, due to a stiff and biased algorithm.[13] Shortly before, on 13 February 2020, the Hague Court had discontinued the

1 Kanellos, 'Electronic cross-checking of tax data', *Applications of Artificial Intelligence* (2021) 152, at 154.
2 Kleintz, *The Automatic Tax Office* (2018), available at https://algorithmenethik.de/2018/03/27/das-automatische-finanzamt/.
3 Brancolini, *Italy Turns to AI to Find Taxes in Cash-First, Evasive Culture* (2023), available at https://news.bloombergtax.com/daily-tax-report-international/italy-turns-to-ai-to-find-taxes-in-cash-first-evasive-culture.
4 EIPA, *Automated artificial intelligence and machine learning supported tax registration for non-Swedish customers*, available at https://www.eipa.eu/epsa/automated-artificial-intelligence-and-machine-learning-supported-tax-registration-for-non-swedish-customers/.
5 Lazaretou, *Re orientation and good governance in tax administration* (2023), available (in Greek) at https://www.enainstitute.org/publication.
6 *Ibid.*
7 *Supra* note 5.
8 Independent Authority for Public Revenue, *G. Pitsilis: How AADE Integrates Artificial Intelligence into Its Controls and Operation* (2023), available (in Greek) at https://www.aade.gr/sites/default/files/2023-12/dt_20.12.2023_1..pdf.
9 M. Suksi, 'Administrative due process when using automated decision-making in public administration: some notes from a Finnish perspective' (2020), available at https://doi.org/10.1007/s10506-020-09269-x.
10 Kanellos, *supra* note 1.
11 Algorithm Watch, *Pre-crime at the tax office: How Poland automated the fight against VAT*, available at https://algorithmwatch.org/en/poland-stir-vat-fraud/.
12 University of Antwerp, *The eKasa case*, available at https://www.uantwerpen.be/en/projects/aitax/publications/ekasa/.
13 University of Antwerp, *The toeslagen affaire,* available at https://www.uantwerpen.be/en/projects/aitax/publications/toeslagen/.

use of the Systeem Risico Indicatie (SyRI),[14] for similar reasons.[15]

Regarding the structure of the paper, the analysis unfolds in two (2) main parts. The first part sets the foundations as follows: Section 1.A. refers to the definitions and terminology of AI, as well as the types of AI systems which are deployed in the context of tax administration. Section 1.B. presents the benefits and challenges for the public sector, while Section 1.C. introduces us to the core principles of the European Union's (hereinafter 'EU') administrative law and the effect of the use of AI from tax authorities on them. The second part consists of three (3) sections about the practical application of the core principles of EU administrative law by tax authorities in the AI era. Section 2.A. analyses the principle of good tax administration and how the rights deriving from it are affected. Section 2.B. refers to the principle of equality and the right not to be discriminated against and, finally, Section 2.C. examines whether the principle of proportionality is respected when AI substitutes tax authorities. The paper concludes with a brief summary of our respective findings.

1. PRELIMINARY REMARKS: DEFINITION OF THE SUBJECT IN QUESTION AND ESSENTIAL TERMINOLOGY

A. Definitions and Terminology

1. Definition of AI and Relevant Systems

Public perception, largely fed by literature and science fiction, often equates AI with robots, which are not just 'servants' of the human species, but surpass human intelligence. This narrative tends to inflate both its positive and negative dimensions and, further, seems to hinder its perception of a reality rather than a futuristic scenario.

In recent years, several definitions and approaches to AI have been formulated, with their common point being the correlation of AI systems with human or cognitive features. It is already evident, however, that the applications and targeting of AI go beyond Marvin Minsky's simple definition, according to which AI is nothing more than 'the technology that allows computers to do things that require intelligence when done by humans'.[16]

The most up-to-date definition of AI systems is embodied in Article 3(1) of the European Commission's Proposal for a Regulation Laying Down Harmonized Rules on Artificial Intelligence, according to which an AI system 'is a machine-based system designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments'.[17] A similar conceptual approach has been adopted by the Council of Europe in Article 2 of the Draft Framework Convention on AI.[18]

For the purposes of the present paper, we adopt the definition set out in the European

14 The Hague District Court, *NJCM et al. v The Dutch State* (2020), Judgement of 5 February 2020, available at: https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:RBDHA:2020:1878.

15 Appelman, Ó Fathaigh and van Hoboken, 'Social Welfare, Risk Profiling and Fundamental Rights: the Case of SyRI in the Netherlands', 12 *Journal of Intellectual Property, Information Technology and E-Commerce Law (JIPITEC)* (2021).

16 C. Lexcellent, *Artificial Intelligence versus Human Intelligence. Are Humans Going to Be Hacked?* (2019), at 5.

17 European Commission, Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonized Rules on Artificial Intelligence (hereinafter 'AI Act') and Amending Certain Union Legislative Acts, 206/21 of 21 April 2021 [text adopted by the European Parliament as of 13 March 2024], Art. 3(1). Since the submission of the paper (April 2024), Regulation 2024/1689 of the European Parliament and of the Council of 13 June 2024 was published (12.7.2024), which upheld the definition in question.

18 Committee on Artificial Intelligence (CAI) 'Zero Draft' Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law (hereinafter 'Framework Convention') [as of 6 January 2023], Art. 2.

Commission's Communication on AI[19] and reiterated by the High-Level Expert Group on AI: 'Artificial intelligence (AI) refers to systems that display intelligent behaviour by analysing their environment and taking action –with some degree of autonomy– to achieve specific goals. AI-based systems can be purely software-based, acting in the virtual world (e.g. voice assistants, image analysis software, search engines, speech and face recognition systems) or AI can be embedded in hardware devices (e.g. advanced robots, autonomous cars, drones or Internet of Things applications).'[20]

The reason why the above definition is preferred for the needs of the present paper is that it is very broad and technologically neutral, while at the same time emphasizing the dual use of AI systems, either as stand-alone software or as part of a hardware device. Such a distinction is crucial for their use within the tax administration and, consequently, for the opportunities and challenges arising, as will be further analysed in the following parts of the paper. Finally, it is noted that in the context of the present paper, where emphasis is given to the deployment of AI systems in the public sector, the terms artificial intelligence and automated decision-making (hereinafter 'ADM') are used interchangeably, as in the respective bibliography.[21]

2. Types of AI Systems Deployed in the Public Sector

Understanding the complexity and diversity of AI systems is crucial to ensure their regulation and, thus, their optimal use in public administration. A distinction should be made between, on the one hand, autonomous systems, the implementation of which requires the carrying out of assessments similar to those required for the adoption of administrative acts, and, on the other hand, systems which merely support the decision-making process of the relevant competent administrative bodies, the implementation of which remains subject to human supervision.[22]

Different AI systems are used at different stages of the administrative process. In the case of tax audits, in particular, AI may be present at every stage of the process, from the selection of cases for audit to the issuing of fines and tax assessments. Such systems may vary from symbolic AI, which operates on the basis of symbols, namely representations provided by the programmers, to machine (supervised) learning, which runs on the correlation between input data and expected outcomes, and / or unsupervised learning, which differs from the latter in that it is programmed to produce a possible output, without requiring labelled examples with regard to the relevant input.[23]

Most of the time, in everyday life, the way AI systems work is indifferent. For example, in relation to the e-mail spam filter, which operates with statistics to predict if an e-mail is spam, there is no need to understand the exact function of the respective algorithm because spam can be predicted with very high accuracy.[24] However, this is not the case for the use of AI in tax audits, since the use of AI in this context is inextricably

19 Commission Communication 237/18 of 25 April 2018.
20 High-Level Expert Group on Artificial Intelligence, *A Definition of AI: Main Capabilities and Scientific Disciplines* (2019), available at https://ec.europa.eu/futurium/en/system/files/ged/ai_hleg_definition_of_ai_18_december_1.pdf.
21 Kuziemski and Misuraca, 'AI governance in the public sector: Three tales from the frontiers of automated decision-making in democratic settings', 44 *Telecommunications Policy* (2020), at 2.
22 Hofmann, 'Automated Decision-Making (ADM) in EU Public Law', University of Luxembourg (2023), at 32.
23 Hofmann, 'An Introduction to Automated Decision-making (ADM) and Cyber-Delegation in the Scope of EU Public Law', University of Luxembourg (2021), at 3-4.
24 European Union Agency for Fundamental Rights, *Getting the future right – Artificial intelligence and fundamental rights* (2020), available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-artificial-intelligence_en.pdf.

linked to a potential violation of principles of administrative law and rights of the taxpayers under audit, varying from the reason behind the selection of their cases for audit to the calculation of the imposed tax or fine.

B. Benefits and Challenges for the Public Sector

From the perspective of public administration *per se*, AI presents great opportunities, including the automation of workflows, faster processing of information, enhanced quality of services or increased efficiency.[25] Current applications of AI are associated with solutions to inherent governmental problems such as resource allocation, managing large datasets, creation of scenarios and predictive, repetitive procedural tasks and managing diverse data.[26] Specifically under the scope of the present paper, which focuses on the use of AI systems on behalf of the tax authorities, AI's major advantage lies in its ability to make predictions that are much more comprehensive and accurate than human predictions, as they are based on the quick analysis of vast amounts of data. In contrast, a human would require much more time to analyse and comprehend the same amount of data. This data analysis further allows for the diagnosis of anomalies and discrepancies, a capability that is extremely useful in retrieving cases of tax fraud. In essence, fraud detection systems process data on financial activities to learn patterns associated with tax evasion[27] and then identify such patterns in new cases.

At the same time, the use of AI is linked to the guarantee of foreseeability in the action of the administration, in the sense that an administrative process based on basic programming responds to the requirements of the rule of law, since it can presumably result in objective and rational decisions, forming a transparent administrative practice that could be more calculable and produce predictable results.[28] In this context, the use of AI in public administration stimulates public trust in the government and public services because it promotes efficiency and effectiveness, driven by respect for the rule of law.[29]

Nevertheless, all the aforementioned benefits do not negate the character of AI systems as double-edged swords, since advantages may be outweighed by serious threats. The biggest challenge lies within the inherent characteristics of AI systems to operate as 'black boxes', given that it is almost impossible, even for programmers to understand the exact function of machine learning algorithms, questioning their accountability, liability and trust.[30]

Another challenge refers to the accurate identification of the material facts of each case and of the applicable rule. Difficulties arise when the applicable provision contains vague legal concepts, such as 'public interest', 'serious reason', and 'imminent risk', namely concepts which cannot be applied unless they are specified ad hoc. The very existence of such vague legal concepts in the applicable rule is inextricably linked to the granting of discretion to the administrative body called upon to apply it. This is particularly

25 Wirtz, Weyerer and Geyer, 'Artificial Intelligence and the Public Sector – Applications and Challenges', 42 *International Journal of Public Administration* (2019), at 596-615.

26 Misuraca, van Noordt and Boukli, 'The use of AI in public services: results from a preliminary mapping across the EU', in *Proceedings of the 13th International Conference on Theory and Practice of Electronic Governance* (2020), at 92-93.

27 M. Manzoni *et al.*, *AI Watch, Road to the Adoption of Artificial Intelligence by the Public Sector. A Handbook for Policymakers, Public Administrations and Relevant Stakeholders* (2020), at 17, available at https://publications.jrc.ec.europa.eu/repository/handle/JRC129100.

28 Entscheid, 'Artificial Intelligence in Public Administration – A Possible Framework for Partial and Full Automation', in I. Lindgren (eds.), *International Conference on Electronic Government* (2019), at 248-261.

29 van Noordt and Misuraca, 'Evaluating the impact of artificial intelligence technologies in public services: towards an assessment framework', *International Conference on Theory and Practice of Electronic Governance* (2020), at 12.

30 *Ibid.*, at 14.

problematic if the competent body is replaced by an AI system, since the latter would be asked to produce a decision based not only on data, but also on evaluations or on the balance of conflicting rights and interests.

The challenges posed by the use of AI systems within public administration arise not only where authorities exercise discretion, but also where their powers are non-discretionary, which appears to be the norm in the action of tax authorities in particular. In these cases, most of the issues raised are related to the protection of the principles of administrative law and respect for the rights of taxpayers. These concerns will be analysed in the next part of this paper.

C. The Core Principles of EU Administrative Law Affected by the Use of AI on Behalf of Tax Authorities

This part of the paper serves merely as an attempt to shed more light on the interconnection between the use of AI systems in decision-making by public authorities on one part and the selected fundamental rights and principles possibly affected by the other. Notwithstanding the question of whether AI should be regulated, rather than based solely on general principles,[31] awareness should be brought to the fact that -in some cases- compliance with the existing legal framework does not suffice for the protection of fundamental rights. In addition, a concrete understanding of how the AI systems work as well as of the exact content and scope of such rights is required to detect where the risk of a potential violation lies and, hence, adopt measures to mitigate it.

To this end, what follows is a non-exhaustive overview of certain core rights and principles of administrative law that may be affected when using AI in decision-making by public administration. Those rights and principles are developed further in the context of tax audits using AI in the second part of the paper. Subject to the length limitations of this paper, the main criteria taken into consideration for the selection of the rights and principles presented herein include a) their close relation with the rule of law,[32] and b) their special importance in the field of tax administration.

1. Principle of Good Administration

Good administration operates both as a general principle of EU law and, as Article 41 of the Charter of Fundamental Rights of the European Union (hereinafter 'the Charter') stipulates, as a fundamental right addressed to the EU institutions, bodies, and agencies. While Article 41 *per se* binds the EU administration, cognate requirements, notably the rights of defence and the duty to state reasons, apply to Member State authorities when they act within the scope of EU law.[33] The right functions as an umbrella guarantee encompassing, *inter alia*, the right to be heard, the right of access to the file and the obligation of the administration to give adequate reasons for its decisions.

Transparency is a key element entailed in all three aspects of the right to good administration: the effective exercise of the right to be heard presupposes access to the file, to get an insight into the legal and factual argumentation based on which the authority's decision has been made. In parallel, transparency lies at the heart of the duty to give reasons in the sense that not only enables the person affected to understand why a measure or action has been taken, but also 'guarantees accountability by facilitating the exercise of judicial review through an

31 In this respect, see indicatively: European Commission, AI Act, Explanatory Memorandum (21.4.2021), paras. 3.1. and 3.3.
32 AI Act, Art. 1, para. 1 and recitals 1, 2, 8, 28, 61 and 176, Art. 1, paras. 1, 4, 7, 8 and 24 of the Framework Convention.
33 AI Act recitals 48 and 60.

assessment of the legality of the decision's grounds'.[34]

Against this backdrop, AI-enabled administration raises practical challenges. One is how to guarantee timely, individualized access to the file for large numbers of affected persons. Another is how to ensure compliance with the duty to state reasons where AI systems may exhibit opacity or complexity that resists full *ex ante* explanation.[35] An approach to these issues is developed in Section 2.A.

2. Principle of Equality and the Right not to Be Discriminated

Equality before the law and non-discrimination[36] are enshrined in Articles 20 and 21 of the Charter respectively. Article 20 reflects a general principle of law included in all European constitutions and recognized by the Court of Justice of the European Union (hereinafter 'CJEU') as a basic principle of EU law.[37] Article 21 of the Charter prohibits any discrimination 'based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation'. These are commonly referred to as 'protected grounds', meaning 'a characteristic of an individual that should not be considered relevant to the differential treatment or enjoyment of a particular benefit'.[38] In view of the above, discrimination could be defined as the situation 'where one person is treated less favourably than another is, has been or would be, treated in a comparable situation…',[39] based on protected grounds.

The wording used in Article 21 ('*such as*') indicates the establishment of a non-exhaustive list and could be interpreted as providing a broad spectrum of protection extending to a wide range of new grounds.[40] Article 21 of the Charter corresponds to Article 14[41] of the European Convention on Human Rights (hereinafter 'ECHR'). However, there is a difference in their scope of application: Article 14 of the ECHR prohibits discrimination only in conjunction with the exercise of another right guaranteed by the Convention.[42] Conversely, the Charter's right to non-discrimination is 'a freestanding right that applies to situations that do not need to be covered by any other Charter provision'.[43] Article 1 of Protocol No. 12 to the ECHR bridges this gap by establishing a general prohibition of discrimination '*on any ground*' and '*by any public authority*' in the enjoyment '*of any right set forth by law*'.[44]

Against this background, it is crucial to assess whether deploying AI systems in administrative decision-making entails

34 Karaiskou, *Artificial Intelligence (AI) for Public Sector Decision Making: Rethinking Procedural Rights under EU law* (2023), available at https://digi-con.org/artificial-intelligence-ai-for-public-sector-decision-making-rethinking-procedural-rights-under-eu-law/.
35 FRA, *supra* note 24, at 81.
36 AI Act Art. 77 and recitals 27, 28, 31, 48, 58 and 60, Art. 3 and 12 of the Framework Convention.
37 Explanations relating to the Charter of Fundamental Rights, OJ 2007 C 303, at 17-35, Art. 20.
38 FRA and CoE, *Handbook on European non-discrimination law. 2018 edition* (2018), available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-handbook-non-discrimination-law-2018_en.pdf, at 161.
39 This is part of the definition of the term 'direct discrimination' provided in the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180, at 22-26, Art. 2; and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303, at 16-22, Art. 2.
40 FRA Report, *supra* note 24, at 68.
41 See also 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' (2022), available at https://www.echr.coe.int/documents/d/echr/Guide_Art_14_Art_1_Protocol_12_ENG.
42 In article 14 of the ECHR it is stipulated that 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination …'.
43 FRA and CoE, *supra* note 38, at 35.
44 Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS no. 177), Explanatory Report, para. 21, available at https://rm.coe.int/16800cce48.

discrimination risk. One could argue that since AI systems produce results based on the data already processed, the exclusion of protected information would suffice to mitigate such risk. Unfortunately, this is not always the case, given that 'traces of protected groups are often hidden in other information',[45] meaning that non-sensitive information contained in AI databases may be associated with protected characteristics[46] and therefore lead to discrimination. Examples of such an association are provided in Section 2.B.

3. Principle of Proportionality

This principle requires that 'measures taken by a public authority in pursuance of its powers shall not be excessive in terms of their impact on the rights and interests of individuals, and shall only go as far as is necessary, and to the extent required, in order to achieve the desired goal'.[47] Applying this fundamental principle in the field of new technologies, the European Court of Human Rights (hereinafter 'ECtHR') observed in *S. and Marper v. the UK*[48] that 'any State claiming a pioneer role in the development of new technologies bears special responsibility for striking the right balance in this regard', meaning the protection of fundamental rights.

In respect to AI use in decision-making by public authorities, the first tier of the proportionality test relates to the necessity to use an AI system, while the second entails the suitability of the means used to achieve the relevant aim. The last one, the fair balance test, taking place when reviewing the output of the AI system used, requires 'an examination of the benefits of the AI against its impacts and potential disadvantages, such as the potential lack of transparency or its potentially detrimental effect on minority classes of people'.[49]

2. THE PRACTICAL APPLICATION OF THE CORE PRINCIPLES OF EU ADMINISTRATIVE LAW FROM TAX AUTHORITIES IN THE AGE OF ARTIFICIAL INTELLIGENCE

Following the theoretical approach, this part focuses on the practical examination of the aforementioned principles at the level of tax administration in the era of AI. The aim of this part is to examine whether and to what extent an AI system used by the tax administration can be compatible with the requirements of the principles of good administration, non-discrimination, and proportionality.

A. The Principle of Good Tax Administration in the AI Era

In the context of tax administration, the right to good administration encompasses a taxpayer's right to have their affairs handled impartially and fairly by the authorities in compliance with the right to be heard, the right access to the file so as to enable effective review of the tax administration's decision, as well as the administration's obligation to state adequate reasons.[50]

45 FRA Report, *supra* note 24, at 70.

46 The most used term in AI terminology is *'protected attributes'* and includes race, religion, national origin, gender, marital status, age, and socioeconomic status. More information available at https://ocw.mit.edu/courses/res-ec-001-exploring-fairness-in-machine-learning-for-international-development-spring-2020/pages/module-three-framework/protected-attributes/.

47 Council of Europe, *Comparative Study on Administrative Law And the Use of Artificial Intelligence And Other Algorithmic Systems in the Member States of the Council of Europe* (2022) available at https://www.coe.int/documents/22298481/0/CDCJ%282022%2931E+-+FINAL+6.pdf/4cb20e4b-3da9-d4d4-2da0-65c11cd16116?t=1670943260563, at 11.

48 ECtHR, *S. and Marper v. the United Kingdom [GC]*, Appl. nos. 30562/04 and 30566/04, Judgement of 4 December 2008, at para. 112. All ECtHR decisions are available at https://hudoc.echr.coe.int/.

49 Williams, 'Rethinking Administrative Law for Algorithmic Decision Making', 42 *Oxford Journal of Legal Studies* (2022) 468, at 492. The author aptly observes that 'if an ADM is discriminatory, it will also in all probability not be necessary for proportionality purposes. If it is not necessary to treat one group in such a disadvantageous way, how can it be necessary for another group?'.

50 Bianco and Pantazatou, *Good Administration in the AI Era: The Case of Tax Administrations,* available at https://digi-con.org/good-administration-in-the-ai-era-the-case-of-tax-administrations/.

As a preliminary step, before addressing each of the components, the applicable legal basis for the invocation and application of this principle must be ascertained. The right to good administration, as enshrined in Article 41 of the Charter, does not apply to direct taxation, since the latter remains unharmonized. Furthermore, regarding the *ratione personae* scope of said Article, it only applies to persons dealing with the institutions, bodies, offices and agencies in the Union. Consequently, the right solely protects taxpayers who deal with an EU body using AI for tax purposes. However, this is a very unlikely scenario, as no central EU tax administration exists.[51]

Therefore, the most appropriate legal basis for the protection of taxpayers *vis-à-vis* the tax administration is the principle of good administration, as established in the CJEU case law. Besides, the CJEU reiterates in numerous cases that 'the right to good administration, enshrined in Article 41 of the Charter, reflects a general principle of EU law, which is applicable to Member States when they are implementing that law'.[52] This means that, as long as tax administrations are using AI tools in their fulfilment of EU obligations, taxpayers would be able to rely on this principle.[53] This approach is in conformity with Member States' procedural autonomy, as well as their retained sovereignty in direct taxation. At the same time, though, this approach leads to the conclusion that the application and the content of good tax administration are ultimately left to the Member States and their national courts.[54]

1. The Right to Be Heard

According to CJEU's settled case law, the right to be heard 'guarantees every person the opportunity to make known his or her views effectively during an administrative procedure and before the adoption of any decision liable to affect his or her interests adversely. In addition, ... the right to be heard pursues a dual objective. First, to enable the case to be examined and the facts to be established in as precise and correct a manner as possible, and, secondly, to ensure that the person concerned is in fact protected. The right to be heard is intended, *inter alia*, to guarantee that any decision adversely affecting a person is adopted in full knowledge of the facts, and its purpose is to enable the competent authority to correct an error or to enable the person concerned to submit such information relating to his or her personal circumstances as will argue in favour of the adoption or non-adoption of the decision, or in favour of its having specific content'.[55]

In the tax administration context, authorities are required to give taxpayers the opportunity to express their views throughout the procedure. In principle, the hearing must take place prior to the authorities' decision-making. Limited exceptions may be justified (i) where urgency requires immediate adoption and enforcement; (ii) where a prior hearing could not have led to a different result;[56] or (iii) where a subsequent procedure following a reasoned objection, where the right to be heard is guaranteed.[57] Nevertheless, with regard to the latter exception, as noted by the CJEU, in cases of a lack of a prior hearing of a taxpayer 'his rights of defence are infringed even

51 *Ibid*.
52 C-219/20, *Bezirkshauptmannschaft Hartberg-Fürstenfeld* (EU:C:2022:89), at para. 37.
53 *Supra* note 50.
54 *Ibid*.
55 T-510/17, *Antonio Del Valle Ruíz* (EU:T:2022:312), at para. 120.
56 Kokott, Pistone and Miller, *Public International Law And Tax Law: Taxpayers' Rights*, available at https://www.law.georgetown.edu/international-law-journal/wp-content/uploads/sites/21/2021/06/GT-GJIL210016.pdf, at 399.
57 C-418/11, *Texdata Software GmbH* (EU:C:2013:588), at para. 85.

though he can express his views during a subsequent administrative objection stage, if national legislation does not allow the addressees of such demands, in the absence of a prior hearing, to obtain suspension of their implementation until their possible amendment'.[58]

In cases where the tax administration uses AI for decision-making, the taxpayer's right to be heard requires stronger guarantees. If the use of AI systems is strictly limited to providing input for an independent judgement made by human officials, the right to be heard can easily be integrated into the decision-making process.[59] However, in the case of the adoption of an ADM system, the same right cannot be exercised, since there is no such thing as a hearing before a machine in such a way as to lead to a different decision by the latter on the basis of crucial claims and evidence. In this case, it is our view that the lack of a hearing prior to the decision cannot be outweighed by the accuracy and transparency of the ADM system.

Considering the above, an AI system, in order to comply with the right to be heard, must be subject to human oversight.[60] This human intervention should take one of the following forms: either (a) the form of the final decision-making body, which is simply assisted in its work by an AI system, or (b) the form of the 'human-in-command', namely of the person responsible for overseeing the overall activity of the AI system (including its broader economic, societal, legal and ethical impact) and for deciding when and how to use the system in any particular situation,[61] or (c) the form of the 'appellate' body, which deals with an administrative appeal against a decision taken by an AI system, in order to ensure that the taxpayer is heard at least before the decision on his appeal is taken. Only under the above conditions is the requirement for 'trustworthy'[62] AI met.

2. The Right to Access the Files

Access to the file is an essential condition for the effective exercise of the rights of defence, especially in tax proceedings. As noted by the Advocate General Bobek, 'a timely and appropriate exchange is not solely in the interest of the taxpayer. It is also in the interest of the tax administration to adopt a correct decision on the basis of all the pertinent information. That type of exchange provides for a collaborative set-up, enabling fluid communication between the individual and the administration'.[63]

The specificity of this right in the context of tax audits lies in the fact that certain information within the taxpayer's file might be confidential. In this case, according to CJEU's case law, the right to access one's file is justifiably limited, to 'protect requirements of confidentiality or professional secrecy, which are liable to be infringed by access to certain information and certain documents'.[64] Even in that case, though, it can be argued that access to the relevant documents may be granted, if necessary, through an appropriate disclosure mechanism[65] (*e.g.*, partial

58 Joined Cases C-129/13 and C-130/13, *Kamino International Logistics BV and Datema Hellmann Worldwide Logistics BV* (EU:C:2014:2041), at para. 73.
59 *Supra* note 46, at 13-14.
60 European Commission High-Level Expert Group on Artificial Intelligence, *Ethics Guidelines for Trustworthy AI*, available at https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai, at 16.
61 *Ibid*.
62 AI Act, recital 1.
63 Opinion of Advocate General Bobek, C-298/16, *Teodor Ispas and Anduța Ispas* (EU:C:2017:650), at para. 120.
64 C-298/16, *Teodor Ispas and Anduța Ispas* (EU:C:2017:650), at para. 36.
65 ECtHR, *McGinley and Egan v. United Kingdom*, Appl. nos. 21825/93 and 2341/94, Judgement of 9 June 1998, at 86 and 90.

disclosure[66], 'gist' summaries[67], or in-camera judicial review[68]).

Especially in tax audits, it is crucial to clarify which elements of the file the taxpayer is allowed or even required to have access to. Suppose an audit is triggered by the detection of a fraudulent tax receipt: the initial audit concerns the issuer of said receipt and then extends to its recipient. In this case, a question arises as to whether the recipient, in preparing their defence, may access the audit report concerning another person, namely the issuer, notwithstanding its confidential nature. Moreover, in preparing the taxpayer's defence, it is likely that evidence collected in the context of previous criminal proceedings will be sought. On this matter the CJEU has acknowledged that 'when the tax authorities intend to base their decision on evidence obtained, as in the case of the main proceedings, in the context of criminal procedures and related administrative procedures initiated against the taxable person's suppliers, the principle of respect for the rights of the defence requires that the taxable person be able to have access, during the procedure of which he is the subject, to all of that evidence and to the evidence that may be useful for his or her defence, unless public-interest objectives justify restricting that access'.[69]

Ensuring the right of access to the file is further complicated when a AI system is involved either in the collection of the data for the tax audit or in the decision to impose taxes and fines on the audit. In such cases, an AI system can be in conformity with the principle of good administration only under the following three conditions, which must be cumulatively met: (a) the system enables timely, effective access to the documents and data that form the basis of the decision, (b) it restricts access, where necessary, to information protected by confidentiality or professional secrecy through proportionate measures and (c) it allows the audited person to submit new, potentially decisive crucial information and ensures that such submissions are meaningfully considered.

3. The Obligation to State Reasons

The duty to state reasons is enshrined in the second paragraph of Article 296 (2) of the Treaty on the Functioning of the European Union (hereinafter 'TFEU'), as well as in Article 41(2)(c) of the Charter. It should be noted that the Treaty defines reason given by the administration as a *duty*, whereas the Charter reflects the correlative *right* of the individuals. In functional terms, regardless of its characterization, the duty/right to give/to be given reasons legally protects citizens, both *ex-ante* and *ex-post*. Specifically, it urges the administration to reconsider the legality of its decision, while providing citizens with a legal basis for their defence against such a decision.[70]

The CJEU's approach in Hoechst to the adequacy of statements of reasons for investigatory measures should be applied, in our view, by analogy to tax audits: the scope of the duty to state reasons cannot be curtailed on grounds of investigative efficiency.[71]

Particularly in the case of automated decision-making by tax authorities, this right acquires a further dimension. This is because it is not sufficient to only provide the reasons

66 C-358/16, *UBS Europe and Others* (EU:C:2018:715), at paras. 65-70.
67 ECtHR, *A. and Others v. UK*, Appl. no. 3455/05, Judgement of 19 February 2009, at 67, *Muhammad and Muhammad v. Romania*, Appl. no. 80982/12, Judgement of 15 October 2020, at 156.
68 C-450/06, *Varec SA* (EU:C:2008:91), at paras. 52-55.
69 C-189/18, *Glencore Agriculture Hungary Kft* (EU:C:2019:861), at para. 57.
70 Joined Cases C-225/19 and C-226/19, *R.N.N.S. and K.A.* (EU:C:2020:951), at para. 43.
71 Joined Cases C-46/87 and C-227/8, *Hoechst AG* (EU:C:1989:337), at para. 41.

behind the administrative decision that led to the imposition of the tax or fine, but it is also necessary to understand the mechanism applied by the AI system and the way in which it reached the decision.[72]

Given that the output of AI-driven systems appears incomprehensible due to their inherent complexity, the right to be given reasons is interlinked with the concept of accountability and, thus, with the need for human oversight. This is exactly the ratio behind Article 14 of the AI Act, regarding high-risk AI systems.[73] Therefore, an AI system is to be deemed as in conformity with the principle of good administration, under its more specific manifestation of the right to be given reasons when human intervention throughout its lifecycle is guaranteed. Furthermore, the human responsible for the oversight of the respective AI tool is to be acquainted with the mechanism of the applied algorithm, in a manner that allows them to give reasons to the interested taxpayer for the selection of their case for audit or the imputation of taxes or fines against them.

B. The Principle of Equality and the Right not to Be Discriminated

1. The reasons behind the rise-up in the use of AI-systems in Tax Administration

The use of AI systems in decision-making processes in public administration is gradually gaining ground, *inter alia*, in the field of taxation. The reason for this development lies in the tremendous possibilities it has to offer. First and foremost, their use enables the fast process of a vast amount of data, with a decreased probability of error, which would otherwise require long working hours by a significant number of tax officials. In addition, such systems can conduct information classification and data matching, functions that serve personalized and predictive analysis purposes, thus making it easier to trace irregularities in taxpayers' transactional behaviour and/or indications of tax fraud patterns that could then become the subject of a tax audit. Last but not least, AI systems may be 'to the benefit of better communication between tax administrations and taxpayers',[74] for example by making use of 'virtual conversational assistants and chatbots to assist taxpayers with inquiries regarding the completion of their tax return or technical issue'.[75] In that way, tax officials could be allocated to more complex and demanding projects contributing to the increased efficiency of the tax authorities. In a nutshell, the introduction of AI systems in the tax administration could positively impact the tax system in general, to the extent that it can enhance increased tax compliance and combat tax evasion effectively.

2. Discrimination in Disguise

The above being said, one might reasonably wonder where the pitfalls lie. Tax law terminology often admits multiple interpretations, creating ambiguity and potential misclassifications.[76] That said, the pitfalls arise from two distinct sources. First, legal ambiguity: tax-law terms often admit multiple interpretations, which must be operationalized into decision rules; this discretion can yield inconsistent or erroneous classifications. Second, data and modelling bias: even if protected

72 Hofmann, *supra* note 22, at 22.
73 AI Act, Art. 14.
74 Kerinc and Serrat Romaní, 'AI biases and its consequences on taxation', Maastricht University Press (2022), available at https://pubpub.maastrichtuniversitypress.nl/pub/ai-biases-and-its-consequences-on-taxation, at 4.
75 *Ibid*.
76 Kuźniacki and Tyliński, *Legal risks stemming from the integration of artificial intelligence (AI) to tax law* (2020), available at https://kluwertaxblog.com/2020/09/04/legal-risks-stemming-from-the-integration-of-artificial-intelligence-ai-to-tax-law/#_ftn5.

attributes are excluded, non-representative training data and proxy variables (seemingly neutral features correlated with protected characteristics) can reproduce disparate impacts, for example, concentrating audit selections on particular groups. The examples below illustrate the second risk in practice.

The first example is derived from FRA's findings when interviewing, among others, public administration officials involved in the AI field and demonstrates the correlation between tax identification numbers and immigrant status.[77] When reviewing their algorithms, a public administration authority using AI in tax and customs found a higher error rate in returns associated with recently issued national identification numbers, which have almost always been attributed to immigrants. Further research revealed that the outputs of people with recent identification numbers more often contained errors because they had never filed their taxes before and did not know how to do so (which was also the case for non-migrants).

A case of racial disparity in the selection of tax returns for audit by the Internal Revenue Service (IRS) of the United States of America came to light after the publication of a study from Stanford University estimating that black taxpayers are audited at three to five times the rate of non-black taxpayers.[78] IRS underlined that it does not collect data on race nor considers race as part of its case selection and audit processes.[79] Again, probably the use of proxy information is to blame. For example, the ZIP code data included in the tax return can indicate racial information about who is living in a certain area.[80]

Within the same context, the SyRI case (Netherlands) revealed that the risk indicators used by the machine-learning algorithm *('Systeem Risico Indicatie')* aiming at the detection of welfare or tax fraud, disproportionately affected low-income people and minorities. The Hague District Court asserted that there is, in fact, a risk that SyRI inadvertently creates links based on bias, such as a lower socio-economic status or a migration background.[81] This case also poses the more technical question about how the burden of proof will be allocated between the parties, given the information asymmetry involved, since taxpayers do not have access to the AI system software and therefore it would be difficult -if not impossible- to substantiate the discrimination risk.[82]

Another -apparently remote but still existent- risk, associated with the use of AI-systems in tax administration relates to the deliberate production of discriminatory tax outcomes.[83] That could be the case when a government, in pursuance of its fiscal agenda, may opt for AI models that favour certain groups of taxpayers to the detriment of others, without regard to any existing criteria under General Anti-Abuse Rules (GAAR) provisions (e.g. Article 6 of the Anti-Tax Avoidance

77 FRA, *supra* note 24, at 70.
78 Elzayn *et al.*, 'Measuring and Mitigating Racial Disparities in Tax Audits', Stanford University (2023), available at https://drive.google.com/file/d/1kA7CG3cLq6eWmwBVgTDOIMhxuGZwRJ5O/view.
79 The letter of the IRS commissioner to the members of the Senate Finance Committee, available at https://www.irs.gov/pub/newsroom/werfel-letter-on-audit-selection.pdf.
80 Dorothy Brown's (Georgetown law professor) interview with NBC News, available at https://www.nbcnews.com/news/nbcblk/irs-acknowledges-racial-bias-tax-auditing-based-professors-work-rcna85630.
81 The Hague District Court, *supra* note 14, point 6.93. It was the lack of transparency, due to insufficient and unverifiable explanations for the risk indicators used, that led the Hague District Court to find a violation of Art. 8(2) of the ECHR. In this respect, see also *supra* note 15.
82 Rachovitsa and Johann, 'The Human Rights Implications of the Use of AI in the Digital Welfare State: Lessons Learned from the Dutch SyRI Case', 22 *Human Rights Law Review* (2022), at 1-15.
83 Kuźniacki and Tyliński, *supra* note 72.

Directive).[84] For instance, if the government agenda includes the increase in foreign direct investments, AI systems may have been designed in a way that facilitates taxpayers from target countries, meaning that those taxpayers will not be denied a tax advantage, irrespective of whether this should be the appropriate treatment based on the relevant GAAR provisions, while taxpayers from other countries may be treated in accordance with the relevant -or even stricter- criteria under the GAAR.[85]

3. Non-Discrimination and Taxation under EU and ECHR Law

Based on CJEU settled case law, although the field of direct taxation does not fall within the purview of the EU, the powers of the Member States must nevertheless be exercised in compliance with Union law,[86] including those safeguarding fundamental freedoms and principles of EU law. One of these principles is that of non-discrimination as embedded in Article 2 of the Treaty on European Union (hereinafter 'TEU') as well as Article 21 of the Charter.

Under the ECHR, the non-discrimination principle, enshrined in Article 14 in conjunction with Article 1 of Protocol no. 12 to the ECHR, with respect to matters of taxation,[87] is often applied along with the protection of property set forth by Article 1 of Protocol No. 1 to the ECHR. According to this principle, all taxpayers should be treated equally by the tax authorities that are required to base their decisions merely on the applicable tax provisions, in light of the specific merits of each case. 'A difference of treatment is discriminatory if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realized"'.[88] A tax decision (possibly involving the use of AI systems) would be considered discriminatory, in case its issuance had been based on protected attributes (e.g. gender, race) that are irrelevant to the application of the tax provisions at hand.[89]

4. Possible Way-Outs

Consequently, it becomes apparent that both the detection and mitigation of direct or indirect discrimination risk involved in the use of AI-driven technologies, especially in tax administration,[90] could be considered as one of the most pressing challenges of our era, requiring a multidimensional approach. At the stage of algorithm design, discrimination should be prohibited by default in conjunction with a fundamental rights impact assessment[91] that also takes discrimination risk into account. Further, to ensure

84 Council Directive 2016/1164/EC of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ 2016 L 193.

85 *Ibid*.

86 C-279/93, *Schumacker* (EU:C:1995:31), at para. 21 and the case law cited, C-446/03, *Marks and Spencer* (EU:C:2005:763), at para. 29.

87 B. Kuźniacki *et al.*, 'Towards eXplainable Artificial Intelligence (XAI) in Tax Law: The Need for a Minimum Legal Standard', available at:https://cadmus.eui.eu/bitstream/handle/1814/74855/Towards_eXplainable_artificial_intelligence_in_tax_law_2022.pdf?sequence=2&isAllowed=y, note that 'this legal basis is rarely successfully invoked by taxpayers before the ECtHR, as that court has recognized a wide margin of appreciation for States in tax matters regarding discriminatory tax measures'. ECtHR found a violation of the non-discrimination principle, *inter alia*, *Darby v. Sweden*, Appl. no. 11581/85, Judgement of 23 October 1990, *Glor v. Switzerland,* Appl. no. 13444/04, Judgement of 30 April 2009, *Guberina v. Croatia*, Appl. no. 23682/13, Judgement of 22 March 2016, *Assemblée Chrétienne Des Témoins de Jéhovah d'Anderlecht and Others v. Belgium*, Appl. no. 20165/20, Judgement of 5 April 2022.

88 ECtHR, *Karlheinz Schmidt v. Germany,* Appl. no. 13580/88, Judgement of 18 July 1994, at para. 24

89 Kuźniacki and Tyliński, *supra* note 72.

90 AI Act, Annex III, point 5(a): 'AI systems intended to be used by public authorities or on behalf of public authorities to evaluate the eligibility of natural persons for public assistance benefits and services, as well as to grant, reduce, revoke, or reclaim such benefits and services' are classified as high-risk systems. Kuźniacki et al, supra note 84, note that 'while such benefits are not necessarily related to taxation, this formulation covers the use of AI systems for assessing matters such as need-based tax credits.'

91 AI Act, Art. 27 and Framework Convention, Art. 24.

transparency[92] with regard to the data used for training the algorithm, access to which may be limited due to copyright and business competition issues,[93] algorithms audit[94] properly documented (e.g. by specialized external auditors or dedicated public bodies)[95] may provide a viable solution. Human intervention[96] and oversight,[97] as already analysed in Section 2. A1. above, are also utterly important to safeguard respect for fundamental rights. To this end, public servants, such as tax officials, should, for their part, be well educated in the use of AI systems and thus in a position to critically reflect on the results produced,[98] e.g. validate the tax results when reviewing a tax decision issued with the use of an AI-system. Last but not least, a certain level of AI literacy[99] is also required at the judicial level,[100] so as for the effective review of an AI-driven decision to be possible.

C. The Principle of Proportionality

This section addresses the principle of proportionality, as developed in the recent case law of the CJEU and the ECtHR, on key issues that arise during tax audits. In particular, it examines whether it would be feasible, under the light of the principle of proportionality, for the AI to substitute tax authorities for deciding on the imposition of measures and sanctions.

In the cases that will be cited, the tax administration was required, before taking any measure or sanction, to determine whether the taxable person had intentionally committed a tax offence or whether there were reasons independent of the person. In those cases, the authorities should impartially examine the taxpayer's motives and evaluate human behaviour, such as intent, good or bad faith, diligence and attributable errors. We will then present first the case law of CJEU and then of ECtHR.

The principle of proportionality, enshrined in Article 52 of the Charter and as a general principle of EU law, governs tax audits, 'as Member States must protect the financial interests of the Union, adopt the measures necessary to guarantee the effective and comprehensive collection of own resources, ensuring collection of all VAT due on their territory and to prevent tax evasion',[101] as provided in the Treaties.[102] Therefore, while it is legitimate for the measures adopted by the Member States 'to preserve the rights of the public exchequer as effectively as possible, they must not go further than is necessary for that purpose'.[103]

The Court held that national measures which bring about, de facto, a system of strict joint and several liability go beyond what is

92 AI Act, Art. 1, para. 2 (d), 13 and 50 along with recital 27 and Art. 15 of the Framework Convention.
93 FRA, *#BigData: Discrimination in data-supported decision making*, available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-focus-big-data_en.pdf, at 7.
94 In this respect, see Sandvig *et al., Auditing Algorithms: Research Methods for Detecting Discrimination on Internet Platforms* (2014), available at https://websites.umich.edu/~csandvig/research/Auditing%20Algorithms%20--%20Sandvig%20--%20ICA%202014%20Data%20and%20Discrimination%20Preconference.pdf.
95 FRA, *supra* note 89.
96 Framework Convention, Art. 15 and 20, paras. 1 and 2. In this respect see also the short reference to '*the right of human intervention*' in Kuźniacki and Tyliński, *supra* note 72.
97 AI Act, Art. 14, para. 2.
98 AI Act, recital 73 and Framework Convention, Art. 26.
99 AI Act, Art. 4, read with recitals 20, 56 and 91.
100 AI Act, Annex III, point 8(a): 'AI systems intended to be used by a judicial authority or on their behalf to assist a judicial authority in researching and interpreting facts and the law and in applying the law to a concrete set of facts […]', are classified as high-risk. In this regard, at recital 61 it is clarified that 'The use of AI tools can support the decision-making power of judges or judicial independence, but should not replace it: the final decision-making must remain a human-driven activity.' The above should be considered applicable in tax-related cases as well.
101 C-1/21, *MC v. Direktor na Direktsia* (EU:C:2022:788), at paras. 57, 59, 60, 74, 76 and the case law cited.
102 TEU, Art. 4, para. 3 and TFEU, Art. 325, para. 1.
103 *Supra* note 98, at para. 73 and the case law cited.

necessary to preserve the public exchequer's, and it would be disproportionate if the taxable person acted diligently and in good faith.[104] In VAT deduction cases, time limits are proportionate when they do not introduce excessive procedural requirements in relation to the objectives pursued and do not impose an economic burden on the taxable person.[105] In order to assess whether the principle has been observed, the reasons giving rise to the delay in the tax declaration should be taken into consideration, whether they are independent of the person or whether they reflect errors attributable to the taxpayer.[106] Thus, the right of deduction is exercised whenever the elements on the basis of which a tax assessment may be challenged are discovered after that tax assessment has been issued.[107] In order to determine whether a taxable person acted in that capacity when acquiring goods, the tax or customs authorities should examine the possibility that such an intention may be conveyed implicitly.[108] It is also important if the irregularity of an unjustified VAT refund is the result of an error of assessment made by the parties who wrongly classified a transaction as one that is exempt from VAT, or such specific circumstances do not exist.[109]

All the above raise the question of whether the use of AI systems in tax auditing is suitable to achieve the legitimate aims pursued, given that each case is unique and resists one-size-fits-all rules. The same question arises while overviewing the ECHR's case law. The fair balance test is an act between the requirements of the public interest and the requirements to protect the fundamental rights of the individual.[110] In particular, there should be a proportionality between the means used and the objective pursued.[111] The ECtHR has held that a fair balance was struck in the case of the imposition of a fine and the suspension of business activity, for failure to issue an invoice for the sale of goods. This occurred because the authorities took into account, *inter alia*, the applicant's conduct and the social values at stake.[112] On the contrary, it held that a fair balance was not observed in the case of an erroneous tax assessment when the tax authorities pursued their actions with persistence and unjustified delay in returning the unduly paid to the taxpayer for years, while the applicant had enforcement proceedings against him.[113]

Notwithstanding the above, for acts performed under non-discretionary powers[114], where the taxpayer's intention is not assessed, AI can be considered as an appropriate means of tax audit, since the criteria for issuing the act are absolute and accurate. However, when tax administration enjoys discretionary powers, reliance on AI systems may be problematic.

Properly governed, AI can perform tasks previously carried out by humans and expand the capacity to collect and process large amounts of datasets, while mitigating the possibility of power abuse of the administration body, making the administration neutral and impartial.[115]

104 *Supra* note 98, at para. 76.
105 C-895/19, *A. v. Dyrektor Krajowej Informacji Skarbowej* (EU:C:2021:216), at paras. 23 and 26.
106 *Ibid*, at para. 26.
107 C-835/18, *SC Terracult SRL* (EU:C:2020:520), at paras. 34, 37, 39.
108 C-45/20*, E v. Finanzamt N and Z v. Finanzamt G (*EU:C:2021:852), at paras. 41, 43, 65 and *C-656/19, Bakati Plus* (EU:C:2020:1045), at para. 64 [for customs formalities].
109 C-935/19, *Grupa Warzywna* (EU:C:2021:287), at para. 37.
110 G. Gerapetritis *et al.*, *General Principles of Public Law* (2014) (in Greek), at 224-225.
111 L.A Sisilianos, *The European Convention of Human Rights* (2017) (in Greek), at 798 and 804.
112 ECtHR, *C. Zorina International S.R.L. v. Romania*, Appl. no. 15553/15, Judgement of 27 June 2023, at paras. 38, 53.
113 ECtHR, *Antonov v. Bulgaria*, Appl. no. 58364/10, Judgement of 28 May, at paras. 61-63.
114 ECtHR, *Bežanić and Baškarad v. Croatia*, Appl. nos. 16140/15 and 13322/16, Judgement of 19 May 2022, at paras. 79-80.
115 *Supra* note 110.

It could also help to streamline the administrative decision-making process, since these tools can undoubtedly summarize all the necessary information. This could be a more efficient and objective way than the human brain could possibly do, moreover saving valuable time. The aim in these cases is to create algorithms that have been trained with reliable and unbiased data to search for tax offences.

A cautionary example is the Dutch *toeslagen* (childcare-benefits) affair.[116] The tax authority's automated risk models flagged files for recovery on the basis of minor formal errors (e.g., an omitted signature), triggering automatic cessation of benefits and full clawback. Moreover, dual nationality was reportedly used as a negative risk factor in recovery processes. Combined with a failure to apply proportionality and to consider individual circumstances, the system produced systemic, discriminatory and unduly harsh outcomes, causing severe hardship for many families (there are reported cases of suicide). AI may be suitable for rule-based, non-discretionary tasks (deadline checks, arithmetic verifications, cross-file matches) where criteria are clear and auditable. It is ill-suited—absent strong safeguards—for discretionary evaluations (intent, good/bad faith, diligence, and attributable error), which require context-sensitive, reasoned human judgment backed by transparency, traceability, and meaningful oversight.

The principle of proportionality requires the balance of means and ends, competing interests and objectives, as reflected in the proverb that 'one should not use a sledgehammer to crack a nut'.[117] Therefore, whenever tax authorities have discretionary power and rely on AI systems, the question of proportionality arises as to the applicability of the system's decision. An explanation as to why an AI system has generated a particular decision and what combination of input factors contributed to the harmful measure is not a fact.[118] Moreover, in cases where the tax administration must assess the good or bad faith of the taxable person, [119] or the reasons giving rise to the delay in a tax limit,[120] or the purposes of his economic activity,[121] the explainability of the decision is crucial for the legality of the act. Fairness entails the ability to contest and seek effective redress against decisions made by AI systems.[122] It is, thus, apparent, that without such substantial reasoning in the act, a judge cannot determine whether the principle of proportionality is violated or not.

As it is clear from the analysis of the case law, when tax authorities have discretionary powers, they must assess each case individually, weighing the intention of the taxpayer and circumstances against the public interest and relevant social considerations. In doing so, they should have the necessary perception and ethics to consider the subjective and internal state of the taxpayer and, at the same time, they should refrain from any abusive conduct. The balance is delicate and cannot be standardized *a priori* into a rule when so many variable factors must be considered. It is doubtful that an AI system can include these parameters, thus it will not be able to act in accordance with the principle of proportionality. Human oversight is therefore

116 *Supra* note 13.
117 High-Level Expert Group on Artificial Intelligence, *supra* note 60, at para. 2.2.
118 *Ibid.*
119 *Supra* note 98.
120 *Supra* note 102.
121 *Supra* note 105.
122 *Supra* note 60, at para. 2.2.

essential, as analysed in Section 2.A.1. All in all, an AI system cannot yet pass the test of suitability in the field of tax audits when the administration acts in discretionary power, and therefore cannot substitute human judgement.

CONCLUSION

Our world is experiencing AI breakthroughs one after another at tremendous speed. This paper shows that the opportunities are considerable, but so are the challenges, especially as regards the respect for fundamental rights and principles in the sensitive field of tax administration that has always been at the political centre of attention. Transparency, accountability, and meaningful human agency and oversight are among the key requirements to safeguard EU's values amid this AI revolution. The same conclusion seems to be applicable not only to tax authorities, but also to all aspects of public administration.

In all cases, the issue at stake is the development of a trustworthy, 'human-centric technology that should serve as a tool for people, with the ultimate aim of increasing human well-being'.[123] As the poet exhorts us: 'We must look for man wherever we can find him. When on his way to Thebes Oedipus encountered the Sphinx, his answer to its riddle was: "Man". That simple word destroyed the monster. We have many monsters to destroy. Let us think of the answer of Oedipus.'[124]

123 AI Act, recital 6.

124 G. Seferis, *I am a living contradiction…*, The speeches upon the reception of the Nobel Prize, Olga-Daphne Krinos and Ikaros Publishing (2023), at 55. The speech is also available at https://www.nobelprize.org/prizes/literature/1963/seferis/speech/.

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THE BINDING DECISIONS OF THE EUROPEAN DATA PROTECTION BOARD IN THE LIGHT OF ACCESS TO JUSTICE

This paper outlines the consistency mechanism of the European Data Protection Board (hereinafter EDPB), sets out the role of the binding decisions of the EDPB and presents an overview of the framework and structure of available judicial remedy. We are going to analyse a significant case, which influences the future of enforcement of data protection.

In *WhatsApp Ireland v. EDPB* (Case T-709/21), the General Court dismissed the direct action brought by WhatsApp against a binding decision of the EDPB as inadmissible. Consequently, if the Court of Justice upholds the decision of the General Court – which is subject to an appeal – the applicant has no right to bring an action according to Article 263 of the TFEU. This raises the question of what the correct way is to seek legal remedy against the EDPB's binding decisions.

Beyond case law and literature, we conducted a problem-centred expert interview with the head of the Hungarian Member of EDPB, the Hungarian Data Protection Agency (NAIH), to shed light on the relevant questions of legal disputes arising from the procedures of EDPB.

Building on this analysis, we propose innovative ideas for the effective remedy against the binding decisions of the EDPB.

KEYWORDS:

DATA PROTECTION | EUROPEAN DATA PROTECTION BOARD | CONSISTENCY MECHANISM | BINDING DECISION | RIGHT TO AN EFFECTIVE REMEDY | ADMISSIBILITY

Le présent article décrit le mécanisme de contrôle de la cohérence du Comité européen de la protection des données (ci-après l'« EDPB »), le rôle des décisions contraignantes de ce comité et présente une vue d'ensemble du cadre et de la structure des recours juridictionnels disponibles.

L'analyse se fonde sur un cas important, qui influence l'avenir de l'application de la protection des données : l'affaire *WhatsApp Ireland/EDPB* (T-709/21). Dans cette cause, le tribunal a déclaré irrecevable le recours direct introduit par WhatsApp contre une décision contraignante de l'EDPB. Si la Cour confirme la décision du Tribunal – actuellement sous pourvoi – la requérante ne disposerait pas du droit d'introduire un recours au titre de l'article 263 TFUE. Cette situation soulève la question cruciale de la voie adéquate pour contester les décisions contraignantes de l'EDPB.

Au-delà de la jurisprudence et de la doctrine, les auteurs ont mené un entretien avec le responsable du membre hongrois de l'EDPB, l'Agence hongroise pour la protection des données (NAIH), afin de faire la lumière sur les questions pertinentes des litiges juridiques découlant des procédures de l'EDPB.

Sur la base de cette analyse, les auteurs proposent des idées innovantes pour garantir un recours effectif contre les décisions contraignantes du comité européen de la protection des données.

MOTS-CLÉS :

PROTECTION DES DONNÉES | COMITÉ EUROPÉEN DE LA PROTECTION DES DONNÉES | MÉCANISME DE CONTRÔLE DE LA COHÉRENCE | DÉCISION CONTRAIGNANTE | DROIT À UN RECOURS EFFECTIF | RECEVABILITÉ

INTRODUCTION

From goddess Hera to Shakespeare's Shylock, many applicants were left without what they felt was the correct remedy for their legal problems by their judges.[1] In the aftermath of the decision T-709/21 of the General Court[2], which found that the direct action of WhatsApp Ireland Ltd. (hereinafter: WhatsApp) against the binding decision of the European Data Protection Board (hereinafter EDPB) was inadmissible, serious questions arise concerning the right to an effective remedy. Much like their fictional counterpart, WhatsApp also failed to convince their respective court to render a favourable decision. Following this – *in medias res* – preamble, this introduction aims to provide a brief overview of the key legal problems examined in this paper.

In 1995, a milestone in EU data-protection governance was reached in European Union history with the establishment of the Article 29 Working Party[3] (hereinafter: A29 WP), which is considered to be 'the most significant embodiment of regional coordination'[4] for the purpose of providing advisory activities related to the protection of individuals with regard to the processing of personal data. The A29 WP ceased to operate on 25 May 2018,[5] with the entry of the application of General Data Protection Regulation[6] (hereinafter GDPR) introducing a new cooperation model under the principle of one-stop-shop and consistency mechanisms. In parallel, as the successor of A29 WP under GDPR with a significantly stronger position and extended competences, a new institution started its operation: the EDPB. Focusing on this new approach of the safeguarding of individuals' personal data, the operation of the EDPB opened a new and closer way to cooperation between the data protection authorities in order to provide the coherent and the consistent application of GDPR across the Member States.[7]

The EDPB is an important central body for opinion and policy formation in EU data protection. Compared to A29 WP, the competencies of the EDPB have been strengthened (notably through binding decisions under Article 65 GDPR), which has reinforced its role. The EDPB operates democratically, since every Member State's supervisory authority (hereinafter SA) can express their opinion freely and members have equal rights.[8]

Against the backdrop of an 'EU implementation deficit', where Member States implement the same EU legal provisions 'unevenly', which negative effects for all actors, the introduction of the consistency mechanism was a welcome response. The binding decision of the EDPB may still leave certain questions for the SA to decide. This varies case by case.[9]

There are several cases against the binding decisions of the EDPB, among which the case brought by WhatsApp is 'crucial', because a question arises in this case whether the data controller concerned can sue the EDPB for its binding decision at all. It is unclear if the EDPB could participate in an administrative dispute in a member state, which, of course,

1 While Hera fails to convince prince Paris to award her the golden apple of discord in Greek mythology, Shylock is unable to claim his bond from the titular merchant of Venice, Antonio.
2 Case T-709/201, *WhatsApp Ireland v. European Data Protection Board* (EU:T:2022:783).
3 Directive 95/46/EC of the European Parliament and of the Council, OJ 1995 L 281/31, Art. 29.
4 L. A. Bygrave, *Data Privacy Law: An International Perspective* (2014), at 172.
5 Guidance from the European Data Protection Board by the Irish SA, available at https://www.dataprotection.ie/en/dpc-guidance/guidance-from-the-european-data-protection-board (9 April 2024).
6 Regulation of the European Parliament and of the Council 2016/679, OJ 2016 L 119/1.
7 GDPR, Chapter VII, Section 2-3., Article 68-76.
8 Problem-centred expert interview with Attila Péterfalvi, the Head of the Hungarian SA, 21 March 2024 (hereinafter Interview).
9 *Ibid.*

depends on the procedural codes of the member states.[10]

Case T-709/21 brought by WhatsApp is essential, as it designates the likely pathway of remedy against the binding decisions of the EDPB. Since the order of the General Court is subject to the applicants' appeal, the dispute is not yet settled.[11]

The Court of Justice of the European Union (hereinafter CJEU) accepts that the fundamental rights to access to the court may be subject to limitations,[12] including admissibility requirements. However, such restrictions must have a legitimate aim and there must be a reasonable proportionality between the means used and the aim pursued.[13] If the action is found inadmissible by the Court of Justice, other ways of legal remedy might be necessary to be explored.

1. EUROPEAN DATA PROTECTION BOARD

A. The Institutional Basis for the Operation of the EDPB

EDPB is founded to be a legal entity part of the Union's organizational system.[14] It is represented by its Chair and consists of the head of one SA of each Member State and of the European Data Protection Supervisor or their representatives.[15] The institution's main responsibility is to establish the consistent application of the GDPR on its own initiative or upon the request of the Commission.[16] EDPB's competences are to be determined extended, not exclusively involving advisory, orienting and monitory powers but to adopt binding decisions as well.[17]

Its characteristics had it endow with being a unique and singular entity in the European Union where not only EDPB but supervisory authorities are to ensure the unified employment of the GDPR.[18] These authorities might be defined as national executive bodies who perform their main task by making binding decisions for themselves in cases, for example, where an objection was lodged or turned down to a draft decision of the lead supervisory authority (hereinafter LSA).[19] This activity is part of the consistency mechanism[20] that the paper is aimed at encompassing. The consistency is significant, as the binding decisions of the EDPB are rendered as a result of this mechanism. The binding nature of the EDPB's decision guarantees that the LSA is obligated to follow the decision of the EDPB in its final decision.[21]

B. Cooperation between Supervisory Authorities and the EDPB

EDPB is empowered with extensive powers and tasks in the interest of the consistent and the correct application of the GDPR.[22] This chapter focuses on the consistency mechanism demonstrated as follows:[23]

10 *Ibid.*
11 *Ibid.*
12 This right is guaranteed by Article 6 ECHR and in Article 47 of the Charter of Fundamental Rights. Case T-19/06, *Mindo v. Commission* (ECLI:EU:T:2013:485).
13 Case T-19/06, *Mindo v. Commission* (ECLI:EU:T:2013:485).
14 GDPR Chapter VII Section 3 Article 68(1).
15 EDPB Annual Report 2020 (executive summary), at 3, available at edpb_es_080621_en_0.pdf (europa.eu) (9 April 2024).
16 GDPR, Chapter VII, Section 3, Article 70(1).
17 M. Brandao, 'The one-stop-shop and the European Data Protection Board's role in combatting data supervision forum shopping', *International Data Privacy Law (IDPL)* (2023), at 316.
18 GDPR, Chapter VI, Section 1, Article 51.
19 GDPR, Chapter VII, Section 2, Article 65 (1)(a).
20 Tossoni, 'Cooperation and consistency', in C. Kuner, L. A Bygrave, C. Docksey and L. Drechsler (eds.), *The EU General Data Protection Regulation (GDPR): A Commentary* (2020), at 995.
21 GDPR, Chapter VII, Section 2, Article 65(6).
22 GDPR, Chapter VII, Section 3, Article 70(1).
23 GDPR, Chapter VII, Section 3, Article 70(1)(t). EDPB issues opinions on draft decisions of supervisory authorities pursuant to the consistency mechanism referred to in Article 64(1), on matters submitted pursuant to Article 64(2) and to issue binding decisions pursuant to Article 65, including in cases referred to in Article 66.

24

THE COMMON GOAL IS TO ASSURE THE PROTECTION OF FUNDAMENTAL RIGHTS OF NATURAL PERSONS WITH REGARD TO PROCESSING AND PROMOTING THE FREE FLOW OF PERSONAL DATA IN THE UNION.

Member states are obliged to establish at least one independent public authority.

↓

General expectation is that SA must cooperate with each other.

↓

SA are to fulfill their tasks pursuant to GDPR on the territory of their state.

↓

LSA comes into prominence when data processing involves more than one member state.

↓

LSA is to decide to deal or not to deal with the case.

↓

SA which informed LSA about the complaint may submit a draft for the decision.

↓

In case of deciding to deal with the matter LSA makes a draft decision taking into account the draft already made.

↓

LSA is to submit the draft decision to the other SA in order to form their opinion.

↓

If objection was raised on the draft decision and LSA disagrees with it or finds it not reasoned or relevant, the case shall be a matter of consistency mechanism.

↓

LSA notifies EDPB about the draft decision.

↓

Binding decision shall be approved within one month from the referral by a two-thirds majority of EDPB's members. EDPB adopts the binding decision.

↓

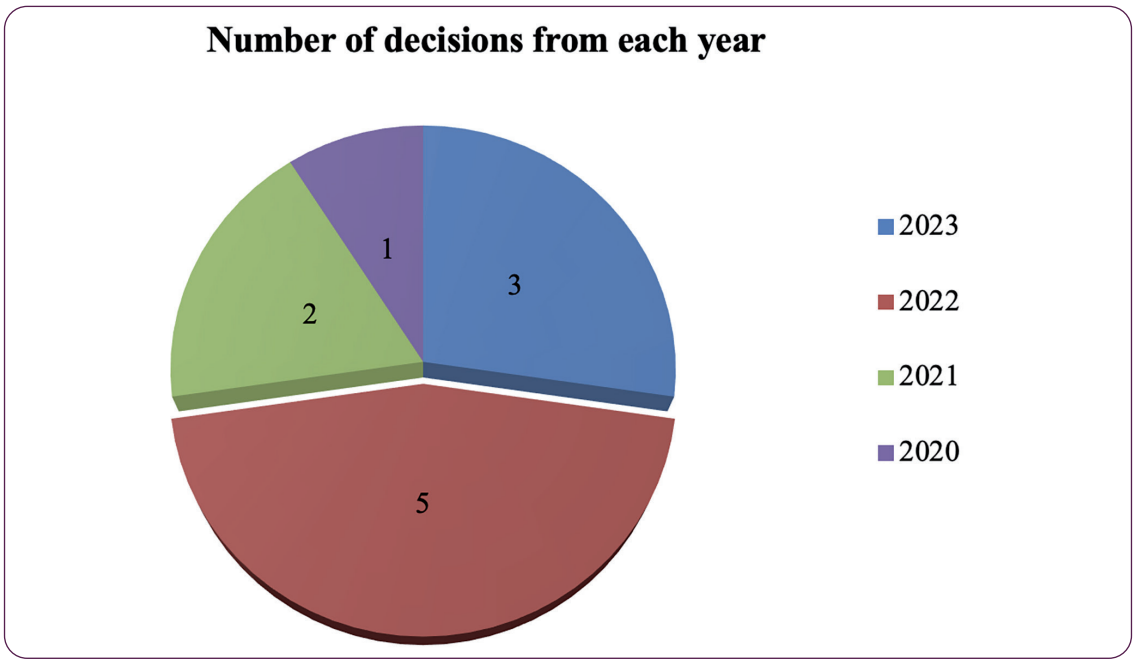
LSA makes its final decision according to the binding decision.

↓

Bindig decision must be adopted in each member state.

24 GDPR, Chapter VI-VII and relevant case law: Case C- 518/ 07, *European Commission v. Federal Republic of Germany* (ECLI:EU:C:2010:125), Case C- 614/ 10, *European Commission v. Republic of Austria* (ECLI:EU:C:2012:631), Case C- 288/ 12, *European Commission v. Hungary* (ECLI:EU:C:2014:237), Case C- 362/ 14, *Maximillian Schrems v. Data Protection Commissioner* (ECLI:EU:C:2015:650), Case C- 582/ 14, *Patrick Breyer v. Bundesrepublik Deutschland* (ECLI:EU:C:2016:779), Case C- 210/ 16, *Unabhängiges Landeszentrum für Datenschutz Schleswig- Holstein v. Wirtschaftsakademie Schleswig- Holstein GmbH* (ECLI:EU:C:2018:388).

C. A Brief Statistical Overview of the Binding Decisions Made by the EDPB



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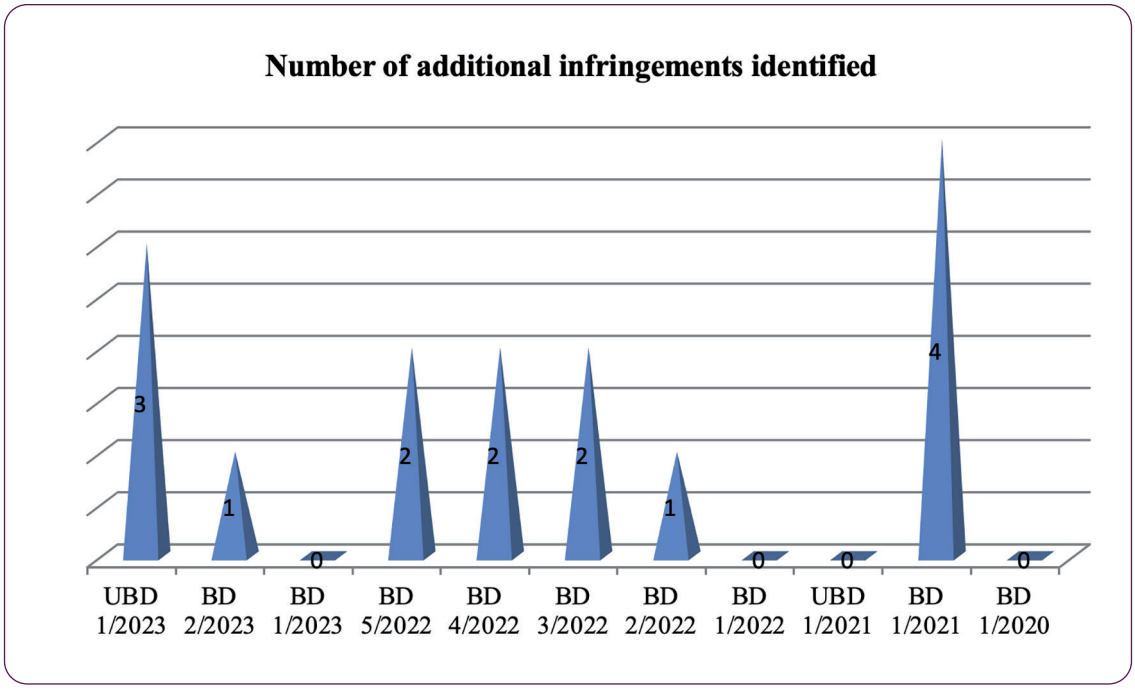
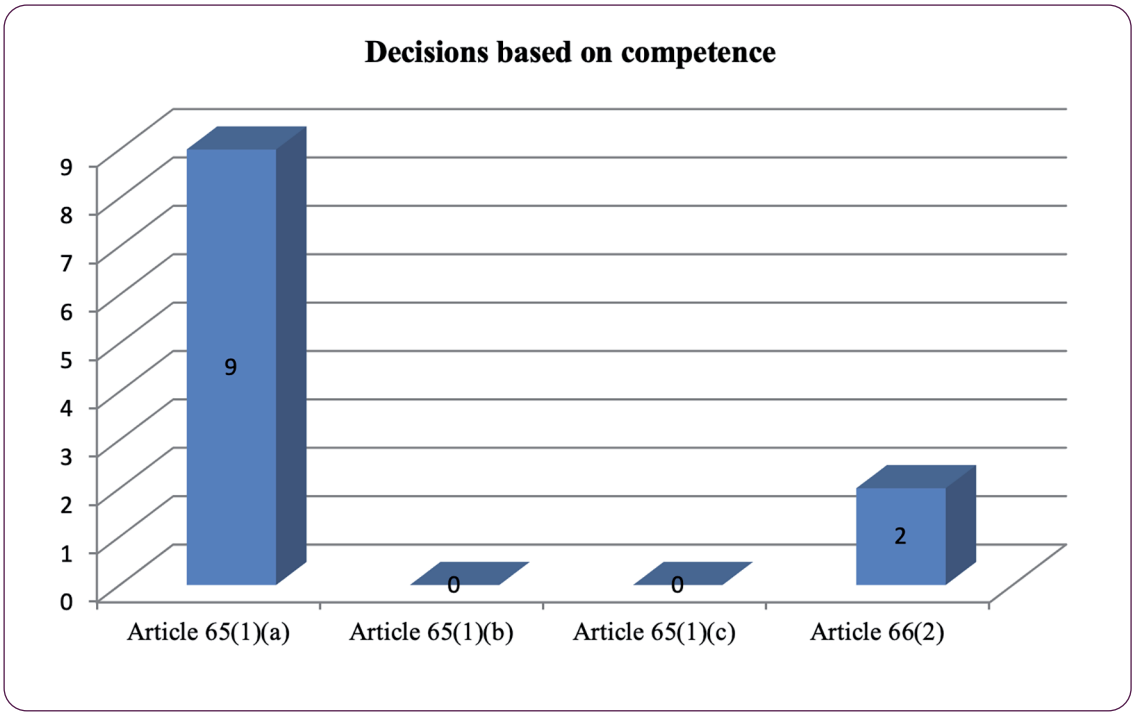


26

25 The total number of binding decisions is 11. EDPB made its first binding decision in 2020 (BD 1/2020). Two binding decisions were rendered in 2021, BD 1/2021 and UBD 1/2021. In 2022, EDPB adopted five binding decisions: 1/2022, 2/2022, 3/2022, 4/2022, 5/2022. In 2023, EDPB rendered UBD 1/2023, BD 1/2023 and BD 2/2023.

26 In UBD 1/2023, three infringements are to be determined – Article 6(1)(b), Article 6(1)(f) and breach of complying with decisions by SA; in BD 2/2023, EDPB established an additional infringement of principle of fairness under Article 5(1)(a) of GDPR; in BD 5/2022, two infringements are to be found – Article 6(1) and 5(1)(a); in BD 4/2022, two infringements are to be identified – Article 6(1) and 5(1)(a); in BD 3/2022, two infringement are instructed to be included – Article 6(1) and 5(1)(a); in BD 2/2022, one infringement was established – Article 6(1); in BD 1/2021, four infringements were found – Article 13(1)(d), Article 13(2)(e), Article 5(1)(a) and Article 14; In BD 1/2023, BD 1/2022, UBD 1/2021 and BD 1/2020, no additional infringement was identified. As a conclusion, EDPB has generally adopted instructions such as fines or corrective measures in the decisions to rectify the violations.

27



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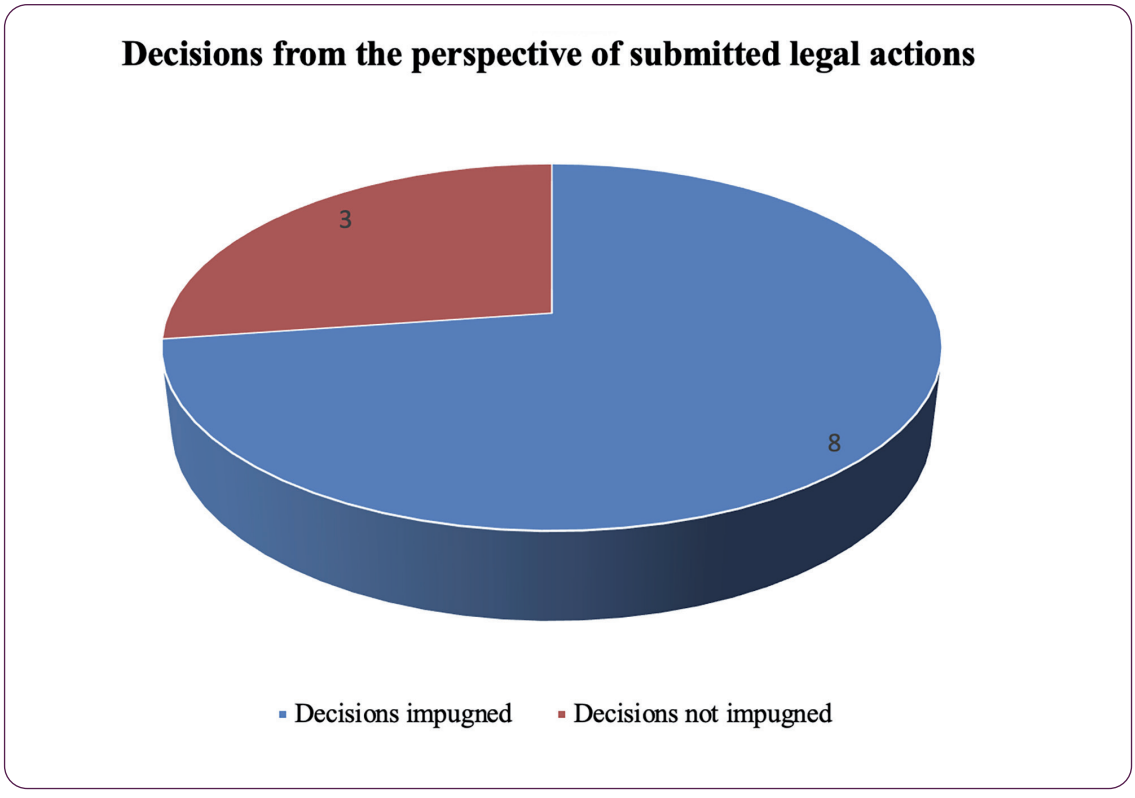
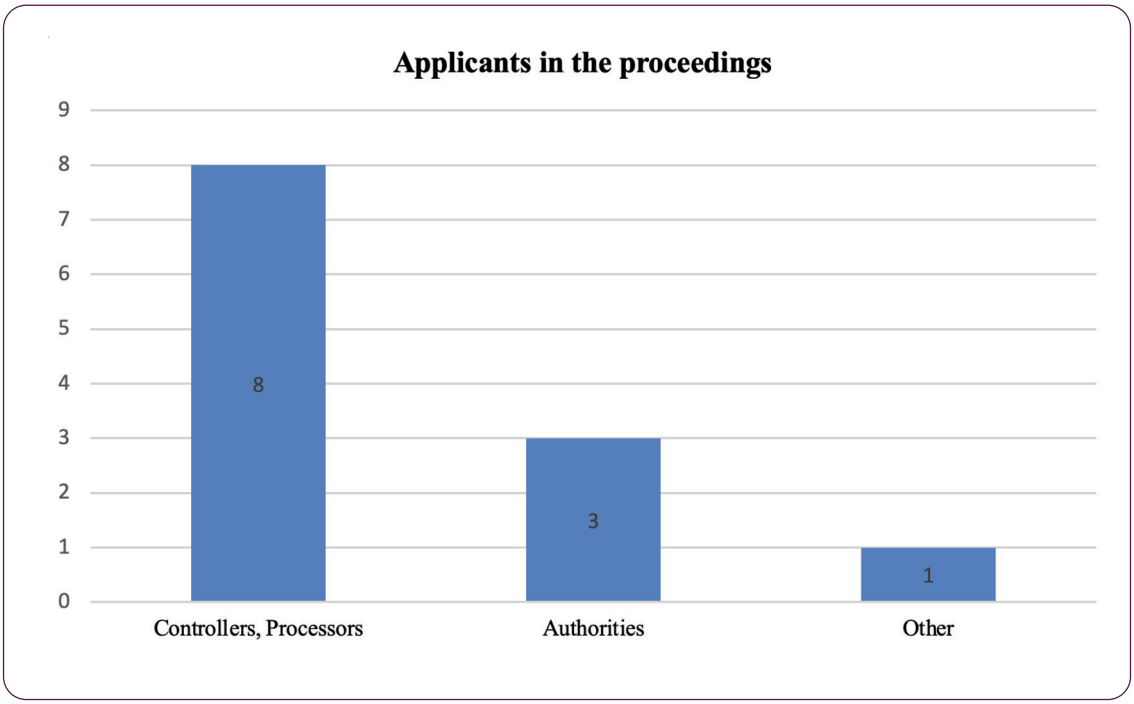


27 In nine out of 11 cases EDPB made its biding decision based on competence laid down in Article 65(1)(a) where GDPR determines that EDPB is to adopt a binding decision if a relevant or a reasoned objection to the draft decision was lodged by a SA or such an objection was refused by the LSA. In two out of 11 cases the decision was based on Article 66(2) – where a SA has taken a measure pursuant to paragraph 1 and considers that final measures need urgently to be adopted, it may request an urgent opinion or an urgent binding decision from the Board, giving reasons for requesting such opinion or decision.

28 Eight out of 11 decisions have been impugned before the General Court. Decisions included are UBD 1/2023, BD 2/2023, BD 1/2023, BD 5/2022, BD 4/2022, BD 3/2022, BD 2/2022 and 1/2021. BD 1/2022, UBD 1/2021 and BD 1/2020 have not been impugned.

29



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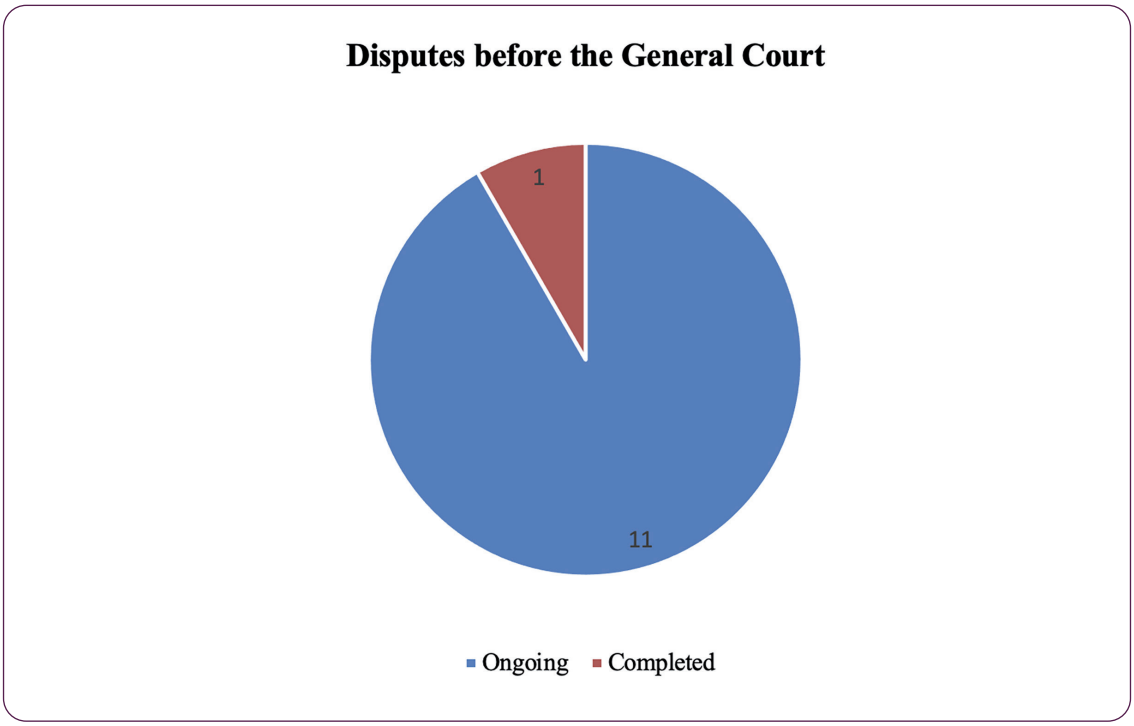

29 To summarize the proceedings before the General Court from the perspective of the applicants, in eight out of 12 cases the processors, controllers submitted actions against EDPB. This affects the following decisions: UBD 1/2023, BD 2/2023, BD 1/2023, BD 5/2022, BD 4/2022, BD 3/2022, BD 2/2022 and BD 1/2021. The applicants claimed that the General Court should annul the decisions. In three out of 12 cases, the Data Protection Commission filed actions involving BD 3/2022, BD 4/2022 and BD 5/2022 claiming for annulment of particular paragraphs (second lines of paragraphs 198 and 487 of BD 3/2022, second lines of paragraphs 203 and 454 of BD 4/2022, paragraphs 222 and 326(8) of BD 5/2022). In one out of 12 cases a natural person, Lisa Ballmann submitted an action against EDPB in connection with BD 3/2022 where she asked for annulment of EDPB's decision of 7 February 2023 refusing access to documents.

30 Ongoing cases: Case T-1030/23, *TikTok Technology v. EDPB*, Case T-325/23, *Meta Platforms Ireland v. EDPB*, Case T-183/23, *Ballmann v. EDPB*, Case T-153/23, *WhatsApp Ireland v. EDPB*, Case T-129/23, *Meta Platforms Ireland v. EDPB*, Case T-128/23, *Meta Platforms Ireland v. EDPB*, Case T-111/23, *Data Protection Commission v. EDPB*, Case T-84/23, *Data Protection Commission v. EDPB*, Case T-70/23, *Data Protection Commission v. EDPB*, Case T-682/22, *Meta Platforms Ireland v. EDPB*, Case T-8/24, *Meta Platforms Ireland v. EDPB*. Completed cases: Case T-709/21, *WhatsApp Ireland v. EDPB* (ECLI:EU:T:2022:783) – Appeal brought on 17 February 2023 by WhatsApp Ireland Ltd against the order of the General Court.

Taking the above into consideration, a conclusion can be drawn that almost each binding decision triggered a direct action addressed to the General Court. Eight out of 11 decisions were subject to a legal remedy.[31] Out of 12 proceedings, only one has been resolved with the order of T-709/21 of the General Court, in that the action was declared inadmissible.[32] The order T-709/21 was appealed by the applicant, WhatsApp; hence, there is an ongoing appeal proceeding – Case C-97/23 P *WhatsApp Ireland Ltd v. European Data Protection Board* – before the Court of Justice, as the second instance court.

2. ADMISSIBILITY OF THE DIRECT ACTION

This chapter discusses two questions concerning the Case T-709/21. Firstly, we ask why the applicant could have assumed that they have the standing to institute proceedings to the General Court. In that section the arguments for admissibility are examined. The second query concerns the reasoning of the General Court. That section analyses the reasons why the General Court found the action inadmissible.

A. Why Could the Applicant Have Assumed that They Have Standing to Bring Proceedings to the General Court?

Following the decision of the EDPB, WhatsApp brought a direct action to the General Court against the binding decision 1/2021 of the EDPB on 28 July 2021.[33] Furthermore, WhatsApp was by far not the only controller to bring a case against the binding decision of the EDPB. In fact – as we pointed out in the previous chapter - most of the binding decisions of the EDPB are contested. Therefore, it is worth asking the question why controllers could have assumed that they had standing to bring proceedings to the General Court.

This chapter answers the question posed above by analysing three reasons, which combine to create a coherent legal argument to affirm the reasoning of the applicant. Firstly, Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter Charter) provides a general right to an effective remedy. This right is recognized by Article 6 (1) of the Treaty of the European Union (hereinafter TEU). Secondly, some aspects and criteria of Article 263 of the Treaty on the Functioning of the European Union (hereinafter TFEU) may lead the applicant to think that they may successfully bring an action to the General Court. Thirdly, recital 143 of GDPR can be understood to mean that the applicant - as a legal person - has the right to bring a direct action for the annulment of decisions of the EDPB before the General Court.

1. Article 47 of the Charter

The literature on the Charter rights often points out its significance: 'legal norms and fundamental rights protected by the Charter should not only be treated as principles that may be balanced and weighed against other competing principles.'[34] It is not only scholars who emphasize the fundamental nature and importance of the rights included in the Charter, the CJEU also expressed that legislation interfering with these rights must 'respect the essence of fundamental rights'.[35]

31 Article 263, TFEU.
32 The order of the General Court (Fourth Chamber, Extended Composition) delivered on 7 December 2022: Case T-709/21, *WhatsApp Ireland v. European Data Protection Board* (ECLI:EU:T:2022:783).
33 Binding decision 1/2021 of the EDPB of 28 July 2021 on the dispute arisen on the draft decision of the Irish SA regarding WhatsApp Ireland under Article 65(1)(a) of GDPR: Case T-709/201, *WhatsApp Ireland v. European Data Protection Board* (EU:T:2022:783).
34 Ojanen, 'Making the Essence of Fundamental Rights Real: The Court of Justice of the European Union Clarifies the Structure of Fundamental Rights under the Charter: ECJ 6 October 2015, Case C-362/14, Case C-362/14, Maximillian Schrems v Data Protection Commissioner', 12 *European Constitutional Law Review* (*EUConst*) (2016) 318, at 322.
35 Case C-362/14, *Maximillian Schrems v. Data Protection Commissioner* (EU:C:2015:650), at para. 95.

One crucially important right among the many that are protected by the Charter is the right to an effective remedy. The first sentence of Article 47 of the Charter provides that: 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.'[36] The right to an effective remedy does not mean that each applicant has standing to bring direct action for the annulment of any act of a body of the EU to the General Court. Furthermore, it should be emphasized that the tension – real or envisaged by the applicant – between Article 47 of the Charter and the standard of admissibility of the General Court is not a recent development, as noted by the literature.[37] Even in the Jégo-Quéré Case, the applicant argued that if their action is found inadmissible, their right to an effective remedy would be infringed on.[38] Why, then, could the applicant have argued for the admissibility of their action on the basis of Article 47 of the Charter?

2. Article 263 of the TFEU

The fourth paragraph of Article 263 TFEU provides an option for any natural or legal person to institute proceedings concerning the judicial review of the legality of an act of bodies, offices or agencies of the Union.[39] The text of the TFEU is interpreted by abundant case law, and two-case law together with the text of the TFEU forms the standards of admissibility.[40] While it was notoriously difficult for non-privileged applicants to bring such an action before the General Court under the TFEU, there still remains a very high bar to clear after the TFEU.[41]

Certain criteria under Article 263(4) TFEU are most definitely met by the action of WhatsApp. It is quite clear that the EDPB – as noted in chapter one – is an EU body. The most doubtful points are whether the contested decision is a) intended to produce legal effects vis-à-vis third parties and b) directly and individually concerns the applicant.[42] Doubtful though they may be, arguments can – and have –been advanced that the contested decision satisfies both above criteria.

In this context it is to be highlighted that the fourth paragraph of Article 263 TFEU requires as a criterion of admissibility that the contested act should be intended to produce legal effects vis-à-vis third parties. This requirement is especially complex when the action is brought against an intermediate act, which can satisfy the above criterion only in exceptional cases.[43] The case law of the CJEU finds actions admissible when the contested intermediate act is '*not simply a preparatory step*'[44] furthermore, the act both produces independent legal effects and effective remedies cannot be insured against those effects.[45]

36 Article 47 of the Charter of Fundamental Rights of the European Union.
37 Varju, 'The Right to Effective Judicial Protection in the System of Judicial Review in the European Community', 44 *Acta Juridica Hungarica* (*Acta Jur Hung*) (2003) 99.
38 Case C-263/02, *Commission of the European Communities v. Jégo-Quéré & Cie SA* (EU:C :2004 :210).
39 Article 263, Section 4, TFEU: 'Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.'
40 See: Case 25/62, *Plaumann & Co v. Commission* (EU:ECR 95) and Case C-263/02, *Commission of the European Communities v. Jégo-Quéré & Cie SA* (EU:C :2004 :210).
41 Kucko, 'The Status of Natural or Legal Persons According to the Annulment Procedure Post-Lisbon', 2 *LSA Law Review* (*LSE LR)* (2017) 101.
42 Article 263, Section 4, TFEU.
43 A. Christian *et al., Taking the EU to court: Annulment proceedings and multilevel judicial conflict* (2020), at 63.
44 Case C400/99, *Italy v. Commission* (EU:C:2001:528), at para. 63 and Case C-312/90, *Spain v Commission* (EU:ECR I-4117), Case C-47/91, *Italy v. Commission* (EU:ECR I-4145).
45 Case C-60/81, *IBM v. Commission* (EU:C:1981:264), at para. 12.

In Case C-60/81, *IBM v. Commission*, IBM brought an action for annulment against the Commission's decision to initiate a procedure. The applicant argued that the measures taken by the Commission amount to a decision, which is in effect binding the Commission itself. The Court of Justice did not share the opinion of the applicant, as it emphasized that: „it is clear from the case law that in principle an act is open to review only if it is a measure definitively laying down the position of the Commission or the Council on the conclusion of that procedure, and not a provisional measure intended to pave the way for the final decision.".[46] In comparison, the binding decision of the EDPB definitively laid down the position of an EU body, although it also paved the way for the final decision of the LSA. In the IBM Case, the Court of Justice further noted that another criterion of admissibility of actions brought against intermediate acts is that any legal defects of the intermediate act cannot be relied upon in an action directed against the definitive act, for which they represent a preparatory step.[47] This requirement was examined in Case C-77/91, *Italian Republic v. Commission*.

In the Case C-77/91, *Italian Republic v. Commission*, the Court of Justice ruled on the admissibility of an action against the letter of the Commission, which notified the Italian Government of the initiation of a state aid review. The applicant claimed that the contested measure had a revocatory effect and, therefore, amounted to a decision, while the Commission argued that the letter merely initiated a procedure and the obligation to suspend the payment of state aid was a consequence which the Treaty attached to initiating the procedure. The Court of Justice considered that the delay in the payment of the aid – which was the necessary consequence of the letter - had irreversible repercussions, which could not be eradicated by a decision that the aid was granted lawfully, therefore the Court of Justice held the action admissible.[48] In that case, the defects of the intermediate act could not be remedied following a successful action against the final decisions, therefore, the Court of Justice found the action admissible. An additional argument for the admissibility of the action was that categorization of the aid by the Commission in the contested measure as 'new aid' – which determined the subsequent procedure - was definitive and could not be altered by the final decision.[49]

Furthermore, in *Deutsche Post and Germany v. Commission*, the Court summarized the case law and concluded that intermediate acts are considered to produce independent legal effects unless 'the illegality attaching to that measure can be relied on in support of an action against the final decision for which it represents a preparatory step'.[50] Case C-77/91, *Italian Republic v. Commission*, together with *Deutsche Post and Germany v. Commission*, strengthens the arguments for the admissibility of WhatsApp's action if one accepts that any legal defects of the binding decision of the EDPB cannot be relied upon in the judicial review of the final decision of the LSA. Therefore, it is not surprising that the applicant may conclude that the contested act should be considered to produce independent legal effects, as the legality of the binding decision – an act of a body of the EU – is not subject to supervision in the judicial procedures of the Member States.

46 Case C-60/81, *IBM v. Commission* (EU:C:1981:264), at para. 10.
47 Case C-60/81, *IBM v. Commission* (EU:C:1981:264), at para. 12.
48 Case C-47/91, *Italian Republic v. Commission of the European Communitie*s (ECLI:EU:C:1992:284).
49 Case C-47/91, *Italian Republic v. Commission of the European Communitie*s (ECLI:EU:C:1992:284), at para. 29 and Case C-354/90, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires v. French State* (ECLI:EU:C:1991:440).
50 Joined Cases C463/10 P and C475/10 P, *Deutsche Post and Germany v. Commission* (EU:C:2011:656), at para. 53.

Moreover, the fourth paragraph of Article 263 TFEU requires that the contested act should directly and individually concern the applicant. Even though the contested decision is not directly enforceable against WhatsApp and thus appeared not to satisfy one criterion set by the case law of the CJEU – 'that decision clearly altered the applicant's legal position'[51] – it can be argued that it altered the legal position of the applicant. The binding decision requires an intermediary – the supervisory authority; therefore, its substance most definitely affected the applicant. WhatsApp argued that the contested decision consists of a final position of the EDPB, which was to be followed by the Irish SA in the final decision.[52] Therefore, the applicant may argue that if the actions were admissible in the State aid review cases cited above, direct concern must be established in this case.

Additionally, there is a limitation period settled by the sixth paragraph of Article 263 TFEU that provides that the direct action shall be submitted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter. A person who could undoubtedly have challenged that decision by direct action, but allowed the time limit to elapse, also loses the right to call into question the legality of that decision before the national court, in an action brought against the national measures implementing that decision. In that case, a request for a preliminary ruling on the validity of the national court would be inadmissible.[53]

3. 143 Recital of the GDPR

Finally, Recital 143 of the GDPR states in its first sentence: 'Any natural or legal person has the right to bring an action for the annulment of decisions of the Board before the Court of Justice under the conditions provided for in Article 263 TFEU.'.[54] The recital clarifies that: 'Where decisions of the Board are of direct and individual concern to a controller, processor or complainant, the latter may bring an action for annulment against those decisions within two months of their publication on the website of the Board, in accordance with Article 263 TFEU.'.[55] While recital is not legally binding, it clearly influences how one interprets both the GDPR and the possible avenues of judicial review.

B. Why Did the General Court Find the Action Inadmissible?

The General Court examined the action in the light of Article 263 of the TFEU and the detailed case law of the General Court and the Court of Justice on admissibility. First, the General Court concluded that the contested decision is, in fact, an act of a body of the Union consequently the act may be open to challenge.[56] However, the action brought by the applicant must satisfy two criteria: a) the act must be intended to produce legal effects vis-à-vis third parties and b) the applicant must be directly and individually concerned.[57]

1. Binding Legal Effects and Distinct Legal Change

The General Court established that the act is indeed intended to produce legal effects vis-à-vis third parties, considering the fact that it is binding on supervisory authorities.[58] However, since the applicant does not belong

51 Case C-53/85, *AKZO Chemie and AKZO Chemie UK v. Commission* (EU:C:1986:256), at para. 19.
52 Case T-709/201, *WhatsApp Ireland v. European Data Protection Board* (EU:T:2022:783), at para. 48.
53 Case C-188/92, *TWD Textilwerke Deggendorf v. Bundesrepublik Deutschland* (EU:C:1994:90), at para. 17.
54 GDPR, recital 143.
55 GDPR, recital 143.
56 Case T-709/201, *WhatsApp Ireland v. European Data Protection Board* (EU:T:2022:783), at para. 36.
57 *Ibid.*, at para. 35.
58 *Ibid.*, at para. 37.

in the narrowly defined group of privileged applicants, the applicant must demonstrate that the contested act has 'binding legal effects capable of affecting the interests of the applicant by bringing about a distinct change in its legal position'.[59] This criterion is based on the case law of the Court of Justice.[60] Furthermore, the General Court noted that the abovementioned criterion overlaps with the condition of direct concern as indicated in *Deutsche Post and Germany v Commission*.[61]

While the contested decision does not in itself change the legal position of the applicant according to the case law of the CJEU, actions that are not directly enforceable may still be open to challenge as intermediate acts.[62] Exceptionally, the lawfulness of intermediate acts can be litigated before the General Court if a) there is no effective remedy through judicial protection by a national court and b) it produces independent legal effect vis-à-vis the applicant.[63] The General Court found that there is an effective judicial remedy against the decision before the national courts and possibly through a preliminary ruling on the validity of the act by the CJEU.[64] The General Court also concluded that the contested act has no independent legal effect vis-à-vis WhatsApp.[65] Therefore the General Court did not share the opinion of the applicant and decided that the contested decision does not have binding legal effects capable of affecting the interests of the applicant by bringing about a distinct change in their legal position.

2. Direct and Individual Concern

On the question of direct and individual concern, the General Court found that WhatsApp was individually concerned, since the contested act is an individual act concerning the breaches of data protection standards of the applicant.[66] Nevertheless, this finding still left the condition of direct concern to be examined.

According to the case law of the General Court and the Court of Justice for direct concern to be established – where the applicant is not the addressee of the act – it must be demonstrated that the contested act a) directly affects the applicant's legal situation and b) leaves no discretion to its addressees, who are entrusted with the task of implementing it.[67] Since the condition of an act *bringing distinct legal change* and *directly affecting the legal standing* of the applicant overlaps – and therefore this condition was detailed previously– the General Court considered it sufficient to contrast the contested act in this case with the act in question in the *Les Verts v. Parliament Case*.[68] In the latter – where the action was admissible – the act provided a complete set of rules requiring no implementation provisions.[69]

59 *Ibid.*, at para. 38.
60 See: Case C-60/81, *IBM v. Commission* (EU:C:1981:264), at para. 9; See also: Case C322/09 P, *NDSHT v. Commission* (EU:C:2010:701), at para. 45, Case C-521/06 P, *Athinaïki Techniki v. Commission* (EU:C:2008:422), at para. 29 and Case C362/08 P, *Internationaler Hilfsfonds v. Commission* (EU:C:2010:40), at para. 51.
61 Joined Cases C463/10 P and C475/10 P, *Deutsche Post and Germany v. Commission* (EU:C:2011:656), at para. 38.
62 Case C-53/85, *AKZO Chemie and AKZO Chemie UK v. Commission* (EU:C:1986:256), at para. 19, Case C-60/81, *IBM v. Commission* (EU:C:1981:264), at para. 10 and Case C362/08 P, *Internationaler Hilfsfonds v. Commission* (EU:C:2010:40), at para. 52.
63 Case C400/99, *Italy v. Commission* (EU:C:2001:528), at paras. 55 to 63, Joined Cases C-18/65 and C-35/65, *Gutmann v. Commission* (EU:C:1966:24), at para. 168, Case C-23/75, *Rey Soda v. Cassa Conguaglio Zucchero* (EU:C:1975:142), at para. 51 and Case T442/16, *Šroubárna Ždánice v. Council* (EU:T:2018:159), at para. 34.
64 Case T-709/201, *WhatsApp Ireland v. European Data Protection Board* (EU:T:2022:783), at para. 45.
65 *Ibid.*, at para. 46.
66 *Ibid.*, at para. 40.
67 *Ibid.*, at para. 51, see also: Joined Cases C-41/70 C-44/70, *International Fruit Company and Others v. Commission* (EU:C:1971:53), at paras. 23 to 28; Case C386/96 P, *Dreyfus v. Commission* (EU:C:1998:193), at para. 43 and Case C519/07 P, *Commission v. Koninklijke FrieslandCampina* (EU:C:2009:556), at para. 48.
68 Case 294/83, *Parti écologiste 'Les Verts' v. European Parliament* (EU:C:1986:166).
69 Case T-709/201, *WhatsApp Ireland v. European Data Protection Board* (EU:T:2022:783), at para. 52.

The second limb of the criterion of direct concern is more difficult; if the contested act leaves sufficient discretion to the LSA in adopting its final decision, then this criterion is not satisfied. To demonstrate the discretion of the LSA, the General Court pointed out that certain parts of the final decision originate – not from the contested decision, but – from the draft decision of the Irish SA. Furthermore, the General Court emphasizes that the Irish authority '*exercised its discretion to draw the conclusions from the instructions given in the contested decision*' concerning classifying material as personal data and determining the administrative fines.[70] As regards to the latter, the authority set the actual amount of the fine within the parameters of the contested decision.[71] Consequently, the General Court concluded that neither of the two criteria of direct concern were met in respect of the action.[72]

3. POSSIBLE REMEDIES AGAINST BINDING DECISIONS OF THE EUROPEAN DATA PROTECTION BOARD

Under Article 47 of the Charter, the right to an effective remedy and to a fair trial must be guaranteed to everyone. In this section we seek answers to the following questions. Firstly, we ask what avenues of judicial remedy are available to controllers, such as WhatsApp, when the decision of the LSA is based on a binding decision of the EDPB. Secondly, we examine the effectiveness of those remedies.

A. Statement of the Problem

In its order, the General Court clearly takes the legal position that the appropriate remedy for controllers against the binding decisions of the EDPB is via national proceedings against the LSA's implementing decision, with the possibility of a preliminary ruling on validity by the Court of Justice. This position of the General Court raises several questions, in particular regarding the system of legal remedies against EU acts and the problems of jurisdiction of national courts. There are also questions as to how the EDPB could be heard or represented in those national administrative court proceedings. While the EDPB can unquestionably be a party in the annulment proceedings before the EU courts, it could hardly be directly involved in the proceedings before the national court.

B. Contestation of Legality and Invalidity

The review of the legality of acts of the Union that the CJEU is to ensure under the Treaties relies, in accordance with settled case law, on two complementary judicial procedures. The TFEU has established, by Articles 263 and 277, on the one hand, and Article 267, on the other, a complete system of legal remedies and procedures designed to ensure judicial review of the legality of the European Union acts, and has entrusted such review to the EU Courts.[73] The TFEU applies very clearly two different definitions and legal consequences in Article 263 and Article 267 TFEU, whereas in actions for annulment the contested decision must be examined as to its legality, in the preliminary ruling procedure the CJEU shall decide on the question of validity.

In the legal literature, there are views that there is no distinction between the test of legality and the test of validity in EU case law and both procedures are aimed at the same thing, namely reviewing the legality of an EU act.[74]

70 *Ibid.*, at para. 57.
71 *Ibid.*, at para. 59.
72 *Ibid.*, at para. 61.
73 Case C-72/15, *PJSC Rosneft Oil Company v. Her Majesty's Treasury and others* (ECLI:EU:C:2017:236), at para. 66.
74 L. Blutman, *Az Európai Unió joga a gyakorlatban – A Brexit után* (3rd ed.) (2020), at 223.

In contrast, the case law of the CJEU consistently uses different terms when making conclusions in relation to direct actions and preliminary ruling proceedings. An example is the *Les Verts Case*, where the judgment says that '... natural or legal persons may bring a direct action before the General Court against implementing measures which are addressed to them or which are of direct and individual concern to them and, in support of such an action, plead the illegality of the general measure on which they are based. Where implementation is a matter for the national authorities, such persons may plead the invalidity of general measures before the national courts and cause the latter to request the Court of Justice for a preliminary ruling.'[75] Furthermore, in the *Rosneft Case,* the Grand Chamber of the Court of Justice stated that the preliminary ruling procedure and actions for annulment are two complementary judicial procedures, in which the requests for preliminary rulings on the validity of a measure are a form of review of the legality of EU acts.[76] In this judgment the Court of Justice also highlighted that '... the power to declare such acts invalid should be reserved to the Court ... ' and '... Court is best placed to give a ruling on the validity of acts of the Union'.[77]

We must point out that, under the TWD Textilwerke Deggendorf doctrine[78], the Court of Justice has set a condition of admissibility of the request for a preliminary ruling in relation to the direct action. A validity reference under Article 267 TFEU is inadmissible only in so far as it would allow a person who undoubtedly had standing to bring an Article 263 action within time, but did not, to circumvent that route; this does not preclude a reference made ex officio by the national court or prompted by a party without locus standi. The Court of Justice held that the possibility for a person to rely, in an action brought before a national court, on the invalidity of provisions contained in a measure of the EU, which constitutes the basis of a national decision taken concerning him, presupposes either that he has also brought, pursuant to the fourth paragraph of Article 263 TFEU, an action for annulment of that EU measure within the prescribed time limits, or that he has not done so, as a result of not having an undoubted right to bring such an action. The action for annulment, which is complemented by the possibility of appealing against the ruling of the General Court, provides a particularly appropriate procedural framework for the thorough examination, both parties being duly heard, of legal and factual questions, particularly in technical and complex fields.[79]

The need for a natural or legal person to bring an action for annulment on the basis of Article 263 TFEU in order to challenge the legality of an EU measure, when that person undoubtedly has standing within the meaning of the fourth paragraph of that article, is without prejudice to the possibility for that person to challenge the legality of national measures implementing that measure before the national courts having jurisdiction.[80]

This issue raises the need to unify or differentiate the terminology, since the TFEU presumably uses different concepts for good reason, despite the fact that the Court of Justice applies the same approach to the effects of a declaration of invalidity as to the effects of a successful action for annulment.

75 Case 294/83, *Parti écologiste 'Les Verts' v. European Parliament* (EU:C:1986:166), at para. 23.
76 Case C-72/15, *PJSC Rosneft Oil Company v. Her Majesty's Treasury and others* (ECLI:EU:C:2017:236), at paras. 66 and 68.
77 Case C-72/15, *PJSC Rosneft Oil Company v. Her Majesty's Treasury and others* (ECLI:EU:C:2017:236), at paras. 78 and 79.
78 Case C-188/92, TWD *Textilwerke Deggendorf GmbH v. Bundesrepublik Deutschland* (ECLI:EU:C:1994:90).
79 Case 135/16, *Georgsmarienhütte GmbH and Others v. Bundesrepublik Deutschland* (EU:C:2018:582), at paras 17-19.
80 *Ibid.*, at para. 22.

Where the annulment action succeeds, the act is declared void and the Court of Justice may, under Article 264(2) TFEU, state which of the effects of the regulation which it has declared void shall be considered definitive.[81] The Court has applied the same approach to the effects of a ruling of invalidity to those of a successful annulment action, as a result of which the illegal act is declared void.[82]

However, the Court of Justice has never stated that there is no difference in the scope of the review of the annulment and in the validity of a legal act. Requests for preliminary rulings which seek to ascertain the validity of a measure constitute, like actions for annulment, a means of reviewing the legality of the European Union acts,[83] but it does not follow that these two judicial procedures are completely equal and may be replaced by each other.

The effect of the judgments on procedures provided for under Article 263 and Article 267 is different from the point of view of Article 266 TFEU. According to Article 266 TFEU the institution, body, office or entity whose act has been declared void or whose failure to act has been declared contrary to the Treaties, shall be required to take the necessary measures to comply with the Court's judgment. Those requirements apply to the annulled acts under Article 263 TFEU only and not to the acts that have been declared invalid under Article 267 TFEU. Article 266 establishes an obligation to remedy the breach found, but it applies only in direct actions.

C. Jurisdiction of National Courts

The preliminary ruling procedure provided for under Article 267 TFEU establishes direct cooperation between the CJEU and the national courts. Only the CJEU has the power to interpret EU law and examine the validity of an EU act, so the national courts must initiate a preliminary ruling request on such measures. However, a judgment given in a preliminary ruling procedure is not directly enforceable against the parties to the national dispute and does not decide the main action. In view of this, the decision on the national action would necessarily be subject to an examination of the merits of the EDPB's binding decision. The necessary coherence of the system of judicial protection requires, in accordance with settled case law, that when the validity of acts of the EU institutions is raised before a national court or tribunal, the power to declare such acts invalid should be reserved to the CJEU under Article 267 TFEU.[84] The allocation of jurisdiction between the EU and national courts requires that if the subject of an action extends to the binding decision of the EDPB, the national court should necessarily initiate a preliminary reference.

Where the outcome of the dispute before the national court depends on the validity of the EU decision, it follows the obligation of sincere cooperation that the national court should, in order to avoid reaching a decision that runs counter to the EU decision, stay its proceedings pending final judgment in the action for annulment before the CJEU, unless it takes the view that, in the circumstances of the case, a reference for a preliminary ruling on the validity of the contested EU decision is warranted.[85]

In case of the CJEU declares the binding decision invalid, which concludes the

81 M. Costa and S. Peers, *EU Law* (14th ed.) (2020), at 293.
82 *Ibid.*, at 247.
83 Case C-72/15, *PJSC Rosneft Oil Company v. Her Majesty's Treasury and others* (ECLI:EU:C:2017:236), at para. 68.
84 *Ibid.*, at para. 78.
85 Case 135/16, *Georgsmarienhütte GmbH and Others v. Bundesrepublik Deutschland* (EU:C:2018:582), at para. 24.

illegality of the decision of the SA, which the national court must annul.

The remedy for a breach under Article 266 TFEU is not applicable to the acts that have been declared invalid under Article 267 TFEU. After a preliminary ruling judgment, the national court must ensure the remedy of the breach in its national judgment. The national court must order the SA to conduct a new administrative procedure, but it has no power to impose any requirements on the EDPB.

Moreover, the subject of the legal dispute and the preliminary ruling procedure may concern not only validity but also the interpretation of EU law, which may affect the final decision.

D. The Participation of the European Data Protection Board in the Proceeding

There is no case law yet on the merits of administrative court proceedings in a Member State against a legal act of an EU body, such as the review of the legality of a binding decision of the EDPB.[86] In such a case, the requirement of a fair trial under Article 47 of the Charter would require that the EDPB be given the opportunity to participate in the proceedings in order to exercise its rights of defence. This may lead to a different procedural status across Member States and may require changes in the national procedural laws. In addition, the EDPB would need to introduce an appropriate procedure to ensure that it is aware of the initiation of proceedings, which are the subject of a binding decision and that it can ensure representation in proceedings in any Member State.

There is no specific regulation on the right of representation of the EDPB and the national authority. It cannot be excluded that the LSA may make a statement in support of the EDPB's decision in a dispute before a national court. According to the President of the Hungarian SA, there may be a potential conflict of interest between the SA and the EDPB, as they act independently of each other, which could lead to the national authority being confronted with the EDPB's interpretation of national case law in its own national court.[87]

E. Parallel Procedures

As an argument for the inadmissibility of the action, the General Court also submitted that the admissibility of WhatsApp's action could lead to parallel proceedings, i.e. the undesirable situation of the CJEU having to rule on the validity of the contested decision simultaneously by way of a preliminary ruling, while the General Court would have to rule on the validity of the contested decision by way of a direct action brought by WhatsApp.[88]

Parallel proceedings by their nature carry the risk of contradictory decisions. Contradictory decisions jeopardize the uniform application of the law and therefore legal certainty.[89]

The Statute of the CJEU provides for parallel proceedings as follows:

> Where the Court of Justice and the General Court are seized of cases in which the same relief is sought, the same issue of interpretation is raised or the validity of the same act is called in question, the General Court may, after hearing the parties, stay the proceedings before it until such time as the Court of Justice has delivered judgment or, where the action is one brought pursuant to Article 263 of the Treaty on the Functioning of the European Union, may decline jurisdiction so as to

86 Interview.
87 *Ibid.*
88 Case T-709/201, *WhatsApp Ireland v. European Data Protection Board* (EU:T:2022:783), at para. 70.
89 Case C-132/21, *Budapesti Elektromos Művek* (EU:C:2023:2), at paras. 18-19.

allow the Court of Justice to rule on such actions. In the same circumstances, the Court of Justice may also decide to stay the proceedings before it; in that event, the proceedings before the General Court shall continue.

Where a member state and an institution of the Union are challenging the same act, the General Court shall decline jurisdiction so that the Court of Justice may rule on those applications.[90]

In Case C-132/21, the CJEU stated that the exercise of parallel and independent remedies is not excluded by the fact that conflicting decisions cannot be taken, as this would jeopardize the consistent and uniform application of the law.[91]

It can be concluded from the Statute of the CJEU and the Court of Justice's judgment that parallel proceedings would not form an obstacle to the admissibility of the action. The General Court could either stay its proceedings or decline jurisdiction to the Court of Justice.

F. Procedural Consequences

Taking these into consideration, a legal remedy remains available even if the direct action is inadmissible, but its effectiveness is unclear.

The decision of the General Court has the consequence that the Court of Justice shall decide on the validity of the binding decision in a preliminary ruling procedure.

If the invalidity of the binding decision was not declared but the national court were to annul the decision of the LSA on other grounds, this would result in an irreconcilable conflict, given that the LSA would still be bound by the decision of the EDPB and could only reach the same result upon readoption.

Either way, it seems necessary to differentiate between legality and validity and determine their precise content.

CONCLUSION

Taking everything into consideration, with the enactment of GDPR and the establishment of the EDPB, a new chapter began in the history of the protection of individuals' personal data in the European Union. By introducing the consistency mechanism as a new legal instrument and in line with it, binding decisions, as intermediate actions between draft and final decisions of SA and LSA, the EDPB fosters close cooperation among Member States. The incorporation of these binding actions in the final decisions and the possibility of their cross-border enforcement may foster consensus between the national authorities. This innovative procedure makes the EDPB a unique and an indispensable entity in the Union.

The TFEU provides an alternative to a legal remedy. On the one hand, the applicant may submit a direct action to the General Court in accordance with Article 263 of TFEU. On the other hand, under Article 267 of TFEU, the CJEU, in a preliminary ruling, might find an act invalid. Several differences can be found between the action for annulment and the preliminary ruling procedure regarding the effects of the judgment, the possibility of evaluating evidence, and the grounds for appeal.

The action for annulment provides greater protection than the preliminary ruling procedure, as the action for annulment has double function. The court both performs a constitutional review - examines the

90 Article 54 of the Statute of the Court of justice of the European Union.
91 Case C-132/21, *Budapesti Elektromos Művek* (EU:C:2023:2).

conformity of EU legislation with the Treaties and the Charter – and a judicial review of the administrative action.[92]

In addition to this, in the preliminary ruling procedure, the CJEU cannot be asked to decide on the questions of fact, because this belongs to the jurisdiction of the national court. This also means that the CJEU will not assess evidence in its procedure. The publicly accessible action of WhatsApp states *inter alia* that the EDPB violated the presumption of innocence by inappropriately shifting the burden of proof onto WhatsApp to demonstrate that its processing environment is such that the risks of re-identification of data subjects are purely speculative and that the EDPB infringed the right to good administration by disregarding WhatsApp's right to be heard and the EDPB's obligations to carefully and impartially examine evidence and to adequately state reasons. These are not questions of interpretation or invalidity but require an examination of the possible procedural violations in the light of the specific facts, which cannot be the subject of a preliminary ruling procedure. Moreover, the request for a preliminary ruling is formulated by the national court, not directly by the plaintiff, so it is up to the court to decide whether the request is in line with the application.

Another important difference between the two procedures is that while the preliminary ruling procedure is an interlocutory procedure and does not end the national case, the annulment procedure brings the case to a conclusion.

Under Article 256(1) TFEU, the General Court has the authority to hear actions for annulment in the first instance. After the General Court delivers its judgment, the parties may appeal on points of law to the Court of Justice, which will make the final decision.[93] Conversely, decisions made by the CJEU in preliminary ruling procedures cannot be appealed; however, the national court has the option to submit a new question to seek further clarification on the previous answer. We advance the following two ideas in connection with Article 263 of TFEU.

With the establishment of the EDPB and its power of decision, a new legal institution was born. It could be argued that the CJEU shall give new perspectives on the new powers of the EDPB (the introduction of binding decisions) and should give new standards of admissibility appropriate to the specificities of this new act. Arguably, the standards of admissibility according to case law also allow such an interpretation, ensuring the controller the right to initiate direct action against the binding decision of the EDPB. For instance, in the case of State-aid review the beneficiaries of the aid are found to be directly and individually concerned, even though the decision does not have a direct effect on the beneficiaries, it only affects them through either the action of a state authority or exceptionally through the action of a third party.[94] Additionally, the discretion of the state authorities is so significant that aid is not recovered in 'exceptional circumstances in which it would be inappropriate to order repayment of the aid'.[95] Therefore, one reasonable solution could be to develop

92 European Parliamentary Research Service, Briefing on the action for annulment of an EU act, 2019, Action for annulment of an EU act (europa.eu).

93 K. Gombos, *European Law – The Legal System of the European Union*, (2020), available at https://doi.org/10.55413/9789632959283.

94 Joined Cases C 71/09 P, C 73/09 P and C 76/09 P, *Comitato Venezia vuole vivere and Others v. Commission* (EU:C:2011:368), at para. 56 and Case C-63/87, *Commission v. Greece* (EU:C:1988:285), Case C 5/89, *Commission v. Germany* (EU:C:1990:320), at para. 15 and 16. Case C-199/06, *CELF and ministre de la Culture et de la Communication* (EU:C:2008:79), at paras. 23 and 39 to 41; At para. 23: 'SIDE requested the Minister for Culture and Communication that payment of the aid granted to CELF be stopped and that the aid already paid be repaid.' Case C 24/95, *Land Rheinland-Pfalz v. Alcan Deutschland GmbH* (EU:C:1997:163).

95 Case C 39/94, *SFEI and Others* (ECR I 3547), at para. 70.

new perspectives on the interpretation of the admissibility standards, which reflect the specificities of the binding decisions of the EDPB.

In order to ensure the possibility of direct action against a binding decision, a possible option might be the transposition of 143 Recital of GDPR into the operative text of the GDPR, which would make it compulsory for all Member States. This change would mean that 143 Recital of GDPR would not only cast light on the interpretation to be given to a legal rule, but it would constitute a binding rule, which carries legal force. This adjustment would still not change the fact that secondary EU law cannot take precedence over the applicable rules of primary law contained in the Treaties. However, this would arguably change how the General Court interprets the TFEU in light of the binding provisions of GDPR. The new binding legal act could be interpreted as a special rule (lex specialis) on access to justice.

If there is no possibility of a direct action, the applicant must seek remedy pursuant to Article 267 of TFEU. In this case, an alternative way to provide controllers with effective legal redress might be to make the preliminary ruling procedure quasi automatic. This opportunity is available when the final decision is based upon the binding decision, and the applicant contests the merits of that decision. In our view, it would be necessary to ensure that the national court initiates, in every case, a preliminary ruling procedure on the issue of validity if the legality of the binding decision was contested.

In our paper, we already discussed two possible solutions to ensure effective legal redress however, it might be necessary to highlight the importance of direct action for annulment. Firstly, there might be a need to define the elements of an effective legal remedy. In this matter, basic principles should be mentioned, such as the right to a direct court hearing before a tribunal that is entitled to decide on the legality of an EU body's act. In this regard, a direct action for annulment can satisfy this need, as the concerned applicant could turn directly to the CJEU without any preparatory procedures being taken. Although the admissibility standards require the act to be directly enforceable towards the applicant, this criterion might not be well interpreted in connection with the binding decisions mandatory only for the LSA, who will then make the final decision. Additionally, the unified interpretation of discretionary power also requires clarification when it comes to the binding force of the EDPB's binding decisions. What are the terms of having discretionary power? Is it guaranteed if there is only one single element that can be overridden, for example the amount of the fine, or does the definition require a more comprehensive discretion? There is a tension between the requirements of an effective legal remedy and the admissibility standards; the question then arises as to which should take precedence, as national courts do not enjoy the privilege to declare an EU body's act null and void.

In our view, the main substantial and procedural rights must be secured for the applicants, including the right to have direct access to the court entitled to adopt a final decision regarding the matter. That is especially pressing when the intermediate act is even partially mandatory for the body responsible for the final decision. Therefore, it may be worth extending the admissibility standards of the direct action in those subjects where the intermediate or preparatory act constitutes binding provisions to the final decision. This development of the admissibility standards could produce a universally applicable rule that could not only solve the question regarding the EDPB's binding decisions but

could also be applied to any preparatory or intermediate act of an EU body.

The Case of WhatsApp's lawsuit is decisive in the matter of whether the controller can bring a direct action against the EDPB's binding decision. Currently, everyone is waiting for the judgment of the Court of Justice, which will put an end to the question of the correct interpretation of admissibility.

We strongly believe that the judgment of the Court of Justice will provide adequate answers to the open questions regarding an effective legal remedy as well as a solution for every controller. In any event, the EDPB and SA, as well as the CJEU and national courts, must reach a higher level of cooperation in the light of the principle of loyalty and mutual solidarity between the Member States and the Union, in order to provide the Union level of protection of personal data of natural persons.[96]

96 Article 4, TEU.

SEMI-FINAL C

EU AND EUROPEAN CIVIL PROCEDURAL LAW

PARTICIPATING TEAMS:

Albania, France, Germany, Greece, Netherlands, Romania I, Romania II, Serbia

1ST PLACE: ROMANIA I
2ND PLACE: GERMANY
3RD PLACE: FRANCE

Selected papers for the THEMIS Annual Journal: France, Germany, Romania I

25-28 JUNE 2024 - ROME, ITALY - ITALIAN MINISTRY OF JUSTICE

JURY MEMBERS

ALEŠ GALIC (SI)

Professor at the Faculty of Law of the University of Ljubljana, Ad-Hoc Judge at the European Court of Human Rights

I would like to express sincere gratitude to the Italian Ministry of Justice for hosting the THEMIS Semi-final C on EU and European Civil Procedural Law in Rome. The organization was superb and their hospitality was excellent. I wish to thank my fellow colleagues, Mrs. Emma-Jean Hinchy and Ms. Paola Giacalone. I have sincerely enjoyed our thorough, diligent, and frank deliberations and I have learnt a lot from them during our discussions. Furthermore, I am thankful to Mr. Flavio Mastrorillo, who organized everything so well on behalf of the EJTN.

The diversity and originality of the chosen topics – ranging from commercial arbitration and commercial jurisdiction agreements, to the issues of European family law – demonstrates the tremendous amount of scholarly knowledge of the participants. This year, diversity was even bigger due to the decision of the EJTN to alternate the topic of this THEMIS semi-final with EU and European Family Law.

With such promising young judges, one can be confident that the future of the judiciary and the rule of law in the European Union are in good hands. All participating teams, along with their tutors, should be proud of their outstanding and inspiring performance. The displayed critical thinking and communication skills, and in-depth knowledge of EU law, international law and (comparative) national law are shown during the competition and in the weeks of preparation leading to it.

Participating in moot courts is always a rewarding experience – either in the role of a participant, a tutor, or a juror. I have some experience in all of these roles and I can confirm that, at least in the THEMIS format, the role of juror is by far the most interesting and rewarding. The reason is that in other competitions all teams deal with the same topic and legal problems, therefore, a juror always finds some repetition. In THEMIS, instead, each team does research on a topic of its choice. This guarantees the opportunity to learn a lot and to broaden significantly one's horizons.

While the diversity of the topics covered by the teams is what makes THEMIS most interesting for a juror, it is also the biggest disadvantage when it comes to the unavoidable task of identifying the winners. It is much easier to compare papers and presentations which examine the same case, and it is, however, extremely difficult to compare and rank excellent papers dealing with different topics. Some topics are new, others are 'evergreen' – but 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, and in others the team is almost pioneering research. Some papers deal with topics which fall within the main academic/professional interests and expertise of a juror, while others are new to the jurors as well. Moreover, considering the diversity of the papers, it is also more difficult for the teams to critically evaluate their own papers in the light of the performance of other teams.

It is unavoidable that there might be some disappointment among the teams after the results are announced. I can assure that, together with my colleagues, we did this final part of our work in good faith, with diligence, after a thorough assessment and discussion. We strove to achieve fair results, adhering to the assessment criteria provided in the rules of the competition and to general academic principles of intellectual honesty, accuracy, and precision.

PAOLA GIACALONE (IT)

Lawyer, Doctoral Researcher at the Faculty of Law and Criminology of the Vrije Universiteit Brussel, Belgium, and at the International and Economic Law Department of the Federico II in Naples, Italy

It was an honour and a privilege to serve as a jury member in the THEMIS semi-final. I am grateful to the EJTN for this opportunity.

I would like to thank the host institution, the Italian Ministry of Justice, for the wonderful organization and warm welcome, and my fellow jury members, Ales and Emma-Jean. I loved the journey and the destination.

The participants were brilliant, competent, and motivated. All the teams demonstrated in-depth knowledge and insight into the chosen topics. The papers covered unexplored, relevant, and controversial issues related to EU civil and procedural law and international legal procedures, such as jurisdiction in private international law, improvements in international arbitration, proposals for EU parenthood recognition, the implications of AI tort liability, and many others. The participants took the stage and presented their ideas in an original and creative way, making reference to various legal instruments and case law.

What truly stood out was the unique atmosphere of the competition. The participants were deeply focused, and the air was filled with a palpable tension and pervasive enthusiasm. This unique atmosphere was a testament to the dedication and significance of the event. The symposium is not meant to be 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 various legal topics.

At the start of the competition, each team dined at separate tables, but on the final day, they walked and had dinner together, symbolizing the unity and collaboration encouraged by the event. The THEMIS Competition was guided by the spirit of ‘United in Diversity’.

Competitions like THEMIS are not just about showcasing talent, but also about building the foundation for mutual trust and cooperation in the European Union. They serve as a starting point for fostering these crucial values in the legal community.

EMMA-JEAN HINCHY (IE)

Head of the English Translation Unit at the Court of Justice of the European Union

It was a delight to preside the Semi-Final C on EU and European Civil Procedural Law in Rome. This was my first contact with this particular competition and I enjoyed how THEMIS made its participants work. It is true that there is a certain level of comfort derived from the deep dive into and presentation of their particular topics, but then competitors must face their peers before enduring a pommelling from the (over-)interested jury. There is nowhere to hide. It is a competition only for the brave.

Accordingly, the teams deserve special credit for choosing such difficult and intellectually complex subjects. We navigated custody arrangements, jurisdictional clauses, anti-suit injunctions, and the status of platform workers – to mention a few of the topics. To me – as I hope was the case for all – the tenor was that of common exploration. I was struck by the immense generosity of the participants towards each other, and their high-level engagement with each other's work. Further, there was a willingness to apply and work through practical issues arising at national level and in cross-border situations. There can be no better preparation for future judges and prosecutors.

Team Members:
Estelle FUCCELLARO
Tao MARQ AUTET
Céliane RESSOUCHE

Tutor: Inès Gharbi

Team France

EU PARENTHOOD PROPOSAL: BIG AMBITIONS, BIGGER OBSTACLES?

The right to privacy and to conduct a normal family life is a fundamental right common to the constitutional traditions of the Member States. The international recognition of filiation within the European Union appears necessary to make that right effective. However, the definition of a family is a sensitive topic both for Member States and their citizens. For the former, family law is a reserved domain of competence regarding EU law, while for the latter, it has direct consequences on citizens' rights in their state of residence. The Proposal for a Council Regulation on the cross-border recognition of parenthood aims at finding an equilibrium at EU level between individual rights and state sovereignty, in order to ensure parents in one Member State are considered as such in all Member States. To that end, the Proposal lays out four main sets of rules. It determines grounds for jurisdiction, the applicable law for the establishment of parenthood, and the recognition of parenthood across all Member States, while allowing for refusal on grounds of public policy. It also creates a Certificate of Parenthood, providing for the automatic recognition of established parenthood in all Member States. However, the Proposal might be too ambitious in light of the strong opposition it is currently facing at national level. This paper offers a critical and contextualized analysis of the balance and compromises reached in the text.

KEYWORDS:
FILIATION | CROSS-BORDER RECOGNITION | EU REGULATION | CERTIFICATE OF PARENTHOOD | CHILDREN'S RIGHTS | ENHANCED COOPERATION

Le droit au respect de la vie privée et à une vie familiale normale, fondamental dans les traditions constitutionnelles des États membres de l'Union européenne (UE), exige une reconnaissance internationale de la filiation pour être pleinement effectif. Pourtant, la définition même de la famille soulève des enjeux sensibles : les États y voient une compétence nationale exclusive, tandis que les citoyens en subissent les conséquences directes dans leur vie quotidienne. Pour concilier droits individuels et souveraineté étatique, la proposition de règlement du Conseil relatif à la reconnaissance transfrontalière de la filiation vise à trouver un équilibre au niveau de l'UE afin de garantir que les parents dans un État membre soient considérés comme tels dans tous les États membres. À cette fin, la proposition énonce quatre grands ensembles de règles. Elle détermine les motifs de compétence, la loi applicable à l'établissement de la filiation et à sa reconnaissance dans tous les États membres, tout en permettant le refus pour des motifs d'ordre public. Elle crée également un certificat de filiation, qui prévoit la reconnaissance automatique de la filiation établie dans tous les États membres. Cependant, l'ambition du projet se heurte à une résistance marquée au niveau national, remettant en question l'équilibre trouvé. Cet article propose une analyse critique et contextualisée de l'équilibre et des compromis atteints dans le texte.

MOTS-CLÉS :

FILIATION | RECONNAISSANCE TRANSFRONTALIÈRE | RÈGLEMENT DE L'UE | CERTIFICAT DE PARENTALITÉ | DROITS DE L'ENFANT | COOPÉRATION RENFORCÉE

INTRODUCTION

'If you are a parent in one country, you are a parent in every country', declared Ursula Von der Leyen, President of the European Commission, in her 2020 State of the Union speech. In December 2022, this assertion was formalized in the Proposal for a Regulation of 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 ('the Proposal').

Despite shared cultural and historical backgrounds, there are strong differences in the national family laws of the Member States of the European Union (EU), which stem from the various family concepts across Europe. The idea of what a family is, and of the members composing it, is influenced by different legal traditions and social backgrounds. Furthermore, the way in which a family is formed and the link between a parent and a child have changed significantly over time. In traditional families, the number of marriages between parents is falling, while divorce is becoming more frequent, creating reconstituted families. Furthermore, progress in medical science has made it possible to conceive a child outside a relationship (e.g. by single women) or within a homosexual relationship, with gametes from a third person.

The use of the word 'family' in this paper should be understood as referring to a group of people that includes at least one parent and one child who are regarded as such under at least one national law in the EU, whether they are blood-related or not. The legal connection that exists between a parent and their child is called 'filiation', although it may also be referred to as 'parenthood' in what follows.[1]

On the one hand, Member States are sovereign when it comes to laying down rules on the definition of the family or the establishment of parenthood. However, legal frameworks must evolve to take the different types of families into account. Member States are more or less inclined to provide the necessary legal framework, which creates major disparities in the establishment of parent-child relationships. Some of the methods used to establish parenthood are unanimously recognized within the EU, while others are subject to debate.

On the other hand, in order to legislate, the EU must have competence under the EU Treaties and must ensure that the measures adopted comply with the subsidiarity requirement in respect to the Member States and the proportionality requirement.[2] The Union may indeed only adopt measures relating to family law with cross-border implications pursuant to Article 81(3) of the Treaty on the Functioning of the European Union (TFEU), such as measures to facilitate the recognition of parenthood in all Member States once it has been established in one of them. The Member States individually would not be able to satisfactorily resolve the problems related to the recognition of filiation, given that the rules and procedures of the Member States would have to be identical in order for filiation to be recognized between Member States.

The Proposal aims at harmonizing Member States' rules on international jurisdiction and their conflict-of-law rules designating the law applicable for the establishment of parenthood in cross-border situations.

1 Article 4 of the 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, COM/2022/695 ('the Proposal').

2 Article 5, TEU.

It also lays down rules for the recognition of foreign documents establishing filiation within the EU and provides for the creation of a Certificate of Parenthood to further simplify recognition. The Proposal is circumscribed to the establishment of parenthood in a Member State in a cross-border situation and to the recognition of parenthood established in a Member State by other Member States. The Proposal does not cover cross-border adoption, whether or not the adoption involves a state that is party to the 1993 Hague Convention on the Protection of Children and Intercountry Adoption.[3]

After underlining the legal insufficiencies that exist regarding cross-border issues concerning the establishment and recognition of filiation in the EU (1.), this paper provides an analysis of the EU Parenthood Proposal and how it aims to address those insufficiencies for the sake of the child's best interests and the prohibition of discrimination (2.), before exploring the necessary adaptations of the Proposal, both in content and in form, in order for it to have a future (3.).

1. OVERVIEW OF THE CURRENT SITUATION: A PREJUDICIAL LACK OF HARMONY

A. A Comparative Analysis of Filiation across Member States

Parent-child relationships may be established in a variety of circumstances. Firstly, the most common way of establishing parenthood is biologically. This occurs when the parent transmits genes to the child through natural conception. Secondly, the parent-child relationship may be legally recognized through the adoption of the child by one or both parents. Thirdly, parent-child relationships may be established through surrogacy, usually a contract for value whereby a third party carries a child for a couple or a single person. Lastly, parenthood may result from medically assisted conception, mainly referred to as assisted reproductive technology (ART). This will usually involve artificial insemination and *in vitro* fertilization, sometimes with a third party as a donor.

To establish a biological parent-child relationship, states use legal presumptions. For instance, all of them consider that the birth of a child within a married couple establishes parenthood. However, nine Member States only allow the registration of children for a certain period of time.[4]

As far as joint adoptions, Member States sometimes distinguish between married and non-married couples, and between homosexual and heterosexual couples. For married couples of different genders, joint adoptions are allowed in all EU Member States, but 23 of them have introduced certain conditions. For unmarried couples engaged in a legally recognized partnership, joint adoption is only possible in nine countries. Married same-sex couples can adopt in 13 countries, while those with a different legal status can adopt in nine countries.[5] Therefore, homosexual parents are exposed to a higher risk of facing an obstacle to exercise their right to free movement within the EU, as 14 Member States would not recognize their parent-child relationship.

In the case of adoption by the second parent, there are once again distinctions between

3 Hague Convention on Protection of Children and Co-Operation in respect of Intercountry Adoption (1993).
4 S. Morel *et al*., *Study to support the preparation of an impact assessment on a possible Union legislative initiative on the recognition of parenthood between Member States* (2022), Annex 4: Analysis of the existing legal framework at EU and Member State level, available at 6a4a696c-6c9e-41df-883a-bf1e53db2ddb_en.
5 *Ibid*.

married and non-married couples, on the one hand, and homosexual and heterosexual couples, on the other hand. A possibility for the second parent in heterosexual married couples to adopt the child of the first parent exists in all Member States. However, only 12 Member States allow such adoption for unmarried couples and in 12 Member States, second-parent adoption is not allowed for registered partners. In 16 Member States, the second parent of a same-sex couple may adopt the child of his or her spouse. 14 Member States allow this type of adoption for homosexual registered partners.[6]

Adoption by single parents is possible in all Member States, except Hungary and Poland, and is rare in Cyprus and Lithuania.[7]

Regarding surrogacy, the problem faced by families is not so much the recognition of the parent-child relationship within the EU but the establishment of this relationship, as many countries prohibit the practice of surrogate motherhood.[8] However, this is a fast-growing phenomenon; the market was worth $4 billion in 2020 and could grow by 32.6% between now and 2027. The European market accounted for 42% of the worldwide market.[9] Although data is incomplete within the EU, it is possible to estimate that around 3,600 children are born as a result of surrogacy each year.

In 2022, surrogacy was expressly banned in eight Member States, while two Member States (Greece and Romania) explicitly allowed it only under certain conditions. In the rest of the EU, the prohibition is the result of provisions which only ban surrogacy where it is remunerated, or which drastically reduce the legal effects of such an agreement. 16 Member States do not recognize surrogacy contracts signed abroad. However, several Member States are open to recognizing the parent-child relationship resulting from a surrogate pregnancy (for example, Austria, Germany, Estonia, France and Hungary).[10]

Concerning ART, the problem is essentially the same as for surrogacy, with difficulties arising at the time of establishing filiation and not so much in the context of recognizing a birth certificate in another state. Around 150,000 children were born to ART in 2020, with the most permissive countries (Spain and Belgium) having higher rates (7.9% and 4.8%).[11]

Twenty European countries have authorized the use of ART for married couples. Same-sex couples are prohibited from using ART in 11 countries, and nine other countries prohibit it for male homosexual couples only. ART is open to single parents in 17 countries (not for men in France and Portugal) and prohibited in Austria, the Czech Republic, Italy, Lithuania, Poland, Slovenia and Slovak Republic.[12]

B. Current State of Play Regarding Parenthood in Europe

Although family matters are considered to be intrinsically linked to Member States' national identity,[13] the EU has already regulated many of the effects of parenthood, whether patrimonial or extra patrimonial.[14] Regarding

6 *Ibid*.
7 *Ibid*.
8 For example: ECtHR, *Mennesson v. France*, Appl. no. 65192/11, Judgment of 26 June 2014, available at http://hudoc.echr.coe.int/.
9 M. Faizullabhoy, *Surrogacy Market - By Type (Gestational Surrogacy, Traditional Surrogacy), By Technology (Intrauterine Insemination (IUI), In-vitro Fertilization (IVF)), By Age Group, By Service Provider & Forecast, 2023-2032*, November 2022, available at https://www.gminsights.com/industry-analysis/surrogacy-market.
10 S. Morel *et al*., *supra* note 5.
11 *Ibid*.
12 *Ibid*.
13 Member States' national identity is protected under Article 4(2) Treaty on European Union.
14 A. Marignani, 'Quelle place pour l'exception d'ordre public au stade de la reconnaissance dans l'avenir de la filiation en droit international privé', *AJ Famille* (2024) 84, at 85.

the latter, three instruments are applicable in the EU. The New Regulation Brussels II Regulation (2019)[15] which replaced the 2003 Brussels II Regulation[16], Regulations defines jurisdiction, recognition and enforcement of decisions in matrimonial matters and of parental responsibility and refers to the 1996 Hague Child Protection Convention.[17] Concerning the patrimonial effects of parenthood, two Regulations are worth mentioning: the Maintenance Obligations Regulation of 18 December 2008,[18] which deals with jurisdiction and refers to the 2007 Child Support Convention[19] to determine the applicable law, and the Successions Regulation[20] of 4 July 2012, which deals with applicable law, jurisdiction, recognition of decisions and authentic instruments and creates a Succession Certificate. The aim of these patrimonial and extra patrimonial Regulations is to create coherence between Member States and hence facilitate citizens' mobility and consequently their right to family and private life. The Regulations rely on the principle of mutual trust and therefore reduce the risk of litigation to enforce rights.

However, in order for these rules to apply, parenthood must first not only be established in one Member State, but also recognized in the other Member States – a process which is currently not harmonized within the EU.

In order to ensure minimum coherence and respect of European rights, EU law, as interpreted by the European Court of Justice (CJEU), particularly in relation to freedom of movement, already provides that parenthood established in one Member State should be recognized in all other Member States for certain purposes, such as the right to enter a territory,[21] in particular rights of residence and non-discrimination in comparison to national citizens. This solution stems from a rather recent 2021 ruling,[22] which implies, for instance, that as long as a child's filiation has been legally established in one Member State, said child should be recognized as a European citizen under EU law, and can therefore not be denied his or her right to stay in any Member State, even where the way in which the child's filiation was established is not recognized in that State. Member States are thus required to provide an identity document that gives effect to these rights of residence and freedom of movement. In this sense, the judgment reaffirms that a state's administrative authorities must comply with EU law as interpreted by the Court.

This 2021 judgment is part of an older tradition. The CJEU has long developed a theory of the rights acquired by citizens of the EU in personal and family matters. Thus, in the *Grunkin-Paul* decision,[23] the rules on the devolution of a name, which are normally the responsibility of each Member State, could be set aside for the sake of the right to identity – and in order to ensure the right to free movement – so that individuals could keep a name devolved under the law of another Member State.

15 Council Regulation (EU) 2019/1111 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (recast), repealing Council Regulation (EC) 2201/2003, OJ 2019 L 178/1.
16 Council Regulation (EC) 2201/2003, no longer in force (date of end of validity: 31 July 2022).
17 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children for applicable law concerning parental responsibility of 19 October 1996.
18 Council Regulation 4/2009, on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ 2009 L 7/1.
19 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance of 23 November 2007.
20 European Parliament and Council Regulation 650/2012, OJ 2012 L 201/107.
21 European Parliament and Council Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L 158/77.
22 CJEU, Case C-490/20, *V.M.A. v Stolichna obshtina, rayon 'Pancharevo'* (EU:C:2021:1008).
23 CJEU, Case C-353/06, *Grunkin and Paul* (EU:C:2008:559).

Lastly, the fundamental rights guaranteed by the European Convention on Human Rights[24] (ECHR) apply to the EU. In this respect, states must recognize the filiation of children born through surrogate motherhood, even if they prohibit surrogacy, such as was the case in *Mennesson v. France*.[25] The means of such recognition may vary from state to state, depending on national laws. The intended parents may have their filiation recognized by operation of law or through a judicial procedure, or they may adopt the child. The European Court of Human Rights (ECtHR) has reached a balance between the states' prerogatives and the right to a private and a normal family life.

Minimum harmonization is therefore ensured by European case law, but it is far from sufficient in view of what is at stake for families.

C. Current Difficulties in the Cross-Border Recognition of Filiation

Numerous families suffer from the legislative disparities that exist regarding filiation across the Member States. The European Commission estimates that there are 1,235,000 couples with children in a cross-border situation in the European Union, and 103,000 mobile parents and their children are affected – or highly likely to be affected – by problems of non-recognition of their filiation in another Member State.[26] The 'Baby Sara' case[27] that took the spotlight in the media a few years ago provides an example of such a situation. A same-sex couple composed of a woman from Gibraltar and a woman from Bulgaria had had a baby in Spain. However, their home country, Bulgaria, would not recognize any form of marital bond between the two women, and therefore denied the baby her Bulgarian citizenship. Although the CJEU has since ruled in this case that no European citizen should be denied their rights derived from EU law,[28] thus granting Baby Sara the right to remain in Bulgaria as a citizen, the little girl is still denied the rights that she would derive from her Bulgarian mother under Bulgarian law.

The most common way for a person to prove their filiation is with their birth certificate, or in some Member States their family record book. One Member State may, however, refuse to acknowledge such a document issued in another Member State where the filiation that it establishes goes against its legal traditions or its interpretation of public policy. Such refusal is generally due to the way in which a child was conceived, e.g. by ART or surrogacy, or to the legal relationship between the parents, e.g. whether they are married or not.

Over and above the different interpretations of public policy, there are a number of legal concepts that exist in one Member State but not in others, making it more difficult to recognize their effects on those other countries. This is particularly true of same-sex couple adoptions and partial adoptions - i.e. adoptions that preserve the bond with the child's original family while adding another filiation.[29] Where a Member State is not familiar with a legal concept whose outcome is contrary to its concept of public policy, chances are high that it will not grant legal recognition.

24 Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950.
25 ECtHR, *Mennesson v. France*, Appl. no. 65192/11, Judgment of 26 June 2014, and ECtHR, *Labassee v. France*, Appl. no. 65941/11, Judgment of 26 June 2014.
26 J.-P. Pont, *Report on the Proposal for the Foreign Affairs Commission of the French National Assembly*, 24 May 2023.
27 EURACTIV, *Lesbian parents in Bulgaria fight to expand LGBTQ+ family rights in EU court* (2022), available at https://www.euractiv.com/section/non-discrimination/news/bulgarian-lesbian-parents-fight-to-expand-lgbtq-family-rights-in-eu-court/.
28 CJEU, Case C-490/20: *V.M.A. v. Stolichna obshtina, rayon 'Pancharevo'* (EU:C:2021:1008).
29 E.g. 'simple adoption' under Article 360, French Civil Code.

Children that are most affected by the absence of automatic recognition of their legally established filiation are those whose parents move abroad to live, or whose parents went abroad solely for the purpose of conceiving or adopting a child. Children who should be able to claim several nationalities may also be affected where their additional nationality is denied on the basis of their filiation. Children of unmarried or same-sex couples are particularly affected as well.[30]

Such difficulties may be regarded as a violation of a child's right to respect for private and family life, which is protected under Articles 7 and 24 of the EU Charter of Fundamental Rights[31] (the EU Charter) as well as Article 8 of the ECHR. Other rights that may be at stake are the right not to be subject to any discrimination (Article 21 of the EU Charter, Article 14 of the ECHR) and the right to identity (Article 7 of the EU Charter).

The child's best interests must guide Member States in the rules that apply to the transcription of foreign birth certificates, pursuant to both Article 24 of the EU Charter and Article 3 of the United Nations Convention on the Rights of the Child,[32] to which all European Union states are parties, and which is often cited by the ECtHR when interpreting the ECHR.

Furthermore, the path towards the recognition of filiation in a foreign country may be lengthy or costly, and the expected outcome may never even happen where recognition is denied. Not only are those procedures sometimes tough for families, but they may also be a burden for Member States: while civil registers are usually competent for birth certificate transcriptions, any dispute in case of refusal may end up before a court, thus costing much more time and money to both families and states. Complex judicial procedures are, in particular, very frequent when it comes to transcribing birth certificates of children born as a result of surrogacy: as many as 14 cases of this kind have been brought before the ECtHR since 2014.[33]

These procedures may be even more burdensome where national systems or case law lack clarity for family law disputes: in Bulgaria, case law is developed by both civil and administrative courts. In Estonia and Italy, the courts, as well as the administration, do not have a uniform approach, which often leads to rulings from the national high courts or supreme courts. On a related note, while Greece has implemented a Special Civil Registrar for the civil status of Greeks domiciled abroad, there are a lot of delays, as the authorities cannot deal with all the requests.

It is therefore crucial for both European families and European states that the recognition of foreign birth certificates be eventually simplified. This is what the Proposal aims to do at the European Union level.

2. ANALYSIS OF THE PROPOSAL: OBSTACLE-FREE CROSS-BORDER PARENTHOOD?

A. Jurisdiction

There are two objectives set out in the Proposal, which are achieved thanks to the rules on jurisdiction: easier access to a court and easier recognition of parenthood. These objectives are an application of Article 81, § 1 of the TFEU, pursuant to which '[t]he Union

30 A. Tryfonidou and R. Wintemute, *Obstacles to the free movement of rainbow families in the EU* (2021), study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the PETI Committee.
31 Charter of Fundamental Rights of the European Union, OJ 2012 C 326/391.
32 UNCRC, GA Res. 44/45, 20 November 1989.
33 E.g. ECtHR, *D v. France*, Appl. no. 11288/18, Judgment of 16 July 2020 and ECtHR, *C v. Italy*, Appl. no. 47196/21, Judgment of 31 August 2023.

shall develop *judicial cooperation* in civil matters having cross-border implications, based on the principle of *mutual recognition of judgments and of decisions in extrajudicial cases* [and such] cooperation may include the adoption of measures for the approximation of the laws and Regulations of the Member States.'[34] This judicial cooperation has always implied setting out rules on jurisdiction. This may be accounted for by the fact that if rules concerning jurisdiction are the same in all Member States, checking jurisdiction becomes unnecessary if the decision stems from a Member State. Hence, Regulations that tackle recognition always include provisions on jurisdiction (e.g. the Succession Regulation[35]).

Access to a court is facilitated by the alternative grounds for jurisdiction that are proposed. The competent courts either have a close link with the child (habitual residence of the child, nationality of the child) or with the parents (residence or nationality of one of the parents, or habitual residence of the defendant).[36] The fact that the claimant can bring proceedings before the courts of their habitual residence is reminiscent of the rules set out in the Maintenance Obligations Regulation.[37] Not only does it ensure consistency between the court that establishes filiation and the court that governs its effects, but it also facilitates access to a court in an international context. The alternative nature of the rule allows the claimant – who will most often be the child or one of their parents – to choose the most convenient jurisdiction, hence facilitating access to a court.

Exceptional cases are also covered by the Proposal, as when no court can be designated through the alternative jurisdiction grounds, the courts of the Member State where the child is present are competent.[38] The best interests of the child are thus preserved and at the heart of this provision, as no situation is excluded from the application of the proposed Regulation.

The Proposal goes further and establishes a *forum necessitates*.[39] This is not uncommon in Regulations that deal with family matters. Establishing a *forum necessitates* means that any court that has a sufficient link with the case can be considered to be competent. In this respect, the Proposal is exhaustive and fulfils its objective of facilitating access to a court. However, the alternative nature of the grounds for jurisdiction and the fact that there is a *forum necessitates* where there is a subsidiary jurisdiction may contribute to a form of legal uncertainty, which could eventually be counterproductive.

B. Applicable Law Pursuant to the Proposal

To be recognized in other Member States, filiation first needs to be established under national law. A crucial question is, therefore, that of the applicable legislation for determining a child's filiation in the first place. Under the Proposal, the best interests of the child are central to the determination of the applicable law.

The primary criterion is that of the 'habitual residence of the person giving birth at the time of birth'.[40] This wording is designed to be as inclusive as possible in comparison to that of 'mother', which would be too restrictive in certain situations: there may indeed be more than one mother, e.g. in the case of

34 Article 81(1), Treaty on the Functioning of the European Union 2007, 12016E081, OJ 2016 C 202/78.
35 European Parliament and Council Regulation 650/2012, OJ 2012 L 201/10.
36 Article 6 of the Proposal.
37 *Supra* note 20.
38 Article 7 of the Proposal.
39 Article 9 of the Proposal.
40 Article 17 of the Proposal.

same-sex female couples, or the person giving birth could be a transgender male, or even a surrogate, i.e. not even necessarily a parent. The chosen phrasing is deliberately 'factual' so as not to contradict the various definitions of 'mother' or 'motherhood' that are to be found in the Member States, while at the same time locking the interpretation that could be used by Member States to circumvent the Regulation – especially because the designation of the applicable law in the Proposal has a universal nature.[41]

The criterion of the 'person giving birth' is a way for the Proposal to ensure that parents of intention, in cases of surrogacy, will be recognized as such in all Member States. Where a Member State does not allow surrogacy, parents who resort to it in another Member State where it is allowed will benefit from the application of the law of the latter State to have their filiation recognized. This criterion is crucial and serves the aim set out by the Proposal: not only does it secure legal ties between children and parents, but it also greatly facilitates the recognition of filiation by enabling the application of a law that will, more often than not, be favourable to it. The same reasoning applies to children born as a result of ART. In cases that do not involve surrogacy or ART, the chosen criterion also facilitates the recognition of parenthood, as the habitual residence of the person giving birth is often easier to determine than that of the unknown – or alleged – parent.

It may, however, be that the habitual residence of the person giving birth at the time of birth cannot be established, for instance in the case of a refugee or an internationally displaced mother. In such a case, the law of the state of birth of the child should apply in a subsidiary order. The existence of this subsidiary criterion shows how exhaustive the Proposal is: it aims to provide answers for every situation, thus going far beyond the criticism according to which its ambitions only lie with comforting the situation of rainbow families.[42]

Nevertheless, where the applicable law pursuant to the above criteria only allows for one parent to be recognized as such, another criterion may be used to allow for the establishment of filiation regarding the second parent only: it may be the law of the state of nationality of either parent, or the law of the state of birth of the child.[43] This may be the case, for instance, where a parent in a same-sex relationship adopts a child in a country where adoption by a homosexual couple is prohibited: the other parent, if their state of nationality allows such a form of adoption, could thus be recognized as such thanks to the Proposal. This provision is therefore revolutionary, as it allows families to essentially combine different national legislation to suit the child's best interests, the latter then having a much greater chance that both of their parents be recognized as such.

The Proposal enables families to basically circumvent the legislation of the Member State they live in to use not only one, but potentially two more permissive foreign national legislations all at once. It thus almost annihilates any obstacle posed by restrictive national legislation in favour of the more permissive, on the condition that families are able to rely on at least one international element, e.g. one parent's foreign nationality. Although this solution is highly beneficial to many families and children, it does create inequalities between families who can travel abroad to conceive a child using more

41 Article 16 of the Proposal.
42 French Senate, Proposal for a European Resolution No. 446, 22 March 2023, at paras. 24-25.
43 Article 17 of the Proposal.

permissive legislation, or who include a foreign parent whose state of nationality has such permissive legislation, and other families who do not meet these requirements.

It must, however, be noted that the application of a second law regarding the second parent does not appear to be mandatory, as the Proposal states that one of the three 'may apply to the establishment of parenthood as regards the second parent'.[44] This might mean that the national authorities establishing filiation could refuse to apply another legislation even where the applicable one leaves one of the parents without any filiation.[45] If that were the correct interpretation of this wording, it would significantly diminish the impact of the provision explained above. Indeed, in the above example, why would a state that bans homosexual parents from adopting together agree to apply another, more permissive legislation to recognize the second parent, i.e. the same-sex partner of the adopting parent, as such?

That said, in order to preserve Member States' sovereignty,[46] the Proposal refers to public policy and allows for 'courts and other competent authorities establishing parenthood in cross-border situations to disregard, in exceptional circumstances, certain provisions of a foreign law'.[47] However, there are two general limits to the use of public policy by Member States: the degree of opposition to public policy must be very high, as it should be 'manifestly incompatible', and the use of public policy should never lead to discrimination.[48] This two-fold limit allows for a high degree of oversight by the CJEU, not to mention that the Proposal must be interpreted in the light of fundamental rights - e.g. the child's best interests and Article 21 of the EU Charter, which prohibits discrimination. On these bases, the CJEU will be able, within the limits of its jurisdiction, to take action against Member States that unfairly refuse to recognize a parent-child relationship established in another Member State, thus making the Regulation all the more efficient. Although public policy is referred to elsewhere in the Proposal, there is a specific limit regarding the designated law: the setting aside of a provision of foreign law has to be circumscribed to specific provisions and thus cannot cover the entire law of the other Member State at issue. Each provision disregarded has to be accounted for and justified by the authority in charge (whether a court or a public authority). Through this limit, a form of indirect oversight is at play, reducing leeway for judges and other competent authorities.

C. Recognition

The recognition of foreign official documents regarding filiation only consists in the formalization of previous rulings of the CJEU, allowing for the rights acquired in one Member State to be recognized in all Member States, at least where such rights derive from EU law[49] – except the same solution would now be applied to rights deriving from national law as well.

At the national level, the establishment and registration of parenthood involve several public authorities. The filiation is generally written down in a civil status or population register once it has been established in a Member State by operation of law following

44 *Ibid*.
45 P. Guez, 'Quelques réflexions sur les éventuelles modifications du conflit de lois', *AJ Famille* (2024), at 80.
46 M. Lardeux, 'Le pluralisme juridictionnel en droit de la famille' (2015), PhD available at https://theses.hal.science/tel-01363890/document.
47 Article 22 of the Proposal.
48 P. Guez, *supra* note 44, at 82.
49 CJEU, 14 December 2021, Case C-490/20: *V.M.A. v Stolichna obshtina, rayon 'Pancharevo'* (EU:C:2021:1008).

birth, for example. To prove this parent-child relationship, the above authorities issue an administrative document, which is often a birth certificate. A court decision may establish the parent-child relationship, as is often the case for adoptions or when parenthood has been challenged.

Judgments and authentic instruments with binding legal effect establishing filiation in the Member State of origin should be recognized in any Member State based on the principle of mutual trust within the EU.[50] Thus, parenthood established in one Member State should be recognized and allow for the updating of the child's civil status record without the need for a special procedure. Recognition under the Proposal implies the absence of a court decision, at least in most cases. Only where recognition is disputed – either by the competent authorities or a designated third party – will the case go before a court. This is cause for optimism, as judicial procedures to obtain the recognition of parenthood often span several years and leave families in very precarious situations.

To have parenthood recognized in another Member State, a citizen should produce a copy of the court decision or authentic instrument with binding legal effect that established said parenthood. These documents must be accompanied by a standardized attestation issued by the Member State of origin and intended to facilitate the interpretation of the documents and thus their recognition.[51] In the case of authentic instruments with binding legal effect, the attestation also serves as a safeguard, as it proves that two conditions are met: the Member State whose authority issued the authentic instrument was competent to establish parenthood under the Proposal, and the document has binding legal effect on the Member State.[52] The harmonization of the requirements for the drafting of the attestation makes any further checks unnecessary, ensuring the efficiency of cross-border parenthood recognition. The same mechanism applies to non-legally binding authentic instruments (e.g. birth certificates), which should have the same probative value in another Member State as in the Member State of origin.[53]

The Proposal provides a limited list of instances where it is considered admissible for a Member State to refuse recognition of a parent-child relationship resulting from a court decision or an authentic instrument, legally binding or not.[54]

Member States may refuse to grant direct effect to a court decision if the defendant was not given sufficient time to prepare for a defence or if there is an application from a parent who claims that the child is theirs and this person has not been heard. The difficulty that is raised here is that, because there is no exequatur procedure, how would the defendant or the applicant be able to have their rights recognized? The issue is identical to the recognition of authentic instruments, as the Proposal also provides for the case in which an authentic instrument violates a person's rights.

The last element that allows Member States to refuse to recognize parenthood is public policy, the interpretation and oversight of which are identical to those concerning applicable law.[55]

50 CJEU, 18 December 2014, Case Opinion 2/13 pursuant to Article 218 (11) TFEU (EU:C:2014:2454), at para. 168.
51 Articles 26 and 29 of the Proposal.
52 Article 37 of the Proposal.
53 Article 45 of the Proposal.
54 Articles 31 and 39 of the Proposal.
55 R. Legendre, 'Filiations internationales. Brèves réflexions sur le principe même d'une réglementation européenne et sur les objectifs poursuivis par la Commission.', *AJ Famille* (2024), at 73.

The Proposal secures the recognition and direct effect of parenthood across the EU but Member States might be reluctant to accept such rules as they would undermine their sovereignty. Beyond the problem of accepting this Regulation, such harmonization does not allow for national particularism, despite this particularism being a fundamental value in the EU. For instance, the ECtHR gives a broad margin of assessment to Member States as to how they recognize parenthood. The Court did not condemn Germany for registering a transgender parent who gave birth to a child as the child's mother, although he identified as a male and would have wished to be recognized as the child's father.[56] The positions of each Member State may evolve in future years, and transgender parents may be registered as mother or father according to their declared sexual identity rather than biological reality. The Proposal would allow for such families to be recognized in all Member States. This is therefore a high level of guarantee of the right to respect for private life.

Although the recognition of court decisions or authentic instruments regarding filiation is only mandatory where it occurs between two Member States, it might be illusory to believe that filiation established in non-Member States would be completely excluded from the recognition process set out by the Proposal. For instance, a child conceived via surrogacy in the United States might, at some point, have their filiation recognized in a Member State – after a court decision, for instance – according to that state's internal rules of private international law. As soon as one Member State recognizes said filiation, then every Member State will have to recognize it as well pursuant to the Proposal, even though the filiation was first established outside the EU.[57]

D. The Certificate of Parenthood

Pursuant to the Proposal, the Certificate of Parenthood is a document that could be requested by any parent or child in the Member State where filiation was established in their regard, and whose jurisdiction is applicable in accordance with the Proposal. However, to the extent there may be multiple states whose jurisdiction is applicable for the delivery of the Certificate, there is an undeniable risk that several certificates providing contradictory information be delivered.[58] This uncertainty could easily be resolved by designating one Member State, which would exclusively be competent for the delivery of the document, i.e. the Member State where filiation was established. The Certificate would be delivered by national courts, or by any other competent authority in matters of parenthood (e.g. local civil registrars).[59]

The information contained in this document would essentially be presumed to be accurate in all Member States. As filiation status is stable in most cases, the validity of the Certificate and its copies would not be limited in time, without prejudice to the possibility of rectifying, amending, suspending or withdrawing the Certificate if necessary. That possibility would be welcome, as some situations may evolve over time.

However, the Certificate can only be used in the child's interest. Yet, other persons may have an interest in using it.[60] Indeed, parenthood allows for a certain number of personal rights for the parent (mainly rights of residence). There seems to be no explanation

56 ECtHR, *O.H. and G.H. v Germany*, Appl. no. 53568/18 and no. 54741/18, Judgment of 4 April 2023.
57 C. Gonzalez Beilfuss, 'La proposition de règlement européen en matière de filiation : analyse liminaire', *RTD Eur.* (2023) 217, at 219.
58 *Ibid*., at 225.
59 Article 48 of the Proposal.
60 Article 47 of the Proposal.

in the Proposal as to the limit set for the use of the Certificate and therefore, its use should be extended to the parents, were it for their personal benefit, and to the child's descendants as well.[61]

The Certificate would be based on a standardized model available in all official languages of the EU, thus considerably reducing translation costs for families. It would not replace equivalent national documents attesting parentage (such as a birth certificate), which could still be used.[62] However, no authority would be entitled to demand the production of a court decision or authentic instrument in place of the Certificate if a copy of the Certificate issued in another Member State is produced. This makes the Certificate of Parenthood undeniably efficient – although its effects may overlap with those of the recognition rules set out by the Proposal.

Overall, the Proposal is ambitious in that it aims to cover all situations and ensure equal treatment for all families. The exhaustive nature of the Proposal, which tackles jurisdiction, applicable law, recognition, and the creation of the Certificate, serves these ambitions. However, the Proposal is certainly open to improvement, like all ambitious texts.

3. PERSPECTIVES: OVERCOMING THE LAST OBSTACLES

A. Rethinking the Balance between the Child's Best Interests and Member State's Sovereignty

1. Jurisdiction

The Proposal provides seven alternative grounds for jurisdiction in matters of parenthood. Although the many options offered undoubtedly allow for facilitated access to a court, mainly through its proximity to the child, the alternative nature of jurisdiction will inevitably lead to forum shopping. If a parent is concerned that the parent-child relationship is not recognized in one Member State, they will be able to initiate recognition proceedings in a more liberal State. In the opposite case, it opens up the possibility of a person initiating proceedings in order to harm a family that has already been formed, which could prove detrimental to the child.

It thus seems more appropriate to introduce a ranking in this provision – while maintaining the *forum necessitates* – to avoid the risk of forum shopping, as families would be bound by an order of priority among the various grounds mentioned above. This suggestion would preserve the child's best interests by increasing legal certainty.

2. Applicable Law

The Proposal provides that the law applicable to the establishment of parenthood should be the law of the state where the person giving birth usually resides at the time of birth. The Marburg Group, a consortium of German international private law scholars, has criticized the unchangeable nature of this connecting factor for the applicable law. The group suggests differentiating between the establishment of parenthood at the time of birth and after the time of birth. After some time following the birth, the applicable law would change the law of the 'habitual residence of the child at the time when parenthood is established'. This would lead

61 The Marburg Group, Comments on the European Commission's 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, 10 May 2023, at 79, available at https://www.marburg-group.de/.

62 Directorate-General for Communication, *Questions & Answers: Recognition of parenthood between Member States*, 7 December 2022, available at https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_7510.

to the application of a national law that has a relevant connection with the child.[63]

Yet, unchangeable nature may find justification: the existence of parenthood or lack thereof is itself unchangeable. The fact that the unchangeable connecting factor is the habitual residence of the mother at the time of birth may, however, not be beyond criticism. There is indeed a form of discrepancy between the fluctuating aspect of habitual residence and the unchangeable aspect of the wording 'at the moment of the child's birth'. The place of birth, specifically in an international context, may be very circumstantial. Implementing the criterion of the nationality of the person giving birth could be a possible alternative, as it is more stable. It would, however, be in contradiction with the usual criteria used by the EU – which rarely uses nationality as a connecting factor.

Additionally, the Proposal may lack ambition in that Article 17 states that where the second parent is left without any filiation under the applicable law, a subsidiary law *may* apply to establish filiation as regards the second parent only. If it means that the application of a subsidiary law would only be a possibility and not an obligation, it might render this provision ineffective, especially in states whose legislation on parenthood is restrictive: why would they deliberately apply a more permissive law? 'May' should therefore be removed from this provision so that the applicable law would necessarily be the subsidiary legislation that effectively establishes filiation towards the second parent. The establishment of filiation could then only be denied where it is not allowed under any of the three legislations envisaged by Article 17 (2), or where the authority in charge makes use of its national public policy if it is relevant and non-discriminatory.

3. Recognition

Under the EU Parenthood Proposal, national public policy[64] is a ground for refusing the recognition of filiation between Member States, although its application is prohibited where it leads to discrimination. While this prohibition is fortunate, as it guarantees that marginal family models are equally likely to have their filiation recognized in other Member States, it also leads to the almost complete annihilation of public policy in most cases. For instance, Greece allows surrogacy for heterosexual couples or single women only, which excludes single men or homosexual couples.[65] Should the Greek authorities refuse to recognize the birth certificate of a child born abroad as a result of surrogacy in a same-sex couple on the basis of Greek public policy, that might amount to discrimination based on sex or sexual orientation. Nevertheless, denying the transcription of the birth certificate of a child born as a result of surrogacy does not necessarily mean this child should be left without filiation. For instance, France allows children born abroad of surrogacy to have their filiation established in France by transcribing their birth certificate with the biological parent only, and via adoption regarding the second parent[66] – even though surrogacy itself is still considered contrary to French public policy.[67] In any case, it is important to note that the exact meaning of the public policy limitation, if adopted, will have to be interpreted by EU Courts.

63 The Marburg Group, *supra* note 64, at 32.
64 I.e. a body of principles to which a state proclaims its attachment because of the social, economic and moral values that it considers essential to tie society together, at one given time.
65 Article 1458 Greek Civil Code.
66 *Cour de cassation* (France), 5 October 2018, no. 10-19/053.
67 Article 47 of the French Civil Code prohibits the direct transcription of birth certificates of children born of surrogacy.

Still, the Proposal might be made more respectful of national public policies, and thus more likely to be adopted. Instead of implementing forced recognition of documents establishing filiation between Member States with a very marginal place left to public policy, it could allow states to deny a literal transcription of a birth certificate incompatible with their public policy as long as they provide another way[68] to establish the same filiation regarding both parents. This is a solution that France, among other Member States, pleads for.[69] However, the establishment of filiation in the Member State refusing the transcription should always be made simple and obstacle-free for the Regulation to be effective: such an amendment to the Proposal should indeed be no excuse for reluctant countries to prevent filiation to be established at all when it does not suit them.

4. The Certificate of Parenthood

The European Certificate of Parenthood is, at most, an instrument that would simplify the recognition process detailed above. The added value of the Certificate may be acknowledged if the EU is understood as a community in an increasingly globalized world where unified modes of proof such as the Certificate would have a broader impact outside the EU and could hence prove to be useful. This document is useful in that it establishes a uniform presumption, contrary to other authentic instruments, which may differ in content and in the extent of what they demonstrate or attest.

However, as the Certificate has the same result as the rules set out by the Proposal for the recognition of court decisions and authentic instruments – i.e. guaranteeing in every Member States the recognition of parenthood established in one of them – its added value may be considered rather marginal, which would call for its suppression.[70] Moreover, as mentioned previously with regard to recognition, the establishment of filiation is an important aspect of national sovereignty and implementing a uniform[71] Certificate would prevent Member States from having any control over the transcription. The suppression of the Certificate would then be coherent with the suggestion made above for the recognition of parenthood, i.e. mandatory recognition but not necessarily a literal transcription.

Lastly, the Certificate proves redundant with the attestations delivered by competent authorities previously mentioned. Indeed, they present the same characteristics: they are available in the language of all Member States, and they follow a single format. What differentiated the Certificate from the attestations was that, contrary to the latter, the Certificate could be requested in various Member States. However, it has been argued above that this provision regarding the Certificate was unfortunate, as it lacked clarity. Therefore, the suppression of the Certificate should prove beneficial to the Proposal, making it clearer as well as allowing for better respect of Member States' sovereignty.

B. The Alternative Path to Thorny Adoption: Enhanced Cooperation

Being a Regulation proposal striving to implement European rules in family law, the text would require unanimity at the EU

68 E.g. the adoption of a child born of surrogacy by the non-biological parent, if the literal transcription of the birth certificate is denied.
69 J.-P. Pont, Report on the Proposal for the Foreign Affairs Commission of the French National Assembly, 24 May 2023.
70 C. Gonzalez Beilfuss, *supra* note 60, at 225.
71 Article 29 of the Proposal.

Council to be adopted.[72] However, several Member States are likely to vote against the Proposal, such as Italy or Hungary, whose governments or parliaments have already expressed strong reservations.[73] Even in seemingly liberal states, the project is facing criticism: similarly to the Italian Senate, the French Senate adopted a resolution against the Proposal in March 2023.[74] Apart from the fact that it allows same-sex parenthood, a concern which is rather marginal in the EU, two main concerns are expressed: the Proposal is perceived as excessive interference in national legislation in family matters, thus supposedly breaching the subsidiarity principle,[75] and it is criticized for the recognition of surrogacy that would be implemented if the Proposal were adopted.[76]

The Regulation's inability to receive the required unanimous approval by the EU Council would not necessarily lead the Proposal to be buried. It may indeed be implemented through enhanced cooperation, i.e. a mechanism that allows some Member States to further develop European integration in a specific field.[77] Should some States be reluctant to adopt the Regulation, only those that are willing to apply it would thus be bound by it. However, certain conditions need to be met for enhanced cooperation to be enacted. Firstly, the mechanism must be authorized by the EU Council, acting by a qualified majority on a proposal from the Commission, and after approval from the European Parliament; secondly, a minimum of nine Member States is required.

Although the objectives set out by the Proposal cannot be reached fully through enhanced cooperation, leaving hundreds of European families in precarious situations, as their rights would still be denied, one may nevertheless choose to believe that an example would be set by the participating Member States. The very existence of increased possibilities for European families within the Union would probably be inspiring to other European citizens so as to progressively change cultural views and overcome initial reluctance.

CONCLUSION

The above developments show that the EU Parenthood Proposal is very ambitious, commensurate with the challenges currently faced by families seeking recognition of their filiation. Some proportionality has been sought between the child's best interests and Member States' sovereignty in this field. The Proposal does also face major obstacles, but these are not insurmountable. They mainly lie in the current impossibility to refuse the recognition of foreign parenthood where it is contrary to national public policy – a solution which, as discussed, might have to be reassessed in the light of the evolution of society and families across the EU.

It is hard not to notice that parenthood was absent in the 2022 Joint declaration on legislative priorities for 2023-2024: should this be considered a sign of the foreseen failure to adopt the Regulation? It is crucial today to push for the Proposal to be adopted, be that through enhanced cooperation at first if necessary, as long as it is not abandoned and forgotten.

72 Article 329(2), Treaty on the Functioning of the European Union 2007, 12016E081, OJ 2016 C 202/78.
73 Italian Senate, Resolution of the 4th permanent commission, 16 March 2023, doc. XVIII-bis no. 2.
74 French Senate, Proposal for a European Resolution n°446, 22 March 2023.
75 *Ibid.*
76 *Ibid.*
77 Article 20, Treaty on European Union, 12016M020, OJ 2016 C 202/27.

Family matters are intrinsically entrenched in culture and therefore fluctuate – more so now than ever before. The idea of what a family is, or should be, has evolved more in a few decades than over centuries previously. Even if the harmonization of filiation in Europe was deemed too ambitious for now, there must be no doubt that the solutions brought by the Proposal and discussed above shall soon be much more consensual.

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ON CASE C-124/21 P (*INTERNATIONAL SKATING UNION V. COMMISSION*) – ICE AGE FOR INTERNATIONAL ARBITRATION? AN ATTEMPT FOR COMPROMISE

In the *ISU v. Commission* case, a case concerning EU competition law and sports arbitration, the CJEU has again increased the requirements for arbitration proceedings in the EU. While arbitration remains generally permissible, the CJEU now requires an 'effective review' of arbitral awards by an EU Member State. This contrasts sharply with the traditional prohibition against revisiting the merits of a case resolved through arbitration. The CJEU now requires that the reviewing court must be able to refer questions to the CJEU under Article 267 TFEU.

By questioning the validity of arbitration agreements that permit a non-EU seat, effectively creating a de facto second instance, reducing enforcement options, and limiting the issues that can be brought before arbitral tribunals, the CJEU is gradually making arbitration a less attractive option. However, the CJEU's reasoning is understandable and important: maintaining the primacy and effective implementation of EU law and upholding the EU's stable framework.

The impact of the ISU judgment on future practices remains uncertain, but it seems clear that a compromise between the two positions is necessary. Solutions could be an arbitral seat within the EU or expanding the right to refer questions to the CJEU under Article 267 TFEU.

KEYWORDS:

INTERNATIONAL SKATING UNION V. COMMISSION | INTERNATIONAL ARBITRATION | AUTONOMY OF EU LAW | PUBLIC POLICY | REVISION AU FOND | COURT OF JUSTICE OF THE EUROPEAN UNION (CJEU)

Dans l'affaire *ISU c. Commission*, concernant le droit de la concurrence de l'Union européenne (UE) et l'arbitrage sportif, la CJUE a de nouveau renforcé les exigences applicables aux procédures d'arbitrage dans l'UE. Si l'arbitrage reste généralement autorisé, la CJUE exige désormais un « contrôle effectif » des sentences arbitrales par un État membre de l'UE. Cette évolution marque une rupture avec l'interdiction traditionnelle de réexaminer le bien-fondé d'une affaire réglée par voie d'arbitrage. La CJUE exige désormais que la juridiction de recours soit en mesure de poser des questions à la CJUE en vertu de l'article 267 TFUE.

En remettant en cause la validité des conventions d'arbitrage prévoyant un siège hors UE, en instaurant *de facto* une forme de double degré de juridiction et en restreignant tant les voies d'exécution que les questions soumises aux tribunaux arbitraux, la CJUE fait progressivement de l'arbitrage une option moins attractive. Toutefois, le raisonnement de la CJUE est compréhensible et important : le maintien de la primauté et de la mise en œuvre effective du droit de l'Union et le maintien du cadre stable de l'Union.

L'impact de l'arrêt ISU sur la pratique dans le futur reste incertain, mais il semble clair qu'un compromis entre les deux positions est nécessaire. Il pourrait s'agir d'un siège arbitral au sein de l'UE ou d'étendre le droit de saisir la CJUE en vertu de l'article 267 TFUE.

MOTS-CLÉS :

INTERNATIONAL SKATING UNION C. COMMISSION | ARBITRAGE INTERNATIONAL | AUTONOMIE DU DROIT DE L'UNION | POLITIQUE PUBLIQUE | RÉVISION AU FOND | COUR DE JUSTICE DE L'UNION EUROPÉENNE (CJUE)

INTRODUCTION: PAIR SKATING TOWARD THE ABYSS?

Suspicion is growing that the Luxemburg judges feel uneasy when it comes to arbitration proceedings. Parties removing disputes from the purview of state courts is difficult to reconcile with the Court of Justice of the European Union (CJEU)'s claim to having the last word in questions of interpretation of EU law. 'Out of sight, out of mind' has so far not worked well when dealing with the CJEU.

Indeed, there seems to be a tug-of-war between private parties asserting their right to submit disputes to arbitration and the CJEU insisting on the autonomy and effective implementation of EU law. Where arbitration disputes take place outside the EU, the role of EU courts in reviewing arbitral awards becomes less and less forceful. Conflict seems inevitable. Should the CJEU give up its goal of exclusivity? Or should private parties resign themselves to losing part of their freedoms related to arbitration in favour of uniform and consistent implementation of EU law?

The infamous *Achmea* Case[1] triggered much discussion on arbitration within the EU and whether the CJEU should practise self-restraint in that field. The CJEU's recent decision *ISU v. Commission*[2] gives cause for renewed debate regarding the future of arbitration in the European Union.

Given the immense popularity and impact of arbitration, on the one hand, and the existential importance of the consistent interpretation of EU law on the other, it seems clear that there cannot be a solution that satisfies all parties in every respect. Rather, it is necessary to create a just balance between the autonomy of the parties and the autonomy of EU law. Permanently wrestling for the upper hand means treading on thin ice and will likely leave no winner.

Attempting to find a compromise between these positions, we first introduce international arbitration (1.A.) and the concept of the autonomy of EU law (1.B.). After outlining the CJEU's findings in the 2018 *Achmea* Case (2.A.), we focus on the recent case of *ISU v. Commission* (2.B.). We shed light on the consequences that the *ISU* Case will have in practice (3.A.) and suggest potential solutions for a compromise (3.B.). We finish with a conclusion.

1. THE ORIGIN STORY: INTERNATIONAL ARBITRATION V. THE AUTONOMY OF EU LAW

While the autonomy of the parties is the bedrock of arbitration, it finds its limitations where public policy is concerned. At the same time, state regulatory interest, which is expressed in the respective public policy exception clauses, finds its limitations where otherwise the autonomy of the parties would be too severely restricted.[3]

A. An Introduction to International Arbitration

Arbitration is a form of dispute resolution, alternative to state courts, that is based on the private autonomy of the parties.[4] Parties to a contract can enter a so-called arbitration agreement, by which they agree to refer all disputes that may arise between them to an arbitral tribunal for a final and binding decision. The parties themselves can choose the arbitrators, i.e. the members of the arbitral tribunal, their own 'private' judges.

1 C-284/16, *Achmea* (ECLI:EU:C:2018:158).
2 C-124/21 P, *ISU v. Commission* (ECLI:EU:C:2023:1012).
3 R. Morbach, *Der kartellrechtliche Ordre Public in der internationalen Schiedsgerichtsbarkeit* [The Anti-Trust Public Policy in International Arbitration] (2021), at 37.
4 M.-P. Weller and C. de Micheli, 'Ordre Public in International Arbitration', in M. Gebauer, T. Klötzel and R. A. Schütze (eds), *Usus Atque Scientia – Festschrift for Roderich C Thümmel* (2020) 968, at 971; Morbach, *supra* note 3, at 37.

As a result of the arbitration agreement, the 'ordinary' state courts now lack jurisdiction to decide the dispute.

The reasons for choosing arbitration instead of opting for state courts are manifold. Arbitration is especially popular in cross-border disputes.[5] Parties are often free to choose the arbitrators – entirely or from a closed list provided by the dispute resolution institution –, which can be particularly advantageous in international disputes. This is because, for one, the parties are not bound to judges from a state that they might feel are biased in favour of one of the parties. For another, they can select experts in the field of the dispute that arises between them. Parties can also devise the procedure itself, including the language of the proceedings, how long the written phase should be, and when and where in the world the hearings should be held. Arbitration proceedings can be strictly confidential, with no scrutiny by the press or general public. Final decisions can also be obtained faster than before state courts: once the arbitral tribunal renders an award, if the parties have so agreed (which is the norm), there is no second instance and parties cannot appeal the tribunal's decision.[6]

Another crucial reason for choosing arbitration is the simplified enforcement mechanism through the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('NYC'). With more than 160 contracting states, this Convention enables arbitral awards to be recognized and enforced nearly all over the globe and much more easily than the decisions of state courts.[7]

There are only two ways to take up arms against an arbitral award once it is rendered: one is through seeking the annulment of the award (sometimes called 'setting aside') before the state courts of the seat of arbitration. The other is fighting recognition of the award before the state courts, where the other party seeks recognition and enforcement. In both cases, though, the scope of review by the state courts is limited. State courts can only cancel awards or refuse their recognition and enforcement on very narrow and exhaustively enumerated grounds,[8] such as a serious and obvious error in the arbitration agreement (Article V(1)(a) NYC) or in the conduct of the proceedings, for instance where one party was unable to present their case (Article V(1)(b) NYC). Further, recognition and enforcement may be refused where the award leads to a result that is obviously contrary to public policy, i.e. incompatible with the fundamental principles of the state (Article V(2)(b) NYC).[9]

Importantly, save this public policy reservation, the competent state court does not review the award on the merits and the application of substantive provisions. A factually wrong decision by the arbitral tribunal must be accepted, provided that the threshold of Article V(2)(b) NYC, an obvious violation of fundamental principles of national law, is not reached. Anything else would call into question the effectiveness of arbitration. The parties have, based on

5 In a 2021 survey conducted by Queen Mary University of London, 90% of the respondents stated that they preferred to refer to arbitration in cross-border disputes, whereas only 6% preferred national courts (Eckhoff, Meyer and Schiering, 'Die Attraktivität Deutschlands als Forum internationaler Streitbeilegung [The Attractiveness of Germany as a Forum for International Dispute Resolution]', 12 *Recht der internationalen Wirtschaft (RIW)* (2023) 804, at 805.

6 Eckhoff, Meyer and Schiering, *supra* note 5, at 805; R.A. Schütze and M. Wendland, '§ 1025', in R.A. Schütze (ed.), *ZPO [Code of Civil Procedure]* (2023), at para. 336 f.

7 Schütze and Wendland, *supra* note 6, at para. 338.

8 The legal basis for refusing recognition and enforcement is found in Art. V New York Convention. The legal basis for annulment depends on the national legislation of the respective state. Many states, however, have adopted the UNCITRAL Model Law on International Commercial Arbitration, whose Art. 34 is a verbatim of Art. V New York Convention. The standard for refusing recognition and annulling an award, therefore, is generally the same.

9 Art. V New York Convention, Art. 34 UNCITRAL Model Law.

their party autonomy, chosen to forego state courts in favour of an arbitral tribunal. This choice cannot be circumvented by having state courts exercise a full review through the backdoor of annulment or recognition proceedings. This restriction of judicial review of the arbitral award is called the 'prohibition of a *révision au fond*' and is a fundamental principle not only in international arbitration but generally when it comes to recognizing foreign decisions.[10]

A potential loophole in the prohibition of the *révision au fond* is the above-mentioned public policy exception. Public policy (also known as '*ordre public*') is the mechanism to protect the fundamental values of a legal system.[11] The concept of 'public policy' is difficult to grasp and nearly impossible to define. However, it can be roughly described as the sum of all values that a legal system takes as its fundamental basis and whose implementation is of such elementary importance to it that everything else must take a back seat without exception.[12] It only applies to extreme cases where the fundamental values of a given legal order are at stake.[13] In Germany, for example, this concerns the violation of fundamental rights (*Grundrechte*)[14] or illegal contracts intended to conceal the payment of bribes.[15] Whilst some have called public policy an 'escape route'[16] for national courts to avoid the consequences of usually enforceable arbitral awards,[17] there is general agreement that those fundamental values need to be protected. However, there is also general agreement on the fact that the 'public policy exception' needs to be interpreted and applied restrictively. An expansive interpretation would jeopardize the effectiveness of the New York Convention and of arbitration proceedings in general. In practice, there are only very few cases where national courts have found an arbitral award to be in violation of public policy. Especially in Switzerland, courts are very reluctant in declaring an arbitral award invalid on grounds of public policy.[18]

B. The Autonomy of EU Law as the Bedrock of the European Union

The kind of autonomy that the EU enjoys is a different one from that of the parties to an arbitration agreement, but no less important. Within the EU legal system, it is particularly enshrined in Article 344 TFEU, which prohibits submitting a dispute concerning the interpretation or application of the EU Treaties to any other resolution mechanism than those provided for in the treaties.[19] Autonomy of EU law is a fundamental principle within the EU, sometimes even referred to as being 'fundamental for the *existence* of the Union'.[20] It finds its basis in the very nature of the EU as a supranational organization based on the rules of law and EU law taking primacy over national law and, in part, having a direct effect on EU citizens.[21] The CJEU claims the final say when

10 Morbach, *supra* note 3, at 246 f.
11 Weller and de Micheli, *supra* note 4, at 982.
12 Morbach, *supra* note 3, at 48 f.
13 *Ibid.*, at 47 f.
14 J. von Hein, 'Art. 6 EGBGB', in J. von Hein (ed.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Bd. 12 [Munich Commentary to the Civil Code, Vol. 12], (9th ed., 2024), at para. 146.
15 Harbst, 'Korruption und andere ordre public-Verstöße als Einwände im Schiedsverfahren [Corruption and Other Breaches of Public Policy as Objections in Arbitration Proceedings]', 1 *Zeitschrift für Schiedsverfahren (SchiedsVZ)* (2007) 22, at 22.
16 Enonchong, 'Public Policy in the Conflict of Laws: A Chinese Wall around Little England?', 45 *The International and Comparative Law Quarterly* (1996) 633, at 634.
17 Morbach, *supra* note 3, at 25.
18 *Ibid.*, at 28 f.
19 C-284/16, *Achmea*, *supra* note 1, at para. 32.
20 Shuibhne, 'What Is the Autonomy of EU Law, and Why Does That Matter?', 88 *Nordic Journal of International Law* (2019) 9, at 11.
21 C-284/16, *Achmea*, *supra* note 1, at para. 33.

it comes to the interpretation of EU law, sometimes referred to as 'the monopoly of interpretation'.[22] As a result, the CJEU enables and secures the consistent and uniform application and interpretation of EU law.[23]

In accordance with Article 19 TEU, it is up to national courts and the CJEU to ensure full application of EU law and efficient judicial protection in all member states. The mechanism by which the CJEU's monopoly is safeguarded is the opportunity and obligation of member states to refer questions of EU law to the CJEU for a preliminary ruling, Article 267 TFEU. This mechanism allows for the preservation of the autonomy of EU law.[24]

2. CONFLICT ENSUES: DEVELOPMENTS IN THE CJEU'S CASE LAW ON INTERNATIONAL ARBITRATION

Hence, the autonomy of the parties is the bedrock of arbitration and finds its limits where public policy and the autonomy of EU law are concerned. Conflict is unavoidable between private parties exercising their party autonomy through entering arbitration agreements and removing certain disputes from the purview of courts, and the EU insisting on its monopoly on interpretation.

As early as 1999, in *EcoSwiss* (C-126/97), the CJEU held that arbitration within the EU was generally permissible. However, whilst for the sake of effective arbitration proceedings, 'review of arbitration awards should be limited in scope' and pertain only to 'exceptional circumstances', some sort of judicial review was necessary.[25] For EU member states, this should include their national public policy matters as well as EU public policy matters. The CJEU also required that, if necessary, the state court should be able to refer those questions to the CJEU for a preliminary ruling.[26]

Since then, the limits of the scope of this judicial review have been tested time and again. Brick by brick, European courts have added a growing line of scepticism and criticism against arbitration.

The European Court of Human Rights, in proceedings relating to discrimination on the basis of sex, found that compulsory arbitration before a non-EU arbitral tribunal without access to state courts failed to afford sufficient institutional and procedural safeguards to the individual party.[27]

In a groundbreaking judgment delivered in 2022, the German Federal Supreme Court decided that arbitral awards relating to matters of competition law were subject to a *révision au fond*, a full review in law and fact by the national courts.[28] In stark contrast to the usually very limited judicial review, this, in fact, creates a second instance of appealing arbitral awards.

The backlash against (investment) arbitration within the EU reached a climax in the infamous *Achmea* Case, which will be contextualized, summarized and discussed below (A.). Most recently, the CJEU has rendered another decision that affects the permissibility of arbitration proceedings that touch upon matters of EU law: The

22 de Abreu Duarte, 'But the Last Word Is Ours': The Monopoly of Jurisdiction of the Court of Justice of the European Union in Light of the Investment Court System', 30 *The European Journal of International Law* (2019) 1187, at 1198.
23 B. Wegener, 'Art. 344 TFEU', in C. Callies and M. Ruffert (eds), *EUV – AEUV [TEU – TFEU]*, (6th ed., 2022), at para. 7; C-284/16, *Achmea*, *supra* note 1, at paras. 35, 37; C-1/09, *Opinion of the Court* (ECLI:EU:C:2011:123), at para. 69; C-2/13, *Opinion of the Court* (ECLI:EU:C:2014:2454), at para. 175; C-244/80, *Foglia v. Avello* (ECLI:EU:C:1981:302), at para. 16; Joined Cases C-422/93, C-423/93, C-424/93, *Zabala Erasun and others* (ECLI:EU:C:1995:183), at para. 15.
24 C-284/16, *Achmea*, *supra* note 1, at paras. 35, 37; Wegener, *supra* note 23, at para. 7.
25 C-126/97, *EcoSwiss* (ECLI:EU:C:1999:269), at para. 35.
26 *Ibid*., at para. 40.
27 ECtHR, *Semenya v. Switzerland*, Appl. no. 10934/21, Judgment of 11 July 2023.
28 Federal Supreme Court (Germany), *Steinbruch*, KZB 75/21, Decision of 27 September 2022.

International Skating Union v. Commission Case (B.).

A. The Achmea Case Before the CJEU: the Beginning of the End?

Appreciating what, how and why the CJEU decided on *Achmea* (C-284/16) requires a short introduction to a special form of international arbitration, investment arbitration.

1. Introduction to Investment Arbitration

Investment arbitration is a form of dispute resolution between a private company (the 'investor') and a nation-state. Rather than a specific arbitration agreement between the two disputing parties, investment arbitration usually finds its basis in arbitration clauses in investment treaties between two or more nation-states to which the private company is not a party. The idea is a win-win situation: a 'capital-importing' state incentivizes foreign investment – and thus, improves economic development – by granting the other contracting state's private companies certain rights when investing in the other states.[29] The contracting state protects its national investors from unfavourable treatment from the host state when setting up business abroad.

Procedurally, the investor usually has the option of having disputes between the investor and their host state, though public in nature, decided before a private arbitral tribunal. Additional to the benefits of conventional commercial arbitration, this is meant to grant foreign investors a fairer and more efficient alternative to the options they traditionally had when challenging the host state's conduct: going before the host state's courts, which were considered unlikely to decide against their own state, or diplomatic protection by the investor's home state, deemed too political.

2. The CJEU's Findings in the Achmea Case

In 2008, a dispute arose between the Slovak Republic and a Dutch health insurance, Achmea, that had set up a business there. Achmea, the investor, initiated arbitration proceedings. The place of arbitration was Frankfurt (Germany). The Slovak Republic claimed that the arbitral tribunal lacked jurisdiction, as the arbitration clause in the Dutch-Slovak investment treaty was incompatible with EU law and therefore legally inoperative.[30] The tribunal rejected this, assumed jurisdiction, and decided in favour of Achmea. The Slovak Republic then asked the German courts to annul the award, maintaining that the arbitration clause was irreconcilable with EU law. In the last instance, the German Federal Supreme Court referred to the Court of Justice the question of whether arbitration clauses in bilateral investment treaties between two EU member states ('intra-EU BITs') were compatible with EU law.

The reasoning in the preliminary ruling was threefold: First, the CJEU noted that the tribunal in question might have to resolve a dispute 'liable to relate to the interpretation of the application of EU law,' as it might consider the law in force of one of the parties, which, in case of EU member states, includes EU law.[31]

In a second step, the CJEU reasoned that an arbitral tribunal was not part of the judicial system of the EU and, thus, not qualified to refer to the CJEU questions for a preliminary

29 *Cf.* e.g. the Germany Pakistan Bilateral Investment Treaty of 1959, whose Preamble reads: '… an understanding reached between the two States is likely to promote investment, encourage private industrial and financial enterprise and to increase the prosperity of both the States …'.

30 C-284/16, *Achmea*, *supra* note 1, at para. 11.

31 *Ibid.*, at paras. 39-42.

ruling under Article 267 TFEU.[32] In this regard, Advocate General Wathelet had argued that an investment tribunal based on an intra-EU BIT could be regarded as a court within the meaning of Article 267 TFEU, since it constituted a dispute resolution mechanism by two member states.[33] The CJEU did not follow that reasoning but argued that the tribunal had no links with the judicial systems of the member states.[34]

Third, the CJEU held that an award by a tribunal constituted under an intra-EU BIT was subject to only very limited judicial review and thus, it could not be ensured that relevant questions of EU law would be submitted to the CJEU for a preliminary ruling.

In this respect, the CJEU emphasized the difference between commercial and investment arbitration tribunals. Commercial arbitration proceedings are based on 'freely expressed wishes of the parties'.[35] As such, they are permissible within the EU, and the CJEU accepts that 'efficient arbitration proceedings [require that] the review of arbitral awards by the courts of the member states [be] limited in scope'.[36] However, what this review must encompass is 'that the fundamental provisions of EU law can be examined in the course of that review, and, if necessary, be the subject of a reference to the Court for a preliminary ruling'.[37]

However, when it comes to investment arbitration, we are looking at a different picture: Investment arbitration proceedings originate from a treaty through which the contracting member states 'agree to remove from the jurisdiction of their own courts … disputes which may concern the application or interpretation of EU law' and 'establish[ed] a mechanism for settling disputes … which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law'.[38] This, in the eyes of the CJEU, constitutes a separate violation of EU law:[39] courts in the member states have a duty to refer questions of EU law to the CJEU, in order to safeguard the autonomy and uniform application and interpretation of EU law. By entering arbitration agreements in intra-EU BITs, they escape that duty by removing questions of EU law from the CJEU's jurisdiction.

The CJEU went so far as to note that an arbitration clause in an intra-EU BIT calls into question 'the principle of mutual trust, [and] the preservation of the particular nature of the law established by the Treaties … and is therefore not compatible with the principle of sincere cooperation'.[40] On this basis, the CJEU ruled that intra-EU investment arbitration clauses have an adverse effect on the autonomy of EU law and, therefore, constitute a violation of EU law.[41]

3. The Aftermath of Achmea

The *Achmea* decision by the CJEU marked the 'beginning of the end' of investment arbitration in the European Union.[42] Since *Achmea*, many intra-EU BITs have been

32 *Ibid.*, at paras. 42-49.
33 C-284/16, *Achmea*, *Opinion of Advocate General Wathelet* (ECLI:EU:C:2017:699), at paras. 126-130.
34 C-284/16, *Achmea*, *supra* note 1, at para. 48.
35 *Ibid.*, at para. 55.
36 *Ibid.*, at para. 54; C-126/97, *EcoSwiss*, *supra* note 25.
37 C-284/16, *Achmea*, *supra* note 1, at para. 54.
38 *Ibid.*, at para. 55 f.
39 Weiniger KC, Croisant and Lacey, *The CJEU and Commercial Arbitration in the EU: Where Are We Now?* 15 January 2024, available at https://www.linklaters.com/de-de/insights/blogs/arbitrationlinks/2024/january/cjeu-commercial-arbitration-and-isu.
40 C-284/16, *Achmea*, *supra* note 1, at para. 58.
41 *Ibid.*, at para. 59 f.
42 Ankersmit, *Achmea: The Beginning of the End for ISDS In and With Europe?* 24 April 2018, available at https://www.iisd.org/itn/en/2018/04/24/achmea-the-beginning-of-the-end-for-isds-in-and-with-europe-laurens-ankersmit/.

terminated,[43] with EU member states otherwise risking infringement proceedings against them.[44]

Some arbitral tribunals have disregarded objections by the parties relating to a lack of jurisdiction due to the *Achmea* decision and assumed jurisdiction regardless of it.[45] However, EU national courts have either confirmed the lack of jurisdiction of the arbitral tribunals when arbitration proceedings were initiated,[46] or set aside and annulled the respective awards and refused enforcement.[47] Despite having unsuccessfully applied several times in other cases,[48] the European Commission is sometimes granted leave to intervene in arbitration proceedings as a non-disputing *amicus curiae* and file a submission on the question of whether the tribunal lacks jurisdiction.[49]

Thus, with *Achmea*, the CJEU did what it could to close the door on investment arbitration within the EU. Scholars and practitioners alike wondered whether this stance on investment arbitration could be transferred to commercial arbitration, i.e. arbitration between two private parties. With the *International Skating Union v. Commission*, the CJEU got the chance to shed light on that question.

B. International Skating Union v. Commission: *Another Nail in the Arbitration Coffin?*[50]

On 21 December 2023, the CJEU delivered judgments in three different cases that all concerned the relationship between international sports federations and EU law, in particular EU Competition Law.[51] The overarching question was whether sports federations could legitimately impose requirements for their members to participate in competitions organized by other federations, or otherwise hamper or even prevent alternative competitions.[52] One of the cases, *International Skating Union v. Commission* (hereinafter 'ISU Case') (C-124/21 P), also raised questions on the admissibility of arbitration proceedings in the sports and competition fields within the EU.[53]

Understanding the CJEU's decision in the ISU Case requires a short introduction to sports arbitration, the Court of Arbitration for Sports ('CAS'), and the International Skating Union ('ISU').

1. Sports Arbitration in General and the Court of Arbitration for Sports in Specific

Sports arbitration is a dispute resolution mechanism for sports-related disputes, including such relating to sponsorship agreements, for licences for certain sports

43 UNCTAD, *The Changing IIA Landscape: New Treaties and Recent Policy Developments* (2020), available at https://unctad.org/system/files/official-document/diaepcbinf2020d4.pdf.
44 Ankersmit, *supra* note 42.
45 Hindelang, Nassl and Kumar Jena, *Achmea Goes to Washington: How a US District Court Enforces EU Law*, 19 April 2023, available at https://verfassungsblog.de/achmea-goes-to-washington/.
46 Federal Supreme Court (Germany), *Raiffeisen Bank v. Croatia*, I ZB 16/21, Decision of 17 November 2021; Hindelang, Nassl and Kumar Jena, *supra* note 45.
47 Paris Court of Appeal (France), *Slot et al. v. Poland*, RG-20-14581, Decision of 19 April 2022; Cour de cassation (Luxembourg), *Micula v. Romania*, CAS-2021-00061, no. 116/2022, Judgment of 14 July 2022; Hindelang, Nassl and Kumar Jena, *supra* note 45.
48 E.g. ICSID, *Cube Infrastructure v. Spain – Decision on EC's Intervention*, 2 April 2020, ICSID Case no. ARB/15/20.
49 ICSID, *Tallinn v. Estonia – Decision on EC's Intervention*, 2 October 2018, Case no. ARB/14/24; ICSID, *Mainstram et al. v. Germany – Decision on EC's Intervention*, 1 February 2023, Case no. ARB/21/26.
50 *Cf.* Schrader *et al.*, *CJEU's 'ISU Decision': A Nail in the Coffin of Antitrust-Related Arbitration in the EU?* 9 February 2024, available at https://arbitrationblog.kluwerarbitration.com/2024/02/09/cjeus-isu-decision-a-nail-in-the-coffin-of-antitrust-related-arbitration-in-the-eu/.
51 C-333/21, *European Super League* (ECLI:EU:C:2023:1011); C-680/21, *Royal Antwerp Football Club* (ECLI:EU:C:2023:1010); C-124/21 P, *ISU v. Commission*, *supra* note 2.
52 Wauters, Killick and Hertel, *Sport Before the European Court of Justice*, 28 December 2023, available at https://www.whitecase.com/insight-alert/sport-european-court-justice-three-decisions-upholding-primacy-eu-law-also.
53 C-124/21 P, *ISU v. Commission*, *supra* note 2.

leagues, organization of and participation in competitions, violations of anti-doping regulations, disciplinary measures etc.

The Court of Arbitration for Sports is an arbitration institution headquartered in Lausanne, Switzerland, which, as the name suggests, administrates sports disputes.[54] Submitting a dispute to the CAS requires an arbitration agreement between the two parties that stipulates a CAS tribunal as the competent body to resolve the dispute.[55] The parties can then freely choose their arbitrators. Notably, neither the parties nor the tribunal can choose the seat of arbitration (i.e. the place whose courts could review the award): R28 of the CAS Code Procedural Rules determines an *exclusive* seat in Lausanne. An award rendered by a CAS tribunal can be enforced in accordance with the New York Convention and is therefore subject to only limited judicial review and, if any, only by Swiss Courts.

Though the CAS is not the only institution specialized in sports-related disputes,[56] it is the most popular, dubbed as the 'supreme court of world sport'.[57] Many international sports federations require their members to agree to CAS's exclusive jurisdiction over potential disputes.[58]

2. Background: What Is the ISU?

The International Skating Union is an international sports federation in the fields of figure skating and speed skating throughout the world that seeks to 'regulate, govern and promote' these sports.[59] The ISU describes itself as the only sports federation recognized by the International Olympic Committee in this field.[60]

The ISU's members are national associations, which are, in turn, made up of professional athletes.[61] Among others, the ISU explicitly sets out the following rules for its members: (1) prior to organizing any international skating competition, the organizing body must obtain prior authorization for that competition from the ISU (the '*prior authorization rules*'[62]); (2) in case an athlete participates in a competition that was not primarily authorized by the ISU or otherwise does not comply with the established rules, that athlete may be either issued a warning or be banned from any future competition organized under the umbrella of the ISU (the '*eligibility rules*'[63]); and (3) in case of disputes between the ISU and its members, exclusive and final dispute settlement by way of arbitration before the CAS (the '*arbitration rules*'[64]).[65]

Thus, as the ISU is the only internationally recognized body in the field of skating sports, if an athlete wishes to pursue an international career in skating, they must, in practice, abide by these rules or else risk a lifetime ban and, thereby, the end of their career.[66]

54 CAS Code of Sports-Related Arbitration (2023), at para. S1.
55 *Ibid.*, at para. R27.
56 *Cf.*, for instance, the German Court of Arbitration for Sport within the German Arbitration Institute (DIS).
57 Abanazir, *The Court of Arbitration for Sport's Multifarious Views on Freedom of Expression*, 23 February 2022, available at https://verfassungsblog.de/the-court-of-arbitration-for-sports-multifarious-views-on-freedom-of-expression/.
58 *Cf. inter alia* Art. 61 UEFA Statute, Art. 56 f. FIFA Statute, Art. 26 ISU Constitution, Art. 61 Olympic Charter.
59 f. Art. 3.1 ISU Constitution.
60 C-124/21 P, *ISU v. Commission*, *supra* note 2, at para. 4; International Skating Union, *About the ISU*, https://www.isu.org/about/.
61 International Skating Union, *About the ISU*, *supra* note 60.
62 International Skating Union, *ISU Communication no. 1974*, 20 October 2015, available at https://insightplus.bakermckenzie.com/bm/attachment_dw.action?attkey=FRbANEucS95NMLRN47z%2BeeOgEFCt8EGQJsWJiCH2WAWuU9AaVDeFgq9gxTxSJepG&nav=FRbANEucS95NMLRN47z%2BeeOgEFCt8EGQbuwypnpZjc4%3D&attdocparam=pB7HEsg%2FZ312Bk8OluOIH1c%2BY4beLEAeOus5uxTYXe0%3D&fromContentView=1.
63 Rule 102 ISU General Regulations.
64 Art. 26 ISU Statute.
65 C-124/21 P, *ISU v. Commission*, *supra* note 2, at paras. 9 ff.
66 The rules on the *lifetime* ban have since been redrafted. At the time of the ISU decision, they were still in force.

If an athlete or a national association wishes to appeal a decision rendered by the ISU, because of the exclusive arbitration clause, the only competent body is a CAS tribunal. Ensuing awards by CAS tribunals are subject only to review by the Swiss *Tribunal Fédéral*, i.e. the Swiss Supreme Court. The reviewing court's scope of review is limited to confirming whether the award observed public policy matters within the meaning defined by the respective reviewing court. The *Tribunal Fédéral* being a Swiss court, the public policy matters it takes into consideration do not necessarily include EU public policy matters.[67]

Further, decisions by the ISU (and thus also confirming arbitral awards) do not always require additional enforcement procedures. If an athlete is found to infringe the sports organization's statutes, they are simply prevented from participating in upcoming competitions. Any form of judicial review of the respective decision and of its *factual* enforcement could take years. In the field of professional sports and athletes' particularly short careers, justice delayed would often mean justice denied.

3. The Procedural History

In June 2014, two professional Dutch skaters filed a complaint with the European Commission concerning the ISU's prior authorization and eligibility rules described above.[68] They claimed that those rules infringed Articles 101 and 102 TFEU, i.e. the two key provisions in EU Competition Law, the first of which prohibit any agreements that could disrupt free competition within the European economic area ('EEA').

The Commission decided in the athletes' favour and, in 2017, adopted a decision that objected to the ISU's prior authorization and eligibility rules as well as the arbitration rules.[69] The Commission argued that whilst the prior authorization and the eligibility rules violated EU Competition Law themselves, the arbitration rules, though not restricting competition by themselves, reinforced the restriction by the other two.[70]

Subsequently, the ISU filed a request for the annulment of the Commission's decision with the General Court of the EU.[71] In December 2020, the General Court decided that the Commission's decision was correct insofar as it concerned the prior authorization rules and the eligibility rules.[72] However, as far as it concerned the arbitration rules, the General Court annulled the Commission's decision, as it considered the Commission's reasoning flawed.[73]

Regarding the alleged violation of EU law by the prior authorization and the eligibility rules, the ISU appealed the General Court's decision before the CJEU.[74] The Dutch skaters, along with the European Elite Athletes Association, cross-appealed the General Court's partial annulment of the Commission's decision insofar as it regarded the lawfulness of arbitration rules.[75]

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67 Tribunal Fédéral (Switzerland), Decision of 8 March 2006, 4P.278/2005; Meinhardt and Ahrens, 'Wettbewerbsrecht und Schiedsgerichtsbarkeit in der Schweiz – Eine Würdigung des Entscheids des Bundesgerichts vom 8. März 2006 [Competition Law and Arbitration in Switzerland – An Assessment of the Decision of the Federal Court of 8 March 2006], 4 *SchiedsVZ* (2006) 182, at 182; C-124/21 P, *ISU v. Commission*, *supra* note 2, at para. 162; Morbach, *supra* note 3, at 77.

68 C-124/21 P, *ISU v. Commission*, *supra* note 2, at para. 22.

69 *Ibid.*, at para. 24; Commission Decision C(2017) 8240 final of 8 December 2017, OJ 2018 C 148/06.

70 C-124/21 P, *ISU v. Commission*, *supra* note 2, at paras. 30 ff.

71 *Ibid.*, at para. 35.

72 *Ibid.*, at para. 39; General Court of the EU, T-93/18, *ISU v. Commission* (ECLI:EU:T:2020:610).

73 C-124/21 P, *ISU v. Commission*, *supra* note 2, at para. 39 f.

74 *Ibid.*, at para. 1.

75 *Ibid.*, at para. 2.

4. Legal Findings

The CJEU upheld both the Commission's and the General Court's decisions: for one, the CJEU found that the prior authorization and the eligibility rules violated Articles 101 and 102 TFEU, i.e. infringed EU Competition Law, as they restricted competition within the EEA's market 'by object'. For another, the CJEU confirmed the Commission's reasoning that the exclusive and compulsory arbitration rules reinforced that restriction of competition.[76]

Through the lens of the ISU's infringement on EU Competition Law, the CJEU thus ruled on the admissibility of arbitration clauses in commercial arbitration within the European Union.[77] The General Court had simply argued that an exclusive arbitration mechanism in the field of sports could be justified by the 'legitimate interests linked to the specific nature of the sport,'[78] *inter alia* 'enabling a single, specialized court to rule, in a quick, economic and uniform manner, on a multiplicity of disputes,'[79] which could facilitate uniformity and strengthen legal certainty.[80]

The CJEU, however, rejected that reasoning.[81] It stressed the importance of an effective judicial review of the arbitral award if it touched upon matters of EU public policy (a). This, in turn, was aggravated by the fact that the athletes in this case had no access to an alternative adequate remedy (b).[82]

(a) Effective Judicial Review of Awards by EU Court or EU Member State Court

First and foremost, the CJEU reiterated that referring disputes to the exclusive jurisdiction of an arbitral tribunal is generally permissible.[83] The CJEU also accepts that, to ensure effective arbitration proceedings, the judicial review by a national court may necessarily be limited.[84]

However, insofar as disputes concern matters of EU public policy,[85] arbitration agreements need to comply with certain standards. For one, they must ensure 'effective compliance with the public policy provisions that EU law contains'.[86] For another, they must be 'compatible with the principles underlying the judicial architecture of the European Union'.[87]

The judicial review thus requires that, as far as disputes relate to matters of EU public policy, the reviewing court must be able to ascertain whether the award complies with those fundamental provisions of EU law.[88] Where a decision by the CJEU is necessary, the reviewing court must satisfy the requirements of Article 267 TFEU, i.e. be able to refer questions to the CJEU for a preliminary ruling.[89]

Where this kind of judicial review is not guaranteed, the arbitration mechanism has the potential to undermine the protection of rights conferred on EU citizens and effective compliance with matters of EU public policy.[90]

In the case of CAS, the only judicial review of the arbitral awards is carried out by the

76 *Ibid.*, at para. 148 f.
77 *Ibid.*, at paras. 184 ff.
78 General Court of the EU, T-93/18, *ISU v. Commission*, *supra* note 72, at para. 156.
79 *Ibid.*, at para. 185.
80 *Ibid.*, at para. 156.
81 C-124/21 P, *ISU v. Commission*, *supra* note 2, at para. 164.
82 *Cf.* Weiniger KC, Croisant and Lacey, *supra* note 39.
83 C-124/21 P, *ISU v. Commission*, *supra* note 2, at para. 193.
84 *Ibid*., confirmed in C-600/23, *Royal Football Club Seraing*, (ECLI:EU:C:2025:617), at para. 82.
85 *Ibid.*, at para. 189.
86 *Ibid.*, at para. 188; confirmed in C-600/23, *Royal Football Club Seraing*, *supra* note 84, at para. 84.
87 *Ibid*.
88 *Ibid.*, at para. 197 f.
89 *Ibid.*, at para. 198.
90 *Ibid.*, at para. 194.

Tribunal Fédéral, i.e. a court of a third state, which is not obligated to verify the conformity of the award with EU public policy and cannot refer questions to the CJEU. The Swiss courts have the last word, and EU courts have no say in the matter. Consequently, the CJEU has no oversight over whether fundamental provisions of EU law are respected, interpreted, and applied in a consistent and effective way. Therefore, the requirements for permissible arbitration agreements within the EU were not met. The problem with the ISU's arbitration rules, thus, was not arbitration as such but the 'legal immunity' relating to EU law enjoyed by ISU and CAS.[91]

(b) No Adequate Alternative Remedy

Though national courts, theoretically, can play a role in the enforcement proceedings of the awards once it is in force, seeking damages or applying for annulment of the arbitral award before EU member state courts was, in the eyes of the CJEU, no adequate alternative remedy. The CJEU held that ex post referral to the CJEU and a resulting potential annulment of the award were insufficient in terms of judicial protection.[92] It could not compensate for the absence of legal means to obtain an effective ex ante remedy before the arbitral award is rendered.[93] This is because, amongst others, challenging recognition and enforcement is 'fragmented and therefore costly':[94] the award must be challenged in separate proceedings wherever enforcement might happen. For instance, if the ISU banned an athlete from participating in competitions, and an arbitral award agreed with the ISU's measure, that athlete would have to challenge the award in every single jurisdiction where they intended to participate in a competition.[95] For professional athletes, whose short careers depend on participating in as many competitions as possible, having to go through lengthy and costly annulment proceedings in order to be able to participate in competitions would often equal the end of their career.[96]

3. *QUO VADIS*, CJEU? CONSEQUENCES AND POTENTIAL SOLUTIONS

A. Where Do We Stand? Taking Stock After ISU v. Commission

First and foremost, in contrast to its *Achmea* decision, in *ISU v. Commission*, the CJEU did not directly declare any form of arbitration within the EU as inadmissible per se.[97] Rather, it further defined the requirements applicable to arbitration proceedings within the EU.[98] What consequences these new requirements may have, and whether they will lead to de facto inadmissibility of arbitration proceedings within the EU, is a different story.

Second, the CJEU now requires an 'effective' judicial review of such arbitral awards that relate to matters of EU public policy. The CJEU thus implicitly confirms the German Federal Supreme Court's decision.[99] Whilst the CJEU refrains from calling this new standard a 'full review' or 'review on the merits,' it is difficult to imagine what an 'effective' review could look like without encompassing a

91 *Ibid.*, at para. 184.
92 *Ibid.*, at paras. 170 f., 201.
93 *Ibid*.
94 *Ibid.*, at para. 163.
95 *Ibid*.
96 *Ibid.*, at paras. 163, 201.
97 Paschalidis, *ISU v. Comission: Arbitration as a Reinforcement of Infringements of EU Competition Law*, 9 January 2024, available at https://competitionlawblog.kluwercompetitionlaw.com/2024/01/09/isu-v-commission-arbitration-as-a-reinforcement-of-infringements-of-eu-competition-law/.
98 *Ibid*.
99 Schrader *et al.*, *supra* note 50.

révision au fond.[100] The original prohibition of a *révision au fond* is thereby significantly weakened, if not abandoned for the sake of the primacy of EU law.[101]

Third, the CJEU also requires that EU courts should always have the last word on arbitral awards that touch upon matters of EU public policy. Conversely, this could mean that arbitration proceedings that touch upon matters of EU public policy but are not subject to judicial review by an EU court are not permissible. In the *ISU* Case, the CJEU held that the arbitral proceedings in question could only have complied with EU law if they had been seated in a member state.[102]

In the more recent *Royal Football Club Seraing* judgment, however, the CJEU clarified that, where sport is concerned as an economic activity, it is sufficient that a system of direct or indirect judicial review within the EU is available.[103] This possibility is not necessarily precluded by an arbitral seat located outside the EU.[104] What is required is only effective judicial review by 'any court or tribunal of a Member State that is liable to examine such an award in any manner whatsoever'.[105]

That EU courts could have played a role during the enforcement proceedings was, in the *ISU* Case, insufficient in the eyes of the CJEU. This is because the enforcement of concrete arbitral awards in sports arbitration would be 'fragmented and costly'.[106] In case of professional athletes, any ruling on a challenge of the award would be delivered after the competition and would, therefore, be belated and ineffective when it comes to the athletes' protection.[107] The ISU can factually enforce the decision itself or through its members by preventing the respective athlete from participating in competitions. The CJEU suggested that the threshold for a violation of public policy was too high: it was insufficient that an award '[could] only be regarded as contrary to EU public policy in the event of a flagrant, effective and concrete breach of the competition rules'.[108]

However, whether the CJEU only considered this with sports arbitration in mind and in the specific case of pre-emptive factual enforcement by the institution (through excluding athletes from competitions before they have a chance to challenge the measure) remains unanswered. What points to this more limited understanding is that the CJEU stressed that, in this case, ex post access to justice was generally insufficient.

1. The New Requirements: Much Ado About Nothing?

The *ISU* Case has sparked discussion and caused a surge in analyses by scholars and practitioners alike. Attempting to predict the practical consequences that the *ISU* decision will have ranges from it constituting 'another nail in the arbitration coffin'[109] to 'manageable consequences for international arbitration'.[110]

100 *Ibid*.
101 Wuschka, *ISU v. Commission – the 'Achmea Moment' for Sports Arbitration and Beyond?*, 17 January 2024, available at https://www.luther-lawfirm.com/newsroom/pressemitteilungen/detail/isu-v-commission-the-achmea-moment-for-sports-arbitration-and-beyond.
102 *Ibid*.
103 C-600/23, *Royal Football Club Seraing*, *supra* note 84, at para. 85 f.
104 *Ibid*.
105 *Ibid*., at para. 100.
106 C-124/21 P, *ISU v. Commission*, *supra* note 2, at para. 163.
107 *Ibid*.
108 *Ibid*.
109 Schrader *et al.*, *supra* note 50.
110 Landolt, *CJEU's Decision in International Skating Union v. European Commission: Its Manageable Consequences for International Arbitration*, 10 April 2024, available at https://arbitrationblog.kluwerarbitration.com/2024/04/10/cjeus-decision-in-international-skating-union-v-european-commission-its-manageable-consequences-for-international-arbitration/.

As is often the case, the truth probably falls somewhere in between: as set out above, the CJEU has not closed the door on sports or commercial arbitration, but rather clarified the requirements applicable to it. On the other hand, the question arises how an EU member state court will react to an arbitration agreement as the one in the ISU rules. The CJEU's decision must, in this regard, be seen in the light of the circumstances in which it was delivered: explicitly, the CJEU ruled only on the permissibility of arbitration clauses (1) within the field of sports arbitration and (2) through the lens of them reinforcing a violation of competition law.

However, because of the express reasoning in the case, its outcome can also be applied to a wider spectrum of cases: the arbitration agreement reinforced the violation of competition law because competition law is a matter of EU public policy. In a nutshell, this means that arbitration agreements may be in question as soon as they are applicable to disputes relating to EU public policy matters.

Nor does the fact that the decision was made in the special context of sports arbitration mean it cannot be applied to a wider spectrum of cases. Rather than as a decisive reason, the CJEU viewed the context of sports arbitration as an aggravating factor in the violation and an additional reason justifying scrutiny by the EU courts. The new requirements, therefore, may well be definitive for other commercial arbitration proceedings as well.

In this regard, the reaction by EU courts is also uncertain: if arbitration agreements do not satisfy the CJEU's requirements, national courts might simply disregard them. If a party defies the arbitration agreement and initiates proceedings before an EU state court, any objection by the other party might be dismissed by the EU court on the grounds that the arbitration agreement is incompatible with EU law.

Moreover, EU member states could also generally disregard arbitration clauses with which parties agreed for commercial arbitration with a seat outside of the EU. Consequently, EU member state courts might uphold claims relating to EU law matters, as they might not deny their own jurisdiction in the absence of a conflicting arbitration agreement.[111] As seen in *Achmea*, the threshold for a dispute to touch upon EU law is conceivably low, at least in the eyes of the CJEU.[112]

Thereby, arbitration agreements would, in part, lose their binding character.[113] If EU member state courts assume jurisdiction on the basis that the original arbitration agreement is invalid within the EU, but the other party calls upon an arbitral tribunal that disagrees with the state courts' assessment or the CJEU's decision, parallel proceedings and diverging decisions loom.

That is far from a 'storm in a teacup'. The *ISU* decision requires reactions by different stakeholders.

2. Practical Consequences: the Need for Compromise

Similarly to *Achmea*, the *ISU* decision seems to be principally motivated by the CJEU's wish to maintain the autonomy of EU law and its monopoly over the interpretation of EU law.[114] What all this means is that within

111 *Cf.* Wuschka, *supra* note 101.
112 C-284/16, *Achmea*, *supra* note 1, at para. 41 f.
113 Arrarte Arisnabarreta and Rosero Espinosa, *European Union: ISU v. Commission - Judicial Review of Court of Arbitration for Sport Awards and EU Public Policy*, 22 January 2024, available at https://insightplus.bakermckenzie.com/bm/dispute-resolution/european-union-isu-v-commission-judicial-review-of-cas-awards-and-eu-public-policy.
114 Wuschka, *supra* note 101.

the EU, step by step, the opportunities for arbitration, its effectiveness and its attractiveness are being reduced.

Certainly, the primacy of EU law and its effective and uniform implementation are fundamental pillars in the framework of the EU. Still, what started out as a story of party autonomy and the freedom to have disputes settled in a way that was tailor-made by the parties has now been rewritten by *Achmea* and *ISU v. Commission*. The CJEU respects the parties' autonomy, but only to the degree that the parties do not step on the CJEU's toes.

Where can this tug-of-war lead? Total abandonment of arbitration, or even just sports arbitration, within the EU seems the least desirable option, already because of the vacuum in judicial protection that it would leave in its wake as well as the barely justifiable infringement on party autonomy. The CJEU slackening the reins and letting arbitration run freely, without ensuring that parties and tribunals respect fundamental features of EU law, seems equally unsatisfying, and rather dangerous for the EU's stable framework.

Thus, a compromise must be found. In order to find an adequate balance, it is helpful to identify the interests at stake.

3. Which Interests Are at Stake? The Different Players

The EU's principal interests, as set out above, are to obtain an opportunity for effective control and to safeguard the primacy of EU law and its consistent implementation. Naturally, and as shown in the *ISU* case, this includes protecting the rights of individual EU citizens that they are granted through provisions with direct effect. It is important to consider that, on the one side, this includes upholding party autonomy and, to a certain extent, an arbitration mechanism itself. On the other hand, the CJEU also sees a responsibility in protecting weaker parties from removing their disputes from the purview of the EU. This, the CJEU found, was particularly necessary where the dispute resolution through arbitration was de facto imposed on the individual,[115] as it was the case regarding the ISU for reasons of an imbalance of power between the parties, as set out above. Apart from accounting for party autonomy, the EU also has a separate economic interest in remaining an internationally attractive place for arbitration proceedings and preventing arbitration proceedings from drifting off to other jurisdictions.

Correspondingly, parties that consider arbitration proceedings seek to preserve their autonomy to do so. In the wake of *ISU v. Commission*, and the now required judicial review, parties are placed before a choice: on the one hand, they could ensure that the CJEU's requirements are met and designate an arbitral seat within the EU. Compatibility with EU law would grant them more options regarding where to enforce a later arbitral award. On the other hand, parties could steer well clear of the EU and ensure that neither during the proceedings nor in the enforcement stage, the EU could be asked to determine the arbitration's validity. This, however, could be sabotaged by the losing party, which could separately submit a complaint to the Commission, or move its assets to the EU – provided that they are not already there –[116], so that enforcement is only possible there.

The ISU, interestingly, has – as far as discernible – not commented or publicly reacted to the CJEU's decision. Sports

115 C-124/21 P, *ISU v. Commission*, *supra* note 2, at para. 193.
116 *Cf.* C-600/23, *Royal Football Club Seraing*, *supra* note 84.

federations can generally, under EU law, no longer limit the exercise of rights and freedoms conferred on individuals by EU law by removing the respective disputes from the purview of EU courts, e.g. by referring them exclusively to arbitration in a non-EU state.[117] The CJEU's decision thus theoretically requires the ISU to change its rules if awards should still be enforceable within the EU. Factually, the ISU can either enforce them in non-EU states, or, because of pre-emptive factual enforcement of its decision, refrain from formally enforcing them altogether, but the latter option would de facto deprive the ISU's substantive and procedural rules of a significant part of their effectiveness.

The CAS, as an arbitration institution, does not necessarily have to change its approach. That the court reviewing the CAS's awards, the *Tribunal Fédéral*, will change its approach after the CJEU's decision seems unlikely. However, the CAS has an interest in remaining attractive to the parties. This includes that the awards rendered under the auspices of that arbitration institution should be widely enforceable. Otherwise, if parties want to enforce in the EU, they could drift off to other international sports arbitration institutions, for example the German Court of Arbitration for Sport. Hence, the CAS could also have an interest in conforming to the CJEU's decision.

B. Where Do We Go From Here? A Search for Solutions

1. The CJEU Showing Self-Restraint

The CJEU limiting its own purview, by way of a 'judicial self-restraint', and taking a step back where parties have agreed on the exclusive jurisdiction of an arbitral tribunal, seems as unlikely as it would be unsatisfactory. For one, the CJEU has consistently held that the primacy of EU law, the effectiveness of its implementation, and the CJEU's monopoly on its interpretation take precedence. This case, in a way, proves the CJEU's point: Had the CJEU not put a stop to the ISU's practices, the rights of the athletes could not have been adequately protected.

The prospect of the CJEU exercising such 'judicial self-restraint' has become even more unlikely in light of its recent *Royal Football Club Seraing* decision. Here, the Court held that individuals affected by CAS awards (or comparable arbitral decisions) must have access to a form of review ensuring that such awards comply with the principles and provisions of EU public policy.[118] While this outcome does not adhere to the 'self-restraint' set out above, it should be viewed against the backdrop of Advocat General Ćapeta's *Opinion*: he had argued for a full review of the merits of the CAS award,[119] a standard the CJEU ultimately declined to follow.

2. Combining the CJEU's Claim to Having the Final Word with Granting the Option of Arbitration Proceedings in Non-EU States: Can the CJEU Have Its Cake and Eat It?

(a) An Eternal Home Game: Permanently Implementing the Arbitral Seat Within the EU

As the CJEU sees the need for jurisdiction by an EU member state court and the possibility of a procedure according to Article 267 TFEU, there is effectively no possibility of choosing a final non-EU jurisdiction. Otherwise, a party to an arbitration agreement always runs the risk of an EU member state court disregarding the arbitration clause or refusing enforcement of an arbitral award. Thus, the safest option for the parties would be to opt for an arbitration seat in an EU member state in case EU public

117 Wauters, Killick and Hertel, *supra* note 52.
118 C-600/23, *Royal Football Club Seraing*, *supra* note 84, at para. 85.
119 C-600/23, *Royal Football Club Seraing*, *Opinion of Advocate General Ćapeta* (ECLI:EU:C:2025:24), at paras. 108-115.

policy could be concerned in a dispute. Still, at *Royal Football Club Seraing,* the CJEU clarified that an arbitral seat outside the EU does not necessarily prevent a review of an arbitral award regarding EU public policy.[120] Rather, the Court held that where sport is concerned as an economic activity, it is sufficient that a system of direct or indirect judicial review within the EU is available.[121] In case the parties generally prefer a seat outside the EU, they could potentially agree on a clause that allows for the tribunal changing the seat of arbitration to within the EU if it feels that matters of EU public policy could play a role.

A possible solution for CAS arbitration proceedings could be the relocation of the seat of CAS arbitration proceedings. Currently, the CAS insists on an exclusive seat in Lausanne (Switzerland).[122] That an arbitral institution calls for a fixed seat is, to say the least, unusual. The seat of arbitration proceedings, in a way, is a theoretical concept: it determines which procedural law is applicable and which state courts can rule on the annulment. It does not, however, determine where the physical hearings as such are held. The CAS could therefore easily make it possible for parties to relocate the seat of their dispute to an EU member state.[123]

Both approaches would allow for referrals to the CJEU by EU state courts, and potential judicial review proceedings before EU courts. It would also preserve the opportunity for arbitration proceedings in the EU as well as protect CAS's position as an influential and attractive arbitration institution.

As a response to the *ISU v. Commission* judgment, the UEFA (a comparable sports federation for football) recently amended its Authorization Rules.[124] When submitting a case to the CAS, the claimant can now choose whether it 'accepts Lausanne, Switzerland, as seat of arbitration or if the seat of the arbitration shall be in Dublin, Ireland, in derogation of Article R28 of the CAS Code'.[125] Arbitral awards by a tribunal seated within the EU can be subject to the required 'effective review' by a court within the EU system. However, this option constitutes a clear derogation from the rules that the CAS has set out, i.e. the exclusive seat in a non-EU state. Thus, it remains to be seen how the CAS will react, especially whether a CAS tribunal will accept this other seat in Ireland and assume jurisdiction. As long as this question remains unanswered, an alternative seat cannot provide the necessary certainty for parties and the CJEU.

(b) Arbitration à la Carte: the Party's Right to Choose

Another option that has been suggested is granting the party that theoretically enjoys protection by EU law the right to choose between CAS arbitration and arbitration under the auspices of another arbitration institution that has its seat in the EU.[126] However, this approach does not seem to satisfy the CJEU's criterion of an EU member state court having the possibility of the final say: as soon as the party chooses CAS arbitration, EU courts – at least regarding direct legal remedies – are out.

120 C-600/23, *Royal Football Club Seraing*, *supra* note 84, at para. 85 f.
121 *Ibid*.
122 Arrarte Arisnabarreta and Rosero Espinosa, *supra* note 113.
123 *Ibid.* That this is unlikely, as has sometimes been argued, because the CAS just opened new premises in Lausanne (*cf*. Wuschka, *supra* note 101), is not convincing. The seat of the arbitration and the physical place of the hearings can diverge.
124 Murphy, *Dublin Becomes Alternative Seat for CAS*, 12 July 2024, available at https://www.ogier.com/news-and-insights/insights/dublin-becomes-alternative-seat-for-cas-court-of-arbitration-for-sport/.
125 UEFA, *UEFA Authorization Rules* (21 June 2024), available at https://documents.uefa.com/v/u/8NRorgWVby0A4GBnfk3p8g?trk=feed-detail_main-feed-card_feed-article-content, at Art. 16, para. 3.
126 Paschalidis, *supra* note 97.

(c) Expanding the Right to Refer Questions for Preliminary Rulings

De lege lata, referring to a question for a preliminary ruling to the CJEU is only possible for EU member states. In *Achmea*, despite Advocate General Wathelet's efforts,[127] the CJEU held in clear terms that even an arbitral tribunal that was seated in a member state and based on a treaty between two member states did not qualify as a 'court of a member state'.[128] At the same time, in order to comply with the CJEU's requirements, no review of a court of any third state court could be sufficient, regardless of the level of scrutiny applied.[129]

Maybe, then, this is where the European Union has to slacken its reins: though at first, the idea may seem ludicrous, the solution may just lie in expanding the right to refer questions to the CJEU for preliminary rulings. It would grant the CJEU the right to have the final word on matters of EU law. It would also preserve the possibility for EU as well as non-EU arbitration proceedings.

On the one hand, one could think about allowing arbitral tribunals to refer questions to the CJEU for preliminary rulings. On the other hand, in the case of Switzerland as an arbitration location, Swiss courts could be granted the right to refer questions of EU law to the CJEU.

An agreement to that effect may be in everyone's interest. Though, certainly, neither Swiss courts nor arbitration tribunals could be *forced* to refer questions to the CJEU, in order to remain attractive to parties and render widely enforceable awards, it might just be in their intrinsic interest to comply with the requirements that the CJEU has set out.

As for the possibility that tribunals ignore this right and defy the CJEU's requirements: perhaps this is the bullet that the EU has to bite. Famously, no compromise leaves everyone completely happy.

4. CONCLUSION

With *ISU v. Commission*, the CJEU has once again raised the threshold for arbitration proceedings in the EU. Despite maintaining that arbitration proceedings are generally permissible, the CJEU now requires an effective review of arbitral awards by an EU member state where EU public policy in concerned. Though refusing enforcement of an arbitral award due to reasons of public policy was already possible before the *ISU* judgment, the now required 'effective review' is in stark contrast to the usual prohibition of a *révision au fond*. Additionally, the CJEU has now expressed the need to make use of its reviewing power at an earlier stage of the arbitration proceedings, i.e. through the possibility of a member state court as the final authority to make use of Article 267 TFEU.

By putting the validity of arbitration agreements that allow for a non-EU seat into question, establishing a de facto second instance, reducing possibilities for enforcement and restricting the issues that can be brought before arbitral tribunals, the CJEU step-by-step makes arbitration increasingly less desirable. Nonetheless, the CJEU's reasons for doing so are understandable and important. Primacy of EU law and its effective implementation are pillars of the EU's framework that should not be evaded by private parties.

It remains to be seen how practice will deal with the consequences of the ISU judgment, and whether there will be an arbitration

127 C-284/16, *Achmea, Opinion of Advocate General Wathelet*, *supra* note 33, at paras. 126-130.
128 C-284/16, *Achmea*, *supra* note 1, at paras. 43-46.
129 Schrader *et al.*, *supra* note 50.

vacuum. However, it seems clear that a compromise is needed. Though none will tick all the boxes, potential solutions could be the parties always choosing an arbitral seat within the EU, the CAS allowing for arbitral seats within the EU, or expanding the procedure under Article 267 TFEU, to allow non-member state courts or arbitral tribunals to refer questions to the CJEU for a preliminary ruling.

To secure the future of international arbitration within the EU, all interested parties will have to make concessions. As ever, mutual trust and respect are key to any international (figure skating) routine.

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EFFECTS OF THE JURISDICTION AGREEMENT IN CASE OF ASYMMETRY, AGAINST THIRD PARTIES AND IN CASE OF A BREACH OF THE CLAUSE

'Si vis pacem, para bellum'
Vegetius, De Re Militari

This paper aims at analysing three distinct yet connected issues concerning the effects of a jurisdiction agreement under Brussels I Recast Regulation. The first part refers to asymmetric jurisdiction clauses: after briefly presenting the controversy surrounding the validity of such clauses, it contends that Article 31 (2), which applies to exclusive choice of court agreements, should apply to such clauses also. The second part proposes a solution and some perspectives on the question of whether an assignee of a claim should be able to rely upon or be sued based on a jurisdiction clause inserted in the contract between the original creditor (the assignor) and the debtor. The third part discusses the possibility of a court in the EU to award damages for breach of a jurisdiction agreement. The article contends that although such a possibility should not be excluded, it should be analysed in connection with the procedural and substantial effects of the clause.

KEYWORDS:
ASYMMETRIC JURISDICTION CLAUSES | *LIS PENDENS* | THIRD-PARTY EFFECTS | ASSIGNMENT OF CLAIMS | DAMAGES

Le présent article vise à analyser trois questions distinctes, mais connexes, concernant les effets d'une convention attributive de juridiction au titre du règlement Bruxelles I (refonte). La première partie aborde les clauses de compétence asymétriques. Après avoir brièvement exposé la controverse entourant la validité de telles clauses, elle soutient que l'article 31, § 2, qui s'applique aux accords exclusifs d'élection de for, devrait également s'appliquer à ces clauses. La deuxième partie propose une solution et quelques perspectives sur la question de savoir si le cessionnaire d'une créance devrait pouvoir invoquer ou être attrait sur la base d'une clause attributive de juridiction insérée dans le contrat entre le créancier initial (le cédant) et le débiteur. La troisième partie traite de la possibilité pour un tribunal de l'Union européenne (UE) d'accorder des dommages et intérêts pour violation d'un accord de compétence. L'article soutient que, bien qu'une telle possibilité ne doive pas être exclue, elle devrait être analysée en relation avec les effets procéduraux et substantiels de la clause.

MOTS-CLÉS :

CLAUSES DE COMPÉTENCE ASYMÉTRIQUES | LITISPENDANCE | OPPOSABILITÉ | CESSION DE CRÉANCES | DOMMAGES ET INTÉRÊTS

INTRODUCTION

In the tangled realm of contracts, where agreements reign supreme, lies a battlefield of unforeseen challenges and potential conflict. Just as the ancient Romans used to advise preparation for peace through readiness for war, modern business owners navigate a landscape where jurisdictional agreements serve as shields against legal discord. These agreements act as bulwarks, aiming to forestall conflicts and delineate the path to resolution. However, in our globalized world, determining the appropriate jurisdiction amidst cross-border disputes can introduce uncertainties, underscoring the importance of careful preparation and foresight.

In the European Union, Article 25 of Brussels I Recast Regulation[1] allows parties to exercise their autonomy by choosing in advance which country's courts are to decide on any later, undesired yet sometimes inevitable disputes.[2] Aimed at promoting foreseeability and certainty, a choice-of-court agreement might reduce costs,[3] prevent parallel proceedings by channelling all possible claims to the same court[4] and enable parties to choose a neutral venue for dispute resolution.[5] These aims might be jeopardized when the very reason why parties have concluded the agreement – its enforceability, i.e. its ability to produce effects – might be put into question. At the moment, in case law[6] and legal doctrine[7] on Article 25 Brussels I Recast, three problems have been particularly often dealt with: the enforceability of asymmetric agreements,[8] the enforceability of an agreement against third parties and the enforceability of claiming damages,[9] also called collateral enforcement.[10]

On this backdrop of different solutions, we aim to provide some guidance towards solving these legal conundrums. The first puzzle: what are the effects, if any, of an asymmetric agreement? What is the interplay of these effects and Article 31 (2) of the

1 Regulation (EU) no. 1215/2012 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, OJ 2012 L 351. Further referred to as 'Brussels I bis', 'Brussels I bis Regulation', 'Recast Regulation'.

2 Magnus, 'Article 25', in U. Magnus and P. Mankowski (eds), *European Commentaries on Private International Law. Commentary. Brussels I bis Regulation*, vol I (2023) 580, at 587; Brosch and Kahl, 'Article 25', in M. R. Isidro (ed.), *Brussels I Bis. A Commentary on Regulation (EU) No 1215/2012* (2022) 425, at 425; Mankowski, 'Artikel 25 – Zulässigkeit und Form von Gerichtsstandsvereinbarungen', in Rauscher (ed.), *EuZPR/EuIPR, Band I: Europäisches Zivilprozess- und Kollisionsrecht* (5th ed., 2021) 666, at 677; G. van Calster, *European Private International Law* (2nd ed., 2016), at 114; L. Zidaru, *Competența în materie civilă potrivit Regulamentului Bruxelles I bis (nr. 1215/2012)* (2017), at 387; M. Watt, '"Party Autonomy" in international contracts: from the makings of a myth to the requirements of global governance', 6 *European Review of Contract Law (ERCL)* (2010) 250, at 265; Garcimartin, 'Prorogation of Jurisdiction - Choice of Court Agreements and Submission (Arts. 25-26)', in A. Dickinson and E. Lein (eds), *The Brussels I Regulation Recast* (2015).

3 R. Fentiman, *International Commercial Litigation* (2nd ed., 2015), at 42.

4 M. Winkler, 'Understanding Claim Proximity in the EU Regime of Jurisdiction Agreements', 69 *International & Comparative Law Quarterly* (*ICLQ*) (2020) 431, at 432.

5 L. Merrett, 'The Future Enforcement of Asymmetric Jurisdiction Agreements', 67 *International & Comparative Law Quarterly* (*ICLQ*) (2018), at 37, at 40; R. Fentiman, 'Unilateral Jurisdiction Agreements in Europe', 72 *The Cambridge Law Journal (CLJ)* (2013) 24, at 24.

6 For a detailed account on the reception in practice of Brussels I bis Regulation, see Analysis National Reports Executed by IJI in the frame of the project *Regulation Brussels I: a Standard for Free Circulation of Judgments and Mutual Trust in the European Union (JUDGTRUST)*, 17 April 2020. The consolidated report for each country is available at https://www.asser.nl/media/795642/belgium_report.pdf. Further referred to as 'the Report'.

7 A. Briggs, *Agreements on Jurisdiction and Choice of Law* (2008); V. Lazić and P. Mankowski, *The Brussels I-bis Regulation. Interpretation and Implementation* (2023); Mills, 'Choice of Court Agreements: Effects and Effectiveness', in A. Mills (ed.), *Party Autonomy in Private International Law* (2018), at 91.

8 Some jurisdictions refuse to enforce asymmetric clauses or express doubts on whether Article 31 (2) of the Regulation is applicable in relation to them. For a comprehensive overview of the issue, see B. Marshall, *Asymmetric Jurisdiction Clauses* (2023).

9 Finally, some courts have validated an atypical enforcement of such clauses, by awarding damages to one party in case the other brings proceedings to an undesignated forum, *infra* Chapter III.

10 R. Fentiman, *supra* note 3, at 113.

Regulation? (A.) The second one: how far do the effects of such an agreement, be it symmetric or asymmetric, extend to persons that are not direct parties to it? (B.) Finally, the third one: can such agreements be enforced by awarding damages? (C.).

A. Enforceability of Asymmetric Agreements[11]

Consider a scenario where two parties enter into a loan agreement, the lender being based in Germany and the borrower in France. The contract includes the following clause (clause 1):

> *The courts of France have exclusive jurisdiction to settle any dispute arising out of or in connection with this agreement.*[12]

Or, in a different wording:

> *Jurisdiction: Paris, France.*[13]

According to Article 25 (1), provided that such clauses are valid, both from a formal and a substantive point of view, they confer exclusive jurisdiction onto the chosen court(s), *i.e.* the courts from France (international jurisdiction, for the first version) and the courts from Paris (international and territorial jurisdiction, for the second one). Either party can bring proceedings only in the chosen court(s) and nowhere else unless the other party voluntarily submits to the jurisdiction of another court.[14]

Now consider the same contract, but with a slight difference (clause 2):

> *The courts of France have exclusive jurisdiction to settle any dispute arising out of or in connection with this agreement.*
>
> *However, the lender cannot be prevented from taking proceedings in any other courts with jurisdiction.*[15]

As clause 1 gives both parties the same option, i.e. the courts in France, it is considered bilateral or symmetric, while the second one, giving more options to the lender, who can sue the borrower, both in France, but also in other competent jurisdictions, is unilateral or asymmetric.[16] This last clause can be seen as a two-branch tree.[17] The main branch or the anchor branch[18] is represented by the jurisdiction chosen by both parties, while the option branch is the part of the clause that gives only one of the parties the option to refer future disputes to any other jurisdiction of its choice.

In order to shed light on this type of clauses and their effects, we will first discus the controversy surrounding the validity of such clauses (A.). After that, assuming that an asymmetric agreement is valid, we will deal with its effects in relation to Article 31 (2) of the Regulation (B.).

11 For the sake of precision and considering the complexity of the topic, in this section we will not refer to consumer contracts, contracts of employment or to matters relating to insurance.

12 When the clause designates just the Member State, the courts of that state will apply their procedural law in order to establish which court has jurisdiction *in concreto*. See Bucharest Tribunal, Decision from 9 October 202, available at https://www.rejust.ro/juris/8689e5933.

13 For further examples of such clauses, see M. Winkler, *supra* note 4, at 433. Also, for a clause which designated either the local court of Szeged or the District Court of Gyula, depending on the value of the claim, see District Court of Oradea, Decision no. 885/2024 from 27 February 2024, available at https://www.rejust.ro/juris/g87257de4.

14 U. Magnus, *supra* note 2, at 652.

15 Adapted from examples provided by B. Marshall, 'Asymmetric Jurisdiction Clauses and the Anomaly Created by Article 31(2) of the Brussels I Recast Regulation', 72 *International & Comparative Law Quarterly* (*ICLQ*) (2022) 297, at 299.

16 Though there is a wide variety of asymmetric jurisdiction clauses, the clause presented above is the most common type one being a 'Rothschild clause', after the widely discussed *Madame X v Banque Privée Edmond de Rothschild*, French Court of Cassation, First Civil Chamber, 26 September 2012, no. 11-26.022, see *infra* section 1.A.1.

17 T. Petch, 'The Treatment of Asymmetric Jurisdiction Clauses in Financial Contracts in France and England', 5 *Journal of Law and Jurisprudence* (2016) 313.

18 See also B. Marshall, *supra* note 13, for the same terminology.

1. (Again) on the Issue of Validity

In order to discuss the validity of asymmetric or one-sided jurisdiction clauses, we will first present the most relevant case law on the subject (1) then we will provide an analysis of the potential grounds for the invalidity of such clauses (2).

(a) The relevant case law on the issue of validity

The history of the controversy[19] surrounding this type of clause has culminated with the preliminary reference made on the 22nd of August 2023 by the French Court of Cassation in a dispute between the French company Agora SARL and the Italian company Societa Italiana Lastre SpA (SIL).[20] According to the agreement, the anchor court was the Tribunal of Brescia, with the possibility for Italiana Lastre to bring proceedings before another competent court in Italy or abroad. When Agora brought a claim before the French courts, the lack of jurisdiction raised by Italiana Lastre was rejected by the Rennes Court of Appeal on the grounds of unpredictability and, consequently, unlawfulness of the choice-of-court agreement.

In front of the French Court of Cassation, the Italian company complained that the French court, by declaring the clause *illicit*, had assessed its substantive validity in the light of the French law and not the Italian law, the latter being the law of the chosen court (*lex fori prorogati*). The French Court of Cassation referred the matter to the CJEU, asking, among other questions, whether the fact that the clause is imprecise and one-sided is a matter of substantive validity, which should be determined in accordance with the law of the Member State designated by the clause or it should be assessed based on the autonomous rules derived from Article 25 (1). In the latter case, the court asked whether Article 25 forbids such agreements or not.

These questions reflect an oscillating approach of some EU jurisdictions towards such clauses. While Italian,[21] German and English,[22] courts seem to admit this type of clauses,[23] French and Belgian[24] case law tends, in some instances, to invalidate them on grounds of lack of predictability and precision.[25] This was the case in a dispute from 2009 between Madame X and Rothschild bank.[26] Although bound by a jurisdiction agreement inserted in the general conditions of the bank, signed upon opening an account,[27] Madame X, disregarding the clause, which tied her to the anchor court in Luxembourg,[28] brought a claim against the bank in front of the court of first instance in Paris. This court, and subsequently the

19 The seeds might be traced back to the absence from the current Regulation of a provision similar to that contained in the former Article 17 (3) of the Brussels Convention. Article 17 (3) of the Conventions provided that '[i]f the agreement conferring jurisdiction was concluded for the benefit of only one of the parties, that party shall retain the right to bring proceedings in any other court which has jurisdiction by virtue of this Convention'. Interpreting this very provision, CJEU stated that 'clauses which … give one of them a wider choice of courts must be regarded as clauses whose wording shows that they were agreed for the exclusive benefit of one of the parties' (Case C-22/85, *Anterist v. Credit lyonnais* (EU:C:1986:255), at para. 15).

20 Case C-537/23, *Societa Italiana Lastre SpA* (ECLI:EU:C:2025:120). See also Mailhé, *French Supreme Court Refers Validity of Asymmetrical Clauses to CJEU*, 4 May 2023, available at https://eapil.org/2023/05/04/french-supreme-courts-refers-validity-of-asymmetrical-clauses-to-cjeu/.

21 Italian Court of cassation, civil section, decision no. 20349 of 31 July 2018.

22 *Commerzbank Aktiengesellschaft v. Liquimar Tankers Management Inc*, [2017] EWHC 161 (Comm); *Etihad Airways PJSC v. Prof Dr Lucas Flöther* [2019] EWHC 3107 (Comm).

23 LG Mainz, 13 September 2005, 10 HK O 112/04.

24 Belgium's answer to Question 47 in Annex I of the Report, at 177, *supra* note 6.

25 For a through insight into this case law, see M. Keyes and B. Marshall, 'Jurisdiction agreements: exclusive, optional and asymmetrical', 11 *Journal of Private International Law* (2015) 345.

26 Banque Privée Edmond de Rothschild Europe through the Compagnie Finançière Edmond de Rothschild.

27 Section 4 of the Regulation did not apply, see Art. 17(1) c) of the Regulation.

28 The same situation was in the *Etihad Airways case*, where the borrower (not the option holder) first brought proceedings before another court that the anchor court.

Court of Cassation, in 2012[29] had invalidated the jurisdiction clause on the grounds that it had a purely *potestative* character. Some authors[30] argued that, when speaking about *potestative* character, the Court of Cassation referred to the fact that the bank was under a purely *potestative* obligation,[31] i.e. a conditional obligation, which depends solely on the will of the bank, an obligation which, under French civil law,[32] but also other civil law jurisdictions, notably the Romanian one,[33] produces no effects. As such, being prone to invalidity, the forum choice would be unpredictable for the other party, hence rendering the clause incompatible with the purpose of Article 25 of the Regulation.[34] In a later and more nuanced approach,[35] after finding that the option branch was sufficiently precise (because it provided that the option holder 'can sue the other party in any other court, the Swiss law remaining in all cases applicable'), the Court of Cassation upheld such a clause. In its reasoning, the Court of Cassation stated that the option holder, as defendant, could rely on the anchor branch of the clause, regardless of imprecision of the option branch.[36]

As such, considering this evolving case law, it would appear that regardless of the imprecision of the option branch of the clause, if parties rely on the anchor branch, it remains standing. By contrast, the imprecision of the option branch could be sanctioned if the claimant is the option holder, who has referred 'any other court' under the clause. It thus seems that the balance is restored in this new vision, as the courts will find they lack jurisdiction both when the option holder invokes the anchor branch by way of defence and when the option holder refers the matter to the French court itself on the basis of the option branch (judged insufficiently precise).

(b) Analysis of the potential grounds for invalidity

One of the first grounds to refuse enforceability of the clause is related to its alleged imprecision. Yet, it might be reasonable to ask ourselves whether this approach of invalidating the clause does not generate more imprecision for the option holder, who, as a rule, had stipulated it in a loan agreement precisely in order to allow him to sue the other party in any jurisdiction it might have assets, for reasons of efficiency in debt recovery? To this matter, one solution advanced in legal doctrine[37] is the full validation of these clauses because the imprecision in the option branch can be easily filled by the court with the rules of

29 French Court of cassation, civil section 1, decision no. 11-26.022 of 26 September 2012.
30 D. Sindres, *supra* note 31, at 340.
31 Which, under French law, but also other civil law jurisdictions, notably the Romanian one, produces no effects.
32 Article 1304-2, French Civil Code.
33 Article 1.403, Romanian Civil Code.
34 This approach was criticized, on the grounds that the Court of Cassation wrongly found a *potestative* obligation in what was, in fact, only a *potestative* right of the bank, which is just a way to reflect the non-exclusivity of the agreement, namely the *unless the parties have agreed otherwise* from Article 25. Shortly, the fact the clause contains a *potestative* right only means that it is non-exclusive, not that it would be unlawful. See D. Sindres, 'Nouvelles réflexions sur les clauses attributives de compétence optionnelles', 2 *Revue critique de droit international privé* (2023) 335, at 342. For a slightly different, yet also invalidating solution see the decision of the same French Court of cassation, Chamber of commerce, decision no. 15-18.758, 1 May 2017.
35 French Court of cassation, first civil chamber, decision no. 21-13.686, 28 September 2022. For a similar conclusion, see French Court of cassation, first civil chamber, *Apple v. eBizcuss*, 7 October 2015, where the French Court of Cassation found the following clause sufficiently precise: 'the parties shall submit to the jurisdiction of the courts of the Republic of Ireland. Apple reserves the right to institute proceedings against Reseller in the courts having jurisdiction in the place where Reseller has its seat or in any jurisdiction where a harm to Apple is occurring.'
36 French Court of cassation, civil section, decision no. 21-13.686 of 28 September 2022: 'peu important que la clause attributive … ne désignait pas de façon suffisamment précise les juridictions que celle-ci pouvait saisir en cette hypothèse.'
37 T. Petch, 'The Treatment of Asymmetric Jurisdiction Clauses in Financial Contracts in France and England', 5 *Journal of Law and Jurisprudence* (2016); 'Nouvelle paralysie d'une clause attributive de juridiction dissymétrique. (Civ. 1re, 7 févr. 2018, n° 16-24.497)', 3 *Revue critique de droit international privé* (2018) 630.

private international law of the forum. For example, the simplest case would be the application of the common rule named *actor sequitur forum rei* (Article 4 of the Regulation), when the option holder seizes the forum of the state of the debtor's domicile.

A relevant question remains: to whom is the notion of predictability most relevant?[38] Is it only relevant to the court, which needs to determine its jurisdiction from the clause, or is it also crucial for the parties who need to foresee the potential venue for litigation?

With a particularly relevant approach on this subject, the CJEU states: 'as regards the precision of a jurisdiction clause, that it must not explicitly provide for a competent court, but must contain objective factors which must be sufficiently precise to enable the court seized to ascertain whether it has jurisdiction. These factors may, where appropriate, be determined by the particular circumstances of the case.'[39] Also, the CJEU indicates that '... a jurisdiction clause referring to 'the courts' of a city of a Member State refers implicitly …, for the exact determination of the court …, to the system of jurisdiction rules in force in that Member State.'[40] This is further supported by the Court in another important case,[41] where the court points to recitals 11 and 14 of Regulation 44/2001,[42] according to which 'the rules of jurisdiction must be highly predictable' (currently recital 15 of Brussels I bis).[43]

Therefore, a court will always have at hand the necessary tools to assess whether or not it has jurisdiction for a particular litigation. Indeed, the requirement of determinability is primarily for the parties. Indeed, what some jurisdictions do invalidate is not any asymmetric clause, but those asymmetric clauses that do not contain, in the option-branch,[44] sufficient elements to determine the possibly chosen court, an aspect that generates insecurity.

It was also argued that such clauses should be admitted based on the reasoning from *Meeth and Glacetal* case.[45] That case concerned a clause which nominates one court exclusively for each party, excluding all of the otherwise competent courts for each party and obliging each party to litigate in its nominated court. Still, such a clause is clearly different from a *Rothschild* one, as in *Meeth and Glacetal* case, the chosen jurisdictions were clearly determinable for each of the parties to the contract, which might not be the case with an asymmetric clause, which includes an option branch that cannot be determined.

An argument sometimes relied on in the context of choice of court agreements is that asymmetric clauses infringe Article 6 ECHR.[46] Probably the most well-known case in this matter is that of the English High Court of Justice, *Commercial Court Mauritius Commercial Bank Ltd v Hestia Holdings*

38 B. Marshall, 'Dernier état de la jurisprudence sur les clauses attributives de juridiction asymétriques', 3 *Revue critique de droit international privé* (2023) 644.
39 Case C-387/98, *Coreck Maritime GmbH* (EU:C:2000:606), at para. 15
40 Case C-167/08, *Draka NK Cables e.a* (EU:C:2009:263), at para. 20.
41 Case C-222/15, *Hőszig* (EU:C:2016:525), at para. 44.
42 Council Regulation (EC) 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 OJ 2001 L12/1.
43 In so far as Regulation no. 44/2001 now replaces the Brussels Convention in the relations between Member States, the interpretation provided by the Court in respect of the provisions of the Brussels Convention is also valid for those of Regulation no. 44/2001 whenever both sets of provisions may be regarded as equivalent.
44 One might consider, as some courts have done, that phrases such as 'any other competent court' are indeed imprecise, since they do not refer to the courts of any state, and the determinability of the jurisdiction of those courts strictly on the basis of the international private law rules of that state is not sufficient to satisfy the requirement of clarity and precision.
45 T. Petch, *supra* note 31.
46 Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe Treaty Series 005, Council of Europe, 1950.

Limited.[47] Still, in that case, the arguments against this type of agreement, based on Article 6 ECHR were rejected, mainly because '... article 6 is directed to access to justice within the forum chosen by the parties, not to the choice of forum. No forum was identified in which the Defendant's access to justice would be unequal to that of [the bank] merely because the bank had the option of choosing the forum.' Accordingly, in another case of the same court, *OT Africa Line Ltd v Hijazy (The Kribi) (No 1)* case,[48] another court stated that 'article 6 of the ECHR does not deal at all with where the right to a 'fair and public hearing before an independent and impartial tribunal established by law" is to be exercised by a litigant'.[49] Still, it has been noted that the right to a fair trial is enshrined in Article 6 ECHR, which 'provides the parties to a dispute with rights applicable not only after the institution of the proceedings but also before a claim is brought'.[50] Accordingly, in *Golder v. United Kingdom* case,[51] the European Court of Human Rights rejected the argument that the right of access to courts that is inherent to Article 6 ECHR only applies to an action that has already been initiated.[52] Therefore, the court understood to confer a much larger application to the international principle of equal treatment of the parties, which was not limited to the procedural phase of the dispute, but also concerned the period before a trial stared.

Most of the arguments presented in this section come down to a balancing exercise between the principle of party autonomy and the need to ensure foreseeability of the agreements governed by Article 25 Brussels I bis. Before some guidance is given by the CJEU on the matter through preliminary rulings, the balancing exercise is to be done by each national judge.

2. The Effects of an Asymmetric Agreement in Relation to Article 31 (2) of the Regulation

One of the main effects of a bilateral/ symmetric clause consists of their exclusion from the *lis pendens* rule, provided by Article 29 (1) of the Regulation. According to the latter, when parties sue each other in multiple courts, based on the same cause of action,[53] the second court should stay its proceedings until the first court establishes its jurisdiction.[54] Yet, when parties sue each other in multiple courts in spite of a valid exclusive jurisdiction agreement, there is a derogation from *lis pendens*, provided by Article 31 (2), which reverses the aforementioned rule.[55] As such, the non-designated court, irrespective if it is the first court seized, must stay its proceedings until the chosen court declares it has jurisdiction, when the other court shall decline their jurisdiction to the chosen court. In this situation, only the chosen court can decide whether it has jurisdiction or not, in order to mitigate the 'torpedo' effect that consisted of the fact that one party, in order to delay the proceedings, seized another court than the designated one. Thus, the seized court had to decide whether it had

47 [2013] EWHC 1328 (Comm), [43]; L. Merrett, *supra* note 5, at 10
48 [2001] Lloyd's Rep 76, [42].
49 L. Merrett, *supra* note 5, at 8; R. Fentiman, *supra* note 2, at para. 2.419.
50 P. Malyuta, 'Compatibility of Unilateral Option Clauses with the European Convention of Human Rights', 8 *University College London Journal of Law and Jurisprudence* (2019).
51 ECtHR, *Golder v. the United Kingdom*, Appl. no. 4451/70, Judgement of 21 February 1975.
52 J. H. Gerards and L. R. Gras, 'Access to Justice in the European Convention on Human Rights System', 35 *Netherlands Quarterly of Human Rights*, 3 April 2017.
53 A. Dickinson, 'Exclusively Yours', *LQR* (2020) 215, at 218.
54 J. Steinle and E. Vasiliades, 'The Enforcement of Jurisdiction Agreements Under The Brussels I Regulation: Reconsidering The Principle Of Party Autonomy', 6 *Journal of Private International Law* (2015) 565, at 567; Heinze and Steinrötter, 'The Revised Lis Pendens Rules in the Brussels Ibis Regulation', in V. Lazic and S. Stuij (eds.), *Brussels Ibis Regulation Changes and Challenges of the Renewed Procedural Scheme* (2017) 7.
55 B. Marshall, *supra* note 13, at 298.

jurisdiction or not, while the chosen court was staying its proceedings until that time.

There is, of course, an issue related to the extent to which the non-designated courts can analyse the exclusivity of the clause conferring jurisdiction to another court, in order to stay their proceedings. For instance, according to the example above,[56] if the borrower brings claims in front of the Spanish court, the latter would analyse whether there is an appearance that the French courts have exclusive jurisdiction, since the designated court is the only one to have the last word on whether the jurisdiction is exclusive or not.[57] The exclusive or non-exclusive nature of a clause is essential for the applicability of Article 31 (2), since the exclusion of *lis pendens* rule applies when 'an agreement as referred to in Article 25 confers exclusive jurisdiction'.[58]

In case of the typical asymmetric clause presented above, is the agreement exclusive for the other party than the option-holder and non-exclusive for the option holder? Is the agreement non-exclusive as a whole? Is the exclusivity of the agreement a conditional one, depending on the sole option of the option holder?[59] Finally and surprisingly, is the agreement exclusive under Article 25, but non-exclusive under Article 31(2)?[60]

In the case law from the French Court of Cassation and the *Flother* case, it was not very difficult to split the branches of the clause, since the anchor branch had been breached by the party who was bound by it. Thus, it was natural to assert that the seized court had no jurisdiction, since the agreement was exclusive in this branch, but non-exclusive in the option branch.[61]

But what if the option holder first seizes a court of its choice and then the other party seizes the anchor court? Does the latter court still have exclusive jurisdiction? Consider the example above: the lender seizes a Spanish court first (its option). Afterwards, the borrower seizes the anchor court – the French court. In legal doctrine, this was described as the anomaly of the application of Article 31 (2) to asymmetric clauses,[62] on the one hand, as regards the option holder's option (situation A) and, on the other hand, as regards the wording of the clause (situation B).

To illustrate the 'anomaly', we will adapt the example above. The option holder first seizes the Spanish court and then, the other party seizes the French courts. According to Article 31 (2), the designated court should decide if it has jurisdiction. Thus, the Spanish court should stay its proceedings on this ground (on the grounds of its – at least, apparent - lack of jurisdiction due to the anchor clause), but the French courts, while asserting their jurisdiction, would breach the option holder's option (situation A). Meanwhile, if the French court decides it does not have jurisdiction, it will go against the parties' express agreement (according to which the French court is the anchor court) (situation B).

Another solution would be to regard the clause as a non-exclusive clause as a whole, but, in this case, the torpedo effect would be restored because Article 31 (2) would no longer be applied.

56 *Supra* Chapter I.
57 This aspect can be deduced from recital 22 of the Regulation, according to which ,the designated court has priority to decide on the validity of the agreement and on the extent to which the agreement applies to the dispute pending before it.'
58 Article 31 (2) of the Regulation.
59 B. Marshall, *supra* note 13, at 317.
60 R. Fentiman, *supra* note 2, para. 2.145.
61 *Etihad case*, *supra* note 20.
62 B. Marshall, *supra* note 13, at 318.

We can consequently ask the following question: if, once the Spanish court is seized, we consider that the French court has no longer exclusive jurisdiction,[63] we may say that the anchor court becomes effectively *lettre morte* and could be translated into what could be the option holder's statement: 'the French court has jurisdiction only if I want it to". This means that the borrower assumes from the beginning that the possibility of seizing the anchor court is, for him, conditional, in the sense that it depends on whether the lender has previously seized another court of its choice. This approach, however, seems much more indifferent to the borrower's perspective and, at first sight, would seem more *potestative* than the classical one. However, this is not the case, since the borrower is bound by the anchor court if the lender wants to, so it is not a purely *potestative* clause for the borrower, i.e. it does not depend on his sole will. Practically, in this interpretation, the borrower would recognize the lender's option not only to seize any other court of its choice, but also to disable the anchor branch.

No interpretation may accommodate all the interests at stake.[64] Indeed, perhaps the first question one should answer is whether we treat an asymmetric agreement as a whole or we look at it as two separate agreements. Since it is difficult to interpret the will of the parties in a fragmented manner, the first approach seems preferable.

B. Enforceability Against Third Parties

As a rule, jurisdiction clauses are generally effective only between its parties,[65] since CJEU's case law on Article 25 of the Regulation[66] emphasizes the necessity of genuine consent between parties to a jurisdiction agreement. Still, it is often the case that a third party relies upon or is sued based on a jurisdiction clause agreed upon by the original contract parties. To this matter, the CJEU's case law has established a rather diverse approach, deemed as being 'far from consistent' by some authors.[67]

Indeed, a clear provision in the Regulation regarding third party effects could improve the foreseeability of the rules applicable. Even more so since Recital 15 of the Regulation clearly states that 'the rules of jurisdiction should be highly predictable'. The requirement of predictability should equally apply when 'the autonomy of the parties warrants a different connecting factor' than the one established by the general rules. The applicability of this recital in the case of a jurisdiction agreement was established by the CJEU in the rather famous *Hőszig* case.[68]

It is generally considered[69] that there are three ways according to which a jurisdiction agreement can produce an effect on a third party: through its consent to the original contract (**1**) by succession of rights (**2**) and by an agreement to the benefit of the third party (**3**).

63 *Ibid*.
64 *Ibid*.
65 Case C-595/17, *Apple Sales International et al. v. MJA, acting as liquidator of eBizcuss.com* (EU:C:2018: 854), at para. 22; Case C-436/16, *Georgios Leventis, Nikolas Vafeias v. Malcon Navigation Co Ltd. and Brave Bulk Transport Ltd.* (EU:C:2017:497), at para. 35; Case C-352/13, *Cartel Damages Claims (CDC) Hydrogen Peroxide SA v. Akzo Nobel NV et al* (EU:C:2015:335), para. 64; BGH, ZIP 2019, 1160 para. 30; Cass. Clunet 2000, 78 Paris E.C.C. 1988, 291. See U. Magnus, *supra* note 2, at 160.
66 Case C-106/95, *Mainschiffahrts-Genossenschaft eG (MSG) v. Les Gravières Rhénanes SARL.* (EU:C: 1997:70), at para. 15
67 M. R. Isidro, *supra* note 2, at 447.
68 Case C-222/15, *Hőszig* (EU:C:2016:525).
69 *Ibid.*, at 448.

1. Third Party's Consent

By giving its subsequent consent, a person would technically become a party to the agreement. While this may appear straightforward, since the jurisdiction agreement is an autonomous concept, the CJEU had to carefully scrutinize the way in which a third party could express its consent to the original agreement, stating, however, that it is primarily for the national court to examine 'whether the clause conferring jurisdiction upon it was, in fact, the subject of consensus between the parties, which must be clearly and precisely demonstrated'.[70] Indeed, national courts must rigorously assess whether there is genuine consent from a third party that binds them to the jurisdiction agreement in order to comply with the need for genuine and real consent, the backbone of Article 25 of the Regulation.

Generally, the conditions may vary considering the nature of the initial contract,[71] but considerable attention should be paid to the choice of jurisdiction clause itself. In *Powell Duffryn plc v Wolfgang Petereit*[72] the Court stated that the concept of 'agreement conferring jurisdiction' should not be interpreted simply as referring to the national law of one or other of the States concerned, but in light of the objectives and general scheme of the Brussels Convention.[73] Thus, a jurisdiction agreement should be considered an autonomous concept.[74] For instance, in *Profit Investment Sim SpA*,[75] in a matter regarding the issue of bonds which were sold on the primary market to an intermediary and further sold on the secondary market to a third party, the Court noted that it is the national court's duty to analyse if the contract signed upon the sale of the bonds on the secondary market also mentions the acceptance of that clause or contains such reference.

In contrast, in a matter regarding the binding force of a jurisdiction clause introduced in the statues of a company,[76] the Court stated that the company's statutes must be regarded as a contract covering both the relations between the shareholders and the relations between them and the company they set up. Therefore, by agreeing to become a shareholder in a company, the latter becomes bound by the provisions of the company's statutes, including the jurisdiction clause.[77]

In a later case, *Refcomp SpA v Axa Corporate Solutions Assurance SA and Others*,[78] when analysing if a jurisdiction clause inserted in a contract between a manufacturer of goods and a buyer is effective against the sub-buyer, the Court has returned to the general principle: the concept of 'jurisdiction clause' must be interpreted as an autonomous concept, giving full effect to the principle of freedom of choice on which Article 25 (1) of the Regulation is based. Therefore, in order for the sub-buyer to rely on the jurisdiction clause, he has to actually consent to the clause under the conditions laid down in that article.

Comparing the cited case law, it seems that the need for a particular consent from the

70 Case C-387/98, *Coreck Maritime GmbH* (EU:C:2000:606), at para. 13; Case C-543/10, *Refcomp SpA v. Axa Corporate Solutions Assurance SA* (EU:C:2020:933), at para. 27.
71 Case C-543/10, *supra* note 36, at para. 30.
72 Case C-214/89, *Powell Duffryn v. Petereit Case* (EU:C:1992:115), at para. 13.
73 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 27 September 1968, consolidated version at1998 OJ 1998 C27/1.
74 B. Marshall, *supra* note 13, at 302.
75 Case C-366/16, *Profit Investment Sim SpA* (EU:C:2016:282).
76 Case C-214/89, *Powell Duffryn v Petereit Case* (EU:C:1992:115).
77 For a case where the clause was inserted into a contract concluded by a representative of a legal person who, at the moment of the conclusion of the contract, had no right to act on behalf of the legal person, see Timiș Tribunal, Decision no. 17/2023 from 21 December 2023, available at https://www.rejust.ro/juris/23d5d7d75. The court found that the other party could rely on the clause against the misrepresented legal person.
78 Case C-543/10, *supra* note 34.

third party to the choice of forum clause may or may not exist depending on the nature of the initial legal relationship. Hence, the presented cases, although similar, are based on different grounds.

In *Profit Investment Sim SpA* the legal relationship entailed two different agreements. The 'intermediary' was the common party in both contracts, but the third party did not establish a direct legal relationship with the issuer of the bonds. Therefore, a separate consent was necessary for the jurisdiction agreement to have a binding effect on third parties. The same reasoning is applicable in *Refcomp*.

However, in *Powell Duffryn plc v Wolfgang Petereit* the third party became an actual party to the agreement in which the jurisdiction clause was inserted. The nature of the consent necessary to become a shareholder in a company entails that the potential shareholder must agree with all the provisions existing in the company's statues, including a clause concerning the choice of jurisdiction in matters regarding disputes between the shareholders and between the shareholders and the company itself. Moreso this is the case even when a third person becomes a shareholder after the approval of the statute containing a jurisdiction agreement or has opposed the adoption of the choice of jurisdiction clause in the statue of the company.

However, a question that might arise from this issue is related to the formal conditions that such subsequent consent should comply with in light of Articles 25 para. (1) and (2). The formal validity of a jurisdiction clause cannot be fully separated from the need for real consent.[79]

In the case where particular consent is required, it seems that the third party needs to follow the requirements of Article 25 (1) (a)-(c). Circling back to *Profit Investment Sim SpA*, the Court analysed if the jurisdiction clause can produce effects against the acquirer in light of the existence of a usage of international trade. Moreover, in *Refcomp SpA v Axa Corporate Solutions Assurance SA and Others* the Court underlined again that the third party's consent needs to follow the conditions laid down by Article 25 (1) (a)-(c).

As for the situation where consent to become a party to the substantive legal relationship is sufficient, we feel that the formal requirements imposed by the Regulation should be followed as well. It must be noted that the Regulation itself states that the jurisdiction agreement should be treated as a different agreement from the contract it is inserted in.[80] As a consequence, the conditions of validity, both material and formal, should be analysed by the national court in virtue of the *lex causae* determined for each one of the agreements. The fact that the formal conditions are not imposed by a national law, but by the Regulation itself, should not lead to a different outcome.

2. Succession of Rights

Even in the absence of explicit consent to a choice of jurisdiction clause, a third party may be bound by its compelling force. It is usually the case when the initial contract, containing the clause, is transferred, in part or as a whole, to another person. The situations and conditions under which this mechanism operates, especially in assignment contracts, are still under debate,[81] but the following principles can be drawn from CJEU's case law.[82]

79 U. Magnus, *supra* note 2, at 619.
80 Art. 25, at para. (5), of the Regulation.
81 Latvia's answer to Question 4 in Annex I of the Report, at 77, *supra* note 6.
82 U. Magnus, *supra* note 2, at 658.

Following the purpose of Article 25, which is to neutralize the effect of jurisdiction clauses that might pass unnoticed in contracts and to ensure the real consent of the parties,[83] it might be argued that such clauses should not be considered binding for the assignee in an assignment contract. Moreover, it was even argued that the principle of separability should be applied not only to the validity of the jurisdiction agreement, but also to the transferability of the jurisdiction agreement.[84] This implies that the jurisdiction agreement would not automatically circulate together with the main contract as a result of an assignment of the contract. However, in a recent case,[85] the Italian Supreme Court did not make such a distinction. In fact, in the particular cases analysed, the Court seems to dwell on the interpretation that the jurisdiction agreement is severable from the main contract for validity purposes, but it should be considerate as an integral part of the contract for transferability purposes.

In this background, the question of succession of rights needs careful scrutiny. If a party to a contract assigns its rights under the contract to a third party, it may raise the question if the initial jurisdiction clause is binding on the assignee in spite of the absence of a real consent between the latter and the debtor. However, the solution seems to differ between the case of an assignment of rights and an assignment of contract as a whole.

In *Tilly Russ case*[86] the Court stated that as regards the relationship between the carrier and a third party holding the bill of lading, 'a choice-of-court agreement is binding between the assignee and the debtor if it is valid between the initial parties of the contract and if, by virtue of relevant national law, the third party, upon acquiring the bill of landing, succeeded to the shipper's rights and obligations'. The same reasoning was made in regard to a third party holding the bill of lading in *Coreck Maritime*[87] and in *Castelletti*.[88] In *Hydrogen Peroxide*,[89] the Court stated again the above-mentioned principle. This time, the main contract was not a bill of lading, but a dispute started by a company established for the purpose of pursuing claims for damages of undertakings affected by a cartel.

However, this reasoning was circumstantiated by the Court in other instances. In *Ryanair DAC v. Delayfix*,[90] in a dispute regarding a jurisdiction clause incorporated in a contract of carriage concluded between a passenger and an airline, relied upon by the airline against a collection agency to which the passenger has assigned the claim, the Court stated that the assignee must be the successor to all the initial contracting party's rights and obligations in order for the choice of court agreement introduced by the initial parties to be binding for the assignee.[91]

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83 G. van Calster, *supra* note 2, at 114.

84 C. Benini, *The Fate of Choice of Court Agreements Following an Assignment of Claims: A Recent Ruling of the Italian Supreme Court*, 8 December 2020, available at https://eapil.org/2020/12/08/the-fate-of-choice-of-court-agreements-following-an-assignment-of-claims-a-recent-ruling-of-the-italian-supreme-court/. In the sense that the court seized of the matter should assess whether the assignee of the contract (or of the claims arising therefrom) is bound by the choice of court agreement, based on the rules governing the transferability of the dispute resolution agreement itself.

85 Italian Court of Cassation, judgment no. 7736/2020 of 7 April 2020.

86 Case C-71/83, *Tilly Russ v. Nova* (EU:C:1984:217).

87 *Supra* note 60.

88 Case C-159/97, *Castelletti* (EU:C:1999:142), at para. 41.

89 *Supra* note 56.

90 Case C519/19, *Ryanair DAC* (EU:C:2020:933).

91 For a discussion on the case, see M. Lehmann, *CJEU Significantly Weakens Jurisdiction Clauses in Case of Assignment*, 30 November 2020, available at https://eapil.org/2020/11/30/cjeu-significantly-weakens-jurisdiction-clauses-in-case-of-assignment/; A. M. Ruiz Martín, 'Validity of Choice Of Court Agreements, Abusive Terms in Air Carriage Contracts, Assignments and Compensation, Is There Room For Anyone Else?' (Comments On CJEU Judgment *Delayfix*, C-519/19), 13 *Cuadernos De Derecho Transnacional* (2021) 882.

Comparing the cited case law, it may seem that a clear distinction has been made between an assignment of rights and an assignment of agreement. For a jurisdiction agreement to become binding for a third party, an assignment of agreement must take place, whereby the assignee succeeds in all the assignor's rights and obligations under the provision of the national law applicable. In contrast, the assignment of a payment claim does not suffice to subject the assignee to the jurisdiction clause in the original contract.[92] The same opinion was adopted for unifying the case law in a meeting organized by the Romanian National Institute of Magistracy with the representatives of the Romanian courts of appeal[93], when analysing the binding force of a jurisdiction agreement in similar circumstances as in *Ryanair DAC v. Delayfix.*

However, the rules on third party effects seem to be still under question. On 15 November 2023, the Court of Appeal Cluj lodged a request for a preliminary ruling[94], asking the Court if Article 25 of the Regulation can be interpreted as conferring on the assignee of a claim arising from a contract the right to enforce the jurisdiction clause in that contract against the original party to the contract, if the assignment contract has, in accordance with the national law applicable to the substance of the dispute, transferred the claim and its ancillary rights, but not the obligations arising from the contract.[95]

Reviewing the CJEU case law for the purpose of this preliminary ruling request, it appears that the court distinguishes between an assignment of right and an assignment of contract. Previous judgements, such as *Tilly Russ* case (1984) and up to *Hydrogen Peroxide* case (2015), have established the principle of the succession of both rights and obligations. While initially not explicitly delineated, the Court's reasoning seems to have shown that an assignment of the contract was required for the assignee to be bound by the jurisdiction agreement, since the Court always referred not only to the assignment of rights, but also the assignment of the obligations. This distinction was indeed confirmed in *Ryanair DAC v. Delayfix* case.

Considering the preliminary ruling submitted by the Romanian court, it is likely that the CJEU will adhere to the same principle. Consequently, the national court should scrutinize if the assignment constitutes a mere transfer of rights or, on the contrary, an assignment of the entire contract, including all rights and obligations of the assignor. In the present dispute, governed by Polish law, the assignment concluded between the assignor and the assignee seems to fall under the category of an assignment of rights,[96] in accordance with Article 509 of the Polish Civil Code.[97] Therefore, the jurisdiction agreement appears not to be binding between the assignor and the assignee, except for the scenario where the assignee gives his consent to the choice of court agreement. However, it is also plausible that the CJEU

92 U. Magnus, *supra* note 2, at 658.

93 Report of the meeting between the presidents of the special divisions of the Court of Appeal, held in Constanța on 16-17 of September 2021, available here: https://inm-lex.ro/poca/files/8_Minuta_%C3%8Ent%C3%A2lnire%208%20(litigii%20cu%20profesionisti%20%C8%99i%20insolventa)%20Constan%C5%A3a%2016-17.09.2021.pdf, at 119.

94 Case C-682/23, *E.B.SP*.

95 Also, the Romanian court asked if in a case such as the one described above, is the opposition of the party that agreed to the jurisdiction clause, against whom the action is brought, relevant for the purpose of determining which court has jurisdiction. In addition, asked if a new consensus is required from that party, prior to or concomitant with bringing a legal action, in order for the third-party assignee to be entitled to rely on the jurisdiction clause.

96 Cluj Court of Appeals, Decision on addressing a question to CJEU, available at https://www.rejust.ro/juris/237g2g258.

97 Article 509, Assignment § 1. A creditor can, without the debtor's consent, transfer a claim to a third party (assignment) unless the same is contrary to the law, a contractual stipulation or the nature of the obligation. § 2 The assignment of a claim transfers to the assignee all the rights related to the claim, especially a claim for outstanding interest.

may consider the context of the *Ryanair DAC v. Delayfix* case, where the initial party to the contract was a consumer. In the Romanian case at hand, all parties are merchants, which could potentially influence the court's interpretation.

Although, what seems to be the red string in CJEU's case law is based on sound reasoning, it did not remain uncritical.[98] The *Ryanair DAC v. Delayfix* made an echo and had some authors wondering if this reasoning does not weaken the binding force of a jurisdiction agreement. In this light it has been argued that a mere assignment of claim can ensure that the claimant avoids the jurisdiction agreement he consented to and this mechanism cannot be prevented, since the exclusion by means of a contractual prohibition of assignment is usually not permitted. It was also argued[99] that by proceeding in such a way 'the identity of the transferred right will vanish' since it is transferred to a different structure than the one it had before the assignment.

Though very strong arguments, we feel that it should all circle back to the core of Article 25. The provision has, since Brussels Convention changed its structure in order to accommodate and ensure the real, informed and determined consent of the parties to such an agreement. In an assignment of claim, the debtor's consent is usually not required, thus it would be bound by the jurisdiction agreement to a third party without its consent, while in an assignment of contract the debtor's consent it is usually necessary. Indeed, a debtor is usually required to pay regardless of the creditor, however, this principle of civil law may be shaped by the autonomous interpretation of the jurisdiction agreement.

In contrast to the case of a third party's explicit consent to a jurisdiction agreement, in light of the theory of the succession of rights, the formal requirements of Article 25 (1) and (2) need to be satisfied only by the original jurisdiction agreement but not by any further assignment or transfer.[100]

3. Agreements for the Benefit of a Third Party

Another limitation to the general principle of the real consent of the parties has been established in regard to the situations where the jurisdiction agreement would operate for the benefit of a third party who did not consent to it in any form. This in generally the case of insurance contracts, which are concluded without the beneficiary's consent.

In *Gerling Konzern* case,[101] the Court underlined that when it comes to insurance contracts, if the consent of the insurer has been clearly and precisely manifested in the contract with the policy-holder, it could be concluded that it is valid within the meaning of Article 25 and can justify the action brought by the beneficiary even if he is not a party to the insurance contract.

This reasoning is based on multiple factors. Firstly, the provisions of Section 3 confirm the view according to which the insured should have a wider range of jurisdictions than that available to the insurer. The purpose of this measure is to protect the insured, who is, in most cases, faced with a contract whose clauses are predetermined and which are no longer negotiable. Secondly, in the same light, the insured is placed in a weaker economic position. Therefore, it seems that

98 M. Lehmann, *supra* note 91.
99 B. Musseva, *Opposability of choice-of-court agreements against third parties under the Hague choice-of-court convention and Brussels I Bis Regulation,* available at https://www.prf.unze.ba/Docs/Anali/Analibr18god9/4.pdf.
100 M. R. Isidro, *supra* note 2, at 450.
101 Case C-201/82, *Gerling Konzern Speziale Kreditversicherung AG and Others v. Amministrazione del Tesoro dello Stato* (EU:C:1983:217).

it would be contrary to the reasoning of the Regulation to impose the need for consent from an insured him to beneficiate from an advantageous jurisdiction agreement.

It must be noted that the above-mentioned reasoning can function only if the jurisdiction clause is stipulated for the benefit of a third party. This means that the effect of the clause should be the prerogative one, conferring the insured the possibility to bring proceedings in courts other than those normally holding jurisdiction.

Yet, outside the field of insurance contracts, the question of the enforceability of the choice of jurisdiction clause against third-party beneficiaries has raised several questions. For example, in a case brought before the Austrian courts, the Austrian Supreme Court[102] held that a jurisdiction clause under Article 25 of the Regulation cannot be invoked against third parties benefitting from the contract, citing the ruling of the Court of Justice in Refcomp. This case was based on a contract between an airline established in Austria, the claimant, and the defendant, which operates a hotel in India. They concluded a contract for the accommodation of the airline's crew members as well as their transfer from the airport to the hotel, including an exclusive jurisdiction clause on behalf of a competent court in Austria. The contract also stated an obligation for the defendant to indemnify the claimant in respect to property or injury or death of persons, encompassing the property of the claimant and the crew members, caused by negligent or wilful misconduct of the hotel or its staff. The claimant brought a claim to the Vienna commercial court for payment of damages, including damage claims assigned to it by its crew members. Hence, when the court decided on its jurisdiction, the question arose as to whether the Austrian courts could hold jurisdiction over the crew members' claims. The Austrian Supreme Court confirmed the international jurisdiction of Austrian courts also with regard to the claims made by the crew members, but not because the jurisdiction agreement was in their favour and therefore, they could rely on it, but because the clause could be interpreted as it was also aimed to protect them.

Therefore, no clear rules have been established yet regarding jurisdictional agreements for the benefit of a third party. Although in insurance disputes the reasoning why such a clause should be enforceable even without the consent of the third party seems reasonable, outside this field it seems that great consideration should be given by national courts when scrutinizing such cases. Perhaps the mantra of Article 25 – the real and informed consent of the parties to the jurisdiction agreement – should prevail over the potential benefits of a party who was not a party to the initial report.

C. Enforceability via damages

This section examines the possibility of one of the parties to rely on different remedies for the breach of a choice-of-court agreement.[103] Can the party which starts proceedings in another court than the one indicated in the jurisdiction agreement, also be asked to pay damages for the violation of the clause? In order to provide guidance on this question (**B**), we must start with an analysis of the nature of a jurisdiction agreement (**A**).

102 Austrian Supreme Court, 21 June 2020, 2Ob104/19m; S. Laimer, *Austrian Supreme Court on Choice-of-Court Agreements and the Assignment of Claims*, 12 January 2021, available at https://eapil.org/2021/01/12/austrian-supreme-court-on-the-effects-of-choice-of-court-agreements-in-relation-to-third-parties/.

103 For an extensive discussion on the issue, see A. Briggs, *supra* note 7, at 237; C. Knight, 'The Damage of Damages: Agreements on Jurisdiction and Choice of Law', 4 *Journal of Private International Law* (2008) 501, at 504; A. Dinelli, 'The Limits on the Remedy of Damages for Breach of Jurisdiction Agreements: the Law of Contract Meets Private International Law', 38 *Melbourne University Law Review* (2015) 1023; S. Dutson, 'Breach of an Arbitration or Exclusive Jurisdiction Clause: The Legal Remedies if it Continues', 16 *Arbitration International* (2000) 89.

1. The nature of the jurisdiction agreement

Article 25 (5) of the Regulation states that an agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. Therefore, the jurisdiction agreement seems to be a contract in itself which is governed by lex fori prorogati in regard to the material conditions and by the Regulation in regard to the formal requirements.

However, the nature of jurisdiction agreements has been long disputed.[104] On the one hand, common law systems usually favour the contractual character of such agreements. On the contrary, in civil law countries the agreement is seen as having a predominantly procedural nature.[105] For example, Spanish courts[106] considered the procedural qualification of such a clause. Therefore, as the lower court judge retained, they cannot be assimilated to substantial conventions, since they would not imply a contractual commitment but would rather be the channel through which the parties' claims are pursued. Yet, Tribunale Supremo[107] held a mixed nature of the jurisdiction agreement. While recognizing that the exclusive choice-of-court agreement has a procedural nature, it must nonetheless be respected by the parties. Even more so, since the cause of the clause should be particularly analysed, since it could have a greater role in the economy of the contract from a substantial point of view.

The same dispute was also raised by French legal doctrine. From a particular doctrinal perspective,[108] specific obligations arise from this contract. If the jurisdiction agreement has an exclusive derogative effect on both parties in each of their patrimony, an obligation to act arises, namely to bring the matter only before the chosen court, as well as an obligation not to act, namely not to file a claim before any other court other than the chosen one, which would hold jurisdiction in the absence of the jurisdiction agreement. In contrast, from another perspective,[109] a difference must be made between the binding force of a contract and the obligations arising from it. Following this opinion a jurisdiction agreement does not create any obligations for the parties. The parties must comply with the clause, since it is binding between them, but there are no specific obligations arising from it.

Although CJEU has not yet stated if such agreement has a procedural or obligational nature, as national courts have tried to explain and it is possible that the juridical nature of Article 25 jurisdiction agreement is neither. The Court has underlined many times that the concept of 'jurisdiction agreement' is an independent one under the Recast and, therefore, should not be interpreted according to national legislation. Therefore, the nature of a jurisdiction agreement should only be examined within the scope of the Regulation.

2. The Remedies

Depending on the nature appointed to the jurisdiction agreement, the remedies available to the aggrieved party and the

104 M. R. Isidro, 'Violación de acuerdos de elección de foro y derecho a indemnización: Estado de la cuestión', *Revista Electrónica de Estudios Internacionales* (2008); S. Sánchez Fernández, 'Choice-of-Court Agreements: Breach and Damages within the Brussels I Regime', 12 *Yearbook of Private International Law* (2010) 377.

105 U. Magnus, *supra* note 2, at 660.

106 *Travelstead Spain SA Group and USA Sogo Inc*., Judgment of the Supreme Court (Chamber 1, Civil), 6/2009 of 12 January 2009. See also M. R. Isidro, *On the Value of Choice of Forum and Choice of Law Clauses in Spain*, 24 April 2009, available at https://conflictoflaws.net/2009/on-the-value-of-choice-of-forum-and-choice-of-law-clauses-in-spain/.

107 *Ibid*.

108 D. Sindres, 'Retour sur la loi applicable à la validité de la clause d'élection', 4 *Revue critique de droit international privé* (2015) 787.

109 M. E. Ancel quoted in D. Sindres, *supra* note 31; J. Steinle and E. Vasiliades, *supra* note 43, at 575.

conditions under which they can be accessed might vary.[110]

If the procedural character is followed, the remedies available for the defendant are, as a rule, procedural ones. This implies that the defendant must contest the jurisdiction and have the court decline its jurisdiction if the claim is made in violation of the jurisdiction agreement.

If the contractual character is followed, a breach of the jurisdiction agreement, the non-submission of the parties to the elected court, shall confer upon the counterparty the right to seek other remedies, including the right to claim damages.

Common law courts have awarded damages for some time[111] now even if it has been just as a second-rate sanction,[112] the primary sanction has been either declining jurisdiction or granting an anti-suit injunction. Even though the problem is still up to debate, it may seem that even civil law courts have adopted a more nuanced approach when it comes to the remedies available to the aggrieved party. For instance, in a German case,[113] even though the Court of Appeal dismissed the counterclaim for the compensation of the costs in the US proceedings that were initiated in violation of the jurisdiction agreement, the BGH accepted that the breach of jurisdiction agreement clause shall justify damages, since the court interpreted the clause as containing an obligation not to breach it.

Circling back to the above-mentioned Spanish ruling, the first instance court and the Court of Appeal retained the procedural nature of the jurisdiction agreement stating that 'agreements of contractual contents (economic agreements) and procedural covenants to submit to jurisdiction cannot be assimilated'. Tribunal Supremo on the other hand, held that the jurisdiction agreement creates a duty, even if it is an accessory one, and the breach of such a duty can be of substantial meaning, since it can determine the economic frustration of contract for one party. Therefore, the Spanish court granted the right to damages arising from the violation of the jurisdiction agreement.

However, it is our view that the solution to this topic should be regarded in light of CJEU case law. Even though the Court has not stated its reasoning on this particular topic, some guidelines can be drawn from its previous rulings on Article 25.

In the *Benincasa* case,[114] CJEU underlined that a jurisdiction clause serves a procedural purpose. As a consequence, it is governed by the provisions of the Regulation, whose aim is to establish uniform rules of international jurisdiction. The Court also made a clear distinction between the substantial aspects of the contract and the jurisdiction agreement, each of them being governed by a different lex causa, being two separate agreements. Therefore, based on these statements, we can conclude that the jurisdiction agreement is an autonomous agreement even though it is included in a contract and has a procedural nature serving a procedural scope. A jurisdiction clause is indeed an agreement, but it should not be regarded as a contract in view of its particular nature, but as an agreement by which the parties or one of the

110 For a discussion on the legal basis of the claim for damages, see K. Takahashi, 'Damages for Breach of a Choice-of-Court Agreement: Remaining Issues', 11 *Yearbook of Private International Law* (2009) 73, at 78.
111 For example, in *Discount Union Co. Ltd 4 v. Zoller* the English Court of Appeal held that by bringing the action before the American Court in violation of the jurisdiction agreement there has been a breach of contract giving rise to a right to claim damages if certain conditions are met.
112 D. Cuniberti and M. Requejo, 'The sanction of choice of court clauses by the granting of damages', 11 *ERA Forum* (2010) 7.
113 BGH, 17 October 2019, IPRax 2020, 459 with note by L. aColberg, IPRax 2020, 426.
114 Case C-269/95, *Francesco Benincasa v. Dentalkit Srl* (EU:C:1997:337).

parties limit their prerogative right to seize a court that would normally hold jurisdiction.[115]

Even more, in *Gregory Paul Turner* case,[116] CJEU stated the incompatibility of an injunction that prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another Member State, even where that party is acting in bad faith with a view to frustrating the existing proceedings. Thereby, it is clear that under Brussels I Recast the remedy of an anti-suit injunction is not applicable. However, the motivation provided by the Court can be closely linked to the remedy of damages. In paragraph 28, the Court seems to take a more general approach as to the remedies a Member State court can apply: '[i]n so far as the conduct for which the defendant is criticised consists in recourse to the jurisdiction of the court of another Member State, the judgment made as to the abusive nature of that conduct implies an assessment of the appropriateness of bringing proceedings before a court of another Member State. Such an assessment runs counter to the principle of mutual trust … the Convention and prohibits a court, except in special circumstances which are not applicable in this case, from reviewing the jurisdiction of the court of another Member State.' Therefore, it might be concluded that this judgement seems to oppose any mechanism authorizing a court of another Member State to assess the jurisdiction of another court of a Member State and, in consequence, to sanction the abuse of rights of the claimant who breaches the jurisdiction agreement.

Since granting damages would automatically imply an analysis of the jurisdiction of the court of another Member State, it seems that neither of these remedies should not be available to the aggrieved party. It could not be denied that an antisuit injunction, on the one hand, and damages, on the other hand, have a very different nature, the first one being an order and the latter a mere pecuniary sanction. However, in this situation, both would have the same objective – to sanction the party who breached the jurisdiction agreement.

As such, applying by analogy the reasoning from *Gregory Paul Turner* case, it might be considered that the breach of a jurisdiction agreement does not entitle the aggrieved party to damages, since it is not the non-performance of a contractual obligation. As Article 25 stipulates an exclusive jurisdiction for the chosen court if the parties do not agree otherwise, and considering Article 27, the only remedy available is to decline jurisdiction. In view of the principle of procedural autonomy, the courts of Member States, in a scenario when the court shall decline jurisdiction, can award the costs of judicial proceedings according to their national law.[117]

Still, there is also the view that the costs which are not recompensed under the national procedural law of costs and further consequential costs should be awarded as damages for breach of the clause.[118] In this view, the jurisdiction agreement establishes an obligation to sue only in the agreed court, therefore, the violation of the said obligation requires a sanction beyond the mere procedural reaction of dismissal of the claim.[119] An argument in favour of this solution is the fact that the procedural character of a judicial situation does not always exclude the possibility of awarding damages. For example, in some civil jurisdictions,[120] abuse of

115 *Ibid*.
116 Case C-159/02, *Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA* (EU:C:2004:228).
117 Joined Cases C224/19 and C259/19, *CY and Others v. Caixabank SA and Banco Bilbao Vizcaya Argentaria SA* (EU:C:2020:578).
118 U. Magnus, *supra* note 2, at 661.
119 *Ibid*.
120 See, for instance, Article 12 (2) Romanian Code of Civil Procedure, Article 32-1 French Code of Civil Procedure.

procedural rights might also lead to damages. Still, as the authors rightly point, there must be limits to such damages claims in order not to unreasonably restrict a party's right to litigate.[121]

CONCLUSION

Although the three matters discussed above concern three different issues on the effects of a jurisdiction agreement, one can draw some common conclusions. When assessing the effects of a jurisdiction agreement under Brussels I Recast Regulation, one should always bear in mind the autonomous nature of the concept and the fact that, no matter its structure, it should always be interpreted as a whole, and not by splitting it into branches.

Regarding asymmetric clauses, their validity and effects on *lis pendens* are to be clarified. First, it must be determined if they are admissible and under what conditions, in order to alleviate the uncertainty created by radically divergent national case law in this matter. As a consequence, it seems that an express solution to this problem would be necessary, and if the CJEU states the option branch does not lack precision, such a solution would be similar to the one provided by Article 17 (3) of the Brussels Convention. Thus, the asymmetric clause would be interpreted as being concluded for the benefit of the option holder, who, on the basis of the Regulation itself, retains the right to bring proceedings in any other court. Second, the Regulation would require a solution as to whether Article 31 (2) applies to such agreements or not, the solution depending on the interpretation method. Although all the proposed solutions are perfectible, considering such a clause as a whole, conferring exclusive jurisdiction to the first seized court (as long as each party complies with the obligation corresponding to its branch) would eventually solve the problem of *lis pendens*.

Even though CJEU case law has had a thorough review of third parties' effects, it seems that the complexity of the legal problem makes national courts put forward even more questions. That may be because of the key principle of Article 25 – the real consent of the parties. When this principle seems to be violated, in case of an assignment of rights or by conferring binding force to the jurisdiction agreement in favour of a third party, national courts are reluctant to enforce the agreement, rightly so. Indeed, a clear provision in the Regulation regarding third party effects could improve the foreseeability of the rules applicable. Even more so since recital 15 of the Regulation clearly states that 'the rules of jurisdiction should be highly predictable'. The requirement of predictability should equally apply when 'the autonomy of the parties warrants a different connecting factor' than the one established by the general rules.

In the distressing but not uncommon situation of a breach of jurisdiction agreement the question raised by the two different legal traditions and jurisdictions[122] within the EU must be answered. Although it seems that national case law favours an obligating effect on the jurisdiction agreement, it is doubtful that this solution is compatible with CJEU previous case law on similar matters. Since the remedies available for the aggrieved party are an essential part of the enforceability of the jurisdiction agreement itself, an express provision should make this autonomous European concept easier to grasp.

121 *Ibid*.

122 Green Paper on the review of Council Regulation (EC) no. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2009) 175.

SEMI-FINAL D

JUDICIAL ETHICS AND PROFESSIONAL CONDUCT

PARTICIPATING TEAMS:

Bosnia and Herzegovina (BA), Bosnia and Herzegovina (RS), Bulgaria, France, Germany, Netherlands, Poland I, Poland II, Romania, Spain

1ST PLACE: SPAIN
2ND PLACE: FRANCE
3RD PLACE: NETHERLANDS

Selected papers for the THEMIS Annual Journal: France, Netherlands, Spain

16-19 JULY 2024 - TRIER, GERMANY - GERMAN JUDICIAL ACADEMY

JURY MEMBERS

STYLIANOS BIOS (EL)

Criminal and Civil Judge, former Seconded National Expert at Eurojust

I had the honour of presiding over the jury at this year's THEMIS semi-final on Judicial Ethics and Professional Conduct, which took place at the German Judicial Academy in Trier.

Ten Teams from eight different countries, eager for knowledge and personal growth, presented papers and led discussions on various topics. It was incredibly enriching to read, listen, and engage in discussions with these young judges on a range of issues related to Judicial Ethics. This experience has been incredibly rewarding, thanks to the exceptional quality of the work presented by the various teams, as well as the enthusiasm, energy, and precision with which these young European judges defended their legal theses.

It was particularly fascinating to observe the agility and flexibility of these jurists as they presented their arguments, engaged with their opponents, and ultimately defended their conclusions with remarkable professionalism.

I had the pleasure of working with Judge Andrea Moravčíková and Judge Christopher McNall. Our collaboration was excellent, and we smoothly exchanged views and legal insights. I would also like to take this opportunity to publicly thank Mr. Flavio Mastrorillo of the EJTN secretariat for his continuous help and support before, during, and after the semi-final.

It has been a privilege not only to participate in this wonderful activity organized by the EJTN, which fosters cooperation among judges from different Member States, but also to witness the high quality of the work, which reflects the deep professional dedication of our young judges.

In my view, activities like those organized by the EJTN promote comradeship and collaboration toward a common goal, to deepen one's understanding of European law. They also help new European judges connect with each other, grounded in the shared ideals of a united Europe.

In conclusion, I am deeply grateful for the opportunity to participate in these very special and positive training activities.

CHRISTOPHER MCNALL (UK)

Fee-paid Judge at First-tier Tribunal (Tax Chamber), Chairperson at Agricultural Land Tribunal of Wales, Lawyer-Chairperson at the Residential Property Tribunal of Wales, Deputy District Judge of England and Wales

It was a great privilege to have been a member of the jury for the Judicial Ethics and Professional Conduct Semi-Final D held at the German Judicial Academy in Trier.

The extent of everyone's hard work and commitment to the competition was obvious, and breathtaking – all the more so since everyone was working in (impeccable) English.

Each and every one of the ten teams, and every participant, showed great enthusiasm and skill in the presentation of their informative and enjoyable papers, and in answering searching questions from the other teams and from the jurors.

A range of different subjects was addressed: the judicial use of social media; and of AI; judicial response to challenges to the Rule of Law and perceived ‚unjust' laws (for instance, laws restricting, on cost grounds, access to life-saving medicines); the ethics of prosecuting and sentencing climate change protestors; as well as judicial responses to political and media pressure.

There was a common thread running through the papers, which is that judges in countries across the continent of Europe – however senior we are, whatever kind of law we do, and wherever we do it – face common challenges of various kinds: economic, political, societal, and technological.

To meet, share, and discuss these challenges is an excellent reason why this competition is so worthwhile. I am glad to have been able to play my part, and I wish all the participants well.

ANDREA MORAVCIKOVA (SK)

Justice at the Supreme Court of the Slovak republic

Every collaboration with the EJTN is a welcome and enriching opportunity, but participating as a juror in the 2024 THEMIS Semi-final D on Judicial Ethics and Professional Conduct was an exceptional experience in several specific ways.

I had the opportunity to work with young professionals, at the beginning of their judicial careers, who are passionate about issues that are becoming highly important across Europe and that have not only a legal dimension, but also ethical and moral. The creativity of these young judges, as well as their enthusiasm for law and justice, became an inspiration in both the day-to-day judicial decision-making and in the education of our young Slovak lawyers.

The judges and their personality are manifested not only in the decisions they make. It is also in the way one communicates with the parties in the courtroom, through social networks, and new technologies. The questions of judges' public expression and the limits of their behaviour resonated, as well as the use of new technologies in the context of preserving the human element and the input of the judge's personality despite the use of such tools ('a good servant but a bad master' is a Slovak proverb that is associated with fire, but can equally be applied to AI). Furthermore, the question arises as to whether and how the judiciary presents itself externally from the perspective of non-discrimination, based on respect not only for gender, but also for other prerequisites of public perception of the judiciary.

I was very impressed by the presentations of the participants, where they skilfully handled data and managed to present complex considerations in a clear and engaging way, in the form of surveys, interviews, and analytical tools.

I consider THEMIS one of the most important activities to raise awareness of a pan-European community of young judges, and I am extremely pleased to have been able to participate this year.

All the teams and their tutors deserve a lot of respect and gratitude for their personal input and work. A special thanks goes to the other jurors, with whom I had a great time working and who enriched me in many ways. Finally – and most importantly – many thanks to the EJTN.

Team Members:
Florent ARNAUD
Marie DENIZOT
Yann-Erwin SCHAMSCHULA

Tutor: Stéphanie Deffez

Team France

DIVERSITY VS IMPARTIALITY: AN UNUSUAL CONFRONTATION

THE EUROPEAN JUDICIARY'S NEW DIVERSITY EXPECTATIONS: IMPARTIALITY CALLED INTO QUESTION?

As time goes by, as institutions evolve, and as the rearrangement of ethical values spreads to all fields of human endeavours, the judiciary, and more specifically, for all intents and purposes, the national judiciaries composing the European judicial landscape can no longer avoid answering one of the most critical questions of our time : is it salutary to implement strict DEI standards (for diversity, equity and inclusion) in European judiciaries, or shall it, on the contrary, be perceived as a risky step towards the deconsecration of the impartiality prerequisite ? This new dilemma, ethical in nature and of utter importance, delves deep into the essence of what makes a judge truly impartial, and raises crucial questions around the relevance of contemporary concerns, to the extent that they might revolutionize our judiciaries, for better or worse.

KEYWORDS:
DIVERSITY | IMPARTIALITY | EUROPEAN JUDICIARIES | GENDER EQUALITY | ETHICAL CONFLICT | INCLUSION

Au fil du temps, au fur et à mesure que les institutions évoluent et que le réaménagement des valeurs éthiques s'étend à tous les domaines de l'activité humaine, le système judiciaire, et plus particulièrement les systèmes judiciaires nationaux qui composent le paysage judiciaire européen, ne peuvent plus éviter de répondre à l'une des questions les plus critiques de notre époque : est-il salutaire de mettre en œuvre des normes DEI strictes (pour « diversité, équité et inclusion ») dans les systèmes judiciaires européens, ou une telle initiative doit-elle au contraire être perçue comme une étape risquée vers une perte d'importance de la condition d'impartialité ? Ce nouveau dilemme, de nature éthique et d'une importance certaine, plonge profondément dans l'essence de ce qui rend un juge vraiment impartial, et soulève des questions cruciales autour de la pertinence des préoccupations contemporaines, dans la mesure où elles pourraient révolutionner nos systèmes judiciaires, pour le meilleur ou pour le pire.

MOTS-CLÉS :

DIVERSITÉ | IMPARTIALITÉ | SYSTÈMES JUDICIAIRES EUROPÉENS | ÉGALITÉ ENTRE LES HOMMES ET LES FEMMES | CONFLIT ÉTHIQUE | INCLUSION

On 9 February 2024, French President Emmanuel Macron posted a picture of himself with the Class of 2024 of the French National School for the Judiciary (hereinafter *ENM*) via his Instagram account.[1]

Numerous comments such as *'Lmaoo you're playing where is Waldo to find diversity*'[2] and '*there's not a single colored person in that thing, that's crazy*'[3] immediately criticized a blatant lack of diversity in the class.

Ironically, neither President Macron[4] nor the ENM could agree more. Over the last few years, an impressive number of initiatives to promote diversity in the judiciary – as well as in the public sector in general[5] – have emphasized that 'the judiciary, even more than other professions, should strive to reflect the diversity of the society on whose behalf it dispenses justice'.[6] To name but a few: the '*Classes Prépa Talents*' created in 2008, targeted advertising, the publication each year of the 'sociological profiles' of the ENM's graduating classes, the diversification of recruitment methods, a program supporting equal opportunity[7] and, recently, the organization of a symposium focusing on this particular topic.[8]

However, France is not an isolated case. Most European Union (EU) countries, echoing the famous motto *'united in diversity'*, have also joined forces to promote it in their own jurisdictions. Some have commissioned studies,[9] formalized diversity as an objective,[10] set 'quotas',[11] or created specific commissions or bodies with the task of achieving effective equality,[12] while others have established new diversity criteria for the selection of judges.[13]

While Europe has fully embraced this new goal, brainstorming on the need to improve diversity in the judiciary started much earlier in non-EU countries such as the United States, Canada and the United Kingdom.[14] The definition[15] of the concepts used throughout this paper is clearly imbued with a powerful Anglo-Saxon influence:

- *Diversity is a measure of representation within a community or population that includes identity, background, lived experience, culture, and many more.*
- *Inclusion* – or inclusivity – refers to the creation of an environment where

1 E. Macron, 9 February 2024, available at instagram.com/emmanualmacron.
2 @vivez_bio, 9 February 2024, available at instagram.com/emmanuelmacron.
3 @russiascat, 9 February 2024, available at instagram.com/emmanuelmacron.
4 E. Macron, Discours du Président Emmanuel Macron lors de la prestation de serment des nouveaux auditeurs de justice, available at https://www.elysee.fr/emmanuel-macron/2024/02/09/.
5 Letter defining Frédéric Thiriez's mission to reform the senior civil service; Prime Minister Édouard Philippe asked him to review the entire training system for officials, 8 May 2019.
6 M. Miller, 'Dans la magistrature, une lente ouverture sociale grâce aux classes prépa « *égalité des chances* »', *Le Monde* (2022).
7 ENM Website: 'Cordées de la réussite: l'ENM lance ses actions auprès des collégiens', available at https://www.enm.justice.fr/actu-04072022-cordees-de-la-reussite-l-enm-lance-ses-actions-aupres-descollegiens.
8 Report on the conference held on 30 and 31 January 2020, 'Magistrates: A corps examined by the social sciences', organized by the Mission de recherche Droit et Justice, the Laboratoire Printemps and the École nationale de la magistrature.
9 The Netherlands: 'Judicial reform in the Netherlands: A new process for the recruitment, selection and training of judges', *Scientific magazine for the organization of the Dutch judiciary*, available at https://www.rechtspraak.nl/SiteCollectionDocuments/Judicial-reform-2015-compleet.pdf.
10 Ireland: report 'Increasing judicial diversity', 2017, available at https://files.justice.org.uk/wp-content/uploads/2017/04/06170655/JUSTICE-Increasing-judicial-diversity-report-2017-web.pdf.
11 Belgium: M. Raes, *Les femmes et le droit* (1999), at 175-196.
12 Spain: CEPEJ Studies no. 26, 'European judicial systems. Efficiency and quality of justice', 2018, available at https://rm.coe.int/rapport-avec-couv-18-09-2018-en/16808def9c.
13 Czech Republic: A. Procházková, 'How to Form the Czech Constitutional Court?', *VerfBlog* (2023), https://verfassungsblog.de/how-to-form-the-czech-constitutional-court.
14 S. Bearne, O. Bowcott and A. Perkins, 'Lady Hale: Courts and judiciary should reflect diversity of UK', 15 February 2018, available at https://www.theguardian.com/law/2018/feb/15/lady-hale-courts-and-judiciary-should-reflect-diversity-of-uk.
15 Definitions provided by the Division of the Vice-President of Research and Innovation of the University of Toronto on its website, available at https://research.utoronto.ca/equity-diversity-inclusion/equity-diversity-inclusion.

everyone shares a sense of belonging, is treated with respect, and is able to fully participate.

- *Equity* should be understood as the promotion of fairness and justice for each individual that considers historical, social, systemic, and structural issues that impact experience and individual needs. In broader terms, it corresponds to the corrective endeavour to pursue a reshaping of reality (for example, by making it more diverse through inclusivity) in order to reach an equality of outcome, rather than an equality of rights or opportunity (this being the liberal prism).

All three concepts are today encapsulated in a single concept: DEI (Diversity, Equity and Inclusion),[16] for which a legal definition has yet to be drawn up.

On the other hand, the European Union has been considerably more active in defining the notion of impartiality: often considered a cardinal prerequisite to the act of judging, it has long been analysed and discussed. Impartiality is an essential element of public trust in the judicial institution and is a right guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and by Article 47 of the Charter of Fundamental Rights of the EU. It is a prerequisite for the respect of the fundamental principle of equality of citizens before the law.[17] The European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) have gone even further in clarifying this notion: since the decision handed down by the ECtHR on 1 October 1982 in *Piersack v. Belgium*, it has been established that the requirement of impartiality actually entails two requirements. Firstly, there is a requirement for functional impartiality, also known as objective impartiality. There is also a requirement for personal impartiality, otherwise known as subjective impartiality.[18] Objective impartiality does not vary according to the person of the magistrate but according to his or her functions. It refers to the principle of separation of the functions of prosecution, investigation and judgment, which entails two main prohibitions: the exercise of separate judicial functions in the same case and the successive exercise of the same judicial function for the same persons. On the other hand, subjective impartiality is not linked to the duties performed by members of the judiciary, but their character. The requirement for personal impartiality was first set out by the ECtHR.[19]

Much criticism has since arisen against the unreachable purity of such a principle, as judges are constantly under the influence of their own personality, characteristics, feelings, biases and even their digestion![20] Subjective impartiality is thus impossible to reach, and this endeavour is made even more difficult by the judge's identity, which cannot be altered.

The ECtHR attempted to solve this issue by deciding that a court must offer every appearance of impartiality in order to exclude any legitimate suspicion in the mind of the public, while the defendant's perspective comes into play by reference to his or her subjective feelings and understanding of the stakeholders in the trial. As a basis for its reasoning, the Court referred to the adage in English law that '*justice must not only be*

16 UN Global Compact Diversity, Equity and Inclusion (2022), available at https://unglobalcompact.org/take-action/action/dei.
17 High Council for the Judiciary, *Compendium of the Judiciary's Ethical Obligations* (2019), at 10.
18 ECtHR, *Piersack v. Belgium*, Appl. no. 8692/79, Judgment of 1st October 1982.
19 ECtHR, *Lavents v. Latvia,* Appl. no. 58442/00, Judgment of 28 November 2002.
20 M. E. de Montaigne, *Essays* (1582).

done, it must also be seen to be done'.[21] It is not enough for justice to be done; it must also ensure that it is perceived as having been done properly with all the required impartiality, and must be seen to be done, in other words be 'externalized'.[22] This is a way to render impartiality more objective and, therefore, to foster it.

This notion of the appearance of impartiality lies at the very heart of the confrontation between impartiality, as the ultimate ethical value to which a judge's conduct should conform, and diversity, which constitutes a new ethical principle within the judicial sphere. This 'confrontation' of ethics must be examined in depth because of the novelty it encompasses, especially in a distinct 'corps' such as the judiciary.[23] The need to ensure the emergence of a body trained for the demanding responsibilities of the judicial profession has long sidelined the importance of diversity.

Jacques Commaille understands the justice system as an institution with an intrinsic political nature: not only regulating but transforming societies.[24] This may challenge the professional identity of judges, sometimes accused of being too legal and too technical, too detached from reality, too political or even too permeable to society. The solutions recommended have often been to transform the social composition of the group, either to close it or, more often, to open it up.

The first studies of court activity beyond a strictly legal perspective began to emerge in 1975, particularly in the United States. Later on, the Centre for Organizational Sociology set up the first working group focusing on the organizational analysis of justice.

More recently (2023), a study by two French researchers, Yoann Demoli and Laurent Willemez, entitled *Sociology of the Judiciary – Genesis, social morphology and working conditions of a corps* updated said research and provided an in-depth analysis of the evolution of the judicial corps.

This debate even reached the ECtHR with a case opposing impartiality and diversity (the only one to this day). In *Ottan v. France* (2018), the Court had to consider whether to condemn an attorney, who, following the acquittal of a police officer in 2009 who had killed a young man belonging to a minority ethnic community in a working-class neighbourhood during a car chase, made the following comment: 'I always knew it was possible. A white jury, exclusively white, where not all communities are represented ... the path to acquittal was a royally open path, no surprise there',[25] therefore blaming an unfair verdict on the lack of diversity, constituted a violation of Article 10 of the European Convention on Human Rights. It did, according to the Court, however, the fundamental question raised by this case has not yet been resolved. This remains, to this day, the first – and only – opportunity for the ECtHR to examine the issue of diversity within the judiciary in a European country.

However, because impartiality is a core principle of the CJEU's jurisdiction, and in view of the vigour of the new diversity requirements, there is no doubt that a new case will be brought before the CJEU in no time.

A new set of values inevitably entails unpredictability and happenstance, requiring a 'confrontation' on both a theoretical and

21 *R. v. Sussex Justices*, ex parte McCarthy [1923] All ER Rep 233.
22 M-A. Frison-Roche, *L'impartialité du juge* (1999), at 55.
23 J. Bell, *Judiciaries within Europe. A comparative review, University of Cambridge* (2006), at 19.
24 J. Commaille, *À quoi nous sert le droit ?* (2015).
25 ECtHR, *Ottan v. France*, Appl. no. 41841/12, Judgment of 19 April 2018.

a practical level. While diversity may surely enrich the judiciary, it might not entirely be from the impartiality standpoint; and if it does, it is far from obvious to think that the improvement in impartiality through diversity, equity and inclusion would happen without any collateral damage. In the end, does greater diversity make for 'better' judging?

As improving diversity legitimately becomes a priority across national judiciaries in Europe, we believe it is not only useful, but also necessary, to question the merits of these initiatives and the risk they may pose to long-standing principles of justice, such as impartiality, in order to ensure that they are as ethical as they are effective. While diversity is rightly considered by most as an appropriate response to a deep-rooted suspicion of judicial bias (1), encouraging it could also be perceived as a subtle way of questioning the ability of the judge to fully detach from said bias (2).

To answer this question at the crossroads of various disciplines (law, philosophy, history, sociology), several studies, articles, and statistics from both EU Member States and non-EU states, as well as many testimonials from European judges themselves were used. However, the analysis of the social composition of the judiciary can be scattered. Empirical research is more common in the Anglo-Saxon world than in continental Europe and the information available is therefore quite incomplete. Considerations of diversity in research studies are often limited to the position of women in the judiciary and the extent to which the judiciary is a meritocratic elite.[26]

1. AN ASSET TO IMPARTIALITY: HOW DIVERSITY COULD HELP ACHIEVE 'BETTER' JUSTICE

Growing suspicions of homogeneity-related bias in the judiciary (A) suggest that diversity could prove to be an asset in improving the impartiality of European judges (B).

A. Traditional Suspicions of Bias in the Face of a Lack of Judicial Diversity

Faced with highly homogenous national judiciaries (1), litigants may be tempted to believe that the former lacks impartiality (2).

1. Highly Homogenous National Judiciaries in Europe

As mentioned earlier, the homogeneity of the judiciary must be considered a 'recent' issue, not because homogeneity itself is recent, but because it was never truly considered an issue before.[27]

The homogeneity of European judicial systems may be observed from different angles: economic, political, gender, age, ethnicity, social background, religious beliefs, etc. As researchers have pointed out, it is hard to ignore that 'courtrooms, offices, law firm partner meetings and lecture halls are much more homogeneous than [in this case German] society'.[28] Even though this may be generalized to all government bodies,[29] the distinctiveness of the judicial corps tends to suggest that its homogeneity is particularly prevalent. It is considered to result partly from training and continuing education,[30] though sometimes not consciously,[31] and from initial recruitment as well. Some examiners for the French National School of the Judiciary consider that homogeneity appears even before final recruitment, as they criticize

26 J. Bell, *Judiciaries within Europe. A comparative review* (2006), at 19.
27 V. Albouy and T.Wanecq, *Les inégalités sociales d'accès aux grandes écoles* 361(2003), at 27-52.
28 M. Grünberger and A.K. Mangold, *Diversität in Rechtswissenschaft und Rechtspraxis: Ein Essay*, 17 (June 2021).
29 M. Miller, 'Dans la magistrature, une lente ouverture sociale grâce aux classes prépa « égalité des chances »', *Le Monde* (2022).
30 J. Bell, *Judiciaries within Europe. A comparative review* (2006), at 361.
31 A. Garapon, *Bien juger. Essai sur le rituel judiciaire* (1997), at 150.

applicants each year for a lack of original thought.[32]

An easy way to consider judicial social background is to look at information such as parents' professional occupation. For every 100 judges and prosecutors in France, 62.9 have parents who are company directors, civil service executives or in a liberal or intellectual profession. The proportion of judges joining the corps between 2006 and 2019 and whose fathers were in an intermediate, white or blue-collar profession increased very slightly to around 13%, compared to 10% between 1975 and 1990. A strong rationale for homogamy ensures that this social homogeneity persists throughout the professional career.[33] Given that high educational qualifications are a prerequisite for entry into the judiciary, it may be expected that judges, like other lawyers, will come more frequently from middle-class backgrounds.

Homogeneity in the European judiciary has also undergone changes in relation to gender: a predominantly male profession has become predominantly female. Female representation is the most documented feature of social diversity: the latest European Commission for the Efficiency of Justice (CEPEJ) on the issue of diversity report shows that there has been a general trend towards an increase in the percentage of female professional judges[34]. In 2014, the average ratio of female professional judges was higher than that of their male counterparts for the first time. Since then, it has risen steadily to reach 56% in 2020. The gender split still varies from one state and entity to another. The states with the highest percentage of women in the judiciary are Croatia, France, Hungary, Latvia, Luxembourg, Romania, Serbia and Slovenia, where more than two thirds of professional judges are women. On the other hand, the ratio of women is still below 40% in Ireland. Generally speaking, it appears that common law countries continue to have a high percentage of male judges.

A similar picture emerges for prosecutors. While the male/female ratio of the total number of prosecutors still favoured men in 2010, with 54% men and 46% women in Council of Europe countries, it now favours women, with 53% women and 47% men on average in 2020. Unlike judges, however, this ratio has been fairly stable since 2012. Croatia, Cyprus, Estonia, Slovenia and France all have a high proportion of female prosecutors, with more than two thirds of women. On the other hand, in Georgia, the percentage of female prosecutors is less than 40%.

It has already been noted that women are far more present in judicial careers (and in the role of career prosecutors) amongst EU countries than in the predominantly self-employed lawyer sector. As in most of Europe, law has quickly become a topic mostly followed by women.

Study no. 26 of the CEPEJ, published in 2018 on the basis of data provided in 2016 by the Member States of the Council of Europe, nevertheless showed that, although there are more and more women judges and prosecutors, it is still more difficult for them to reach the higher levels of the judicial hierarchy. A 'glass ceiling' remains. The Czech judiciary is a good example: despite the fact that three fifths of Czech judges are women, it would be a mistake to consider the Czech judiciary 'feminized' as vertical gender segregation and a slow 'defeminization' in

32 ENM 2022 and 2023 jury report, available at https://www.enm.justice.fr.
33 Y. Demoli and L. Willemez, *Sociologie de la magistrature* (2019), at 30.
34 2024 CEPEJ Evaluation Report (2022 data), available at https://rm.coe.int/trends-and-conclusions-2024-cepej-evaluation-report-2022-data-/1680b1fa00.

positions of power and influence can be observed.[35]

More recently, the topic of ethnicity has appeared crucial. However, because of restrictions on ethnicity statistics in several European states, it is extremely difficult to analyse ethnic diversity in the judiciary for the simple reason that researchers cannot seek such information – all citizens being equal. The same problem arises for several other characteristics, such as religious belief, gender identity or political views: data often does not exist, as some states forbid such censuses. This differs from Anglo-Saxon countries such as the United Kingdom. The Ministry of Justice 2022 statistics showed that as of 1st April 2022, 5% of judges were from Asian backgrounds, while 1% was black, 2% of mixed ethnicity and 1% from other ethnic minority backgrounds.[36]

More can be said about the social representativeness of the lay judiciary.[37] Accordingly, there have been studies in England, France, Germany and Sweden on who becomes a lay judge. Increasingly, continental European systems are recruiting not just among recent graduates but also among professionals with a non-negligible number of years of experience in legal activity or in public administration. In France, in 2024, 165 judicial trainees out of 459 held another job before entering the judiciary, including an osteopath and a business manager.[38]

This general homogeneity claim needs to be nuanced to some extent. One may consider that, because European Union law has now taken a significant place in the various legal systems, heterogeneity is created de facto by judges from different countries. Thus, back in 2006, John Bell wrote: 'If you visit criminal courts in different Western European countries, judges look different and behave differently. In Sweden, the young judge in the Tingsrätt [district court] will be in ordinary clothes, sitting on a panel with lay assessors, probably even older than her parents … In France, the three women judges, one middle-aged and two younger, will be in robes … The English, middle-aged trial judge is even more formal, wearing a wig.'

Overall, and especially from a national perspective, homogeneity remains overwhelming. Suspicions of judicial bias have progressively arisen in relation to this lack of diversity (2).

2. The Lack of Diversity: A Threat to Impartiality

If any institution's computer security specialists are asked what the worst weakness of the system for which they are responsible is, the answer will always be the same: humans using computers. In any system, despite the best efforts of its agents, the beautifully crafted theory will have to face the limits of being implemented by human beings. A decision-making system such as the judicial system is not immune to such limits. Social science research regarding cognitive biases has increased knowledge about the traps the human brain can set for itself when it tries to assess a situation and reach the right decision.

Research tends to conclude that humans are not naturally impartial: during a negotiation, people tend to think that the objectively 'fair' outcome is one that actually leans in their

35 Czech Republic: A. Procházková, 'How to Form the Czech Constitutional Court?', *VerfBlog* (2023), https://verfassungsblog.de/how-to-form-the-czech-constitutional-court.

36 Data available at https://www.gov.uk/government/statistics/diversity-of-the-judiciary-2022-statistics/diversity-of-the-judiciary-legal-professions-new-appointments-and-current-post-holders-2022-statistics.

37 J. Bell, *Judiciaries within Europe. A comparative review* (2006).

38 ENM 2024 Class Profile, available at https://www.enm.justice.fr/api/getFile/sites/default/files/2024-02/ADJ%20Promo%202024%20-%20Profil%20promo%20%28nouvelle%20version%29.pdf.

own favour.[39] Even when the subject happens not to be involved in the system, when observing from the outside, research would show that humans do not spontaneously adopt an impartial approach: when observing the same debate between two persons of two different opinions, observers from both sides always think the person advocating their own side came out on top.[40] This is a cognitive bias known as the '*my side bias*', or '*confirmation bias*'. To fully understand the consequences of confirmation bias, one must not focus on political opinion, but combine it with experienced bias.[41] According to experience bias, people tend to think their personal subjective experience may be generalized as an objective truth. This means that when someone tells a story based on personal experience, this person will first exaggerate the generality of that experience (the experience bias) and will then look for signs confirming the truth of that story (the so-called 'my side bias').

This idea can be illustrated in the context of mutual allegations when a white woman accuses a black man of sexual assault in the workplace, while the black man accuses the white woman of lying as part of racial harassment. Of course, a woman will not automatically believe the white woman, but if she has experienced sexual assault in her private life, the white woman's story will sound credible. Meanwhile, a black person will not automatically believe the black man, yet if that person never experienced sexual assault but did experience racial harassment, the black man's story will appear more plausible from the beginning.

Personal experience also leads to the availability bias: one tends to assess the probability of an event based on how easily a similarly experienced event comes to mind, meaning our risk assessment is less affected by reasoning based on objective data than by recalling past experiences.[42] Thus, if a person who never experienced rape reads a paper on false rape accusations, their assessment of the probability of a rape accusation being false would probably genuinely be high (the concept of a false accusation being available in that person's recent memory because of the paper), despite data showing it is actually extremely low.

Furthermore, despite data indicating the contrary, most people tend to think that, unlike others, they are smart enough to think straight and are immune to biases. This has led researchers to study a new bias, now called the *bias blind spot*, which involves knowing about bias impact in general but failing to accept biases impacting ourselves. The fact that research has revealed that confirmation bias has no link with the level of intellect of a person allows us to fully understand how the profile of the judge affects the decision-making process.[43] This implies that, regardless of how clever a person is or how good their critical thinking skills are, it will be easier for that person to believe a story confirming their prejudices than to believe a story disrupting those prejudices.[44]

Giving additional credit to one side is different from automatically believing without a second thought: no study seems to conclude that cognitive biases may not be overcome. However, for any person, including a judge, overcoming a bias implies a considerable

39 R. H. Thaler and C. R. Sunstein, *Nudge: La méthode douce pour inspirer la bonne décision* (2012), at 350 (French translation of *Nudge: Improving Decisions about Health, Wealth, and Happiness* [2008]).
40 O. Sibony, *Vous allez commettre une terrible erreur! Combattre les biais cognitifs pour prendre de meilleures décisions* (2019), at 28.
41 *Ibid*., at 32-33.
42 Maatoug and Kubica, 'Biais cognitifs au tribunal pour enfants: faites entrer les faits', 19 *Délibérée* (September 2023) 64, at 66-67.
43 O. Sibony, *Vous allez commettre une terrible erreur! Combattre les biais cognitifs pour prendre de meilleures décisions* (2019), at 29.
44 *Ibid*., at 32.

amount of effort, while surrendering to said bias will feel easier, leading to a nudge in favour of partiality. It is not surprising then that studies conducted in the US have found that female judges are more likely than their male counterparts to rule in favour of plaintiffs in sexual harassment and employment discrimination cases.[45]

Whatever the intensity of the additional credit given to some stories by the personal experience of the judge (may it be only slightly more than any other story), questions may arise when most judges' experiences seem quite similar, due to profiles lacking in diversity. Such questions were asked in *Ottan v. France*,[46] when the applicant did not criticize the members of the court (three professional judges and nine non-professional jurors) for lacking the skills to judge with impartiality, but for their ethnic homogeneity, assuming (but not stating) that a court composed of members of only one ethnic group could be foreseen as siding with the litigant from the same ethnic group against the litigant of another (misrepresented) group, as did the criticized court.

A lack of diversity in the judiciary may be perceived as having problematic consequences on a judge's impartiality. Diversity should, therefore, be considered an asset to impartiality (B).

B. Diversity, an Asset to Impartiality

While fostering diversity would not solve all the problems of legitimacy faced by the 21st century's European judicial systems, many argue it would be a true asset to both the impartiality of decisions (1) and the judiciary's appearance in impartiality (2).

1. How Diversity Contributes to Impartiality

The contribution of diversity to impartiality has been widely examined. David M. Bigge observes that authors advocating for more religious diversity often underline the value added to the decision-making process: 'In short, ... diverse experiences and values, which we expect the judges to bring to the adjudication process, make that process richer, fairer, and more legitimate.'[47]

In a study regarding the judiciary and cultural diversity in France and Belgium, uncovering the topic's complexity, Anne Wyvekens writes: 'The first reaction of the majority of magistrates can be summed up in one word: discomfort.'[48] Improving diversity in the European judiciary, by fostering a variety of judicial experiences, would help the judiciary take into account the cultural differences it is faced with, along with most other differences, leading to a more accurate analysis of factual situations before adjudication.

This may well explain why the ECtHR procedure ensures that the judge originating from the same state as the applicant is always part of the chamber rendering the decision[49] and may be invited to be part of a three-judge committee.[50] The insights brought by this specific judge into the discussion could be quite useful in enabling the other judges to understand the cultural aspects of the case. Indeed, the improved quality of a decision gained from increasing diversity is especially true for collective decisions, since these require judges to discuss their different views, and hence explain and justify their views in order to reach a group decision: 'It obliges each judge to submit their own analyses

45 D. Root, J. Faleschini and G. Oyenubi, *Building a More Inclusive Federal Judiciary* (2019).
46 ECtHR, *Ottan v. France*, Appl. no. 41841/12, Judgment of 19 April 2018.
47 D.M. Bigge, 'Justifications for the promotion of religious diversity on the international bench', in F. Baetens (ed.), *Identity and Diversity on the International Bench* (2020) 62, at 67.
48 Wyvekens, 'Les magistrats et la diversité culturelle: "comme M. Jourdain..."', 3 *Les Cahiers de la Justice* (2013) 137, at 140 (translated from French).
49 Art. 26(4), ECHR.
50 Art. 28(3), ECHR.

to the critical gaze of the other judges and, therefore, to become more aware of the personal prejudices that they reflect, which constitutes many biases likely to have an influence on the decision.'[51]

The effects of an increase in judicial diversity on the reduction of discrimination have already been acknowledged and measured in the USA by Allison P. Harris, who 'argue[s] that increasing the representation of racial-minority-group members on the bench decreases racial disparities in felony sentencing, not because of these judges' behaviour, but because their presence alters their peers' behaviour'.[52] An increase in ethnic diversity does not mean that black judges will favour black defendants to compensate for white judges favouring white defendants in a sort of 'fair global average' that would actually stem from several unfair cases. It instead entails that every judge be more impartial and all decisions fairer. It should also be underlined that the results of A.P. Harris' study do not seem to be linked to the diversity of the composition of the tribunal rendering the decision, but to the diversity of the courthouse as a whole, of which this tribunal is a part. Thus, a global increase in diversity could improve impartiality even in situations where the few judges composing the tribunal are not themselves especially different from one another, but simply know and see judges different from themselves working in the same courthouse.

2. How Diversity Contributes to the Appearance of Impartiality

As previously mentioned, the appearance of impartiality is henceforth a component of the wider principle of impartiality.

Not all diversity is visible to the naked eye, which, when focusing on the sole appearance of impartiality, excludes certain types of diversity, such as the religious belief of a judge. While some religions require specific clothing to be worn, some states prohibit public servants or tribunal members wearing any form of religious sign, while other religious communities do not ask their members to wear any visible apparel. This means that religious diversity amongst judges, or an eventual lack thereof, is mostly invisible. The same goes for philosophical and political opinions, gender identity and some non-visible disabilities. This limits the study of the role of diversity in the appearance of impartiality to 'visible' diversity, i.e. ethnic, gender or age diversity.

Indeed, while a lack of diversity in the judiciary may negatively affect its legitimacy, it also suggests that increasing diversity in the judiciary fosters public confidence in the fairness of the system.[53]

In the aforementioned *Ottan v. France* case, the ECtHR noted that the attorney criticizing the ethnic profile of the members of the court not only stated that they were all white people, but also that 'communities were not all represented'. This statement is interesting, as it reveals an unaddressed expectation of the attorney's clients to feel represented by the composition of the bench, which was taken into account by the Court:

> The Court notes that the question of the diversity and representativeness of the judiciary is the subject of debate in several other Member States of the Council of Europe and that some have chosen to deal with it in a very different way from France.

51 C-T. Soulard, 'Le juge et les valeurs fondamentales: pour une éthique de la discussion', 1 *Les cahiers de la justice* (2022) 65, at 71 (translated from French).
52 A.P. Harris, *Can Racial Diversity among Judges Affect Sentencing Outcomes?* (2023).
53 J. Barton-Crosby, S. Lynch-Huggins, L. MacNaboe, A. Liddar and J. DeMarco, *Judicial diversity: Barriers and initiatives, Rapid evidence assessment*, study conducted for the UK Ministry of Justice (2023).

> … The Court emphasizes that, by using the expression 'white, exclusively white' in relation to the jury to explain that, together with other circumstances, that element made acquittal possible, the applicant referred to an ethnic characteristic which was the subject of debate, criticism and even prohibition on account of the historical tragedies to which it is linked and the discrimination which it may still frequently conceal. However, it does not appear to the Court that the applicant intended to accuse the jurors of racial prejudice. Rather, it considers that his statement was linked to a fairly widely developed analysis according to which the impartiality of judges, whether professional or occasional is not a disembodied virtue but the result of in-depth work leading them to rid themselves of unconscious prejudices which may be rooted in geographical or social origins and which may make those they are judging fear that they cannot be understood by persons apparently different from themselves. The Court considers that this interpretation results from putting into context the remarks made against the applicant, which also contained the words '(a jury) in which not all communities are represented' and which were preceded by a social comment on the effect of the verdict, namely that the 'verdict received [was] … dramatic in terms of social peace', there is a 'two-speed society' in which 'people live in tower blocks, are separated from town centers, have been the subject of criminal proceedings which end in convictions for some and acquittals for others … it is the whole social system that needs to be rethought' (paragraphs 11 and 12 above).[54]

This case clearly shows that diversity is an asset for the appearance of impartiality in that it avoids undue suspicion as to a judge's ethics and allows litigants to feel 'represented'.

This appearance of partiality reaches its height when the difference in profiles between judges and litigants is systemic. For instance, in one of the ultra-peripheral regions of the European Union, French Guiana, judges usually come from mainland France, since recruitment is centralized. This means a young white woman of mainland culture may be sent to a criminal court to judge mostly local black men, whose local black lawyers will not feel obligated to refrain from criticizing the obviously visible difference in profile and the judge's loss of legitimacy caused by it.[55] Consequently, one may deduce that the judiciary is not expected to be perfectly representative of diversity in order to appear impartial, but rather to avoid a total absence of diversity.

Even though diversity is undoubtedly beneficial to both objective and subjective impartiality, attention should be paid to the examination of the potential limits of this new expectation (2).

2. FROM IMPARTIALITY TO DIVERSITY: FORESHADOWING A POTENTIAL CLASH OF ETHICS

It is far from obvious to assert peaceful coexistence as well as the mutual enrichment of both impartiality and diversity. As a consequence, the former should not be sacrificed to the benefit of the latter (A), and its practical application begs to be foreseen with seriousness (B).

A. The Importance of not Trading Impartiality for Diversity

As with any other ethical innovation, diversity must not grow in importance to the point

54 ECtHR, *Ottan v. France*, Appl. no. 41841/12, Judgment of 19 April 2018, paras. 63 and 64.
55 R. Salis' documentary DVD, *Rendre la justice* (2019).

of overshadowing impartiality (A), making the establishment of a reasoned balance a necessity (B).

1. The Substitutive Threat of New Ethical Standards

Now that it is clear that diversity requirements may – and do – help enhance impartiality, the main focus should be on the potential downsides of such a new standard. The first inevitable question that begs to be answered is practical: could diversity in the judiciary lead to a mathematical dead end?

Indeed, the more diversity is prioritized as value and inclusion, the harder it is to select potential judges from a large pool of candidates. While diversity requirements may be satisfied in putting forward certain groups or categories at the expense of the majority, the range of people to choose from may drastically shrink, leaving a small pool of candidates in which competence, and thus impartiality, have less chance of prospering. Furthermore, the smaller the diverse category being promoted, the harder it will be to find a suitable candidate for the task. It might then turn out to be rather difficult to find as competent a candidate chosen by a minuscule margin of society as one picked among the entirety of potential candidates. Of course, the combination of such diversity concerns through intersectionality makes this practical issue even more challenging.

An eloquent and recent example of this mathematical issue was the nomination of Ketanji Brown Jackson in February 2022 by President Joe Biden as Associate Justice of the United States Supreme Court.[56] What marks the singularity of this nomination is that Ketanji Brown Jackson is the first black and female Supreme Court Justice in American history. The remarkable career that preceded her nomination can only plead in favour of her appointment, and any claim of incompetence could not, by any stretch of the imagination, be reasonably upheld. But here lies the issue: back in 2020, President Biden had already stated that the next Supreme Court Justice nominated by him would be a black woman.[57] This means that regular criteria of competence were not prioritized in the appointment process: the primary concern was the ethnicity and gender of the nominee. Thus, within the pool of potential candidates, about half were excluded due to their gender, and from what remained, the vast majority was excluded because of unsuitable ethnic identities. This resulted in an immense reduction in the pool of candidates, and a great loss in the probability of coming across the most competent one. If diversity standards were to be strictly and methodically applied within European justice systems, this drastic reduction in potential candidates, exponentially propagated on a wide level, might lead to a lowering of competence, ethical integrity, and impartiality. This logical consequence of the implementation of diversity, notwithstanding diversity quotas, has already been observed in Spain, where members of the Judicial Council are selected following a strict equal distribution between men and women.[58]

Secondly, another concern, of a theoretical and ethical nature this time, is the potential for corruption and the dystopian perspective of tailor-made justice. On the one hand, concerning subjective impartiality, and as developed by the philosopher Hannah Arendt,[59] impartiality is only a requirement

56 https://www.whitehouse.gov/kbj/.
57 S. Kapur, *Biden pledged to put a black woman on the Supreme Court. Here is what he might have to do*, NBC News, 6 May 2020, available at https://www.nbcnews.com/politics/2020-election/problem-biden-s-pledge-black-woman-justice-n1200826.
58 https://www.poderjudicial.es/cgpj/es/Temas/Igualdad-de-Genero/La-igualdad-de-genero-en-la-carrera-judicial/Plan-de-Igualdad-de-la-Carrera-Judicial/.
59 H. Arendt, *Lectures on Kant's Political Philosophy* (1982).

of critical thinking. Being impartial is about choosing, within our own subjectivity, between what is to be shared and what is to be kept intimate. To this way of thinking, impartiality cannot be sought through DEI standards, since impartiality is not about recognizing someone's singularity, but about trusting judges to keep their personality traits to themselves. Paradoxically, impartiality from these newly set standards would almost never be reached; it would no longer be about making sure that the right decision is being taken, but about ensuring that the right person takes the decision.

On the other hand, concerning objective impartiality, if the diverse composition of a court is a prerequisite for its impartiality, because litigants will then find it to be more legitimate, the risk of a tailor-made justice system then emerges. Much as with the extension *ad absurdum* of this principle, anyone could invoke the partiality of any judge, for there would always be an aspect of his or her own identity that would not match with the judges sitting in the court. Nevertheless, this is the conclusion endorsed by the ECtHR in the already quoted decision from 2018: 'The Court considers that the applicant's statement reflected a widely held view that the impartiality of judges, whether professional or lay judges, is a virtue that does not exist in a vacuum but is the result of considerable efforts to shake off unconscious bias rooted, in particular, in geographical and social background and liable to arouse fears in persons being tired of being ill-understood by persons of different appearance to them.'[60]

This, in the most absurd extrapolation, could lead to a segregated, or even tribal justice system, in the spirit of Canadian reasonable accommodation.[61] A practical illustration of this idea has been developed in the field of religious diversity by David M. Bigge in one of his recent papers.[62]

However, this may only lead to corruption and biases if handled and applied poorly. Hence a balance should be sought if this endeavour is to be fruitful (2).

2. In Pursuit of a Balance: Avoiding a Clash

As Alain Lacabarats pointed out at the 2020 conference 'The Soul of the Body', 'while seeking to promote diversity, the authorities responsible for selecting candidates for access to judicial office and for appointing and promoting magistrates must be careful not to ignore a number of fundamental constitutional or supranational principles, such as equal access to the judiciary for all and the prohibition of discrimination of any kind'.[63] International and European texts are particularly clear on these issues.

Firstly, paragraph 10 of the Basic Principles on the Independence of the Judiciary adopted by the United Nations in 1985 reads as follows: 'Persons selected to serve as judges shall be of integrity and competence and shall have adequate legal training and qualifications. Any method of selecting judges shall include safeguards against improper appointments. Judges shall be chosen without distinction as to race, color, sex, religion, political or other opinion, national or social origin, property, birth or other status …'[64]

60 ECtHR, Fifth Section, *Ottan v. France*, Appl. no. 41841/12, Judgment of 19 April 2018.
61 A. Wyvekens, 'Les magistrats et la diversité culturelle: "comme M. Jourdain…', *Les Cahiers de la Justice* (2013), at 137.
62 D. M. Bigge, 'Justifications for the promotion of religious diversity on the international bench', in F. Baetens (ed.), *Identity and Diversity on the International Bench* (2020) 62, at 77.
63 Final Report, Mission de recherche Droit et Justice, *L'Âme du Corps*, June 2019.
64 Basic Principles on the Independence of the Judiciary adopted by the United Nations on 6 September 1985, by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985.

European standards on access to the judiciary are also very clear regarding the objectivity of the conditions required for the recruitment of judges (integrity, competence, qualifications) and the impartiality of the appointment process, while recalling fundamental principles such as non-discrimination. The Council of Europe Recommendation (2010) on the statute for judges, adopted in November 2010, states: 'Any form of discrimination against judges or candidates for judicial office on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property or disability should be prohibited ...'[65]

While, fortunately, the application of these non-discrimination guidelines is not yet a matter of discussion in France, the issue of judges' social origin is regularly the subject of debate and calls for a review of the procedures for access to the judicial office. The issue of quotas is particularly relevant here, bearing in mind that parity has been adopted for the Belgian constitutional court.[66]

In Opinion no. 1 adopted in 2001, the Consultative Council of European Judges (CCJE) emphasized the need to achieve genuine equality of opportunity for men and women, for integration into the judiciary, as well as for promotion within the judicial hierarchy. It clearly states that, despite the need to ensure equal opportunities, especially throughout the recruitment process of judges, the authorities responsible for recruitment must never give in to the temptation to trade the ideal of meritocracy for diversity, at the risk of permanently affecting the quality of the impartial work incumbent on judges.

Some consider that by affording a decisive nature to a litigant's subjective perception of legal reality,[67] the ECtHR seems to be yielding to 'the pressure of an instrumental and privatized conception of the judge'.[68] Judicial truth cannot depend on appearances, which, 'like a chameleon, change in relation to the same person according to the interest that is their own in a case'.[69]

In the end, it is very difficult to recognize which right has been violated to identify what is unlawful. 'The Court is aiming at something intangible: it is the doubt, the applicant's feeling, that is the source of the State's liability, and not the wrongful conduct of the Government Commissioner or the court',[70] even though when the Court speaks of doubt, it does not place itself in the field of the psychology of every litigant, but 'rather uses the fiction of reasonable doubt'.[71] This is why, in the *Kress* judgment, in what may seem to be an extreme case, European case law 'does not provide an instrument for judging appearances, nor does it demonstrate how the presence of the public prosecutor or the equivalent magistrate in the deliberations violates the principle of a fair trial. It merely asserts that it does, and is content to assume an impression that has not been verified'. Although the Court found that the presence of the commissioner during deliberations violated the principle of equality of arms and impartiality, it did not require France to completely change the role of the

65 Recommendation CM/rec 2010(12) adopted by the Committee of Ministers of the Council of Europe on 17 November 2010.
66 M. Raes, *Les femmes et le droit*, Bruxelles (1999), at 175-196.
67 I. Muller-Quoy, 'Théorie de l'apparence et mise en scène de l'impartialité: à propos de l'application de l'article 6 de la CESDH par la Cour européenne des droits de l'homme', in E. Rude-Antoine (ed.), *Le procès, enjeu de droit, enjeu de vérité* (2007).
68 P. Martens, *La tyrannie des apparences* (1996).
69 Dissenting opinion of Judge Cremona in the Borgers case: ECtHR, Plenary Session, *Borgers v. Belgium*, Appl. no. 12005/86, Judgment of 30 October 1991.
70 H. Tigroudja, 'Les difficultés d'exécution de l'arrêt de la CEDH du 7 juin 2001 rendu dans l'affaire Kress/France", *RTDH* (2004), at 358.
71 *Ibid*., at 359.

commissioner, but emphasized the need for procedural safeguards to ensure fairness and transparency.[72]

By emphasizing a subjective criterion for the fairness of the trial, European case law, which reflects the quest for ideal impartiality, might undermine the function of judging. In such cases, it has been possible to speak of a 'mystique of impartiality', 'with reference to an ideal of abstract and disembodied neutrality that would be utopian',[73] a 'principle that is all the more corrosive for borrowing its inspiration from the most angelic virtues',[74] in that it leads to a search for the 'intellectual virginity of the judge'.[75] However, this cannot correspond to the judicial reality of a trial, which is a gradual process. It may be argued that in seeking to strengthen guarantees for litigants, the theory of appearances emphasizes distrust, as if to emphasize that litigants have good reason to distrust justice.[76]

B. Addressing the Blind Spots of Diversity as an Impartiality Standard

1. Facing Insufficiencies

In many respects, improved diversity seems to be quite difficult to achieve. As with any other profession, a career in the judiciary is perceived as appealing and worthy of commitment, although this depends according to the group analysed. The most obvious, social and cultural diversity, implies an inevitable disparity in the representation of the 'lower fringes' of society, since reaching high levels of education and competence tends to bring people from a more 'privileged' background, and lowering the level of expectations should not be seen as an ideal solution. Making it possible to enhance social diversity within the judiciary calls for more subtle and difficult solutions, such as public preparatory classes with access based on social criteria, just like those being developed by the French National School for the Judiciary. The latter has had a rather disappointing success rate, however, considering the fact that for the 2024 class, out of 288 successful candidates, only 19 had been prepared through this program.[77]

Another blind spot that needs to be addressed is disenchantment. For instance, among the 46 Member States of the Council of Europe, only seven had at least 50% of female court presidents back in 2020.[78] Women are thus scarcely represented within higher functions, despite their growing presence in the judiciary in general. While European judiciaries are evolving more and more towards gender diversity, one of the reasons that explains such a gap is sociological: taking on such demanding careers often requires huge sacrifices in terms of social and family life, energy, and dedication; a sacrifice that has widely been observed to be taken less willingly by female judges, who tend to prefer stability over careerism.[79] This disenchantment can be generalized beyond gender-related issues: it has been shown[80] that the general public, and especially disadvantaged minorities, have very little interest in becoming involved in the judiciary.

72 J. Andriantsimbazovina, *Bien lu, bien compris mais est-ce bien raisonnable, Toujours à propos du droit à un procès équitable et du 'ministère public'* (2004), at 890.
73 R. de Gouttes, *L'impartialité du juge: Connaître, traiter et juger quelle compatibilité* (2003), at 64.
74 C. Goyet, *Remarques sur l'impartialité du tribunal* (2001), at 329.
75 P. Martens, *La tyrannie des apparences* (2002), at 348.
76 I. Muller-Quoy, 'Théorie de l'apparence et mise en scène de l'impartialité: à propos de l'application de l'article 6 de la CESDH par la Cour européenne des droits de l'homme', in E. Rude-Antoine (ed.), *Le procès, enjeu de droit, enjeu de vérité* (2007).
77 2024 ENM Class Profile, available at https://www.enm.justice.fr/api/getFile/sites/default/files/2024-02/ADJ%20Promo%202024%20-%20Profil%20promo%20%28nouvelle%20version%29.pdf, at 9.
78 Council of Europe data, available at https://rm.coe.int/cepej-fiche-pays-2020-22-e-web/1680a86276.
79 P. Januel, 'Les femmes restent discriminées dans la haute magistrature', *Dalloz Actualité* (2019).
80 Y. Demoli and L. Willemez, *Sociologie de la Magistrature* (2023).

Thus, even if a European state wishes that higher judicial positions be more diversely occupied by women for all intents and purposes, this aim might be foiled by the disenchantment and lack of interest expressed by the very categories that state wishes to include.

This behavioural blind spot also stems from a broader phenomenon that has been observed on a wider level in many other working fields: it appears that larger gender disparities in occupational choices are greater in countries where gender equality has been sought the furthest. A plausible explanation is that deeply rooted and intrinsic gender differences are less restrained and materialize more easily in gender equal countries.[81] This paradox, also referred to as the Scandinavian paradox, leads one to believe that diversity-oriented policies may have a counterproductive effect.

Another issue that fails to be addressed by diversity politics is the inversion of disparity towards a rarefaction of the categories that were deemed overly represented at the beginning of the diversification and inclusion process. As an example, women in France in 1982 made up 28% of national judges. Today, the proportions have switched: men barely make up 29% of judges.[82] Diversity standards are thus changing the landscape to an extent that is difficult to fully grasp and control, and the main observation that can be made with any certainty is that perfect equity is impossible to reach through common policies.[83]

Finally, there is a difficulty that DEI policies potentially fail to overcome, namely the comprehensive grasp of the complex diversity that makes up society. Pre-established categories end up mapping imperfectly the complexity of the reality that is supposed to be represented. Each category may, in itself, be divided into many subcategories. Adding to this, the complexity of cross-categorical inclusion, through intersectionality, makes it theoretically, as well as practically, impossible to establish and fully operate such an intricate system. When combined together, all these categories that ought to be included, in an attempt to implement 'intersectionality'[84], become almost impossible to effectively integrate, without creating discrimination and disparities.

For all these reasons, diversity should not be sought blindly, neither should we expect it to be installed ideally. This is why restraint, moderation and humility should guide any project focusing on the diversification of European judiciaries. However, being careful not to chase miracles should not preclude hoping for the best.

2. Hopes and Remedies: Raising Standards

Improved knowledge of biases linked to judges' personal characteristics in the context of a homogeneous judiciary means those biases constitute less and less of a blind spot for the system. While it is very difficult to alter the person making the decisions, modifying that person's environment instead of their reasoning has proven effective in reducing cognitive biases.[85]

The obvious remedy for the lack of impartiality caused by the high homogeneity of judges is an increase in judicial diversity.

81 G. Stoet and D.C. Geary, 'The Gender-Equality Paradox in Science, Technology, Engineering, and Mathematics Education', *Psychological Science* 29 (2018).
82 2024 ENM Class Profile, available at https://www.enm.justice.fr/api/getFile/sites/default/files/2024-02/ADJ%20Promo%202024%20-%20Profil%20promo%20%28nouvelle%20version%29.pdf.
83 G. Joly-Coz, *Femmes de justice* (2023).
84 Cooper, Brittney (2016). 'Intersectionality', in L. Disch and M. Hawkesworth (eds.),*The Oxford Handbook of Feminist Theory* (2016), at 385-406.
85 O. Sibony, *Vous allez commettre une terrible erreur! Combattre les biais cognitifs pour prendre de meilleures décisions* (2019), at 206.

Allison P. Harris' abovementioned study has already demonstrated that increasing diversity in a courthouse decreases partiality toward the consequently better represented community.

The European judiciary has taken numerous steps towards improving that diversity, despite the process taking time (depending on the recruitment system) or implying non-consensual methods (such as quotas), which can produce undesirable side effects.

Recognizing the existence of a problem may be the most important step toward a solution. Sometimes, drawing attention to bias is already a solution. At first, a study into NBA basketball games demonstrated that fouls (violations of rules) by black players were called more often by white referees. Subsequent studies showed that broad dissemination of this first study resulted in an end to this difference.[86] The lack of impartiality linked to the different profiles of referees (in-game judges) and players (in-game litigants) was changed for the better, not by increasing diversity in referees but by drawing attention to a measured lack of impartiality. The hope is that all the studies mentioned above – and those newly commissioned – will have a 'snowball effect', raising awareness of those issues and leading to considered action.

As this paper has shown that there is not one 'true' method to simultaneously support and foster diversity and impartiality in the judiciary, several proposals can be made in this regard: generalizing collegiality; increasing the number of courses dedicated to theory about cognitive biases during judicial training, as well as practical workshops, meant training judges-to-be to think beyond their biases; encouraging meetings between European judicial trainees and qualified judges to allow them to challenge and emulate each other; promoting collaboration between judges and other justice professionals; enforcing measures to increase equality of opportunities; creating and testing new inclusivity policies, and last but not least, continuously fostering reflection – both individual and collective – on ethics. While a number of such systems have already been set up, European Union countries could make them more widespread. Instead of judicial training reinforcing homogeneity, it would be desirable for everyone involved to use it to share and confront the wealth and (sometimes invisible) diversity of their personal experience. Furthermore, looking to the future, while LegalTech has not yet brought about the revolution expected and while biases also affect algorithms, tools intended to help decision-making could add a digital third person to the process to allow judges to compare their point of view with a digital diversity of views, especially when deciding as single judges, enabling those future judges to get rid of certain prejudice.[87] However, a cautious approach is certainly needed in this regard.

Justice can hardly be achieved without trust: such is the bottom line of this confrontation between Diversity and Impartiality. The hope is that while filing a complaint with any European or national court, litigants will one day cease to expect to be judged by judges with a homogeneous profile. Better still, unlike *Ottan v. France*, they will trust the court to be impartial regardless of judicial profile.

86 Maatoug and Kubica, 'Biais cognitifs au tribunal pour enfants : faites entrer les faits', 19 *Délibérée* (September 2023) 64, at 68 (referring to the conclusions of Arnaud Philipe's book *La fabrique des jugements* [2022]).

87 *Ibid*., at 69.

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PROTEST, PRECIOUS ART AND PROFESSIONAL ETHICS
THE JUDICIARY'S RESPONSE TO PROVOCATIVE CLIMATE ACTION

On 27 October 2022, protestors vandalized Johannes Vermeer's famous painting 'Girl with a Pearl Earring' with glue and paint. At least that is what it looked like to horrified bystanders. The purpose of the action was to draw attention to the impact of climate change. In response, the District Court imposed comparatively harsh prison sentences, at least by Dutch standards. Surprisingly, these sentences were quashed by the Court of Appeal. The Court of Appeal found the imposition of punishment inappropriate because it could cause a so-called 'chilling effect'. Case law shows that the rights under articles 10 and 11 of the ECHR are fundamental and enjoy protection under European (human) rights law. They are, however, not absolute. A national court will examine whether governmental measures – often a criminal prosecution – meet the conditions under which a restriction of these rights is possible. The assessment of the 'chilling effect' thus involves a subjective evaluation of the spillover effects of society as a whole. The way the judges reached a decision in the case of Girl with a Pearl Earring raises fundamental ethical questions about the judge's independence, impartiality and subjectivity. What do society and citizens expect of a judge in a controversial case involving climate protests? Can these expectations be met? How do the judge's own views come into play?

KEYWORDS:
CLIMATE PROTEST | CRIMINAL PROSECUTION | CHILLING EFFECT | ARTICLES 10 AND 11 ECHR | IMPARTIALITY | SUBJECTIVITY

Le 27 octobre 2022, des manifestants ont vandalisé la célèbre peinture de Johannes Vermeer « Girl with a Pearl Earring » avec de la colle et de la peinture. Du moins, c'est ce à quoi cela ressemblait pour les spectateurs horrifiés. L'objectif de l'action était d'attirer l'attention sur l'impact du changement climatique. En réponse, le tribunal de district a imposé des peines de prison relativement sévères, du moins selon les normes néerlandaises. À la surprise de certains observateurs, ces peines ont été annulées par la cour d'appel. Cette dernière a jugé que l'imposition d'une sanction était inappropriée, car elle pouvait avoir un « effet dissuasif ». La jurisprudence montre que les droits garantis par les articles 10 et 11 de la CEDH sont fondamentaux et bénéficient d'une protection en vertu du droit européen des droits de l'homme. Ils ne sont cependant pas absolus. Une juridiction nationale examinera si les mesures gouvernementales – souvent des poursuites pénales – remplissent les conditions dans lesquelles une restriction de ces droits est possible. L'appréciation de l'« effet dissuasif » sur l'exercice de la liberté d'expression implique donc une évaluation subjective des effets de contagion pour la société dans son ensemble. La manière dont les juges ont rendu leur décision dans l'affaire commentée soulève des questions éthiques fondamentales quant à l'indépendance, à l'impartialité et à la subjectivité du juge. Qu'attendent la société et les citoyens d'un juge dans une affaire controversée impliquant une manifestation pour le climat ? Ces attentes peuvent-elles être satisfaites ? Comment le point de vue du juge lui-même entre-t-il en jeu ?

MOTS-CLÉS :

MANIFESTATION POUR LE CLIMAT | POURSUITES PÉNALES | EFFET DISSUASIF | ARTICLES 10 ET 11 CEDH | IMPARTIALITÉ | SUBJECTIVITÉ

INTRODUCTION: GLUING ONESELF TO THE GIRL

On 27 October 2022, three men drove together to the Mauritshuis museum in The Hague, the Netherlands. This is a beautiful museum, housing some of the most precious masterpieces in Dutch art history. Among them is the world-famous – and priceless – painting by Johannes Vermeer 'Girl with a Pearl Earring'. The men came up specifically for this painting. But not to admire it. They came to use this masterpiece in a climate protest, linked to the action groups Extinction Rebellion and Just Stop Oil.

With this protest, they drew an imaginatively found parallel between the painting and Planet Earth: both masterpieces; both vulnerable; and – during the protest – both in dire straits. In the – fairly crowded hall (it was the middle of the day, during a school vacation) – one of the men climbed over the fence in front of the painting and glued his head against its protective glass frame. A second man then poured a red liquid substance from a soup can over his head and the frame. Lastly, a third man taped his hand to the back panel of the painting and shouted: 'How do you feel when you see something beautiful and priceless being apparently destroyed before your eyes? Do you feel outraged? Good!'

The men got what they came for: outrage and, as a result, national and even global news coverage. Many politicians and other public figures responded negatively to the protest. Others deemed the protest appropriate and useful and some even argued that these protesters acted on behalf of us all. The next day, the museum director was interviewed on national television. He pointed out that his people work around the clock to preserve this piece of national heritage for future generations. Perhaps unconsciously, the director thereby referred to the very point of the protest. After all, its message was that Planet Earth should also be preserved for future generations.

When the protesters were brought to court, the final verdict of the The Hague Court of Appeal surprised many. The Court, although it underlined the severity of the crime, did not impose a prison sentence, so as to avoid a so-called 'chilling effect'.

In this paper we explore the legal and moral implications of this case, paying special attention to the issue of professional ethics. First, we will analyse the case and describe what decisions the judges reached in two instances (chapter 1). We will then put the case in a legal context by discussing the central doctrine of the chilling effect in more detail and showing how it has developed in European case law (chapter 2). Finally, we will examine what professional standards apply here, what challenges cases like these poses to the judiciary and what role the judge's own moral views may play in it (chapter 3). We intend to show that the case touches upon fundamental and trending societal issues and underlines the role of subjectivity in decision-making and our understanding of justice.

1. THE GIRL WITH A PEARL EARRING IN COURT

A. Climate Protest from a Social Perspective

The action against 'Girl with a Pearl Earring' is just one example of an increasingly common trend to resort to more provocative means of climate protest. Such forms of protest have included smearing famous works of art with paint or food, as happened to work from Claude Monet (Grainsta in Potsdam), Vincent Van Gogh (Sunflowers in London) and even the Mona Lisa by Leonardo da Vinci was vandalized in Paris.

The name of the climate protest group behind many of these actions is 'Extinction

Rebellion', and this group commonly uses masks to conceal the identity of protestors. The way they shape their protests – like mini performances – and their rhetoric (with its calls to 'fight') are reminiscent of the disruptive protest movements of the 1970s. These forms of protest are becoming increasingly direct, organized and often walk the thin line between non-violent civil disobedience and criminal behaviour.

B. The Judgment in the First Instance

According to the District Court of The Hague, that thin line was crossed with the action against Girl with a Pearl Earring.[1] All three protestors were arrested on the spot and taken into custody pending their trial. It was their first time in jail, as none of them had criminal records. Although the defendants immediately confessed to their crimes, the Court included unusually elaborate statements in its judgment, thereby painting a good picture of the defendants' characters and providing context for the purpose and intent of their actions. Especially the statement of the third protestor (as included in the judgment) is telling:

> I am convinced of the seriousness of the climate crisis and the need to act accordingly as a society. It was my attention to add to the public debate. The museum was chosen because we knew it would draw attention. We were very careful to make sure we didn't cause any actual damage. I realize now that it was a big mistake to do this and that it is not okay. I wanted to make a change; do well. I deeply regret it because I crossed a line. I also crossed a personal line. I'm a decent person. I have a wife, children and a job. I am socially engaged, I have even welcomed refugees to my home. I hope to get the chance to make up for what I did (translation by the authors).

In his closing statement, the defendant added:

> I realize that I have crossed a line. I have already expressed my regret, but I want to do this again. It won't happen again. If you have never come into contact with the justice system, eight days in custody have a devastating effect. I will lose my job and possibly my family. The public prosecutor portrays me as a radical criminal, but I took pains to act in a careful manner so as to help improve society. The Secretary General of the United Nations clearly states that the real radicals are not the activists, but the governments that continue to produce fossil fuels. Shell also continues to supply fuel even though this destroys our environment and we can no longer pay our bills. That causes more civil unrest than what we have done (translation by the authors).

By including these long statements, the Court handed the protestors an unprecedented forum to display the purpose and intent of their protest.

What is interesting in the context of this paper is how the Court subsequently included this purpose and intent in the sentencing process. The Court considered that the defendant was genuinely concerned about the climate and obviously has a right to express this. Furthermore, it noted that criminal action may not be so drastic that it has a chilling effect on those who want to exercise their rights under the European Convention on Human Rights (ECHR).

On the other hand, the Court considered that the defendant is concerned with the

1 The Hague District Court, Judgement of 4 November 2022 (ECLI:NL:RBDHA:2022:14575).

climate, and within the context of the Extinction Rebellion Group, deliberately pushes boundaries, which fits the increasing trend for more intense and disruptive forms of climate protests. The Court saw this as a risk that these actions will be repeated. In view of the fact that the protest was directed at a very valuable work of art and caused a shock in society, the Court deemed imprisonment to be the only appropriate type of sentence. Therefore, the Court condemned the defendants to two months in prison of which one month was suspended with a two-year probation. The days the defendants already spent in pre-trial detention were subtracted from the sentence.

C. THE JUDGMENT IN APPEAL

1. Introduction

Although the Appellate rule was rendered almost five months after the action against Girl with a Pearl Earring took place, it still came as a shock. The Court of Appeal agreed with the District Court that the action did not fall under the protection of articles 10 and 11 of the ECHR. That was not the controversial part of the judgment. However, what did raise some eyebrows was the fact that the Court applied Article 9a of the Dutch Criminal Code. It decided to do so, specifically acknowledging that the risk of a harsh sentence was to have a chilling effect on others who want to exercise their rights under the ECHR.

2. Article 9a of the Dutch Criminal Code

Article 9a of the Dutch Criminal Code entails the so-called legal pardon. When the pardon is applied, the accused is found guilty, but no punishment is imposed. The reasons that may prompt such a pardon may relate to the lack of seriousness of the offence, the character of the offender, the circumstances under which the crime was committed, or circumstances that have occurred after the fact. The latter includes the situation in which the defendant's circumstances have changed to such an extent that punishment no longer serves a purpose.[2] That situation may arise if the offender becomes incurably ill, loses his/her job as a result of the conviction, or is otherwise disproportionately affected by the consequences of the prosecution. Especially when such new facts become known only after the start of the court proceedings – at which point the public prosecutor can no longer withdraw the case – there may be a good reason to refrain from imposing a sentence.

3. The Sentencing Process of the Court of Appeal

The Attorney General stated in the Appellate Proceedings that the action against the painting, in fact, entailed an attack on national heritage. Therefore, imprisonment was rightfully deemed an appropriate sentence. However, in view of the motive behind the criminal actions, he stated during the court proceedings that the sentences imposed by the court were too severe. Therefore, he submitted to the court that a sentence of 50 days imprisonment was more appropriate, of which 27 days would be suspended for a period of 2 years.

The Court of Appeal, however, decided to apply the legal pardon instead.[3] It is considered that the defendants committed the crime because of their concern about climate change and to draw attention to their cause. It pointed out that, although they are free to do so, the chosen mode of expression was reprehensible. For that reason, punishment was called for. On the other hand, the Court of Appeal considered that punishment may not be so drastic as to

2 R. Heemskerk, 'SDU Commentaar Strafrecht', *Wetboek van Strafrecht* (2019), at 11.
3 The Hague Court of Appeal, Judgment of 11 March 2024 (ECLI:NL:GHDHA:2024:344).

have a chilling effect on persons wishing to exercise their rights to freedom of expression and freedom of peaceful assembly. For that purpose, the Court of Appeal took into account all elements of governmental action in response to the offence: the fact that the protest was ended, the fact that the defendants were arrested, prosecuted and convicted in the first instance and the (duration of) their pre-trial detention. In view of the duration of their pre-trial detention, the Court of Appeal decided to apply the legal pardon, and consequently imposed no punishment.

D. Criticism and Political Pressure

So, what is the big deal? Well, for starters, the application of the doctrine of the chilling effect in both proceedings has led to very different outcomes. Whilst it did not keep the District Court from imposing a relatively severe sentence (two months imprisonment of which one month was suspended), it led the Court of Appeal to apply Article 9a of the Criminal Code. The Court of Appeal, after dwelling extensively on the seriousness of the crime (that was directed against national heritage), boldly decided not to impose a sentence after all.

The remarkable thing about this judgment is that the Court of Appeal explained that it applied the legal pardon – specifically – in view of the duration of the pre-trial detention of the accused. If it was the court's intention to take the pre-trial detention into account, would it not have made more sense to impose a sentence equal to the length of the pre-trial detention? Also interesting is the fact that because the Court of Appeal set out to avoid an unacceptable chilling effect, it – naturally – focused on the intent and purpose of the protest. As a result, it weighed on the effects of the judicial proceedings as a whole (arrest, prosecution and judgment in the first instance). However, it did not discuss any of the circumstances in which the legal pardon is available by law (e.g. the fact that a crime is not serious, the character of the accused, the circumstances under which the crime was committed or that have come into play after the fact). It should be noted that undesirable future effects on society (such as a chilling effect) are not mentioned in Article 9a of the Criminal Code. Therefore, it is questionable whether the 'escape' of 9a of the Criminal Code was available to the Appellate Court in this case.

All this begs the question as to whether the Court of Appeal got carried away because it, as a matter of principle, and at any cost, wanted to avoid imposing any restrictions on future climate protests. Or was this just an error of thought? Is the Court of Appeal to be applauded or criticized for attributing so much relevance to the defendants' motivations? And if so, is the chilling effect applicable to all kinds of disruptive and provocative protests, even if the judges do not sympathize with the message in question?

In the Netherlands, the last word about this is not out. Just a little over a month after the Appellate Ruling, parliamentary questions were put to the Dutch Minister of Justice.[4] These were leading questions. For example, the Minister was asked if she agreed that the smearing of the painting was 'utterly unacceptable', how often Article 9a of the Criminal Code is applied and for what sorts of crimes, how the chilling effect should be perceived in the context of the limits to the freedom of expression in the Constitution, and whether the Minister is prepared to confer with the public prosecutor's office about raising the sentencing guidelines for vandalizing pieces of national heritage?

4 Parliamentary questions, no. 2024Z04124 and 2024Z04277, available at https://www.tweedekamer.nl/kamerstukken/kamervragen.

2. LEGAL FRAMEWORK OF THE CHILLING EFFECT

A. Introduction

Chapter 1 discusses the case of the vandalizing of Girl with a Pearl Earring. In recent years, we have seen an increase in the importance and sheer numbers of the reference to, and use of, international conventions in Dutch case law. This is undeniably the case for the ECHR. This chapter will discuss in paragraph 3C the importance and scope of the ECHR in the Netherlands, in particular in respect to Articles 10 and 11 of the ECHR and the concept of the chilling effect. Paragraph 3B will discuss Dutch case law, which has been settled – partly or mainly – on the basis of Articles 10 and 11 of the ECHR.

B. Articles 10 and 11 ECHR

The right to freedom of expression and the right to peaceful assembly and freedom of association, including the right to demonstrate, are fundamental rights protected under European (human rights) law. These rights are covered by Articles 10 (Freedom of expression) and 11 (Freedom of assembly and association) of the ECHR.

The Constitution of the Netherlands (the Constitution) also provides for the right to demonstrate (Article 9 of the Constitution). Article 120 of the Constitution, however, prohibits the judicial review of laws and international treaties for compliance with the Constitution. Under the Dutch system, the constitutional review is solely carried by the Dutch parliament during the adoption of legislation. Once a legislative proposal has entered into force, or before it has entered into force for that matter, it can no longer be reviewed by a Dutch court. This being said, many – if not all – of the fundamental rights covered by the Constitution are also covered by the ECHR (and similar international conventions). Due to the direct application of the convention of Dutch law, Dutch courts are allowed to assess Dutch national legislation on the basis of the rights set out in the ECHR.

The European Court of Human Rights (ECtHR) interprets and enforces the rights set out in the ECHR. The ECtHR has held that the right to freedom of assembly is one of the cornerstones of a democratic society and is essential for the effective exercise of other human rights and freedoms. The ECHR guarantees the right to peaceful assembly and freedom of association. As a crucial and essential element of these rights, the right to demonstrate is equally safeguarded under the ECHR. To this end, in order to exercise one's right to demonstrate, it could be deemed necessary, or even essential, to undermine other fundamental rights, such as the protection of property.[5] The relationship between these rights has been a topic of several key cases of the ECtHR, as well as the Dutch Supreme Court and the Dutch lower courts.

The relationship between these rights is affected where the right to demonstrate is accompanied by an act or omission, which act or omission can in itself be considered a criminal offence. This includes, for example, breach of the peace, destruction of property, or failure to comply with an official order. As previously said, Articles 10 and 11 of the ECHR guarantee the right to freedom of expression and the right to freedom of assembly and association, respectively. According to the ECtHR, Article 10 ECHR contains 'one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment'.[6]

5 Article 1, ECHR.

6 Reference is made to ECtHR, *Handyside v. the UK*, Appl. no. 5493/72, Judgment of 7 December 1976 and ECtHR, *Couderc and Hachette Filipacchi Associés v. France*, Appl. no. 40454/07, Judgment of 10 November 2015. All ECtHR decisions are available at http://hudoc.echr.coe.int/.

However, this does not mean that these rights are absolute. Exercise of the rights set out in Articles 10 and 11 of the ECHR may be restricted. This is especially the case where (i) the restriction is governed by law, (ii) the restriction serves a legitimate purpose, and (iii) the restriction is necessary for the functioning of the democratic order.

When answering the question as to whether the restriction is necessary for the functioning of the democratic order, national authorities are entitled to a certain degree of discretion ('margin of appreciation'). The limitation must be seen as a pressing social need. In addition, it is required that the restriction is proportionate to the goal to be achieved. Finally, the reasons for the restriction must be viewed 'relevant and sufficient'. In any case, it is important that the intervention of the authorities is not of such a nature that it results in (unacceptable) restraint in the future exercise of the right to demonstrate the so-called chilling effect. The nature and severity of any penalties to be imposed may also be taken into account. The ECHR has explained in its *Kudrevičius and others v. Lithuania* that measures that do not amount to an outright ban can still amount to interference, such as a refusal to allow a person to travel to a rally, the dispersal of the rally or the arrest of participants and imposing penalties for having taken part in it:[7] In *Kudrevičius and others v. Lithuania*, confirmed in the *Navalnyy v. Russia* judgment[8], the ECtHR underlined that 'when examining whether restrictions on the rights and freedoms guaranteed by the Convention can be considered "necessary in a democratic society", the Contracting States enjoy a certain but not unlimited margin of appreciation'.

The term chilling effect was first used by the ECtHR in 1996 in the *Goodwin v. The UK* judgment.[9] Much earlier, the word *chill* first appeared in a US Supreme Court case in 1952.[10] The term *chilling effect* appeared first in the US Supreme Court case *Gibson v. Florida Legislative Investigation Committee* in 1963.[11] *Gibson* dealt with the question as to whether the Florida Legislative Investigation Committee (a governmental organization) could require the National Association for the Advancement of Coloured People (NAACP) to disclose its membership list for review by the Committee for affiliations with communism (at that point illegal). Gibson, the President of the Miami Branch of the NAACP, refused to do so and was held in contempt. The US Supreme Court considered the relationship between the constitutionally enshrined rights of free speech, expression, and association, on the one hand, and the importance of a legislative investigation on the other, and ruled that the 'deterrent and chilling effect on the free exercise of these rights is consequently the most immediate and substantial'.

There is no general definition of the term chilling effect. Pech, for example, uses the following definition: 'From a legal point of view, chilling effect may be defined as the negative effect any state action has on natural and/or legal persons, and which results in pre-emptively dissuading them from exercising their rights or fulfilling their professional obligations, for fear of being subject to formal state proceedings which could lead to sanctions or informal consequences such as threats, attacks or smear campaigns.'[12]

7 ECtHR, *Kudrevičius and others v. Lithuania,* Appl. no. 37553/05, Judgment of 15 October 2015, para. 100.
8 ECtHR, *Navalnyy v. Russia*, Appl. no. 29580/12, Judgment of 15 November 2018.
9 ECtHR, *Goodwin v. The UK*, Appl. no. 17488/90, Judgment of 27 March 1996.
10 US Supreme Court, *Wieman v. Updegraff*, 344 US 183, Judgment of 15 December 1952.
11 US Supreme Court, *Gibson v. Florida Legislative Investigation Committee,* 372 US 539, Judgment of 25 March 1963.
12 L. Pech, *The concept of chilling effect, its untapped potential to better protect democracy, the rule of law and fundamental rights in the EU* (2021), available at the-concept-of-chilling-effect-20210322.pdf (opensocietyfoundations.org).

In *Murat Vural v. Turkey*, the ECtHR ruled that 'in deciding whether a certain act or conduct falls within the ambit of Article 10 of the Convention, an assessment must be made of the nature of the act or conduct in question, in particular of its expressive character seen from an objective point of view, as well as of the purpose or the intention of the person performing the act or carrying out the conduct in question'.[13] *Murat Vuval v. Turkey* involved the vandalizing of a statue of Ataturk with paint. Mr. Vuval, who claimed he undertook the action to express opposition to the former President,[14] was sentenced to 13 years of imprisonment. The ECtHR concluded that 'the penalties imposed on the applicant were grossly disproportionate to the legitimate aim, being the protection of public property from vandalism, pursued and were therefore not necessary in a democratic society. There has accordingly been a violation of Article 10 of the Convention'.

Other examples that can be derived from ECtHR case law include the following.

Açik and others v. Turkey involved a demonstration by students during the opening of the academic year at a university in Istanbul.[15] This protest was ended with the use of violence by the authorities. In addition, the demonstrators were imprisoned for 11.5 hours. It was not determined whether a criminal offence was committed. The protester claimed that their arrest and detention had infringed on their freedom of expression in breach of Article 10. The ECtHR decided that, although the protest disrupted the ceremony, it wasn't violent or insulting. The use of violence by Turkey was found disproportionate; the ECtHR suggested that less restrictive responses would have sufficed, such as denying re-entry to the hall. Therefore, this interference was neither necessary in a democratic society nor proportionate, constituting a violation of Article 10.

Steel and other v. The UK involved a protest at a conference against the sale of fighter helicopters.[16] The protest was ended by the arrest of the protesters, whilst it was not determined that any criminal offence had been committed. Moreover, the protest took place in open air and none of the conference attendees were hindered. The protesters were imprisoned for 7 hours. The protesters claimed that their arrest and detention for causing a breach of the peace in the context of various demonstrations in which they took part infringed their freedom of expression in breach of Article 10. The ECtHR held that the measures taken against three of the five protestors were not 'lawful' or 'prescribed by law'. It also considered that interference with the exercise by the protestors of their right to freedom of expression was also disproportionate to the aim of preventing disorder and protecting the rights of others, and was not, therefore, 'necessary in a democratic society'.

C. Dutch Case Law on the Chilling Effect

In paragraph 3B, we have provided an overview of the ECtHR case law in regard to the chilling effect. In this paragraph, we will discuss key Dutch cases in which the chilling effect was identified.

As recently as February 2024, this matter was considered by the Amsterdam Court of Appeal in a case where a tram (owned and operated by a public transportation company) was vandalized with graffiti in the context of a

13 ECtHR, *Murat Vural v. Turkey*, Appl. no. 9540/07, Judgment of 21 October 2014.
14 *Ibid*.
15 ECtHR, *Açik and others v. Turkey*, Appl. no. 31451/03, Judgment of 13 January 2009.
16 ECtHR, *Steel and other v. The UK*, Appl. no.67/1997/851/1058, Judgment of 23 September 1998.

pro-choice demonstration.[17] The vandalizing of the trams infringed the rights of the public transportation company. The court held that "it can be deduced from the case law of the ECHR that Article 11 of the ECHR relates to various forms of protest (such as protest marches, blockades, sit-ins and occupations), as well as the right to – within the limits set by the second paragraph of that provision – freely choose the time, place and method of protest. The basic principle in the case law of the ECtHR is that every demonstration can entail a certain degree of 'disruption to ordinary life'. Such a disruption is not in itself sufficient to justify a restriction of the right to peaceful assembly." The court continued by stating that this does not mean that each and every criminal prosecution of protestors would constitute a breach of Article 10 or 11 of the ECHR. The right to peaceful assembly and freedom of association does not preclude a person who participates in a peaceful demonstration from being subjected to a criminal prosecution if that person commits a "reprehensible act" during the demonstration.

In the case at hand, the Amsterdam Court held that the protesters could have easily exercised their Articles 10 and 11 ECHR right to freedom of expression and the right to freedom of assembly and association without vandalizing the trams. Central to the court's judgment was the consideration that the criminal sanctions imposed on the appellants were not, in fact, likely to have a chilling effect on persons who want to exercise their right to peaceful assembly and freedom of association. The latter consideration, of course, entails a subjective appreciation of the response in criminal law to potential future protesters.

Again, very recently the Central Netherlands District Court ruled in a case in which the defendant had displayed a large amount of Nazi-German memorabilia during a public exhibition.[18] Under Dutch law, this constitutes a criminal offence for which the person in question was prosecuted. The Court assessed whether the prosecution against the person in question could be viewed as an infringement of freedom of expression. The Court ruled that, in general, care should be taken to ensure that prosecutions did not result in a chilling effect on freedom of expression, which could lead to a general feeling of intolerance, hence leading to the exact opposite of what the right to freedom of expression intends to accomplish. In this specific case, the Court ruled that a conviction of the defendant would disproportionately affect the defendant's right to freedom of expression.

In 2019, the East Brabant District Court delivered a ruling on a protest by animal activists.[19] The activists violated the property of a farmer, punishable under the Dutch Criminal Code, and were arrested. In line with standing case law, the Court established that the rights covered by Articles 10 and 11 of the ECHR are not absolute and, hence, that an infringement on those rights must meet the requirements of proportionality and subsidiarity. In the end, the protesters' rights to demonstrate were, in this case, not infringed by their arrest.

D. Interim Conclusions

From the case law of the ECtHR, it follows that the rights covered under Articles 10 and 11 of the ECHR – i.e. the right to freedom of expression and the right to peaceful assembly and freedom of association, including the

17 Amsterdam Court of Appeal, Judgment of 1st February 2024 (ECLI:NL:GHAMS:2024:277). It is noted that the right to abortion is firmly established in Dutch law and the Dutch society. The demonstration in this case was aimed to underline the right to abortion in the US following the US Supreme Court judgment of 24 June 2022.
18 Central Netherlands District Court, Judgment of 18 March 2024 (ECLI:NL:RBMNE:2024:1678).
19 East Brabant District Court, Judgment of 6 November 2019 (ECLI:NL:RBOBR:2019:6955).

right to demonstrate – are fundamental rights protected under European (human rights) law. These are crucial rights for the proper-functioning of a democratic society. This being said, these rights are not absolute; they may be subject to certain formalities, conditions, or restrictions provided for by law and which are necessary in a democratic society in the interests of, *inter alia*, public safety, the prevention of disorder and criminal offences and protecting the rights of others. From the ECtHR case law, it follows that restriction of these rights is possible, where:

(i) the restriction is governed by law,

(ii) the restriction serves a legitimate purpose, and

(iii) the restriction is necessary for the functioning of the democratic order. This requires the restriction to answer to a pressing social need, to be proportionate to the legitimate aim pursued, and to be relevant and sufficient.[20]

A national court will balance governmental measures – often a criminal prosecution – against the abovementioned conditions. The assessment of the so-called *chilling effect* is thus a subjective evaluation (by the court) of the spillover effects of society as a whole.

3. THE CHILLING EFFECT AND JUDICIAL ETHICS

A. Introduction

As we wrote in chapter 1, the ruling of the Court of Appeal of The Hague in the case of Girl with a Pearl Earring was met with mixed and puzzled reactions. While anti-establishment parties are on the rise, Dutch society is increasingly divided on the topic of global warming and many other issues. Actions like the one in the Mauritshuis Museum tap right into that divide. They raise questions of professional judicial conduct and ethics that exceed the mere interpretation of the law, such as what do society and citizens expect of a judge, can these expectancies be met, and how do the judge's own views come into play?

B. What Do (May) Society and Citizens Expect of a Judge?

To find an answer to the first part of that question, we start by looking at the codes for professional ethics. The value that comes first in most professional codes for the judiciary is independence. Independence is 'the right of every citizen to benefit from a judiciary, which is independent of the legislative and executive branches of government and which is established to safeguard the freedom and the rights of the citizen under the rule of law'.[21] Therefore, judges should 'have unfettered freedom'[22] to decide cases impartially, in accordance with the law and their interpretation of the facts. A judge must remain independent of all pressure groups.[23] Meanwhile, the independence of the judiciary is not the judiciary's sole responsibility. The executive and legislative powers should avoid 'criticism that would undermine the independence of or public confidence in the judiciary. They should also avoid actions which may call into question their willingness to abide by judges' decisions.'[24] There are some situations in which the judiciary will directly intervene in the affairs of the other branches of government. The executive can be made to answer for his actions in court, laws made by the legislative can be subject to judicial review. Not all countries allow

20 ECtHR, *Janowski v. Poland*, Appl. no. 25716/94, Judgment of 21 January 1999.
21 ENCJ, Judicial Ethics Report 2009-2010 (2010), available at judicialethicsdeontologiefinal.pdf (encj.eu), at 2.
22 Recommendation CM/REC(2010)12, I.4, available at https://www.icj.org/.
23 ENCJ, *supra* note 21, at 2.
24 Committee of Ministers to member states on judges, Recommendation CM/REC(2010)12, II.18, available at https://www.icj.org/.

judges to be a candidate in political elections and when they do, this can be regulated by rules on incompatibilities.[25] It is clear that the primary mission of the judiciary is neither to write laws nor to enforce them, but 'to ensure the proper application of the law in an impartial, just, fair and efficient manner'.[26] This does presuppose a certain level of self-restraint on the part of the judiciary and due respect for the separation of powers.

The twin sibling of independence is impartiality. The impartiality of the judge 'represents the absence of any prejudice or preconceived idea when exercising judgment'.[27] This requires awareness of the judge's own prejudices. An interesting element that we only found in the Dutch NVVR code is that a judge should also be aware of how others judge and think: 'The judge is aware that there are other cultures, norms and opinions besides his own and takes them into account when passing judgment, wherever necessary.'[28] Echoing the ECtHR ruling in *Hausschildt*,[29] the codes do not just stipulate that the judge is impartial, but that he or she should also be concerned about the public's perception of impartiality. A judge should avoid 'any conduct likely to promote the belief that his decisions are driven by motives other than the fair and reasoned application of the law'. This is not to say that a judge cannot have opinions on politics, but he or she should show 'reserve and discretion' when expressing them, so as to guarantee that individuals 'can have confidence in justice, without worrying about the opinions of the judge'.[30]

On all accounts, a judge should fulfil his judicial duties without 'fear, favouritism or prejudice'.[31] The absence of favouritism is also cited as a constitutive element of integrity, which goes to show that mayor values in professional codes are often interconnected to the point of becoming – almost – interchangeable.[32] There is a similar connection between impartiality and equality. Equality of treatment means 'to give everyone that to which he (or she, we should hope) is entitled, both in the process and in the result of any case, through recognizing the uniqueness of each individual'.[33] To be able to do all this, a judge needs to foster a range of cardinal virtues. The virtue of wisdom means, among other things, that he is 'creative in applying the law to determine cases, including those which are not settled by existing law'.[34] The judge must also show 'courage, both physical and moral: … to cope with various pressures, political, social and public opinion … [and] to meet the challenges of modern society'.[35]

C. Challenges Posed by Provocative Activism

When deciding a case like the case of the 'Girl with a Pearl Earring' there are a number of challenges to be met. We have identified three challenges that we shall discuss in this paper: instrumentalization, delegitimization and identification.

The first challenge is instrumentalization. It challenges the value of independence. Even if a judge does not yield to the pressure of groups in society, the courts may be used

25 ENCJ, *supra* note 21, at 12.
26 CCJE, Magna Charta of Judges, (2010) 3, available at rm.coe.int/16807482c6, at 1.
27 ENCJ, *supra* note 21, at 4.
28 NVVR, Judges Code, para. 2.3.2. available at https://www.rechtspraak.nl/sitecollectiondocuments/matters-of-principle.pdf, at 84.
29 ECtHR, *Hauschildt v. Denmark*, Appl. no. 10486/83, Judgement of 24 of May 1989.
30 ENCJ, *supra* note 21, at 6.
31 *Ibid.*, at 4.
32 *Ibid.*, at 3.
33 *Ibid.*, at 8.
34 *Ibid.*, at 11.
35 *Ibid.*, at 13.

to promote a group's cause. After all, the purpose of provocative action is to trigger a reaction from the public and the authorities. The response of the authorities is at least as important as the action itself. It targets all branches of state and the media in a three-act drama, typically involving footage of police officers dragging away and arresting the activists (executive branch), questions and debates in parliament (legislative branch) and court proceedings (judicial branch). The trial proceedings provide a stage to once again set out the group's political and social views in public. Activists read out well-prepared and eloquent statements in the courtroom. The verdict is also a part of this script. A harsh verdict creates martyrs for the cause or even leads to further radicalization – unless, of course, the activists are discouraged ('chilled'). A lenient verdict, by contrast, might invite follow-up actions and the further pushing of boundaries. In either case, the judge may feel he or she is being forced to play a part in a political stage play rather than in the administration of justice.

The second challenge of delegitimization is closely related to the first and has to do with (the perception of) impartiality. When deciding polarized cases, it may be impossible to retain the confidence of all parties involved. A judge can try to explain why, in this particular case, the law comes down on the side of one party, while simultaneously acknowledging the concerns and interests of the opposite side. In a case of provocative climate action, he or she may, for example, concede that activists have the right to raise concerns about climate change, but should choose different methods. Or else the judge could explain that in this particular case the act goes unpunished because the culprit is not just some hooligan offending people and thrashing things but a person exercising his freedom of speech and the right to demonstrate, both of which are essential for upholding democracy and the rule of law.

Although judges are trained to perform and explain such balancing acts, the *finesse* of the arguments of the court may be lost on both the trial participants and the members of the general public. For them, it is the decision that counts and that decision is also what will be cited in the press headlines. After all, this is what courts are perceived to do: rule in favour of one party or the other. A party that has been vindicated by the courts will advertise that widely and try to make political gains from it. The party whose views did not prevail will find it hard to resist the temptation to blame the judge for that. There is a risk that such mechanisms will eventually erode the authority of the judiciary.

The third challenge is that a judge may actually feel sympathetic to the activist's cause. We have dubbed this the issue of identification. He or she may share the activist's concerns, for example regarding global warming, and feel this is a genuine threat. This judge may have more patience for activists setting fire to an oil drum on a town square to make a point about global warming than for activists concerned about the advance of Islam who want to use that same drum for burning copies of the Quran. Ultimately, this touches upon what, in the judge's view, is required and helpful in a just society, and it touches upon the judge's concept of virtue and justice. After all, apart from being a professional who – hopefully – knows the law, a judge is also a human being with a particular social and cultural background, a life history and personal preferences. Indeed, in the Netherlands, one of the selection criteria for new judges is the candidate's level of social commitment. The selection committee also welcomes strong views and tests the candidates' ability to stand firm by them. The selection committee also tries (not always successfully) to recruit candidates from diverse social and cultural backgrounds, believing that diversity enriches the judiciary and enhances the quality

of justice. Yet as we saw, the judge must pass judgement without prejudices and preconceptions. How then can these two precepts be reconciled?

D. Judicial Subjectivity

Judge and legal theorist Richard Posner sums up the process of decision making as follows: '[A judge's] response to a case is generated by legal doctrine, institutional constraints, policy preferences, strategic considerations, and the equities of the case, all mixed together and all mediated by temperament, experience, ambition, and other personal factors.'[36] Bernard Schlink, a former judge and law professor famous for his novel *The Reader*, seems to agree. He thinks there is undeniably such a thing as subjectivity at work in the decision-making of judges. 'It is the gateway through which the political affiliations and inclinations of judges make their way into the law.'[37] This is not to say that judges take decisions on the basis of their personal preferences and then find some legal justification afterwards to sell the outcome to the public – at least not if they have integrity, which most judges do. When judges deliberate in chambers, they only talk about the law and the legally relevant facts. They try to reach a decision through legal argumentation and on the basis of legal sources. Yet subjectivity does play a role, albeit not in a blunt and arbitrary way, but in a filtered and disciplined way. One of the examples Schlink cites to make his point is the principle of proportionality. The assessment of proportionality is key to assessing the legitimacy of government action. It involves 'a weighing and balancing of a goal against the rights and freedoms that are intruded upon'.[38] According to Schlink, this is an area where subjectivity is very noticeable: 'Since there are no objective measures or scales for goals, rights and freedoms, weighing and balancing is an area where judicial subjectivity triumphs. It is an area where judges make politics.'[39]

If that is correct, the same holds true for deciding the case of 'Girl with a Pearl Earring', which, as we saw in chapters 2 and 3, also requires a fair amount of 'weighing and balancing'. The difference between the rulings of the District Court and the Court of Appeal illustrates how this weighing and balancing can have entirely different results depending on the judge(s). Looking into the future, Schlink sees some quite spectacular changes, both in society and the judiciary. In society, the interest citizens take in what their parliaments and governments do is dwindling. 'Instead, they turn their political interests into idiosyncratic engagements and protest movements of all kinds. And they go to court and sue.'[40] As a corollary to this, courts are also adopting new habits. Fitting a decision into existing doctrine has become less important. Instead, they are more concerned 'with whether the decision looks and feels good as the solution for the case at hand. And whether it feels good includes whether it finds the right political tone and whether it sends the right political signal.[41] According to Schlink this could ultimately lead to a situation in which judges - especially those higher up in the judicial hierarchy – become more like senators in a 'parliamentary-judiciary democracy'.

E. Impersonal Justice

Schlink made remarks at a public debate held at the Peace Palace in The Hague in

36 Posner, *How Judges Think* (2010), at 82.
37 B. Schlink and G. Corstens, *Objective Law and Subjective Judges* (2011), at 74.
38 Schlink and Corstens, *supra* note 37, at 66.
39 *Ibid.*, at 75.
40 *Ibid.*, at 77.
41 *Ibid.*, at 75.

2010. He got a reply from Geert Corstens, then president of the Supreme Court of the Netherlands. Corstens seemed less excited about the prospect that his Court would turn into a type of senate. Assuming the role of the humble and cautious public officer, he argues that a judge should have no agenda whatsoever: 'A judge must ensure that his or her decisions fit into the system as consistently as possible. His or her personal beliefs and preferences do not play a role in this. By this, I do not mean that a judge will always be able to separate him or herself from social background, training or environment. However, a judge should try to do so.' According to Corstens: 'Impersonal justice is what it is all about.'[42]

More recently, Jonathan Soeharno, a Dutch professor of administration of justice and legal philosophy, has advocated for a 'Parmenidean ethos' for the judiciary, that essentially subscribes to Corstens' view. Soeharno points out that if key decisions are taken by judges rather than by politicians, there is a serious risk that the views of groups that are not parties to the court proceedings will not be given due consideration.[43] This author thinks it is significant that most international professional codes of conduct for the judiciary do *not* include the value of justice as such.[44] According to Soeharno this is no omission by neglect, but a deliberate choice, because ultimately, it is not up to the judges to decide what is good or fair or decent in society. The focus should be on the judge as a professional officer, not on the judge as a person. According to Soeharno: 'It is precisely by suppressing their own moral views that judges make a plurality of them possible.'[45]

The judiciary should try and remain a haven of neutral 'Parmenidean' stability even when the political pendulum swings.[46]

CONCLUSIONS

A. Our Point of View

Where do we stand on this issue of subjectivity and justice? It may be true that 'justice' as such is not recognized as a value in the professional codes for the judiciary in the same way as independence, impartiality, integrity and other values are. However, the professional codes, as quoted above, are rife with concepts that indirectly refer to justice. The Dutch NVVR code explicitly states: 'The judge allows himself to be directed by the law and his own conscience, and his sense of justice.'[47] Also, we would argue that all the values and virtues in the codes taken together provide a fair idea of what justice is about.

We subscribe to the view that judges must be cautious with imposing their political ideas through verdicts. On the other hand, we do think that judges should strive for an outcome that is not just legally sound, but also just. Justice requires commitment from legal professionals, for which reason it never can be an entirely dispassionate affair. If the outcome doesn't feel good, it may well be that some essential elements are overlooked. Reconciling strong beliefs with the independence and impartiality expected of magistrates can be a struggle and that is what it should be. A struggle implies that judges are aware of the reasons why a case may make their heart race and what basic ethical principles may, as a result thereof, have come under pressure. Awareness is key: only when

42 *Ibid.*, at 86.
43 Soeharno, 'Gezocht: een rechter die rechtspreekt vanuit karakter en geweten', *Nederlands Juristenblad* (NJB) (2023) 2888, at 3477.
44 Soeharno, *supra* note 43, at 3478. The Dutch word for 'justice' is *rechtvaardigheid*.
45 Soeharno, *supra* note 43, at 3483.
46 The ancient Greek philosopher Parmenides is known for teaching that the Cosmos is filled with unchangeable being, hence 'the Parmenidean ethos.'
47 NVVR, *supra* note 28, para. 2.1, at 81.

judges are properly aware of their personal beliefs, will they be able to decide whether they should push back on them or allow them to play some role in finding a solution for the case within the limits of the law.

B. The Courts Make Headlines

It seems that the judiciary is growing bolder. Since 2010, Dutch courts have rendered more landmark rulings on politically charged situations than ever before in such a short period of time. In the *Rawagede* case, for example, the court set aside a statute of limitations (prescription) to hold the Dutch state liable to pay damages to the widows of victims of war crimes committed over sixty years ago during Indonesia's war of independence.[48] Another landmark case is the *Urgenda* lawsuit, in which the Dutch state was found to wrongfully fail to meet international environmental policy obligations.[49] In a very recent ruling, the Court of Appeal in The Hague forbade military exports to Israel because of concerns they might be used for unacceptable purposes in Gaza.[50] All of these cases have in common that courts intervened on an unprecedented scale on sensitive political issues, drawing on European and international law and basically a sense of what 'feels right.' Some will hail this development as a new and timely form of judicial lawmaking.[51] In cases in which the legislative has forfeited its duties for too long, the courts should take responsibility. Others, like Soeharno, have urged for modesty and caution.

On the European level, headlines are being made by the ECtHR ruling in *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*.[52] In this case, a group of senior women filed a lawsuit against the Swiss Government, alleging that it had failed to uphold obligations under the Swiss Constitution and the European Convention on Human Rights (ECHR). The ECtHR found violations of the ECHR due to insufficient measures taken by Switzerland to combat climate change. The case sheds light on the intersection of climate change, human rights and legal accountability, emphasizing the need for effective protection of the rights covered under the ECHR in the context of environmental challenges. Although the judgment underscores the importance of addressing climate change as a fundamental human rights issue, it is viewed by many as an expression of social and political views.

C. Walking a Thin Line

Whether or not the case of 'Girl with a Pearl Earring' will be seen as another landmark case is too early to tell. Supporters of free speech can be content that a chilling effect was avoided. Others may feel that it provided a 'get free out of jail card' for any vandal who upon arrest states s/he was motivated by concerns about global warming.

What drove the judges who took the decision in the case of Girl with a Pearl Earring? We can't look inside their heads. For now, we only have the arguments delivered in the verdict to go on. Our analysis does seem to suggest that the legal argument was subordinated to the desired outcome: no (more) punishment for these activists. Although activists have been in court more often, this type of action was unprecedented and thus there was also more freedom for the judge to do what she or he felt was right. The virtue of wisdom also demands creativity in situations where existing law provides no clearcut answer. Though the resulting verdict must be phrased

48 District Court of The Hague, Judgment of 14 September 2011 (ECLI:NL:RBSGR:2011:BS8793).
49 Supreme Court of the Netherlands, Judgment of 20 December 2019 (ECLI:NL:HR:2019:2007).
50 The Hague Court of Appeal, Judgement of 12 February 2024 (ECLI:NL:GHDHA:2024:191).
51 *Cf.* Van Gestel and Loth, 'Urgenda: roekeloze rechtspraak of rechtsvinding 3.0', *Nederlands Juristenblad* (NJB) (2015) 1849, at 2598.
52 ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, Appl. no. 53600/20, Judgment of 9 April 2024.

in objective terms, the first spark towards that result may be subjective. To quote Bernard Schlink one last time: 'A lawyer who never manages to come up with a justification for the result that he or she likes lacks imagination. But a lawyer who always manages to come up with a justification for the result that he or she likes lacks integrity.'[53]

As we learn from the ECHR case law, 'in deciding whether a certain act or conduct falls within the ambit of the Convention, an assessment must be made of the nature of the act or conduct in question, in particular of its expressive character seen from an objective point of view, as well as of the purpose or the intention of the person performing the act or carrying out the conduct in question'.[54] In advocating both an *objective* as well as a *relative* assessment, the ECtHR strikes a delicate balance between objectivity and context-specific evaluation to safeguard human rights across Europe.

For magistrates dealing with these issues on a day-by-day basis, balancing these rights is far from easy. It is our belief that the magistrates in the cases we have reviewed have acted with integrity. On the other hand, we have also found that their judgments may have been influenced by their personal concerns for climate change, which may have led to some form of motivational reasoning. Provocative protestors may walk a thin line between non-violent civil disobedience and criminal behaviour. In trying them, judges also walk a thin line, balancing out their personal beliefs and own moral code with the basic ethical principles of impartiality and independence.

53 Schlink and Corstens, *supra* note 37, at 73.
54 ECtHR, *Murat Vural v. Turkey*, Appl. no. 9540/07, Judgment of 21 October 2014.

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BEING A JUDGE IN 280 CHARACTERS

In recent years, the use of communication technologies has grown exponentially, and social media have become increasingly widespread. Judges are not excluded from this trend and the expanding use of social media has led to more members of the judiciary creating social media profiles. The question is whether judges should set a limit to avoid any possible excesses and to protect the essential impartiality principle or, on the contrary, they should be able to use social media as freely as anyone else based on the fundamental right of freedom of expression. This paper analyses this debate, highlighting the main advantages and disadvantages of judges' use of social media, based on interviews with three Spanish judges who frequently use social media and a survey of new young Spanish judges. It also presents a comparative analysis of the position of the different EU member states, as well as a review of the main case law and important judicial decisions concerning the problem of impartiality. Based on all these sources, an intermediate position is defended, supporting the active participation of judges in social media, but with limits and cautions to protect their impartiality and the dignity of the judiciary.

KEYWORDS:
SOCIAL MEDIA | JUDGES | FREEDOM OF EXPRESSION | IMPARTIALITY | EUROPE | JUDICIARY

Ces dernières années, l'utilisation des technologies de communication a connu une croissance exponentielle et les réseaux sociaux se sont de plus en plus répandus. Les juges ne sont pas exclus de cette tendance et l'utilisation croissante des réseaux sociaux a conduit à un plus grand nombre de membres du pouvoir judiciaire à créer des profils. La question est de savoir si les juges devraient fixer une limite pour éviter d'éventuels excès et protéger le principe essentiel d'impartialité ou, au contraire, s'ils devraient pouvoir utiliser les réseaux sociaux aussi librement que quiconque sur la base du droit fondamental à la liberté d'expression. Le présent article analyse cette problématique, en mettant en évidence les principaux avantages et inconvénients de l'utilisation des réseaux sociaux par les juges, sur la base d'entretiens avec trois juges espagnols qui utilisent fréquemment les réseaux sociaux et d'une enquête auprès de jeunes juges espagnols. Il présente également une analyse comparative de la position des différents États membres de l'UE, ainsi qu'un examen de la jurisprudence principale et des décisions judiciaires importantes concernant le problème d'impartialité en lien avec cette utilisation des réseaux sociaux. Sur la base de toutes ces sources, une position intermédiaire est défendue, soutenant la participation active des juges dans les médias sociaux, mais avec des limites et des mises en garde pour protéger leur impartialité et la dignité du pouvoir judiciaire.

MOTS-CLÉS :

RÉSEAUX SOCIAUX | JUGES | LIBERTÉ D'EXPRESSION | IMPARTIALITÉ | EUROPE | MAGISTRATURE

INTRODUCTION

In recent years, the use of new information and communication technologies has grown exponentially, and social media has been increasingly widely used. It is usual for judges, as active members of our society, to post legal or political news on their Facebook or Twitter accounts and share content on Instagram. Although there are no official statistics, new generations of judges are boosting this trend, and expanding social media use by young people has led more members of the judiciary to create social media profiles.[1]

In this expansionist context of social media use by judges,[2] the question is whether judges, as holders of the function of adjudicating, should set a limit to avoid any possible excesses and to protect the essential impartiality principle or, on the contrary, should be able to use social media as freely as anyone else. This paper analyses the debate, specifically regarding the problems of impartiality and freedom of expression. Both principles operate in different dimensions and are sometimes difficult to combine, with impartiality protection pushing towards a more restrictive approach and the fundamental right of freedom of expression defending a more liberal vision.

Furthermore, this paper analyses the main advantages and disadvantages of judges' use of social media. For our research, we interviewed three Spanish judges who frequently use social media and have important and influential accounts on X (formerly Twitter) to learn about their experiences in disseminating legal content online.[3]

Moreover, in order to take into account different opinions to resolve this question, we present a comparative analysis of the position of the different EU Member States, as well as a survey of the main case law and important judicial decisions concerning the problem of impartiality arising from judges' social media use. Based on all these sources, we argue for an intermediate position, supporting active social media participation by judges but with limits and cautions that protect their impartiality and the dignity of the judiciary.

1. THE IMPARTIALITY PRINCIPLE AND THE JUDGES' SOCIAL MEDIA USE

The globally recognized *Bangalore Principles of Judicial Conduct* establish six core values that should guide judges' daily behaviour: independence, impartiality, integrity, propriety, equality, and competence and diligence. When using social media, judges should always be guided by the Bangalore Principles.

At an international level, the *Doha Declaration on Judicial Integrity* of the Global Judicial Integrity Network launched a global survey in 2018 on the specific challenges judges face when using social media. As a result of the research, the Global Judicial Integrity Network produced the *Non-Binding Guidelines on the Use of Social Media by Judges.*[4] The document summarizes the discussions during the Expert Group Meeting.

1 As an example, we surveyed 105 colleagues at the Spanish Judicial School, of whom 63% responded that they often use social media and 23% of them that they use social media but not often.

2 Throughout this paper, when we use the expression 'social media use by judges' we refer to an active one, beyond mere consultation of content posted by other users.

3 The three judges interviewed are:
- Natalia Velilla (@natalia_velilla – 54k followers)
- Teresa Puchol (@ladycrocs – 118 k followers)
- Carlos Viader (@ViaderCarlos – 33k followers)

4 United Nations Office on Drugs and Crime (UNODC) (2019), *Non-Binding guidelines on the use of Social Media by judges*, available at NON-BINDING GUIDELINES ON THE USE OF SOCIAL MEDIA BY JUDGES (unodc.org).

Focusing on Spain, at the national level, there are the *Principles of Judicial Ethics* approved by the General Council of the Judiciary (hereinafter CGPJ),[5] which set out the fundamental principles that should govern judicial ethics: independence, impartiality, integrity, courtesy, diligence and transparency.[6] More specifically, regarding social media, it is important to consider the opinions of the Judicial Ethics Commission created to interpret the *Principles of Judicial Ethics*. The Commission's opinions are written replies to queries on specific cases made to it by the Governing Chambers of the Courts, Chambers of Judges, Judicial Associations or any active judge.

When analysing judges' social media use, it is necessary to focus on the impartiality principle, since its importance is reflected in both rules 16 and 17 of the *Principles of Judicial Ethics*:

> '16. Impartiality also imposes the duty to avoid conduct which, in or out of the proceedings, may call it into question and undermine public confidence in justice.
>
> 17. The judge must ensure that the appearance of impartiality is maintained in the consistent with the essential nature of material impartiality for the exercise of the Jurisdiction.'

When considering regulatory aspects, it is important to distinguish between national and international dimensions.

On the one hand, Title VI of the Spanish Constitution,[7] relating to the judiciary, begins with Article 117. The first paragraph of this article only makes express reference to the principle of independence when it lists the guarantees by the members of the judiciary: 'Justice emanates from the people and is administered in the name of the King by judges and magistrates who are members of the judiciary, independent, irremovable, responsible and subject only to the rule of law.' However, impartiality is not mentioned in any of the Articles of the Organic Law on the Judiciary (hereinafter LOPJ).[8]

In contrast, Article 10 of the Universal Declaration of Human Rights, Article 6(1) of the European Convention on Human Rights (ECHR) and Article 14 of the International Covenant on Civil and Political Rights set out very clearly the principles of judicial impartiality and independence.[9]

A. Freedom of Expression

Article 20(1)(a) of the Spanish Constitution includes the right to 'freely express and disseminate thoughts, ideas and opinions by word, writing or any other means of reproduction'. At the international level, it is included, among others, in Article 10(1) ECHR. However, Article 10(2) states that the exercise of the right to freedom of expression may be subject to certain formalities, conditions, restrictions or sanctions provided for by law to (among other things) guarantee the authority and impartiality of the judiciary.

Thus, although the ECHR recognizes freedom of expression as a human right, it also legitimizes possible restrictions on this right to protect the authority and impartiality of the judiciary. Consequently, possible restrictions on judges' social media use may be justified, as it is sometimes difficult to reconcile freedom of expression with impartiality.

5 The *Principles of Judicial Ethics* were approved in Plenary Session on 20 December 2016.
6 General Council of the Judiciary of the Kingdom of Spain (CGPJ) (2016), *Principles of Judicial Ethics*, available at C.G.P.J | Temas | Ética Judicial | Ética Judicial | Principios de Ética Judicial (poderjudicial.es)
7 The Spanish Constitution was approved on 29 December 1978.
8 *Ley Orgánica del Poder Judicial* (LOPJ), Organic Law 6/1985, 1st of July of the Spanish Judiciary. Its main function is to regulate the judiciary.
9 It was previously called *Convention for the Protection of Human Rights and Fundamental Freedoms.*

In addition, the established doctrine of the European Court of Human Rights (ECtHR) and the Spanish Constitutional Court holds that the rules relating to fundamental rights must be interpreted strictly,[10] while the rules that limit them must be construed with even greater rigour.[11]

Expressions of political opinions are a different matter. To contribute to this aim, the London Declaration of the European Network of Councils for the Judiciary approved the report entitled *Judicial Ethics*: *Judicial Ethics – Principles, Values and Qualities*.[12] This Report declares that the only limit should be 'to ensure that individuals can place their full trust in justice'.

It is not disputed that a judge cannot openly express his/her support for one political party, to the detriment of the others. However, in *Wille v. Liechtenstein*, the European Court of Human Rights (ECtHR) affirms that statements of a technical-legal nature[13] are acceptable even when they have political implications. Indeed, such expression does not entail *per se* a breach of the guarantee of impartiality. A paradigmatic case in this regard is *Baka v. Hungary*.[14] In that judgment, the ECtHR analyses events that began when the President of the National Council of Justice and the Supreme Court of Hungary publicly spoke out about recent legislative reforms. These statements sparked protests from parliamentary groups that had supported the reforms and prematurely ended his term as president of the Hungarian Supreme Court. However, the ECtHR held that the judge's freedom of expression had been violated, as well as the principle of security of tenure and judicial independence.[15]

In view of the preceding, judges and prosecutors are guaranteed the right to freedom of expression, but its exercise is limited by the duties and responsibilities deriving from their position, subject to the impartiality principle. In this regard, the *Principles of Judicial Ethics* are relevant, especially Rule 19 and Rule 31:

> '19. In their social life and in their relationship with the media, judges may contribute their reflections and opinions, but at the same time they must be cautious so that their appearance of impartiality is not affected by their public statements, and they must, in any case, show reserve with respect to information that may be detrimental to the parties or to the development of the proceedings.
>
> …
>
> 31. Judges, as citizens, have the right to freedom of expression, which they shall exercise with care and moderation in order to preserve their independence and appearance of impartiality and to maintain social confidence in the judicial system and the courts.'

B. Analysis of Judges' Social Media Use

When analysing the law applicable to judges' social media use, the Reports by Spain's Judicial Ethics Commission are relevant. In particular, the Report (Consultation 10/2018) of 25 February 2019 analyses the *Implications of the principles of judicial ethics in the use of social networks by members of the*

10 ECtHR, *Vinter and Others v. The United Kingdom*, Appl. nos. 66069/09, 130/10 and 3896/10, Judgment of 28 October 1999. All ECtHR are available at http://hudoc.echr.coe.int/.
11 Climent Gallart, 'La jurisprudencia del TEDH sobre la libertad de expresión de los jueces', 25 *Revista Boliviana de Derecho* (2018), at 527.
12 Report on Judicial Ethics – Principles, Values and Qualities, available at judicialethicsdeontologiefinal.pdf (encj.eu).
13 ECtHR, *Wille v. Liechtenstein*, Appl. no. 28396/95, Judgment of 28 October 1999.
14 ECtHR, *Baka v. Hungary*, Appl. no 20261/12, Judgement of 23 June 2016.
15 ASENSIO GALLEGO, José María, *Dimensión Ética del Derecho Procesal* (2022), at 85-103.

judiciary.[16] It is important to emphasize that 'the Commission cannot replace the judge in assessing their own conduct'. The judge must assess the impact of the *Principles of Judicial Ethics* in every case, guided by caution and restraint. In other words, the Judicial Ethics Commission's Report does not attempt to replace the judge's role in assessing his own social media involvement. Indeed, following the principles of education, courtesy, respect and caution, a judge's actions on social media can help bring citizens and the judiciary closer together.

Its first conclusion states that the 'Judge's participation in social networks does not conflict with the Principles of Judicial Ethics'. However, at the same time, it may create risks in terms of compliance with the principles of judicial ethics. The Report specifically recognizes the judge's right to express private opinions on social media, fulfil their educational role or defend fundamental rights and values. However, the sixth conclusion is clear: 'In all cases, judges must exercise caution on social networks and, in particular, they must be sure to uphold an appearance of impartiality'.

An immutable way to preserve the impartiality principle is contained in the Discussion Guide for the Expert Group Meeting that took place in Vienna in November 2018, promoted by the Global Judicial Integrity Network, about the *Use of Social Media by Judges*,[17] when it states that all judges must avoid referencing matters related to the cases they are hearing: 'Judges cannot post Facebook updates and comments about the issues and the parties of pending cases'.[18]

1. Judges' Identification on Social Media

Judges' social media use has created another important issue: anonymity. There is debate about whether judges should use their real names and identification or whether, on the contrary, they should use pseudonyms or names that hide the identity of the user behind each profile.

On the one hand, in the United States, the Judicial Conference's Committee on Codes of Conduct believes that the professional identification of judges should be restricted.[19] On the other hand, the Global Judicial Integrity Network and the United Nations Vienna Conference allow judges to use social media with their real identity or a pseudonym.[20]

The Report's second conclusion states that 'Judges can publicly present themselves as such on social networks'. However, the Report also states that 'they must conduct a prior ethical assessment on how to present themselves' because, as it continues in the third conclusion, 'the more "judicial identity" they disclose, the greater the risk that their actions and posts may impact on matters of judicial ethics and especially on other people's perception of judicial independence, impartiality and integrity'. However, the sixth Objective of Consultation with the Report states that 'there is no ethical problem with accessing or using social networks with an alias or pseudonym, though doing so does not justify ethically reprehensible behaviour because they are attempting to remain anonymous.'

In the United States, the Judicial Conference's Committee on Codes of Conduct asserts

16 The Report (Consultation 10/2018), of 25 February 2019, available at: (https://www.poderjudicial.es/stfls/CGPJ/COMISI%C3%93N%20DE%20%C3%89TICA%20JUDICIAL/DICT%C3%81MENES/20190225%20Consulta%2010-2018%20Acuerdo%20de%2025-02-2019%20-%20Ingl%C3%A9s.pdf).
17 Discussion Guide for the Expert Group Meeting about the 'Use of Social Media by Judges', available at unodc.pdf (coe.int).
18 The Texas State Commission on Judicial Conduct, CJC no. 14-0820-DI and 14- 0838-DIO, 20 April 2015, United States of America.
19 ASENSIO GALLEGO, José María, *Dimensión Ética del Derecho Procesal* (2022), at 100.
20 *Session Report Template for Substantive Sessions. Launch of the Global Judicial Integrity Network* (9-10 of April 2018).

that social media companies should restrict judicial employees from identifying themselves as judges of a given court. However, at the other end of the spectrum, the Global Judicial Integrity Network calls for members of the judiciary to be allowed to use social media using their real identity or a pseudonym. The United Nations Vienna Conference also took this second option in the Session Report Template for Substantive Sessions on 9 and 10 April 2018.[21]

This discussion was summed up concisely by Benoist Hurel, the vice-chair responsible for the functions of the investigative judge of the Paris Judicial Court and member of the Superior Council of the Judiciary, in his talk *The Magistrate and Social Media: Tool Or Trap?*[22] He claimed that inappropriate expression under a pseudonym would not protect a judge in any way. It rather gives a false sense of security and can become an important risk factor leading to disinhibited expression and ethical errors.

Regarding the judges interviewed, Carlos Viader and Natalia Velilla have used their real names on their accounts from the beginning. However, Teresa Puchol has always used the name 'LadyCrocs', and few people knew her real identity until recently when her identity was revealed without her consent or knowledge, a practice known as *doxing*. Surprisingly, after years of using social media, her identity was revealed to all users. Now, after having tweeted anonymously and later identifiably, Teresa says that she adopts a more cautious stance now: 'I avoid talking about a noisy neighbour or commenting on the good-looking official next door, she jokes', but it has not produced a drastic change, because, despite the anonymity, she was already taking all the necessary precautions to avoid violating the appearance of impartiality.

2. Judges' Social Relationship with Parties on Trial

The Ibero-American Commission on Judicial Ethics has stated that 'the judge has an obligation to observe due care so as not to incur in violation of his duties'.[23] Furthermore, the Commission states that the judge may not maintain any relationship with the parties or show favouritism or preferential treatment that calls into question their objectivity in directing the proceedings or decision-making.

The ninth conclusion of the Report of the Spanish Judicial Ethics Commission considers that 'the use by judges of forms of contact with third persons on social media is likely to create an appearance of favouritism'. It continues by stating that the limit is set again by the 'use of basic caution, which must govern the exercise of their freedom of expression'.

This section would not be complete without discussing the importance of the terms *follower* and *friend*. When the Report analyses the issue, in paragraph 13 stating that 'there is no reason that appearing as someone's *friend* or *follower* should, in itself, affect the appearance of impartiality, even if that person presents him or herself on social media as a member of the Judiciary'. The idea that being a *friend* of a member of the Judiciary on social media does not affect the impartiality principle is widely shared by other countries, such as France. This can be seen in the decision of the French Court of Cassation (civil section) published on 5 January 2017,[24] which

21 ASENSIO GALLEGO, José María. *Dimensión Ética del Derecho Procesal* (2022), at 94.
22 This talk was given the 10 May 2020 at the *École Nationale de la Magistrature*, France. Available at http://www.conseil-superieur-magistrature.fr/actualites/magistrats-et-reseaux-sociaux.
23 Second Opinion, 30 November 2015, about the use of Social Media by Judges. Available at https://eticayvalores.poder-judicial.go.cr/images/CIEJ/Segundo_Dictamen_CIEJ.pdf.
24 *Cour de cassation – Chambre civile 2, Pourvoi*, 16-12.394 (ECLI : FR:CCASS:2017:C200001).

decided that 'the term *friend* used to refer to people who agree to make contact through social media does not refer to friendships in the traditional sense of the term'.[25]

2. ADVANTAGES AND DISADVANTAGES

One of the main reasons judges take an active role on social media is the opportunity to reach a wider audience, spread awareness about the judiciary, answer questions about it, and explain decisions.[26] A lack of awareness about the law and the judges' role in society has forced them to try to explain their job using social media to bring justice closer to the people and banish myths and stereotypes about judges that persist in our societies.

This need also arises because of two other factors: firstly, most journalists have no technical legal training and, secondly, the lack of official information from the judiciary to communicate adequately judicial information on social media. Regarding the first factor, although nowadays legal news makes up a large proportion of daily news in almost every European country, journalists do not generally have specific legal training and even those who have failed to completely understand how legal systems and judicial proceedings work. Moreover, recently, there have been campaigns to discredit judges in some European countries, such as Spain, with some sections of society questioning the judiciary's authority – although judges are still respected by most people. This vision has sometimes been reinforced, if not created, by journalists and traditional media, providing a space for fake news or, at least, legal news that is not adequately explained. In that context, it can appear appropriate for judges or prosecutors to compensate for that information deficit by providing explanations on social media.

Secondly, in many European countries, the judiciary has not yet adapted to the digital era and does not properly explain judicial decisions and resolutions to the general public. It is true that the maxim that 'judges should speak through judgments' still applies, and judges' main aim in their daily lives must be to make proper decisions. However, it is not less true that nowadays, most people believe the information they see on social media, regardless of its source. In this scenario, the judiciary – concretely the CGPJ in Spain – has (to quote Mr. Viader) 'an unresolved issue' since it has a responsibility to provide society with suitable, understandable information about judicial cases.

In the interview with our team, Mr. Viader admits that, in some ways, one of his main aims when he started posting judicial content on social media was to bring the justice system closer to society, explaining judges' work and high-profile judicial resolutions. However, Mrs. Puchol and Mrs. Velilla started making legal disclosures on social media unintentionally and intuitively, as they themselves admit. However, from the outset, they were aware of the lack of official communications by the CGPJ or any other judicial body. By satisfying this need for information, their social media profiles soon became very popular, since many people wanted to read and learn about the law and high-profile court cases.

However, the Spanish judiciary has recently become more active on these channels, and it currently has social media accounts on X (@PoderJudicialEs – 153k followers) and on Instagram (@poderjudiciales – 19.6k followers), on which it posts daily information about the most important judicial decisions

25 Original text in French: 'le terme d' "ami" employé pour désigner les personnes qui acceptent d'entrer en contact par les réseaux sociaux ne renvoie pas à des relations d'amitié au sens traditionnel du terme'.

26 N. Velilla, *Así funciona la justicia* (2021), at 289.

of the day. This has been the case with the former footballer Dani Alves, accused and sentenced by the court of first instance to 4.5 years' imprisonment but released on probation on appeal. This decision, due to the defendant's fame and the social relevance of the case, was both communicated and explained by the judicial authorities on Instagram, with a post about provisional release, and on X, sharing a post by the High Tribunal of Justice of Catalonia (@tsj _cat – 13k followers), which announced the decision in a post on 20 March 2024, since it was from the Court of Barcelona.

The three judges interviewed by our team share this point of view, and all of them consider a recent change in the CGPJ's tone: it seems that for the first time, it uses its social media profile not only institutionally but also to disseminate legal information about controversial cases.

Moreover, the Spanish Judicial Authority has recently organized training courses for judges about freedom of expression, social media and impartiality, in which some judges who were active on social media took part, among whom was Carlos Viader, as he himself told us, or the high-profile judge Fernando Portillo (@JudgeTheZipper – 100k followers), as he announced on X.[27] This initiative shows that, recently, the Spanish Judicial Authority and, especially its communications office, are making a greater effort to address both the lack of official legal disclosure and judges' awareness about social media use.

Finally, even though the three interviewed Judges cannot be seen as 'neutral' since they do have active interaction with social media, another important advantage of judges' social media involvement should be considered. There has been increased engagement with society and social reality, mainly due to the public usage of social media by judges. A good judge cannot work in isolation or disconnected from the real world, and social media can be a useful tool for understanding problems that affect people. In the same way, the judges interviewed share this point of view; when we ask them about the greatest advantage or benefit, they are clear: meeting fascinating people, widening their social circle, and allowing people to better understand the world of the judiciary.

Moreover, judges as individuals must have the same rights as other citizens and be equal members of society. Consequently, judges should not be excluded or discouraged from engaging with social media and online communities as citizens. Judges can use social media to benefit both their personal and professional lives.[28]

However, judges cannot be completely treated as equals with other citizens. There should be some limitations on their social media use. For example, they should not talk openly on social media about the cases assigned to them, even when they avoid mentioning real names or other information, since if they explain details of real proceedings, people involved in the case may recognize themselves. Consequently, when judges use social media, 'it may be beneficial to separate personal and professional identities'.[29] Again, the judges interviewed agreed with this statement and considered it important to set limits, and an insurmountable barrier when dealing with them was speaking publicly about their cases. However, Mrs. Puchol and Mrs. Velilla

27 Tweet from @judgethezipper of 4 April 2024.

28 J.G. Browning, 'Why Can't We Be Friends? Judges' Use of Social Media', 68 *University of Miami Law Review* (2014), at 532. Available at https://lawreview.law.miami.edu/wp-content/uploads/2011/12/Why-Cant-We-Be-Friends-Judges-Use-of-Social-Media.pdf.

29 United Nations Office on Drugs and Crime (UNODC) (2019), *Non-Binding guidelines on the use of Social Media by judges*, available at NON-BINDING GUIDELINES ON THE USE OF SOCIAL MEDIA BY JUDGES (unodc.org).

point out that the only way they could do this would be to change recognizable enough information to prevent specific parties whose case they are talking about ever guessing that a tweet is about them. They have even changed the parties' names and gender, dates, place of residence, or the facts to prevent recognition by the individual.

On the other hand, the main risk for judges when using social media is the loss of impartiality that it can imply. On social media, judges can display or express political or personal opinions that can compromise their impartiality or at least make them seem less impartial than they should be. Consequently, and following the traditional approach that judges have not only to be impartial but also appear to be so, they must use social media cautiously, aware of the risks involved, as it can sometimes compromise their ethical principles and affect public perception of the judiciary.

Finally, the possible red line that judges have to respect when using social media is to avoid openly expressing political opinions. Judges, like anyone else, can in principle express political opinions and approve or criticize government action in private circles. However, they should not openly express opinions on social media about political decisions or other controversial topics that could affect their impartiality, the dignity of the courts that they represent or the fairness that they must embody. This is consistent with our survey among our colleagues at the Spanish Judicial School, of whom only 1% think that judges should use it in an unrestricted way, being able to openly express their personal and legal opinions.

However, Teresa Puchol and Natalia Velilla disagree on this issue when asked whether it is admissible to criticize a law on social media that they are subsequently going to apply to. On the one hand, Mrs. Puchol is categorical and answers affirmatively, arguing that in the same way that doctrinal articles are published in journals, in which judges comment on legislative technique, the effects of a law, or even engage with a judicial interpretation of the law, this can also be done on Twitter. She also states that being active on social media does not prevent her from applying the law in the most rigorous and independent way. On the other hand, Natalia Velilla is more cautious, saying that speaking on social media in our capacity as judges to attack other powers or public persons should be prohibited, since it can affect impartiality. However, Natalia Velilla defends everyday legal criticism in resolutions, journals and social media to improve the law and the legal system, making comments *de lege ferenda* (with a view to future law).

3. COMPARATIVE ANALYSIS ACROSS THE EU

Social media use by judges has been surveyed in different European Union Member States. In this section, we analyse the different guides provided by the Member States to prevent incorrect use.

A. France

In France, the *Conseil Supérieur de la Magistrature* (Superior Council of the Judiciary, hereinafter the 'CSM') has also pronounced itself on claims about the misuse of social media by judges. In its decision of 30 April 2014,[30] the CSM considered that, by his misuse of a social media platform during a criminal trial (the prosecutor and the judge exchanged acerbic comments on Twitter during the hearing), the judge breached his obligation of dignity and his duty of reserve, a guarantee to litigants of his impartiality and neutrality, and undermined the confidence

30 CSM, *Siège*, Decision of 30 April 2014, S212, available at http://www.conseil-superieur-magistrature.fr/missions/discipline/s212.

that litigants should be able to place in judicial decisions.

The French Council also ruled that, by using social media to spread a message for the purpose of gathering evidence in proceedings concerning him in a private capacity, a magistrate may damage the image and authority of the judicial institution if the message creates confusion in the minds of users as to the nature of the judge's approach.[31]

The French-speaking working group of the Judicial Magistracy Council also examined the term *friend*. However, it does not refer to people involved in proceedings, such as the prosecution and the defence, but rather the lawyers representing the parties.[32]

In this case, the report explains three different lines of thought. The first considered compromising the appearance of impartiality. A second line of thought considers that judges must be cautious when accepting social media requests by lawyers and that when doing so, they must assess the nature of the platform: a work-related network like LinkedIn is very different from Facebook, with its eminently social character. Finally, the last line of thought addresses the total lack of connection, considering that the term *friend* does not affect the appearance of impartiality anyway, since it does not prove a relationship of intimate friendship.

This report also considers that judges, like any other citizen, have the right to use social media, protecting their freedom of expression. However, the judge's role implies the obligation to monitor and be cautious about the opinions expressed. The report expressly mentions not only impartiality and independence but also maximum respect for the duty of confidentiality. Social media use must not damage the judiciary's image, so all judges must be aware of the disadvantages and risks of such misuse.

B. Belgium

Magistrates,[33] like any other citizen, enjoy the fundamental right of freedom of expression laid in Article 19 of the Belgian Constitution and Article 10 of the ECHR.

Concerning the subject of this survey, this previous statement implies that magistrates have the right to read and post on social media. This idea is also reflected in the Belgian Judicial Ethics Guide, *Guide pour les Magistrats – Principes, valeurs et qualités* by the *Conseil Supérieur de la Justice* and the *Conseil Consultatif de la Magistrature* and published as far back as 2012.[34] It defines the impartiality principle and comments on relevant aspects such as abstention, right to reply, and freedom of expression.

This Judicial Ethics Guide states that 'members of the judiciary have complete freedom of opinion, but impartiality obliges them to be measured and nuanced in their opinions so that the litigant does not have the impression that the magistrate is prejudiced.' The Guide maintains that a magistrate must, therefore, use all necessary caution.

In the same vein, a judgment of the Court of Appeal of Mons of 29 July 2021,[35] in which a judge expressed his opinion under a

31 CSM, *Siège*, 11 Septembre 2019, Decision of 11 September 2019 S233, available at http://www.conseil-superieur-magistrature.fr/missions/discipline/s233.

32 'Les réseaux sociaux et la magistrature un magistrat branché : à quelles conditions ?', Rapport du groupe de travail du réseau francophone des conseils de la Magistrature Judiciaire (RFCMJ), 2018, at 10. Available at https://csj.be/admin/storage/hrj/2018-11-23-rapport-magistrat-medias-sociaux-fr.pdf.

33 In the Belgian legal system, as well as in France, Judges and Public Prosecutors are collectively known as magistrates.

34 *Guide pour les Magistrats – Principes, valeurs et qualités* by the *Conseil Supérieur de la Justice* and the *Conseil Consultatif de la Magistrature*, available at https://csj.be/admin/storage/hrj/o0023f.pdf.

35 Court of Appel of Mons, Decision of 29 July 2021, TBBR 2022, 563, P&B 2021, 254.

pseudonym on Facebook about a case that was pending before him. The Court's ruling points out that 'by expressing opinions under a pseudonym on Facebook about a case that is still pending before him, the judge gives rise to the assumption that he is incapable of rendering a decision on that case independently and impartially'. The Court finally decided that the judge was no longer capable of ruling on this particular case while maintaining the independence and impartiality principles.

In another relevant case, the Advisory and Investigation Commission of the Belgian High Judicial Council for the Judiciary declared founded a complaint well in a case in which the judge was a Facebook friend of the other party's lawyer. Nevertheless, there is still some ongoing debate because Belgian legal doctrine states that merely being a Facebook friend is not sufficient to cause an apparent lack of impartiality.[36]

C. The Netherlands

The Netherlands Constitution has few rules concerning independence and impartiality. Consequently, Dutch soft law rules are vital to strengthen the judicial system. The main codes of conduct for Dutch judges are the *Code of Conduct for the Judiciary*,[37] *Guidelines on Impartiality and Side Activities*,[38] and *Guidelines on Conflict of Interest*.[39] However, these Codes of Conduct only refer to other regulations on independence and impartiality principles, leaving each judge a wide margin to use their own criteria.[40] Concerning social media use, judges in the Netherlands may participate on social media platforms while keeping some ethical standards to adhere to the impartiality principle.

A recent example in the Netherlands involved the MH17 trial concerning the attack on a Malaysia Airlines Boeing 777 over Ukraine that killed 298 people. On the basis of the criminal investigation, the Dutch Public Prosecution Service (OM) decided on 19 June 2019 to prosecute the suspects. During the investigation, one judge tried to influence the judges in the MH17 trial by claiming that the investigation was 'a deliberate and transparent cover-up', leading to a formal reprimand from the Supreme Court.[41] The judge has now been transferred to another department but was not sacked because she had accepted that her behaviour was wrong.[42] Even though the case concerns the guarantee of independence, it shows that even though judges are free to express their own opinions, the potential influence of those expressions must be taken into account.

D. Italy

In Italy, the Constitutional Court, in its Ruling 100/1981,[43] states that even though freedom of expression is a fundamental right recognized by the Constitution, it must not be exercised in such a way as to infringe the impartiality principle. The decision also focuses on the fact that magistrates must be more cautious than ordinary citizens concerning the issues addressed when

36 *Judicial ethics in Europe and the Arab world: a comparative overview*. Scuola Superiore della Magistratura, 7-8 March 2024 (Naples) (2024), at 13-15.
37 In Dutch: de Gedragscode Rechtelijke Macht 2013. Available at Staatscourant 2013, 31059 | Overheid.nl > Officiële bekendmakingen (officielebekendmakingen.nl).
38 In Dutch: Leidraad onpartijdigheid en nevenfuncties in de Rechtspraak, januari 2014, available at Leidraad-onpartijdigheid-en-nevenfuncties-in-de-rechtspraak-januari-2014.pdf.
39 In Dutch: de NVVR Rechterscode 2011, available at 110929 NVvR-rechterscode.doc.
40 *Judicial ethics in Europe and the Arab world: a comparative overview*, Scuola Superiore della Magistratura, 7-8 March 2024 (Naples), at 18-20.
41 High Council (The Netherlands), 23/01806 (ECLI: ECLI:NL:HR:2023:1019).
42 Dutch News, *Judge reprimanded for spreading MH17 conspiracy theory,* available at Judge reprimanded for spreading MH17 conspiracy theory - DutchNews.nl.
43 *Corte Costituzionale*, Case no. 100/1981, Judgement of 7 May 1981 (ECLI:IT:COST:1981:100).

reaching out to an indeterminate number of people.

Moreover, the *Consiglio Superiore della Magistratura* (Superior Council of Judiciary) has a Disciplinary Board which is in charge of correcting possible misbehaviour by judges. In its Decision 81/2008, the Disciplinary Board affirmed the principle that social media use, even if it relates to judicial work, is always a private activity and, as such, can never constitute the exercise of duties nor, therefore, give rise to the relevant disciplinary offences. On the other hand, it could constitute defamation if the expressions used would constitute this offence.

Finally, the Disciplinary Board has also ruled on a case concerning the conduct of a magistrate who posted an offensive message on his personal Facebook profile against the mayor of the city, where he exercised his judicial functions. In its Ruling 20/2018, the Disciplinary Board ruled that this behaviour implies not only a violation of the code of ethics but is also a direct violation of the impartiality principle, since it can be seen by an unknown number of Facebook users and the expressions used have been deemed defamatory so they harmed the image of the magistrate, since he was performing his duties in the same city as the mayor.

4. CASE LAW SURVEY

The importance of the impartiality principle is also reflected in the settled case law of the ECtHR. Among the more relevant are the cases *De Cubber v. Belgium* and *Piersack v. Belgium*,[44] which have focused on the need to maintain full impartiality in exercising the judicial function.

The ECtHR has often ruled on judges' freedom of expression. These rulings include the judgments *Wille v. Liechtenstein*; *Pitkevich v. Russia*, on religious freedom, in which the ECtHR points out that principle 6.1 of the Bangalore Principles requires that '[t]he judicial duties of a judge take precedence over all other activities', including the exercise of religious rights, *Kudeshkina v. Russia* or *Di Giovanni v. Italy*.[45]

Among the numerous rulings on the duty of judges and courts for discretion when dealing with the press, probably the most well-known ruling is *Buscemi v. Italy*,[46] where a magistrate heard a case after having sent letters to the press in which he took a prior position on it. This ruling helps understand the ECtHR's position on dealing with a case in which the magistrate has already taken a prior position. In the *Buscemi* case, it was a statement to the press and in the channel subject of this survey, speaking out on social media.[47]

Having examined the most relevant case law on freedom of expression, how far does it apply to social media? Moreover, and even more importantly, how does its use affect the appearance of impartiality? The ECtHR maintains a clear criterion: judges have the right to use social media; however, in line with the court's previous decisions, that right must always be exercised with caution and moderation.

An example is the judgment in *Kozan v. Turkey*,[48] delivered on 1 March 2022, in which

44 ECtHR, *De Cubber v. Belgium*, Appl. no. 9186/80, Judgement of 26 October 1984; ECtHR, *Piersack v. Belgium*, Appl. no. 8692/79, Judgement of 1st October 1982.

45 ECtHR, *Wille v. Liechtenstein*, Appl. no. 28396/95, Judgement of 20 October 1999; *Pitkevich v. Russia*, Appl. no. 47936/99, Judgment of 8 February 2001; *Kudeshkina v. Russia*, Appl. no. 29492/02, Judgement of 26 February 2009; *Di Giovanni v. Italy*, Appl. no. 51160/06, Judgement of 9 July 2013.

46 ECtHR, *Buscemi v. Italy*, Appl. no. 29569/95, Judgement of 16 September 1999.

47 Roca Trías, 'Freedom of expression, independence, impartiality: judges on social networks. A study of the decisions of the ECHR', 122 *Revista Española de Derecho Constitucional* (2021), at 13-45, available at https://doi.org/10.18042/cepc/redc.122.01.

48 ECtHR, *Kozan v. Turkey*, Appl. no. 16695/19, Judgement of 1st March 2022.

the ECtHR ruled on the case of a magistrate who had shared an article in a Facebook group criticizing the lack of independence of the Judicial Council of Turkey. This led to a disciplinary sanction, and in its ruling, the ECtHR considered that the disciplinary sanction was contrary to Article 10 of the ECHR. The ECtHR considered that although judges have a duty of discretion, the word of the magistrate, unlike that of the lawyer, is not only perceived as that of an individual but can also compromise the entire judicial institution. In a democratic society, judges sometimes have the right to address issues concerning the separation of powers and the need to preserve the independence of the judiciary, since they may need to protect the justice system against serious and unjustified attacks.

At the national level, some courts have ruled on the concept of *friend*. Thus, the Provincial Court of Asturias, in a decision on 8 October 2014,[49] considered that clicking the *like* icon on social media (the specific case was a *like* on Facebook) 'is not equivalent to having a friendship with the author of the publication, much less intimate friendship' (the latter is what Article 219 LEC expressly mentions as a cause for abstention).[50] The same occurs with Article 29 of the Law of the Contentious Administrative Jurisdiction that would give rise to Sentence 271/2017 of Court No. 1 of Vigo,[51] which considered that '[f]riendship on the internet has nothing to do with real friendship. The first is strategic, virtual, effective and paradoxically anonymous; the second is true, close and coincides with attachment.'

In Poland, on 22 March 2017, the Deputy Disciplinary Ombudsman of the Court of Appeal presented before the Disciplinary Chamber of the Polish Supreme Court a case in which a judge compared a well-known politician to Adolf Hitler on the social network Twitter on 23 September 2016. The court considered that, because of the user's reputation, it had a much broader impact than if it had been issued by a person with a position other than the judicial one and, for further consideration, he had not even used his personal Twitter account, but rather he did it on the profile of an association of judges. The Supreme Court considered that freedom of judicial expression must be subject to specific restrictions that prevent violating the due *impartiality* associated with the judicial institution. The Tweet caused general damage to the image of judges and the appearance of judicial impartiality, for which the Supreme Court imposed a disciplinary sanction.[52]

Without a doubt, one of the most interesting cases in Europe is the *Facebook judge*.[53] In April 2015, a German judge heard the case about a kidnapping and sentenced the defendants to eight and five years in prison. In January of the same year, one of the defendant's lawyers learned that the presiding judge of the chamber in which the case was heard (the Higher Regional Court of Rostock) had published an image of himself on his Facebook profile page wearing a T-shirt that read that 'we will give him a new home in the JVA' (German correctional facility) while posing with a beer in his hand. On the same page, he also published an image of himself, the caption for which read, 'By the time you're

49 Noticias Jurídicas, *Que un juez pinche el 'Me gusta' de Facebook no equivale a que tenga una amistad con el autor de la publicación que sea causa de abstención*, https://noticias.juridicas.com/actualidad/noticias/9142-que-un-juez-pinche-el-8220;me-gusta8221;-de-facebook-no-equivale-a-que-tenga-una-amistad-con-el-autor-de-la-publicacion-que-sea-causa-de-abstencion/.

50 The Code of Civil Procedure (Ley de Enjuiciamiento Civil, LEC 1/2000) is a set of legal rules on procedural civil law in Spain.

51 Noticias Jurídicas, *La amistad de Facebook no puede sustentar una recusación*, https://noticias.juridicas.com/actualidad/jurisprudencia/12609-la-amistad-de-facebook-no-puede-sustentar-una-recusacion/.

52 Global Freedom of Expression, Columbia University, *The Case of the Judge Who Sent Controversial Twitter Posts*, Global Freedom of Expression | The Case of the Judge Who Sent Controversial Twitter Posts - Global Freedom of Expression.

53 German Federal Court of Justice (Bundesgerichtshof, BGH), Judgement of 12 January 2016 (ECLI:DE:BGH:2016:120116B3STR482.15.0).

released from prison, I'll be retired', to finally comments to another user who had replied with the expression, 'said the Swedish curtain salesman'. *Swedish curtains* is an expression known in Germany as a euphemism for prison. Given these arguments, the German Federal Court of Justice considered that the judge's publicly accessible Facebook page ended the appearance of impartiality, mocking the harsh sentences of the accused. The Court concluded that his online presence was incompatible with the appearance of judicial impartiality, and this argument motivated the revocation of the sentence and its transfer to another *impartial* judge. The Court therefore reversed the lower court's decision and remanded the case to a different court.

In Spain, there are numerous cases in which the promoter of the Disciplinary Action of the General Council of the Judiciary has decided to open disciplinary proceedings to sanction the conduct of judges on social networks that violate the principles of Judicial Ethics. Some of the resolved cases consist of the following behaviours: a Judge of the Criminal Court of Granada had published comments on his social networks harshly critical of migrant groups, members of certain religious groups, ethnic minorities and women. Secondly, a Judge of the Social Court of Barcelona had posted on his Twitter social network under anonymous profile messages criticizing politicians and other personalities of political parties seeking independence for Catalonia. The judge admitted such statements but claimed that it was nothing more than 'humour, which can be acid'. Finally, another Judge called the President of the Government a 'psychopath without ethical limits' and insulted other ministers in social networks, even comparing political parties with the Nazis.

In all these three cases, the disciplinary proceedings were discontinued on the same ground: the Disciplinary Commission considered that disciplinary action must be governed by the principle of legality and, therefore, only conduct described in Articles 417 to 419 of the LOPJ may be sanctioned. The commission considered that these cases did not correspond to any type of behaviour covered by disciplinary rules and which could justify a limit to freedom of expression. The violations of the Principles of Judicial Ethics lack disciplinary consequences, as the Plenary of the CGPJ of 20 December 2016 has already stated. It is for this reason that the Disciplinary Commission itself argued that it is advisable for the legislative power to assess the need to review and update the disciplinary types contemplated in the LOPJ. The Council urges the Legislature to include new sanctions that reflect an increasingly common reality: judges, as citizens, make use of social networks and it is up to their prudence and restraint to determine the correct use of the same, and any action that violates the judicial ethical principles must be sanctioned.

CONCLUSION

This paper has examined judges' use of social media by considering both positions: the permissive one, with the unrestrained use of social media by judges in the same way as members of the public -in order to avoid that any variation compared to that position would amount to a violation of the freedom of judges' right to freedom of expression-, and the restrictive one, restricting the use of social media by judges to guarantee the principle of impartiality and dignity of the courts.

Throughout this paper, we have defended a more nuanced vision, encouraging judges' social media use, not in an absolute way, but taking into account some limitations or points of attention that judges should observe. That might be a more realistic approach.[54]

54 J.G. Browning, 'Why Can't We Be Friends? Judges' Use of Social Media', 68/2 *University of Miami Law* (2014).

Firstly, this position is supported by an analysis of the ethical basis in Spain and other countries, which does not prohibit judges from using social media. However, it has to be recognized that there is sometimes a collision between respect for the impartiality principle and the fundamental right to freedom of expression, which is not easy to resolve. Consequently, the impartiality principle should also guide judges' behaviour on social media, as well as what a judge's external appearance should be in that space. Consequently, we accept that judges must exercise caution on social media and, in particular, maintain an appearance of impartiality, but without prejudice to the fundamental premiss that judges should be entitled to maintain an active use of social media.

Secondly, we believe the advantages presented and analysed far exceed the possible disadvantages. Social media can be a valuable outreach tool for spreading legal knowledge. There is indeed a lack of technical legal knowledge in society and few official accounts by judicial institutions nationally. Posts by judges can, therefore, be an effective way of involving them and the justice systems, in general, with society. In order to support this vision, we have cited testimonials from three influential Spanish judges with high-profile social media accounts.

The results of the team's survey also support this more open position, as 63% of new Spanish judges actively use social media (mainly Instagram and X). However, although 46.6% change the way they use these platforms once they join the judiciary, 41% continue using them as before. Moreover, none of them argues that judges should not use social media, and a majority (58.7%) favour use beyond the strictly private or personal sphere, although with limits.

Furthermore, our comparative survey demonstrates that, even though each European country may have its own code of judicial conduct, they share a common respect for the impartiality principle, and none prohibits judges from using social media. The four countries surveyed share the idea that judges should be more cautious than ordinary citizens when using social media, since their posts can reach a very wide audience, but always respecting the right to freedom of expression.

To complete the survey, we have analysed applicable case law. We have focused primarily on the ECtHR since the latter has not only dealt with the conflict between the fundamental right to freedom of expression and the impartiality principle but has also asserted that judges *do* have the right to use social media, although acknowledging the need for a certain degree of prudence and moderation. Otherwise, a judge may face disciplinary proceedings over any particular conduct violating the principles of judicial ethics.

Active involvement by members of the judiciary on social media is a reality. It should not only be permitted but should be encouraged by the judicial institutions to promote greater outreach, not only about legal issues but also about the role that judges play in society. Justice systems and judges cannot ignore new trends and new technologies. Consequently, social media must not be seen as a threat but as a valuable tool for bringing justice closer to society.

GRAND FINAL

JUDICIAL PROTECTION IN THE EUROPEAN UNION

PARTICIPATING TEAMS:

France I, France II, France III, Germany I,
Germany II, Greece, Romania, Spain

1ST PLACE: ROMANIA
2ND PLACE: GERMANY I
3RD PLACE: SPAIN

3-6 DECEMBER 2024 – NAPLES, ITALY – SCHOOL FOR THE JUDICIARY

JURY MEMBERS

LORENZO SALAZAR (IT)

Senior Advisor of the Ministry of Justice for European and International Criminal Justice

I was honoured to be appointed as a member of the jury for the THEMIS Grand Final 2024.

As I am nearing the end of my professional career, it was exciting to meet so many lively and brilliant young colleagues from different Member States, who all shared the same vision and values.

Looking back, I remember when, at the start of my career, there was no concept of European training for magistrates. I was fortunate to be admitted to one of the European Court of Justice's internships for young magistrates in Luxembourg in autumn 1985. This was one of the few opportunities for national magistrates to meet colleagues from other countries. Even today, the importance of that first experience with colleagues from all ten Member States at the time remains vividly etched in my memory.

Forty years later, I was impressed by how familiar the young magistrates were with the notions of national and EU law, the case law of the European Courts of Luxembourg and Strasbourg, the use of vehicular foreign languages, and the preparation of effective multimedia presentations. Moreover, all of this was accompanied by a remarkable sense of humour and an equally remarkable ability to respond almost instantly to their counterparts' arguments, while strictly respecting the allocated time.

Undoubtedly, young people today are far more familiar with European and international issues than they were a few decades ago. However, this would not have been possible without the foresight of an Italian proposal in 1991 regarding the European training of magistrates ('An Erasmus programme for judges'), which paved the way for the establishment of the European Judicial Training Network almost a decade later. For a quarter of a century, the EJTN has promoted a European dimension in the training of members of the European judiciary to foster a shared European legal and judicial culture.

No event better represents the success of the EJTN's actions over the last twenty-five years than the THEMIS Grand Final.

So, long live the European Judicial Training Network, and may it continue to develop in the future in a manner commensurate with its present achievements and future ambitions.

FRANÇOISE TULKENS (BE)

Former Vice-President of the European Court of Human Rights

I have had the privilege of participating in the 2024 THEMIS Grand Final organized by the Italian School for the Judiciary (SSM) in Naples, at *Castel Capuano* – an ancient palace of great beauty and inspiration – from 3 to 6 December 2024.

At a time when democracy, the Rule of Law and human rights need to be defended and respected more than ever, the theme of the final – Judicial Protection in the European Union – was highly topical and allowed for genuine exchanges.

As we know, the teams that reach the final are already among the best, which makes the choice difficult but also the performances exciting and of high quality. The written texts and oral pleadings were assessed mainly on the basis of creativity, originality, and critical thinking. We heard talented young people who are in tune with their times.

After three intense days, it was time for deliberation and the announcement of the results. All the teams deserved warm congratulations, as only minimal differences separated them. The first prize went to team Romania, the second to Germany I, and the third prize to Spain. The atmosphere among the members of the eight final teams was excellent, and I am convinced that friendships have been formed that will be an important source of support in their professional lives.

Two factors contributed to the success of this Grand Final. First, an excellent European jury, which was extremely competent, attentive, and committed. Second, the wonderful organization of Flavio Mastrorillo and the colleagues of the Italian School, who oversaw everything with authority, competence, and kindness. Thank you from the bottom of my heart to everyone who made this wonderful adventure possible. A precious asset for the future.

DALIA VASARIENĖ (LT)

Justice at the Supreme Court of Lithuania (Civil Cases Division) Associated Professor of Public and Private Property Law, and Constitutional Law at Mykolas Romeris University

What may seem like a competition on the surface is, truly, a dynamic laboratory of legal reasoning, values, and vision. For those of us privileged to serve as judges, it is intellectually demanding and deeply inspiring work. We don't simply evaluate performances, we witness the rise of a new generation of legal minds, fluent not only in the language of law, but also in the ethics, plurality, and complexity that define today's Europe.

This became especially clear to me during the 2024 THEMIS Grand Final, where I had the privilege – and the awe-inspiring experience – of serving as a member of the jury. Exceptionally talented teams came together, each having already earned recognition as leaders among their peers. The competition was truly among the best of the best – and to me, it was a rare opportunity to observe, reflect, and take pride in these future European judges. The teams from France, Germany, Greece, Romania, and Spain demonstrated remarkable skills, coming impressively close to excellence in their written and oral presentations. Our hosts – the Italian School for the Judiciary – ensured we felt warmly welcomed, fully supported, and even fairly indulged.

THEMIS is much more than a prestigious event. It offers young professionals not only academic or rhetorical challenges, but also a space to cultivate independent thought, legal precision, and open-minded deliberation. These simulated proceedings encourage the kind of legal conversations Europe needs – grounded in shared values, yet enriched by diverse perspectives.

For aspiring judges, such experiences are formative. They refine legal reasoning, deepen understanding of EU and ECHR law, and bring to life the human dimension behind abstract norms. In this way, THEMIS helps shape not just capable professionals, but thoughtful, principled guardians of justice across borders. That, in the end, may be its most lasting contribution.

To all past, present, and future THEMIS participants – your curiosity, clarity, and commitment remind us why the Rule of Law matters. May you continue to question boldly, argue thoughtfully, and serve justice with both intellect and heart. Europe will be better for it.

PETER GEORGE XUEREB (MT)

Former Judge at the Court of Justice of the European Union

Naples and the many erudite and charming judges, lawyers and administrators who welcomed us proved to be marvellous hosts for the 2024 THEMIS Final. While it may have drawn out some theatrical or even dramatic antics from one or two participants – all of which added to the colour and the enjoyment – the event brought out in full measure the huge talent of all the teams. This by dint of the excellent organization and preparation of the event, not least by the chairperson and other jury members who drew up some fascinating case studies for examination and argument.

Almost disappointingly – for a former professor of law who was somewhat used to looking for flaws in my students' arguments – very few such were on display. Yet, if I may, and for the guidance of future participants, I would like to say only that I thought that more could have been made in argument of the principles of interpretation that are applied by the Court of Justice. Not that they were not employed but the analysis that goes under the rubric of 'interpretation', covering the intentions of the founders, of the Parties to the successive treaties, of the European legislator, of the Court of Justice in

its previous rulings, requires a deep and wide-ranging enquiry into these main elements from each speaker and each team and from both the two main sides of the argument. Speaking for myself, it is from relative success in this key matter that I feel that the winners should finally emerge (as I feel did happen after all in 2024).

Having said that, all teams performed to a very high level. As a judge of the Court of Justice who had retired from that role as recently as October 2024 and was now having his first experience of 'judging' future judges, my abiding sense as the competition came to a close was the following. If the national systems of legal and judicial training and education, clearly combined with added professional development through such demanding events as the THEMIS Competition, can produce future 'European' Judges at national level of the quality of the participants in the 2024 final, then the future of judicial cooperation as between the national courts and the Court of Justice, as well as between the national courts themselves, to say nothing of other players, is in safe hands. It was an honour and a privilege to be associated with this stage in the further training of a not-so-small elite who were destined to serve the noble aims of the Union.

THEMIS 2024 WINNERS' TESTIMONIAL

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Our participation in the THEMIS Competition was marked by character-building experiences, the acquisition of valuable knowledge, and the formation of new professional relationships.

While the THEMIS experience was undoubtedly exciting, it was, at its core, a competition. For us, this meant dedicating ourselves to thorough preparation. In advance of the semi-final, we researched the current developments in European civil procedure and selected a contemporary issue that could arise before any Member State judge. Other teams followed a similar approach, resulting in a four-day marathon of meticulously prepared debates on European Union law. Regardless of the final outcome, we believe that each participant gained substantial insights from the presentations, and the knowledge acquired will undoubtedly inform our future professional work.

The semifinal was particularly relevant because it required an in-depth examination of one topic: validity and enforceability of asymmetric jurisdiction agreements under Article 25 Brussels I bis Regulation.[1] When choosing the topic in March 2023, we found a preliminary ruling request[2] made by the French Court of Cassation, which concerned the validity of a jurisdiction agreement that conferred on one of the parties the option to bring proceedings before any competent court, while for the other party – just to one designated court. While writing the submission for the semifinal, the question was pending before CJEU and we were trying to advance nuanced solutions, based on the previous case law on jurisdiction agreements. On the 27th of February 2025, CJEU delivered its judgement on this matter and, to our satisfaction, we had anticipated some parts of the Court's reasoning on the matter.

The final, however, offered a new perspective. It showed us that the most effective solutions are often achieved through collaboration. The cases in the final round addressed similar, if not identical, issues, with each team offering its own interpretation of potential solutions. Ultimately, we were able to synthesize these diverse perspectives, arriving at a unified solution through collective effort. This may have been one of the first times we have experienced the advantages of cooperation within the framework of the European Union. Moreover, the competition provided us not

1 Regulation (EU) no. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, OJ 2012 L 351, at 1.
2 Case C-537/23, *Societa Italiana Lastre SpA* (EU:C:2025:120).

only with a deeper understanding of the technical aspects of cooperation but also with the opportunity to forge meaningful connections with our colleagues that will serve as the foundation for any future collaborations.

On a more practical note, we can confidently say that we were able to touch on very interesting topics in both of our presentations, which have proven to be very useful now, when all three of us are already judges.

The final addressed issues concerning both fundamental rights, such as the right to a fair, independent and impartial tribunal, but also issues concerning EU law. We shall dwell on three main aspects, which we found most interesting during the final: (1) the standard applicable to the notion of an independent and impartial court, (2) the guarantees of a fair trial when dealing with undisclosed evidence and finally (3) data protection under GDPR[3] and safeguarding fundamental rights, such as the right to a fair trial.

1. THE STANDARD APPLICABLE TO THE NOTION OF AN INDEPENDENT AND IMPARTIAL COURT

The guarantees established by Article 6, paragraph 1, ECHR[4] and Article 47 of the Charter[5] are a common subject for case law and academic research. The case we had to prepare for the final made no exception.

One first point we had to address was whether a judge's previous professional activities can cast doubt on their impartiality. The Court has recognized in cases like *Pescador Valero v. Spain*[6] and *Syndicat National des Journalistes v. France*[7] that close, regular, and remunerated professional ties with one of the parties can create an appearance of bias sufficient to fail the objective test. However, the ECHR also distinguishes between direct involvement in the case at hand, which almost invariably compromises impartiality (as in *Cubber v. Belgium*[8]), and more general, policy-related or academic work in the relevant field, which does not necessarily do so. The key factors are the nature and closeness of the connection, its timing relative to the judicial proceedings, and whether it could reasonably be perceived as influencing the judge's decision-making.

Another question concerned whether a judge's public statements or publications on legal topics relevant to a pending or future case compromise impartiality. The ECtHR has acknowledged in *Karrar v. Belgium*[9] that expressions of general opinion on matters of law are not inherently problematic, particularly where they are abstract and made outside the context of a specific case. However, as noted in *Kyprianou v. Cyprus*[10], the use of emphatic or personally charged language in relation to the conduct of a party may suggest a lack of detachment. The dividing line lies in whether the statements could reasonably be interpreted as prejudging the merits of a specific dispute or demonstrating hostility toward a party.

The third issue was whether the statements of a government official concerning the activities of the judiciary can affect

3 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and the free movement of such data, and repealing Directive 95/46/EC, OJ 2016 L 119, at 1-88.
4 Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe Treaty Series 005, Council of Europe, 1950.
5 Charter of Fundamental Rights of the European Union, OJ 2016 C 202, at 389-405.
6 ECtHR, *Pescador Valero v. Spain*, Appl. no. 62435/00, Judgement of 17 June 2003, para. 27.
7 ECtHR, *Syndicat National des Journalistes v. France*, Appl. no. 41236/18, Judgement of 14 December 2023, para. 27.
8 ECtHR, *Cubber v. Belgium*, Appl. no. 9186/80, Judgement of 26 October 1984.
9 ECtHR, *Karrar v. Belgium*, Appl. no. 61344/16, Judgement of 21 August 2021.
10 ECtHR, *Kyprianou v. Cyprus*, Appl. no. 73797/01, Judgement of 15 December 2005.

the independence of judges. Judicial independence, while guaranteed structurally through constitutional safeguards, can be undermined in practice if members of the executive attempt to influence court proceedings. The ECHR's case law, including *Ciobanu v. Romania*[11], *Sovtransavto Holding v. Ukraine*[12], and *Agrokompleks v. Ukraine*[13], draws a clear distinction between general political statements about the enforcement of laws and direct, targeted interventions in ongoing cases. The latter is incompatible with Article 6, particularly when persistent or when accompanied by pressure on the judiciary. By contrast, one-time public comments not directed at a pending case, even if they praise or criticize enforcement actions, are less likely to infringe judicial independence, provided there is no indication of intent to influence judicial decision-making.

These three areas revealed for us the delicate balance between maintaining judicial integrity and acknowledging that judges, like all professionals, may have prior experiences, intellectual positions, and interactions with broader public discourse. The ECtHR's approach is pragmatic: it safeguards against both real and perceived risks to impartiality and independence, while recognizing that neither quality demands complete isolation from society. The consistent emphasis is on the perspective of the reasonable observer and on whether the safeguards in place are sufficient to maintain public confidence in the judiciary.

2. THE GUARANTEES OF A FAIR TRIAL WHEN DEALING WITH UNDISCLOSED EVIDENCE

In the case we received for the final, one of the most difficult aspects to reconcile with the guarantees of a fair trial was the fact that the evidence used by the administrative authority to sanction one of the parties remained classified throughout the judicial proceedings, on the grounds that overriding national security concerns prevented its disclosure.

Our first step was to assess the nature of the proceedings as criminal in nature, within the meaning of the *Engel* criteria, given that the administrative sanction imposed on one of the parties was particularly severe and had a strong punitive character.

The right to be informed of the essential evidence on which the accusation is based is universally recognized as a core component of the principle of adversarial proceedings and a necessary precondition for the application of the related principle of equality of arms. Nevertheless, the right to be informed of the essential grounds of the accusation and the right of access to evidence are two distinct aspects and should not be conflated.

Already familiar with the well-known ECtHR judgment in *Muhammad and Muhammad v. Romania*[14], we approached the national proceedings conducted by the courts with the aim of identifying procedural counterbalancing factors to offset the rather significant restrictions imposed on the principles of adversarial proceedings and equality of arms.

We found that the fact that the authority conducting the proceedings was a judicial body, enjoying guarantees of independence and impartiality, constituted a strong counterbalancing factor. Moreover, somewhat surprisingly, we observed that the independent and impartial judge's access to

11 ECtHR, *Ciobanu v. Romania*, Appl. no. 52414/99, Judgement of 16 December 2003.
12 ECtHR, *Sovtransavto Holding v. Ukraine*, Appl. no. 48553/99, Judgement of 25 July 2002.
13 ECtHR, *Agrokompleks v. Ukraine*, Appl. no. 23465/03, Judgement of 6 October 2011.
14 ECtHR, *Muhammad and Muhammad v. Romania*, Appl. no. 80982/12, Judgement of 15 October 2020.

the entirety of the classified evidence in itself constitutes a significant safeguard – an aspect that the ECtHR had already acknowledged, albeit boldly, in *Regner v. Czech Republic*[15].

In that case, although the proceedings were not of a criminal nature, the Court held that the proceedings, taken as a whole, had not been unfair, even though none of the evidence had been disclosed to the applicant.

A natural step that followed the facts of the case was to assess the extent of the limitations imposed on the right to a fair trial, in relation to the justification provided for those limitations. In our case, the procedural rights had been restricted on grounds related to national security.

National security, a domain both vast and inherently ambiguous, defined only *obiter dictum* or with marked caution by European courts, has long proven to be fertile ground for the development of strong legal arguments in support of the authorities who, as in the case we had to argue in favour of, relied on classified evidence of this nature.

While the ECtHR has neither defined this concept nor aimed to do so, the CJEU has provided a particularly useful indication in this regard in the *G.D.* Case.[16] There, the Court held that '[t]he importance of the objective of safeguarding national security, read in the light of Article 4(2) TEU[17] – according to which national security remains the sole responsibility of each Member State – exceeds that of the other objectives referred to in Article 15(1) of Directive 2002/58,[18] *inter alia* the objectives of combating crime in general, even serious crime, and of safeguarding public security. Subject to meeting the other requirements laid down in Article 52(1) of the Charter, the objective of safeguarding national security is therefore capable of justifying measures entailing more serious interferences with fundamental rights than those which might be justified by those other objectives'.[19]

Accordingly, any assessment of restrictions on the right to a fair trial for reasons of national security must be approached with greater flexibility – this being rooted both in the margin of discretion afforded to Member States under Article 4(2) TEU and in the very nature of national security itself, a ground of protection considered superior even to public order and crime prevention.

In an effort to mirror the ECtHR standard with that of the CJEU, we examined the judgments in *Kadi*[20] and *ZZ*[21], identifying certain nuances introduced by the Court of Justice regarding fair trial guarantees in national security contexts. Notably, as *ZZ* shows, the extent to which the person involved in the proceedings must be informed cannot be assessed in the abstract, but rather in light of the specific area of EU law at issue. We therefore argued that, in areas concerning the free movement of persons within the EU, such as in *ZZ*, a higher standard of procedural fairness is required, one that cannot be automatically transposed *tale quale* to cases such as the one we had to debate.

Following the 'fair balance' model imposed by the ECtHR between, on the one hand, the right to a fair trial and, on the other, the right to life, liberty, and security of citizens (as the

15 ECtHR, *Regner v. Czech Republic*, Appl. no. 35289/11, Judgement of 19 September 2017.
16 Case C-140/20, *GD* (EU:C:2022:258).
17 Treaty on European Union, OJ 2016 C 202.
18 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, OJ 2002 L 201, at 37-44.
19 *Ibid.*, para. 57.
20 Case C-584/10 P, *Commission and Others v. Kadi* (EU:C:2013:518).
21 Case C-300/11, *ZZ* (EU:C:2013:363).

underlying goal of invoking national security), we similarly concluded that restrictions on the fair trial rights of an international data processing company such as the one in our case can be more readily justified when the security of a State's population was at stake.

Thus, in a case where the procedural violations initially appeared rather serious, we identified a number of circumstantial elements which, upon further legal research, suggested that these restrictions on the right to a fair trial were not as intrusive as they first seemed. The criminal nature of the proceedings, the justification of the fair trial limitations by the need to safeguard national security – and, in turn, the justification of national security by the protection of all citizens' personal data – as well as the existence of solid counterbalancing factors, ultimately led to a situation where the debate could unfold without either party appearing to be absolutely correct.

3. DATA PROTECTION UNDER GDPR REGULATION AND SAFEGUARDING FUNDAMENTAL RIGHTS

For example, GDPR was a fairly new and challenging topic for us, which led to thorough research. One of the most striking pieces of information we found is the *Norra Stockholm Bygg* case,[22] which redefined personal data protection rules, elevating them from specialized and context-specific rules to fundamental principles governing the administration of judicial proceedings.

The Supreme Court of Sweden, in the context of a civil dispute, submitted a request for a preliminary ruling and asked whether '[a] rticle 6(3) and (4) of the GDPR also impose a requirement on national procedural legislation relating to [the obligation to produce documents]' and, if this is the case, 'whether regard must also be had to the interests of the data subjects when a decision on [production] must be made, which involves the processing of personal data? In such circumstances, does EU law establish any requirements concerning how, in detail, that decision should be made?'

Thus, in the light of Article 6 of GDPR, the Court had to establish first if national courts qualify as a regulated entity, namely a data controller.

In this regard, the CJEU followed its previous judgement[23] and stated 'that subject to the cases mentioned in Article 2(2) and (3) thereof, the GDPR applies to processing operations carried out both by private persons and by public authorities, including, as recital 20 thereof indicates, judicial authorities, such as courts'. This reasoning consolidates the position of a court as a data controller which must comply with GDPR rules, even when acting in their judicial capacity, such as when making civil orders, which may involve the disclosure of personal data.

Although the existence of independent public authorities is essential in ensuring the protection of personal data, we must note that in the *Autoriteit Persoonsgegevens case*, cited earlier, the Court stated that in light of Article 55, paragraph 3[24], supervisory authorities are not competent to supervise the processing operations of courts acting in their judicial capacity in order to 'safeguard the independence of the judiciary in the performance of its judicial tasks, including decision-making'.[25]

Further clarifications may, however, be required on what falls under 'the judicial

22 Case C-268/21, *Norra Stockholm Bygg* (EU:C:2023:145).
23 Case C-245/20, *Autoriteit Persoonsgegevens* (EU:C:2022:216), para. 25.
24 Supervisory authorities shall not be competent to supervise processing operations of courts acting in their judicial capacity.
25 Case C-245/20, *Autoriteit Persoonsgegevens* (EU:C:2022:216), para. 31.

capacity' of a court, since *Norra Stockholm Bygg* refers to ordering evidence and *Autoriteit Persoonsgegevens* refers to granting access to a file to journalists and the Court offered a rather broad interpretation of the phrase.[26]

As for the second question, the Court had to establish whether national courts are required to have regard to the interests of the data subjects concerned and what are requirements imposed by EU law in this regard.

In short, the Court stated that when a civil court considers whether to order the disclosure of a document that contains personal data, it must respect the data processing principles[27], ensure the lawfulness of processing[28] and balance the interests of the data subjects against the need to use that data as evidence in judicial proceedings.

The significance of the proportionality test established in *Norra Stockholm Bygg* also attracted the attention of the Austrian team participating in Semi-Final C of the THEMIS Competition 2025: EU and European Civil Procedural Law. Their award-winning paper[29] provides a detailed analysis of this balancing test, once again illustrating that cooperation between us and the participants plays a crucial role in enhancing the understanding and application of EU law.

SOME CONCLUSIONS

The THEMIS 2024 competition provided not only an arena for testing legal knowledge and argumentation skills, but also a unique opportunity to engage critically with complex and evolving areas of European law. Some of the issues debated in the final round – the standard of judicial independence and impartiality, the guarantees of a fair trial in the context of undisclosed evidence, and the interaction between data protection and fundamental rights – are emblematic of the tensions that arise when fundamental principles intersect with practical and policy considerations.

Through the lens of case law from both the ECtHR and the CJEU, our research revealed that the law seeks to strike a careful balance between competing values: safeguarding judicial integrity while acknowledging the realities of professional life; ensuring procedural fairness while accommodating legitimate national security interests; and protecting personal data without undermining the proper administration of justice.

Beyond the technical legal findings, the competition underscored the importance of comparative analysis, cross-jurisdictional dialogue, and cooperative problem-solving. These methods not only enriched our understanding of EU law but also reinforced the idea that robust legal solutions emerge from the interplay of diverse perspectives. The experience demonstrated that the cultivation of professional relationships and the exchange of ideas across borders are indispensable for the continued development and effective application of European legal standards.

26 'As not being limited to the processing of personal data carried out by courts in specific cases, but as referring, more broadly, to all processing operations carried out by courts in the course of their judicial activity, such that those processing operations whose supervision by the supervisory authority would be likely, whether directly or indirectly, to have an influence on the independence of their members or to weigh on their decisions are excluded from that authority's competence.'

27 Article 5 of GDPR.

28 Article 6 of GDPR.

29 *Mag. Sophia Beer, Benjamin Goltner, LL.M., Mag. Felicitas Hinteregger,* Data Protection & Effective Judicial Protection – An Impossible Contradiction? Available at https://catalogue.ejtn.eu/seminars-and-webinars/listing/2239-semi-final-c-eu-and-european-civil-procedural-law?_gl=1%2ao3iq99%2a_ga%2aNDk5MTcyOTEwLjE3NTQ0OTMxOTk.%2a_ga_2W1X6M1KN3%2aczE3NTQ0OTMxOTkkbzEkZzEkdDE3NTQ0OTMyMTIkajQ3JGwwJGgw.

TÉMOIGNAGE DES LAURÉATS THEMIS 2024

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Notre participation au concours THEMIS a été marquée par une expérience ayant stimulé notre force de caractère, l'acquisition de connaissances précieuses et le développement de nouvelles relations professionnelles.

Si l'expérience du concours THEMIS fut sans aucun doute passionnante, la base reste une compétition. Pour nous, cela impliquait de se consacrer à une préparation approfondie. Avant la demi-finale, nous avons étudié les développements actuels de la procédure civile européenne et choisi une question contemporaine qui pourrait se poser devant n'importe quel juge d'un État membre. D'autres équipes ont suivi une approche similaire, ce qui a donné lieu à un marathon de quatre jours de débats méticuleusement préparés sur le droit de l'Union européenne. Quel que soit le résultat final, nous croyons que chaque participant a acquis des connaissances substantielles à partir des présentations, et les connaissances acquises guideront sans aucun doute le futur professionnel de chacun de nous.

La demi-finale était particulièrement pertinente car elle nécessitait un examen approfondi d'un sujet donné, à savoir la validité et la force exécutoire des accords de compétence asymétriques au titre de l'article 25 du règlement Bruxelles I*bis*[1]. Lors du choix du sujet en mars 2023, nous avons identifié une demande de décision préjudicielle[2] introduite par la Cour de cassation française, qui portait sur la validité d'un accord de compétence conférant à l'une des parties la possibilité de saisir toute juridiction compétente, tandis que pour l'autre partie, il ne s'agissait que d'une seule juridiction désignée. Lors de la rédaction de notre papier pour la demi-finale, la question était toujours pendante devant la CJUE et nous avons tenté de faire valoir des solutions nuancées, basées sur la jurisprudence existante sur les accords de compétence. Le 27 février 2025, la CJUE a rendu son arrêt sur cette question et, à notre satisfaction, nous avions anticipé certaines parties du raisonnement de la Cour à ce sujet.

La finale, cependant, offrait une nouvelle perspective. Cela nous a montré que les solutions les plus efficaces sont souvent obtenues grâce à la collaboration. Les cas du dernier tour ont abordé des problèmes similaires, sinon identiques, chaque équipe offrant sa propre interprétation des solutions

1 Règlement (UE) n° 1215/2012 du Parlement européen et du Conseil du 12 décembre 2012 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale (JO, 2012, L 351, p. 1).
2 Affaire C-537/23, *Societa Italiana Lastre SpA* (EU:C:2025:120).

potentielles. En fin de compte, nous avons pu synthétiser ces diverses perspectives, en arrivant à une solution uniforme grâce à un effort collectif. C'est peut-être l'une des premières fois que nous avons fait l'expérience des avantages de la coopération dans le cadre de l'Union européenne. De plus, le concours nous a permis non seulement de mieux comprendre les aspects techniques de la coopération, mais aussi de tisser des liens précieux avec nos collègues, qui serviront de base à toute collaboration future.

Sur un plan plus pratique, nous pouvons affirmer avec confiance que nous avons pu aborder des sujets très intéressants dans nos deux présentations, qui se sont ultérieurement révélées très utiles, alors que nous sommes désormais tous trois devenus juges.

La dernière a abordé des questions concernant à la fois les droits fondamentaux, tels que le droit à un tribunal équitable, indépendant et impartial, mais aussi des questions relatives au droit de l'Union. Nous nous attarderons sur trois aspects principaux, que nous avons trouvés les plus intéressants lors de la finale : (1) la norme applicable à la notion de tribunal indépendant et impartial, (2) les garanties d'un procès équitable lorsqu'il s'agit de traiter des preuves non divulguées et, enfin, (3) la protection des données au titre du RGPD[3] et la sauvegarde des droits fondamentaux, tels que le droit à un procès équitable.

1. LA NORME APPLICABLE À LA NOTION DE TRIBUNAL INDÉPENDANT ET IMPARTIAL

Les garanties établies par l'article 6, paragraphe 1, de la CEDH[4] et l'article 47 de la Charte[5] constituent un sujet commun de jurisprudence et de recherche universitaire. Le cas que nous devions préparer pour la finale n'a pas fait exception.

Un premier point que nous avons dû aborder était de savoir si les activités professionnelles antérieures d'un juge pouvaient mettre en doute son impartialité. La Cour européenne des droits de l'homme a reconnu, dans des affaires telles que *Pescador Valero c. Espagne*[6] et *Syndicat national des journalistes c. France*[7], que des liens professionnels étroits, réguliers et rémunérés avec l'une des parties peuvent créer une apparence de partialité suffisante pour ne pas satisfaire au critère d'impartialité objective. Toutefois, la CEDH établit également une distinction entre l'implication directe dans l'affaire en cause, qui compromet presque invariablement l'impartialité (comme dans *l'affaire Cubber c. Belgique)*[8], et le travail plus général, politique ou universitaire dans le domaine concerné, qui ne le fait pas nécessairement. Les facteurs clés sont la nature et la proximité du lien, la chronologie des événements par rapport à la procédure judiciaire et la question de savoir si ceux-ci peuvent raisonnablement être perçus comme ayant influencé le processus décisionnel du juge.

Une autre question était de savoir si les déclarations publiques ou les publications d'un juge sur des sujets juridiques

3 Règlement (UE) 2016/679 du Parlement européen et du Conseil du 27 avril 2016 relatif à la protection des personnes physiques à l'égard du traitement des données à caractère personnel et à la libre circulation de ces données, et abrogeant la directive 95/46/CE (*JO*, 2016, p. 1).
4 Convention de sauvegarde des droits de l'homme et des libertés fondamentales, Recueil des Traités du Conseil de l'Europe 005, Conseil de l'Europe, 1950.
5 Charte des droits fondamentaux de l'Union européenne, JO 2016 C 202 du 7 juin 2016, pp. 389-405.
6 CEDH, *Pescador Valero c. Espagne,* requête n° 62435/00, arrêt du 17 juin 2003, pt 27.
7 CEDH, *Syndicat national des journalistes c. France,* requête n° 41236/18, arrêt du 14 décembre 2023, pt 27.
8 CEDH, *Cubber c. Belgique,* requête n° 9186/80, arrêt du 26 octobre 1984.

pertinents pour une affaire en cours ou future compromettaient l'impartialité. La Cour européenne des droits de l'homme a reconnu, dans l'affaire *Karrar c. Belgique*[9], que les expressions d'opinions générales sur des questions de droit ne sont pas intrinsèquement problématiques, en particulier lorsqu'elles sont abstraites et formulées en dehors du contexte d'une affaire spécifique. Toutefois, comme indiqué dans l'affaire *Kyprianou c. Chypre*[10], l'utilisation d'un langage emphatique ou personnellement connoté en ce qui concerne le comportement d'une partie peut suggérer un manque de détachement. La ligne de démarcation consiste à déterminer si les déclarations peuvent raisonnablement être interprétées comme préjugeant du bien-fondé d'un différend particulier ou comme démontrant une hostilité à l'égard d'une partie.

La troisième question était de savoir si les déclarations d'un fonctionnaire concernant l'activité du pouvoir judiciaire pouvaient affecter l'indépendance des juges. L'indépendance de la justice, bien que garantie structurellement par des normes constitutionnelles, peut être compromise dans la pratique si les membres de l'exécutif tentent d'influencer les procédures judiciaires. La jurisprudence de la CEDH, notamment les arrêts *Ciobanu c. Roumanie*[11], *Sovtransavto Holding c. Ukraine*[12], et *Agrokompleks c. Ukraine*[13], établit une distinction claire entre les déclarations politiques générales sur l'application des lois et les interventions directes et ciblées dans les affaires en cours. Ces dernières sont incompatibles avec l'article 6 de la CEDH, en particulier lorsque l'intervention est persistante ou lorsqu'elle s'accompagne de pressions sur le pouvoir judiciaire. En revanche, les commentaires publics ponctuels qui ne visent pas une affaire en cours, même s'ils font l'éloge ou critiquent les mesures d'exécution, sont moins susceptibles de porter atteinte à l'indépendance de la justice, à condition qu'il n'y ait aucune indication d'intention d'influencer la prise de décision judiciaire.

Ces trois domaines ont révélé pour nous le délicat équilibre entre le maintien de l'intégrité judiciaire et la reconnaissance du fait que les juges, comme tous les professionnels, peuvent avoir des expériences antérieures, des positions intellectuelles et des interactions avec un discours public plus large. L'approche de la Cour européenne des droits de l'homme est pragmatique : elle protège contre les risques réels et perçus pour l'impartialité et l'indépendance, tout en reconnaissant qu'aucune des deux qualités n'exige un isolement total de la société. L'accent est constamment mis sur le point de vue de l'observateur raisonnable et sur la question de savoir si les garanties en place sont suffisantes pour maintenir la confiance du public dans le pouvoir judiciaire.

2. LES GARANTIES D'UN PROCÈS ÉQUITABLE LORSQU'IL S'AGIT DE PREUVES NON DIVULGUÉES

Dans l'affaire que nous avons reçue pour la finale, l'un des aspects les plus difficiles à concilier avec les garanties d'un procès équitable était le fait que les éléments de preuve utilisés par l'autorité administrative pour sanctionner l'une des parties sont restés classifiés tout au long de la procédure judiciaire, au motif que des préoccupations impérieuses de sécurité nationale empêchaient leur divulgation.

9 CEDH, *Karrar c. Belgique,* requête n° 61344/16, arrêt du 21 août 2021.
10 CEDH, *Kyprianou c. Chypre,* requête n° 73797/01, arrêt du 15 décembre 2005.
11 CEDH, *Ciobanu c. Roumanie,* requête n° 52414/99, arrêt du 16 décembre 2003.
12 CEDH, *Sovtransavto Holding c. Ukraine,* requête n° 48553/99, arrêt du 25 juillet 2002.
13 CEDH, *Agrokompleks c. Ukraine,* requête n° 23465/03, arrêt du 6 octobre 2011.

Notre première étape de raisonnement a été d'apprécier la nature pénale de la procédure, au sens des critères « Engel », étant donné que la sanction administrative imposée à l'une des parties était particulièrement sévère et avait un fort caractère punitif.

Le droit d'être informé des éléments de preuve essentiels sur lesquels l'accusation est fondée est universellement reconnu comme un élément essentiel du principe de la procédure contradictoire et une condition préalable nécessaire à l'application du principe connexe de l'égalité des armes. Néanmoins, le droit d'être informé des motifs essentiels de l'accusation et le droit d'accès aux preuves sont deux aspects distincts et ne devraient pas être confondus.

Ayant déjà pris connaissance de l'arrêt bien connu de la Cour européenne des droits de l'homme dans l'affaire *Muhammad et Muhammad c. Roumanie*[14], nous avons abordé les procédures nationales menées par les juridictions dans le but d'identifier des facteurs de contrepoids procéduraux pour compenser les restrictions assez importantes imposées aux principes de la procédure contradictoire et de l'égalité des armes.

Nous avons constaté que le fait que l'autorité chargée de la procédure était un organe judiciaire, jouissant de garanties d'indépendance et d'impartialité, constituait un facteur de contrepoids important. En outre, de manière quelque peu surprenante, nous avons observé que l'accès du juge indépendant et impartial à l'ensemble des éléments de preuve classifiés constitue en soi une garantie importante – un aspect que la Cour européenne des droits de l'homme avait déjà reconnu dans *l'affaire Regner c. République tchèque*[15].

Dans cette affaire, bien que la procédure n'ait pas un caractère pénal, la Cour a jugé que la procédure, prise dans son ensemble, n'avait pas été abusive, même si aucun des éléments de preuve n'avait été divulgué au requérant.

Une étape naturelle qui a suivi les faits de l'espèce a été d'évaluer l'étendue des limitations imposées au droit à un procès équitable, par rapport à la justification fournie pour ces limitations. Dans notre cas, les droits procéduraux avaient été restreints pour des motifs liés à la sécurité nationale.

La sécurité nationale, domaine à la fois vaste et intrinsèquement ambigu, défini seulement dans le cadre d'*obiter dicta* ou avec une grande prudence par les tribunaux européens, s'est longtemps révélée être un terrain fertile pour le développement d'arguments juridiques solides à l'appui des autorités qui, comme dans l'affaire que nous avons dû plaider, se sont appuyés sur des preuves classifiées de cette nature.

Bien que la Cour européenne des droits de l'homme n'ait ni défini ce concept ni cherché à le faire, la CJUE a fourni une indication particulièrement utile à cet égard dans l'affaire *G.D.*[16] La Cour y a jugé que « [l]'importance de l'objectif de sauvegarde de la sécurité nationale, lu à la lumière de l'article 4, paragraphe 2, TUE[17] – selon lequel la sécurité nationale demeure de la seule responsabilité de chaque État membre – dépasse celle des autres objectifs visés à l'article 15, paragraphe 1, de la directive 2002/58[18], notamment les objectifs de lutte contre la criminalité en général, voire la criminalité

14 CEDH, *Muhammad et Muhammad c. Roumanie,* requête no 80982/12, arrêt du 15 octobre 2020.
15 CEDH, *Regner c. République tchèque,* requête n° 35289/11, arrêt du 19 septembre 2017.
16 C-140/20, *GD* (EU:C:2022:258).
17 Traité sur l'Union européenne, JO C 202 du 7 juin 2016.
18 Directive 2002/58/CE du Parlement européen et du Conseil du 12 juillet 2002 concernant le traitement des données à caractère personnel et la protection de la vie privée dans le secteur des communications électroniques (JO 2002 L 201, pp. 37-44).

grave, et de sauvegarde de la sécurité publique. Sous réserve du respect des autres exigences prévues à l'article 52, paragraphe 1, de la Charte, l'objectif de sauvegarde de la sécurité nationale est donc susceptible de justifier des mesures comportant des ingérences plus graves dans les droits fondamentaux que celles qui pourraient être justifiées par ces autres objectifs »[19].

Par conséquent, toute appréciation des restrictions au droit à un procès équitable pour des raisons de sécurité nationale doit être abordée avec une plus grande souplesse, qui trouve son origine à la fois dans la marge d'appréciation accordée aux États membres en vertu de l'article 4, paragraphe 2, TUE et dans la nature même de la sécurité nationale, un motif de protection considéré comme supérieur même à l'ordre public et à la prévention de la criminalité.

Afin de mettre en perspective la jurisprudence de la Cour européenne des droits de l'homme avec celle de la CJUE, nous avons examiné les arrêts *Kadi*[20] et *ZZ*[21], en identifiant certaines nuances introduites par la Cour de justice en ce qui concerne les garanties d'un procès équitable dans les contextes de sécurité nationale. En particulier, comme le montre l'arrêt *ZZ,* la mesure dans laquelle la personne impliquée dans la procédure doit être informée ne peut pas être appréciée de manière abstraite, mais plutôt à la lumière du domaine spécifique du droit de l'Union en cause. Nous avons donc fait valoir que, dans les domaines concernant la libre circulation des personnes au sein de l'UE, comme dans l'affaire *ZZ,* un niveau plus élevé d'équité procédurale est nécessaire, niveau ne pouvant pas être automatiquement transposé *dans* des cas tels que celui sur lequel nous avons eu à débattre.

Suivant le modèle de « juste équilibre » imposé par la Cour EDH entre, d'une part, le droit à un procès équitable et, d'autre part, le droit à la vie, à la liberté et à la sécurité des citoyens (en tant qu'objectif sous-jacent de l'invocation de la sécurité nationale), nous avons également conclu que les restrictions au droit à un procès équitable d'une société internationale de traitement de données telle que celle en l'espèce peuvent être plus facilement justifiées lorsque la sécurité de la population d'un État est en jeu.

Ainsi, dans une affaire où les violations procédurales semblaient initialement assez graves, nous avons identifié un certain nombre d'éléments circonstanciels qui, après d'autres recherches juridiques, suggéraient que ces restrictions du droit à un procès équitable n'étaient pas aussi intrusives qu'elles ne le semblaient au départ. La nature pénale de la procédure, la justification des limitations du procès équitable par la nécessité de préserver la sécurité nationale – et, à son tour, la justification de la sécurité nationale par la protection des données à caractère personnel de tous les citoyens – ainsi que l'existence de facteurs compensatoires solides ont finalement conduit à une situation dans laquelle le débat pourrait se dérouler sans qu'aucune des parties ne semble absolument correcte dans ses allégations.

3. PROTECTION DES DONNÉES AU TITRE DU RGPD ET PROTECTION DES DROITS FONDAMENTAUX

Le RGPD était un sujet assez nouveau et difficile pour nous, ce qui a exigé de notre part une recherche approfondie. L'une des informations les plus frappantes que nous avons trouvées est l'affaire *Norra Stockholm Bygg*[22], qui a redéfini les règles de protection

19 *Ibid.,* pt 57.
20 Affaire C-584/10 P, *Commission e.a./Kadi* (EU:C:2013:518).
21 Affaire C-300/11, *ZZ* (EU:C:2013:363).
22 Affaire C-268/21, *Norra Stockholm Bygg* (EU:C:2023:145).

des données à caractère personnel, les faisant passer de règles spécialisées et spécifiques au contexte à des principes fondamentaux régissant l'administration des procédures judiciaires.

La Cour suprême de Suède, dans le cadre d'un litige civil, a introduit une demande de décision préjudicielle, demandant si « [l]'article 6, paragraphes 3 et 4, du RGPD impose également une exigence à la législation procédurale nationale relative à [l'obligation de produire des documents] » et, si tel est le cas, « s'il convient également de tenir compte des intérêts des personnes concernées lorsqu'il y a lieu de prendre une décision sur [la production] impliquant le traitement de données à caractère personnel ? Dans de telles circonstances, le droit de l'Union établit-il des exigences quant à la manière dont cette décision doit être prise en détail ? »

Ainsi, à la lumière de l'article 6 du RGPD, la Cour devait d'abord déterminer si les juridictions nationales pouvaient être qualifiées d'entité réglementée, à savoir de responsable du traitement des données.

À cet égard, la CJUE a suivi son arrêt précédent[23] et a déclaré « que, sous réserve des cas mentionnés à l'article 2, paragraphes 2 et 3, du RGPD, le RGPD s'applique aux opérations de traitement effectuées à la fois par des personnes privées et par des autorités publiques, y compris, comme l'indique son considérant 20, les autorités judiciaires, telles que les juridictions ». Ce raisonnement confirme la position d'une juridiction en tant que responsable du traitement des données qui doit se conformer aux règles du RGPD, même lorsqu'elle agit en sa qualité de juge, par exemple lorsqu'elle rend des ordonnances civiles pouvant impliquer la divulgation de données à caractère personnel.

Bien que l'existence d'autorités publiques indépendantes soit essentielle pour garantir la protection des données à caractère personnel, il convient de noter que, dans l'affaire *Autoriteit Persoonsgegevens,* précitée, la Cour a déclaré que, à la lumière de l'article 55, paragraphe 3[24], les autorités de contrôle ne sont pas compétentes pour contrôler les opérations de traitement des juridictions agissant dans l'exercice de leurs fonctions juridictionnelles afin de « préserver l'indépendance du pouvoir judiciaire dans l'exercice de ses missions juridictionnelles, y compris décisionnelles »[25].

Des éclaircissements supplémentaires peuvent toutefois être nécessaires sur ce qui relève de la « capacité juridictionnelle » d'une juridiction, étant donné que *Norra Stockholm Bygg* fait référence à l'ordonnancement de preuves et *Autoriteit Persoonsgegevens* fait référence à l'octroi de l'accès à un dossier aux journalistes et que la Cour a proposé une interprétation assez large de l'expression[26].

Quant à la deuxième question, la Cour devait déterminer si les juridictions nationales sont tenues de tenir compte des intérêts des personnes concernées et quelles sont les exigences imposées par le droit de l'Union à cet égard.

En résumé, la Cour a précisé que, lorsqu'une juridiction civile examine s'il y a lieu

23 Arrêt *Autoriteit Persoonsgegevens*, affaire C-245/20 (EU:C:2022:216), pt 25.
24 Les autorités de contrôle ne sont pas compétentes pour contrôler les opérations de traitement effectuées par les juridictions agissant dans l'exercice de leurs fonctions juridictionnelles.
25 Arrêt *Autoriteit Persoonsgegevens*, affaire C-245/20 (EU:C:2022:216), pt 31.
26 « [N]e se limitant pas au traitement de données à caractère personnel effectué par les juridictions dans des cas spécifiques, mais se référant, plus largement, à toutes les opérations de traitement effectuées par les juridictions dans le cadre de leur activité juridictionnelle, de sorte que les opérations de traitement dont le contrôle par l'autorité de contrôle serait susceptible, directement ou indirectement, d'avoir une influence sur l'indépendance de leurs membres ou de peser sur leurs décisions sont exclues de la compétence de cette autorité ».

d'ordonner la divulgation d'un document contenant des données à caractère personnel, elle doit respecter les principes de traitement des données[27], garantir la licéité du traitement[28] et mettre en balance les intérêts des personnes concernées et la nécessité d'utiliser ces données comme éléments de preuve dans le cadre d'une procédure judiciaire.

L'importance du test de proportionnalité établi dans l'arrêt *Norra Stockholm Bygg* a également attiré l'attention de l'équipe autrichienne participant à la demi-finale C du concours THEMIS 2025 : droit de l'Union et droit européen de la procédure civile. Leur papier, primé à cette occasion[29], fournit une analyse détaillée de ce test de mise en balance, illustrant une fois de plus que la coopération joue un rôle crucial dans l'amélioration de la compréhension et de l'application du droit de l'Union.

QUELQUES CONCLUSIONS

Le concours THEMIS 2024 a fourni non seulement une arène pour tester les connaissances juridiques et les compétences en argumentation, mais aussi une occasion unique de s'engager de manière critique dans des domaines complexes et en évolution du droit européen. Certaines des questions débattues lors du dernier cycle – le niveau d'indépendance et d'impartialité de la justice, les garanties d'un procès équitable dans le contexte de preuves non divulguées et l'interaction entre la protection des données et les droits fondamentaux – sont emblématiques des tensions qui surgissent lorsque les principes fondamentaux recoupent des considérations pratiques et politiques.

À travers le prisme de la jurisprudence de la Cour européenne des droits de l'homme et de la CJUE, nos recherches ont révélé que le droit cherche à trouver un juste équilibre entre des valeurs concurrentes: préserver l'intégrité de la justice tout en reconnaissant les réalités de la vie professionnelle; garantir l'équité procédurale tout en tenant compte des intérêts légitimes de la sécurité nationale; et protéger les données à caractère personnel sans compromettre la bonne administration de la justice.

Au-delà de ces considérations de technique juridique, le concours a souligné l'importance de l'analyse comparative, du dialogue transnational et de la résolution coopérative des problèmes. Ces méthodes ont non seulement enrichi notre compréhension du droit de l'Union, mais elles ont également renforcé l'idée que des solutions juridiques solides émergent de l'interaction de diverses perspectives. L'expérience a montré que le développement des relations professionnelles et l'échange d'idées par-delà les frontières sont indispensables à la poursuite du développement et à l'application effective des normes juridiques européennes.

27 Article 5 du RGPD.
28 Article 6 du RGPD.
29 *Mag. Sophia Beer, Benjamin Goltner, LL.M., Mag. Felicitas Hinteregger,* Data Protection & Effective Judicial Protection – An Impossible Contradiction?, disponible sur https://catalogue.ejtn.eu/seminars-and-webinars/listing/2239-semi-final-c-eu-and-european-civil-procedural-law?_gl=1%2ao3iq99%2a_ga%2aNDk5MTcyOTEwLjE3NTQ0OTMxOTk.%2a_ga_2W1X6M1KN3%2aczE3NTQ0OTMxOTkkbzEkZzEkdDE3NTQ0OTMyMTIkajQ3JGwwJGgw.